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Reflections About The United States Supreme Court

Arthur J. Goldberg*

The widely publicized book *The Brethren*¹ has not, in any substantive sense, contributed to an understanding of the role of the Supreme Court. *The Brethren*, after all, is essentially a gossip book about the Justices. Of course, we all like gossip and engage in it. But gossip does not answer basic questions about the Supreme Court.

Indeed it may be that *The Brethren's* single contribution to an understanding of the Supreme Court is its emphasis that the Justices are human. If this is the case one may well comment, "So What's New?"

I propose to discuss what is myth and what is reality about the Court's decision making process.

The very first myth which apparently must be laid to rest in every generation is that the Court has usurped the function of passing upon the constitutionality of state and federal laws and action. This myth, always revived during times of storm over the Court, has no solid basis in history. Chief Justice John Marshall did not write on a clean slate in asserting in *Marbury v. Madison*² the right and duty of the Court to declare void an act of Congress contravening the Constitution. His action was forecast in the debates in the Constitutional Convention and urged by proponents as one of the solid reasons for the Constitution's adoption. Professor Charles L. Black, Jr., in his excellent book, *The People and the Court*,³ has summarized the historical evidence. It supports his conclusion that "It seems very clear that the preponderance of the evidence lies on the side of judicial review."⁴ And the very first Congress, composed of men whose memories of the making of the Con-

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2. 5 U.S. (1 Cranch) 137 (1803).
4. Id. at 23.
stitution were fresh, enacted the Judiciary Act of 1789, which, from that date to this, has expressly authorized the Court to review the constitutionality of state legislation. This enactment was shortly followed by a succession of laws providing for the Court's ultimate review of judgments of the lower federal courts.

Thus the reality rather than the myth about the Court is that it exercises judicial review as a consequence of intent as well as tradition. Judicial review is not a usurped power, but a part of the grand design to ensure the supremacy of the Constitution as law, supreme law to which all branches of government — executive, legislative and judicial, state and federal — are subject. This is what the Constitution clearly imports.

The next great myth is that, even though judicial review was intended and is sanctioned, it is nevertheless undemocratic and that therefore it is to be regarded with alert suspicion and its exercise to be dimly viewed. The argument has an obvious, albeit superficial, appeal. The Justices are appointed for life and not elected by the people for limited terms, as the President and Congress are. The latter, so the argument goes, being representative of the popular will, should have their way; otherwise, democracy will be forsaken; a guardianship, however benevolent, negates popular government.

This reasoning, however, overlooks the first facts about our Constitution: that its source is the people. It is the people who mandated that the individual be protected and safeguarded in his constitutional rights even against the popular will of the moment, as voiced by the legislature, the executive, or even public opinion polls. In large part, our courts were entrusted with the responsibility of judicial review to protect individuals and minorities in their fundamental rights against abridgment by both government and majorities.

It is not a denial, therefore, but rather a supreme manifestation of democracy that the fundamental rights of the least among us are protected from government or transient majorities by the Constitution and safeguarded by an independent judiciary. History teaches that democ-

5. Judiciary Act of 1789, Ch. 20, 1 Stat. 73 (1789).
6. Circuit Court Act of 1801, Ch. 4, 2 Stat. 89 (1801) (repealed 1802); Act of March 3, 1803, Ch. 40, 2 Stat. 244 (1803).
7. U.S. Const. art. II, § 2, cl. 2 read in conjunction with U.S. Const. art. III, § 1.
racy and an independent judiciary are one and inseparable. A country where judges are faithful to the popular will, to the executive, or to the legislature, rather than to the rule of law, will not be a democratic country worthy of the name.

Another myth disseminated about the Court is that the Court reaches out and determines troublesome cases that would be best avoided. It enters, so it has been said at times, into thickets of controversy. The reality is that the cases which the Court decides are pressed upon it. It does not seek out cases or invite their filing. Under our Constitution it issues no advisory opinions — it decides only actual cases and controversies. These must be genuine and current; otherwise, jurisdiction will be summarily declined.

But what of cases seeking protection of political rights — should not the Court have shunned them? The answer to this is that most of the cases before the Court deal with public issues of the first moment in our society — issues like reapportionment — commonly called political. As de Tocqueville said, “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”

My former colleague Justice Brennan accurately observed in Baker v. Carr — the germinal decision of the reapportionment cases — that “the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words.” If a claim is justiciable, there is no escaping the responsibility of decision just because the constitutional right asserted is a political one.

Whatever the justification in another age or time for seeking out ways of avoiding decisions on the merits of a case, the temper of the modern world demands that judges, like men in all walks of public and private life, avoid escapism, and squarely and frankly confront even the most controversial and troublesome justiciable problems.

And surely it should be agreed by all supporters and critics of the Court alike that the least possible justification for the Court to avoid

adjudicating a claim of constitutional right is that the Court may injure itself if it decides the case. Is this not another way of saying that the Court should avoid unpopular decisions? I have always conceived it to be the first duty of any judge worthy of the name and office to abjure popularity in decision making. Lord Mansfield long ago stated the creed of any worthy judge:

I will not do that which my conscience tells me is wrong upon this occasion to gain the huzzas of thousands, or the daily praise of the papers which come from the press. I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. . . . Once for all, let it be understood, "that no endeavors of this kind will influence any man who at present sits here."

The Court should — the Court must — decide the cases and controversies properly coming before it, however difficult and controversial they may be, by doing what the justices are appointed and sworn to do. They must faithfully and impartially discharge and perform all the duties of their office and "administer justice . . . according to the best of [their] . . . abilities and understanding, agreeably to the Constitution and laws of the United States." Judicial timidity is far more likely to be the undoing of the Court as an institution than the faithful exercise of judicial responsibility.

There is a myth that the Court coddles criminals. In fact, what the Court is doing can be justified on strict constitutional and stare decisis grounds.

But the Court's criminal law decisions are fundamental because they reinforce an old principle that where there is a right, that right will not remain unenforceable because of the defendant's poverty, ignorance or lack of remedy. These decisions lie close to the essence of our great constitutional liberties. The controversial criminal law decisions are designed to give practical effect to the protections afforded by the Bill of Rights, and to deal with the realities of the varying situations confronting the Court in the area of criminal justice.

If I am right that the Court’s criminal law decisions have increased the effectiveness of our cherished constitutional protections without significantly affecting the crime rate, then one must recognize their significance in a democratic society.

As Winston Churchill, then Britain’s Home Secretary, said in the House of Commons on July 20, 1910:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State — a constant heart-searching by all charged with the duty of punishment — a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored up strength of a nation and are sign and proof of the living virtue within it.\textsuperscript{15}

There is a myth that the Court is against states’ rights, oblivious of the great interests of federalism — interests which reflect not only our history and traditions but which require constant and vigilant attention if we are to avoid over-centralism of our national government and if we are to preserve viable local government.

There was considerable substance to this myth during three decades early in this century when the Court, in the name of due process, invalidated social and economic legislation of the states as well as the nation. But, as current decisions demonstrate, the Court does not strike down state or federal legislation because it deems laws of this type unwise or unsound. The nation and the states are free to experiment, and never have their interests in federalism been better safeguarded than they are now by the Court.

But it is asserted that the Court intervenes far more frequently than in the past to protect individuals in their constitutional rights against state action. Particularly is this true, so the argument goes, in connection with criminal prosecutions. The Court, critics charge, is fol-

\textsuperscript{15} 19 \textsc{Parl. Deb.}, H.C. (5th ser.) 1354 (1910).
ollowing a double standard: it denies the application of the due process
clause to economic cases; it applies the clause energetically to cases
involving impairment of personal liberties.

There is a simple answer to this charge. There is no evidence that
the framers intended the fifth and fourteenth amendments to deny to
the nation and the states their right of economic experimentation.\(^{16}\)
There is every evidence that they intended the Bill of Rights and the
fourteenth amendment to safeguard the fundamental personal rights
and liberties of all persons against governmental impairment or
denial.\(^{17}\)

There is a myth, very popular these days, that the Court is divided
into “liberal” and “conservative” wings, or, as some would put it, into
“activists” and those who practice “judicial restraint.” Labels of this
kind are convenient but not accurate. Members of the Court, applying
general constitutional provisions, understandably differ on occasion as
to their meaning and application. This is inevitable in the interpretation
of a document that is both brief and general by a human institution
composed of strong-minded and independent members charged with a
grave and difficult responsibility. But the inappropriateness of these la-
bels becomes apparent upon even the most perfunctory analysis.

A judge may believe, as I did during my tenure on the Court, that
under the Constitution a court without a jury may not adjudge guilty a
defendant charged with serious criminal contempt.\(^{18}\) Is he a liberal or a
conservative, particularly where the defendant is a governor resisting
integration of a state university? Is he an activist or a believer in judi-
cial restraint? Or a judge may refuse to hold a litigant or newspaper in
contempt for biting comment on the guilt or innocence of a criminal

\(^{16}\) See Munn v. Illinois, 94 U.S. 113 (1877); Nebbia v. New York, 291 U.S.
502 (1934); United States v. Carolene Products Co., 304 U.S. 144 (1938); Olsen v.
Nebraska, 313 U.S. 236 (1941); Lincoln Fed. Labor Union v. Northwestern Iron &
Metal Co., 335 U.S. 525 (1949); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421
(1952); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372

\(^{17}\) See Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Meyer v. Nebraska, 262
U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Aptheker v. Secre-
tary of State, 378 U.S. 500 (1964); Skinner v. Oklahoma, 316 U.S. 535 (1942); Gris-

\(^{18}\) United States v. Barnett, 376 U.S. 681, 728 (1964) (Goldberg, J.,
dissenting).
defendant. Is he an activist or a follower of judicial restraint? Is he a liberal or a conservative? May not the denial of a claim of constitutional right be more activist in its effects upon our constitutional structure than the allowance of the claim?

Examples could be multiplied, but inevitably the classification of the justices as liberal or conservative, or activist or believer in judicial restraint, will depend upon the outlook of, or the criteria employed by, the classifier.

I could continue this recital of myths about the Court, but I shall conclude with one that emanates from those who seek to support rather than condemn the Court. It is the myth that the Supreme Court is infallible. A simple and correct answer to this myth is the oft-quoted bon mot of Justice Jackson: “We are not final because we are infallible; we are infallible because we are final.”

The reality is that, as a human institution, the Court is bound to err. It is a tribute to its awareness of human frailty, and the extent to which the Court seeks to avoid mistakes, that so few really serious ones have been made in the Court’s history. And, of course, it is only proper to note that reserved to the people is the right to change the course of the Court’s opinions — right or wrong — through the process of constitutional amendment.

There are more sophisticated mythologists who would seek to preserve the illusion of infallibility by banning dissenting opinions. The Court, by their lights, would then speak with a single authoritative voice not to be gainsaid. Some courts in other lands function in this fashion, burying their differences in a single opinion and judgment. But I, for one, would not have it this way, for I profoundly believe that in the long run the Court benefits, and certainly the people do, by the free expression of dissenting views. They educate and sometimes eventually prevail, and they always demonstrate that our judicial air, like all of the air of American life, is — and, God willing, will remain — free.

So long as the Supreme Court sits, myths about it will exist. Myths are not necessarily all or entirely bad as the literature of mythology proves. But because we must live in this world and not in a

21. U.S. Const. art. V.
make-believe world, myths about the Court or any other human institution must yield to reality. Otherwise our society will be the victim of our fantasies rather than the servant of our purposes.
Florida Inverse Condemnation Law:  
A Primer for the Litigator  

by  
Roger D. Schwenke* and Donald E. Hemke**  

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1. INTRODUCTION  

Florida Constitutions have always prohibited the state from "taking" private property without paying just or full compensation to its owners.1 Presently, Fla. Const. art. 10, § 6(a), often called the "prop-
property clause," provides that “[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.”

Section 6(a) applies to the state, its agencies, and political subdivisions.

Florida Constitution of 1868 was repeated verbatim in section 12 of the Declaration of Rights of the Florida Constitution of 1885. The constitutional revisions in 1968 relocated the provision from the Declaration of Rights to article X, miscellaneous § 6.

2. Note that the 1968 constitutional revisions changed the requirement from “just” to “full” compensation. No definitive pronouncement has been made concerning whether the change has any significance. At least in the context of being compensated for business losses and attorney's fees in eminent domain proceedings, the Supreme Court of Florida reached the same results under both the Florida Constitution of 1968 requiring “full compensation” and the predecessor constitutions requiring “just compensation.” Jamesson v. Downtown Dev. Auth., 322 So. 2d 510 (Fla. 1975); Tosohatchee Game Preserve, Inc. v. Central & S. Fla. Flood Control Dist., 265 So. 2d 681, 684-85 (Fla. 1972); State Rd. Dep't v. Bramlett, 189 So. 2d 481 (Fla. 1966). But see Riverside Military Academy v. Watkins, 19 So. 2d 870, 872 (Fla. 1944). The 1968 constitutional revisions also included a “public purpose” requirement. See Eckert, Acquisition of Development Rights: A Modern Land Use Tool, 23 U. MIAMI L. REV. 347, 353-56 (1968-69).


As a matter of federal constitutional law, the fifth amendment prohibition against the federal government’s “taking” property without “just compensation” applies to the states through the due process clause of the fourteenth amendment. Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

FLA. CONST. art. 16, § 29 (1885) also added a related, but different, provision that “[n]o private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be made to the owner, or first secured to him by deposit of money. . . .” Section 29 applied to private corporations and individuals rather than to the state, its agencies, and political subdivisions. State Rd. Dep’t v. Bramlett, 189 So. 2d 481, 483 (Fla. 1966); Carter v. State Rd. Dep’t, 189 So. 2d 793, 795 (Fla. 1966); DeSoto County v. Highsmith, 60 So. 2d 915 (Fla. 1952); Ellison v. State Rd. Dep’t, 169 So. 2d 485 (Fla. 1964); Daniels v. State Rd. Dep’t, 170 So. 2d 846 (Fla. 1964); Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So. 2d 433, 438 (1941). Some courts incorrectly applied section 29 to state agencies and subdivisions. City of Jacksonville v. Shaffner, 107 Fla. 367, 144 So. 888 (1932); Pinellas County v. General Tel. Co., 229 So. 2d 9 (Fla. 2d Dist. Ct. App. 1969); Wilson v.
subdivisions.³

Florida courts have recognized section 6(a) and its predecessors as "fundamental" law, "universal" law, and "basic" to American democracy.⁴ In State Road Department v. Tharp,⁵ Justice Terrell wrote:

American democracy is a distinct departure from other democracies in that we place the emphasis on the individual and protect him in his personal property rights against the State and all other assailants. The State may condemn his property for public use and pay a just compensation for it, but it will not be permitted to grab or take it by force and the doctrine of nonsuability should not be so construed. Forceful taking is abhorrent to every democratic impulse and alien to our political concepts . . . . [W]here the sovereign has a right to condemn for public use, it will not be permitted to appropriate except by orderly processes.⁶

Section 6(a) is self-executing; it does not require enabling legislation to be effective.⁷ The legislature, however, has implemented section 6(a) in chapters 73 and 74 of the Florida Statutes. The statutes are particularly important "in those matters which are not specifically defined or prohibited" by section 6(a).⁸

State Rd. Dep't, 201 So. 2d 619 (Fla. 1st Dist. Ct. App. 1967); Jacksonville Expressway Auth. v. Bennett, 158 So. 2d 821 (Fla. 1st Dist. Ct. App. 1963); State Rd. Dep't v. Bramlett, 179 So. 2d 137 (Fla. 1st Dist. Ct. App. 1965), rev'd on other grounds, 189 So. 2d 481 (Fla. 1966); Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla. Supp. 94 (Fla. 1st Cir. Ct. 1966). See State Rd. Dep't v. Chicone, 148 So. 2d 532 (Fla. 2d Dist. Ct. App. 1962). Those cases must be viewed in light of the Supreme Court of Florida's earlier unwillingness to determine whether section 29 applied to the state, its agencies, and political subdivisions. See, e.g., Seban v. Dade County, 102 So. 2d 706, 708 (Fla. 1958); Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954); State Rd. Dep't v. Forehand, 56 So. 2d 901, 903 (Fla. 1952).

³. State Rd. Dep't v. Bramlett, 189 So. 2d 481, 483 (Fla. 1966); Daniels v. State Rd. Dep't, 170 So. 2d 846, 851 (Fla. 1964); Cheshire v. State Rd. Dep't, 186 So. 2d 790, 791 (Fla. 4th Dist. Ct. App. 1966).
⁴. 146 Fla. 745, 1 So. 2d 868 (Fla. 1941).
⁵. Id.
⁶. Id. at 870.
⁸. Seban v. Dade County, 102 So. 2d 706, 707 (Fla. 1958).
Although Florida courts will often follow other jurisdictions in construing provisions similar to section 6(a), the Supreme Court of Florida has noted that "[we] have our own Constitution and adjudicated cases by this Court which are controlling . . . ."

If a governmental body "takes" property without formally acquiring it by purchase, eminent domain pursuant to chapters 73 and 74, or otherwise, the property owner may sue the state, its agencies, or its political subdivisions in equity on the theory of inverse condemnation. As the First District Court of Appeal noted in City of Jacksonville v. Schumann, inverse condemnation has been defined as the popular description of a cause of action against a governmental defendant to recover the value or property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency . . . . [I]nverse condemnation is a method of compensation wherein "an owner asserting a claim of appropriation of his property may pursue his right by an action in equity for an injunction, and for damages; the court may then, as an alternative to the injunction, make an award for the taking . . . ."

The sovereign immunity defense does not protect the government.

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9. See Belcher v. Florida Power & Light Co., 74 So. 2d 56 (Fla. 1954).
10. Adams v. Housing Auth., 60 So. 2d 663, 665 (Fla. 1952).
11. As the Supreme Court of the United States recently noted in United States v. Clarke, ___ U.S. ___, 100 S.Ct. 1127, 1130 (1980), "[t]he phrase inverse condemnation appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." The term inverse condemnation has been used in at least sixty-six opinions of the Supreme Court of Florida and the district courts of appeal. E.g., Stanton v. Morgan, 127 Fla. 34, 172 So. 485 (1937); Hillsborough County v. Kensett, 107 Fla. 237, 138 So. 400 (1931); Hillsborough County v. Kensett, 107 Fla. 237, 144 So. 393 (1932); Wilson v. State Rd. Dep't, 201 So. 2d 619 (Fla. 1st Dist. Ct. App. 1967); City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. 1st Dist. Ct. App. 1964), cert. denied, 172 So. 2d 597 (Fla. 1965).
12. City of Jacksonville, 167 So. 2d 95.
from being sued in inverse condemnation.14

The basic policy issue involved in inverse condemnation is simple enough; it can be framed in one question: Should the individual property owner bear the economic cost of government actions or should those costs be distributed across the taxpaying community? As the First District Court of Appeal recently noted,

while government clearly has the right to expropriate private property for purposes beneficial to the general public, it cannot require a single property owner to bear the cost of such general benefits. This principle, which is the essence of the property clauses of the United States and Florida Constitutions, commands that the cost of public benefits be borne by the public.15

This article will discuss the elements of the prima facie case of inverse condemnation, possible defenses to an inverse condemnation claim, and the procedures involved in establishing such a lawsuit. It will focus on recent developments and issues in Florida and federal case law. Practice “pointers” have been suggested to aid the attorney who sues the government in inverse condemnation.

2. THE PRIMA FACIE CASE

A. Private Property

Like its predecessors, the 1968 Florida Constitution clearly requires a taking of “private property” in order for a plaintiff to prevail in an inverse condemnation lawsuit.16 It is questionable whether section 6(a) forbids the taking of government-owned property, even if the

14. State Rd. Dep’t v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941); State Rd. Dep’t v. Tharp, 1 So. 2d 868, 869 (Fla. 1941) (Sovereign immunity “will not be permitted as a City of refuge for a State Agency which appropriates private property before the value has been fixed and paid.”). If a taking has not occurred, sovereign immunity may bar a suit against the state. Venezia A., Inc. v. Askew, 363 So. 2d 367 (Fla. 1st Dist. Ct. App. 1978).


16. FLA. CONST. art. 10, § 6(a).
government holds the property in its proprietary capacity.\textsuperscript{17}

The property may either be real or personal.\textsuperscript{18} It may be a fee simple estate or less than a fee simple estate.\textsuperscript{19} The method of acquisition, i.e., by purchase, gift, or even lottery, is immaterial.\textsuperscript{20}

Tangible property, such as sand and shells,\textsuperscript{21} oil and minerals,\textsuperscript{22} timber and trees,\textsuperscript{23} billboards,\textsuperscript{24} shrubbery and topsoil,\textsuperscript{25} are the clearest examples of private property. Monies also fit the definition.\textsuperscript{26}

Private property includes franchises and other contract rights,\textsuperscript{27} easements,\textsuperscript{28} riparian rights,\textsuperscript{29} airspace,\textsuperscript{30} the common law rights for

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\textsuperscript{17} See Myers v. Board of Pub. Assistance, 21 Fla. Supp. 177, 184 (Fla. 13th Cir. Ct. 1963) (citing City of Key West v. Love, 116 So. 2d 223 (Fla. 1959), and City of Orlando v. Evans, 132 Fla. 609, 182 So. 264 (1938)).


\textsuperscript{21} State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941).


\textsuperscript{23} Corneal v. State Plant Bd., 95 So. 2d 1 (Fla. 1957).

\textsuperscript{24} City of Ormond Beach v. Lamar-Orlando Outdoor Advertising, 49 Fla. Supp. 196 (Fla. 7th Cir. Ct. 1979).

\textsuperscript{25} Florida Power Corp. v. McNeely, 125 So. 2d 311, 313 (Fla. 2d Dist. Ct. App. 1960).


\textsuperscript{28} City of Jacksonville v. Shaffner, 107 Fla. 367, 144 So. 888 (1932).

\textsuperscript{29} Kendry v. State Rd. Dep't, 213 So. 2d 23, 28 (Fla. 4th Dist. Ct. App. 1968); Thiesen v. Gulf, F. & A. R.R. Ry., 75 Fla. 28, 78 So. 491, 507 (1918); Brickell v. Trammell, 77 Fla. 544, 82 So. 221, 227 (1919).

\textsuperscript{30} Benitez v. Hillsborough County Aviation Auth., 26 Fla. Supp. 53 (Fla. 13th Cir. Ct. 1966), aff'd, 200 So. 2d 194 (Fla. 2d Dist. Ct. App. 1967), cert. denied, 204 So. 2d 328 (Fla. 1967).
hunting and fishing on one’s land, the difference in water elevation to operate a millrace, rights to “lateral support” for property in its unimproved condition, ingress and egress, rights to exclude others from one’s property, and statutory, common law, permit or contract rights to develop one’s land. Section 6(a) protects more than title to property; it also guards “the right to acquire, use and dispose of [property] for lawful purposes.”

Other definitions of private property have included the opportunity of a regulated utility to earn a fair rate of return on its invested capital, a railroad’s expenses in operating certain required services, and the right to use one’s property free of an invalid exercise of the police power.

If the law does not recognize the interest as a private property

32. State Rd. Dep’t of Fla. v. Tharp, 146 Fla. 745, 1 So. 2d 868, 869 (1941).
33. See Weir v. Palm Beach County, 85 So. 2d 865, 868 (Fla. 1956).
34. Anhoco Corp. v. Florida State Turnpike Auth., 116 So. 2d 8 (Fla. 1959); Weir v. Palm Beach County, 85 So. 2d 865, 868 (Fla. 1956). See Awbrey v. City of Panama City Beach, 283 So. 2d 114 (Fla. 1st Dist. Ct. App. 1973); Benerofe v. State Rd. Dep’t, 210 So. 2d 28 (Fla. 1st Dist. Ct. App. 1960); Meltzer v. Hillsborough County, 164 So. 2d 54 (Fla. 2d Dist. Ct. App. 1964).
40. Pinellas County v. Jasmine Plaza, Inc., 334 So. 2d 639 (Fla. 2d Dist. Ct. App. 1976) (county ordinance requiring a permit to remove certain trees, but failing to provide standards for issuing such permits).
right, there is no constitutional guarantee to "full compensation." As an example, the rights created by restrictive covenants, or so-called "negative easements," do not qualify as private property. Nor does Florida recognize a property right to lateral support for improved property. And because the unprotected right of a landowner to the "reasonable" use of underground water is merely a qualified right to use, it cannot form the basis of a claim for inverse condemnation.

Florida courts, without elaborating, have refused to define other interests, such as the loss of profit and business damages, as property within the meaning of section 6(a). Loss of profits, when combined with the taking of a recognized property right, does, however, warrant compensation under the Florida Constitution.

B. Taking

Like the fifth amendment to the United States Constitution, section 6(a) of the state constitution requires that compensation be paid only if property is "taken." Florida courts have long noticed that the state constitution, unlike constitutions in approximately twenty-five other states, mandates compensation only for "taking" or "appropriations" and not for "damages." Without such a taking, the Supreme Court of Florida has

41. Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955).
42. Weir v. Palm Beach County, 85 So. 2d 865, 867 (Fla. 1956).
45. FLA. CONST. art. 10, § 6(a).
46. Id.
47. Village of Tequesta v. Jupiter Inlet Corp., 349 So. 2d 216 (Fla. 4th Dist. Ct. App. 1979), rev'd on other grounds, 371 So. 2d 663, 669 (Fla. 1979); Weir v. Palm Beach County, 85 So. 2d 865, 867 (Fla. 1956); Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353 (Fla. 1955); Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637 (Fla. 1955); Kendry v. State Rd. Dep't, 213 So. 2d 23, 29 (Fla. 4th Dist. Ct. App. 1968); Northcutt v. State Rd. Dep't, 209 So. 2d 710, 712 (Fla. 3d Dist. Ct. App. 1968); Moviematic Indus. Corp. v. Dade County, 44 Fla. Supp. 30, 37 (Fla. 11th
ruled that "the damages suffered are damnum absque injuria and compensation therefor by a [public agency] cannot be compelled." 

Determinations of a taking are made on a case-by-case basis. The distinction between a taking and damages is much clearer in concept than in practice. The Supreme Court of Florida recently has noted that "[t]here is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins." The Fourth District Court of Appeal was correct when it noted that the law requiring compensation for taking and appropriation is "easier to state than [it is] to apply." Moreover, as that court observed, "Florida courts have not, over the years, been in consistent agreement on [what constitutes a taking], particularly where . . . there was no actual entry by the governmental authority on the owner's land." Similarly, the First District Court of Appeal has commented that Florida courts have found takings where technically only damage to the property existed. The trend to relax the let-

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48. Weir v. Palm Beach County, 85 So. 2d 865, 867 (Fla. 1956).
50. Kendry v. State Rd. Dep't, 213 So. 2d 23, 27 (Fla. 4th Dist. Ct. App. 1968). Commentators also have observed in Florida case law "the absence of a cohesive doctrinal basis for judicial decisions, the inconsistency in cases holding 'a taking' or 'not a taking', and the need for predictive guidelines in this area of law." Haigler, McInerny and Rhodes, The Legislature's Role in the Taking Issue, 4 FLA. ST. U. L. REV. 1, 3 (1976). Florida courts have not been alone in their inability to establish a useable test. As the United States Supreme Court has noted, "there is no set formula to determine where regulation ends and taking begins." Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). Accord, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Arvo Van Alstyne has noted that "judicial efforts to chart a useable test for determining when police power measures impose constitutionally compensable losses have, on the whole, been notably unsuccessful. With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric." A. Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. CALIF. L. REV. 1, 2 (1971).
ter of the rule, the court explained, reflected “the stresses to which tak-
ing concepts were subjected during years in which sovereign immunity
was regarded as barring more direct judicial remedies for damage by
the State’s drainage trespasses and nuisances.”

Despite the existence of an occasional difficult question, much con-
sistency runs throughout Florida case law. Certain governmental ac-
tions will invariably result in the judiciary determining a taking has
occurred. For example, government improvements which cause physical
removal or invasion of a landowner’s property on a permanent or peri-
odic, but recurring, basis warrant compensation. A taking also may
consist of an entirely negative physical act, such as the destruction of a
residence, shrubbery, or trees, or the “washing away” of plaintiff’s
land, rendering it unusable. A taking may also occur when land is

53. Id. at 921.
1965) (installation of streets and canals on plaintiff’s land), rev’d on other grounds,
189 So. 2d 481 (Fla. 1966); Kendry v. Division of Administration, 366 So. 2d 391 (Fla.
1978) (placing fill on plaintiff’s land to raise elevation of roadway); City of Miami v.
Romer, 73 So. 2d 285 (Fla. 1954) (paving sidewalk on plaintiff’s land); City of Miami
Beach v. Belle Isle Apartment Corp., 177 So. 2d 884 (Fla. 3d Dist. Ct. App. 1965)
(public road on defendant’s property); Florida Power Corp. v. McNeely, 125 So. 2d
311 (Fla. 2d Dist. Ct. App. 1960) (placing electrical towers on plaintiff’s land held to
be a taking, even though electrical company had pre-existing right to string electrical
transmission lines across plaintiff’s land because, inter alia, merely stringing electrical
lines across the land did not preclude certain uses under those lines); Kendry v. State
Rd. Dep’t, 213 So. 2d 23 (Fla. 4th Dist. Ct. App. 1968) (state filled and claimed
bottomlands and flooded certain other lands); Florida Power Corp. v. McNeely, 125
So. 2d 311, 313 (Fla. 2d Dist. Ct. App. 1960) (removal of property such as timber or
top soil from the private premises); State Rd. Dep’t v. Darby, 109 So. 2d 591 (Fla. 1st
Dist. Ct. App. 1959) (construction causing clay, sand, and silt to be washed onto plain-
tiff’s property held to be a taking over dissenting judge’s claim that there was no evi-
dence that the invasion was permanent). A temporary physical invasion is generally
held not to be a taking. Dudley v. Orange County, 137 So. 2d 859 (Fla. 2d Dist. Ct.
(Fla. 11th Cir. Ct. 1966).
55. E.g., State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); Kirkpatrick v.
City of Jacksonville, 312 So. 2d 487 (Fla. 1st Dist. Ct. App. 1975).
56. Elliott v. Hernando County, 281 So. 2d 395 (Fla. 2d Dist. Ct. App. 1973); Pinellas
County v. Austin, 323 So. 2d 6 (Fla. 2d Dist. Ct. App. 1975) (A taking may
occur when a street is vacated, even though it reverts back to adjacent property owners.
taxed as municipal land when in fact no actual or potential municipal use is possible.67

Once beyond these clear-cut cases, Florida courts have used a variety of factors and tests for determining whether governmental actions have resulted in a taking of private property. Unfortunately, the courts have not always applied them in a consistent manner. The Supreme Court of Florida has recently indicated six non-exclusive factors which have been considered in determining whether there has been a taking: (1) whether there has been a physical invasion; (2) the degree of diminution in value; (3) whether the regulation confers a public benefit or prevents a public harm; (4) whether the regulation promotes public health, safety, welfare, and morals; (5) whether the regulation is arbitrarily and capriciously applied; and (6) whether the regulation curtails investment-backed expectations.67.1

**SOME FACTORS AND TESTS**

**Police Power.** Florida courts often had indicated that the reasonable exercise of the state’s police powers68 did not constitute a taking of private property.69

rather than to the government.}. But a tort or trespass does not constitute a constitutional taking. Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353 (Fla. 1955).


59. See City of Miami v. St. Joe Paper Co., 364 So. 2d 439 (Fla. 1978); Sarasota County v. Barg, 302 So. 2d 737 (Fla. 1974); Keating v. State, 173 So. 2d 673, 677 (Fla. 1965); Adams v. Housing Auth., 50 So. 2d 663, 666 (Fla. 1952); City of Miami v. Romer, 58 So. 2d 849 (Fla. 1952); Garvin v. Baker, 59 So. 2d 360 (Fla. 1952); Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So. 2d 543 (1941) (sustaining dismissal of complaint alleging that prohibition of advertising signs within so many feet of
Even prior to *Graham*, this principle was not sacrosanct; it was well-established that an overly restrictive exercise of the state’s police power, or an “unreasonable” exercise of police power may result in the appropriation of private property. Similarly, exercises of the police power that are unnecessarily restrictive, or standardless, or arbitrarily applied may give rise to a claim of inverse condemnation.

Like other judicially created tests, the police power test had its own assortment of problems. Courts frequently disagreed over where the line should be drawn between a reasonable exercise and an unreasonable or overly restrictive exercise of the police power. Furthermore, because of the ease with which one could mechanically apply the test, courts frequently used it without reasoned analysis. In referring to the conclusional character of this test, the Third District Court of Appeal in *Moviematic Industries Corp. v. Board of County Commissioners* recognized that under certain circumstances even a valid exercise of the police power may constitute a taking. In *Moviematic*, the court found that a rezoning of certain land from heavy industrial use to residential use was reasonably related to the public health and welfare.
Under the traditional police power test, such a conclusion should have ended the court's inquiry; instead, the court asked a second question: Whether the legitimate exercise of the police power so impaired the use of the property as to be a compensable appropriation? The court held that a taking did not occur only because the plaintiff could still use the property for residential purposes. An insufficient "reduction of the property's market value" did not render the property valueless; consequently, the plaintiff failed to satisfy the second part of the two-part analysis fashioned by the court.

Laws requiring land developers to dedicate land and to maintain certain minimal lot sizes and the condition of the development have been sustained as valid exercises of the police power. In Garvin v. Baker, the city refused to approve certain plats or maps of property which failed to meet the specifications of a local ordinance. The trial court held the enactment, which required that at least sixty feet of land be dedicated for streets, sidewalks, and curb purposes and prohibited the platting of lots less than fifty feet in width and one hundred feet in depth, was reasonable. The Supreme Court of Florida noted that requiring specifications of street widths may prevent "hazardous traffic conditions," thus involving the "public welfare and safety to a high degree." Referring to the mandatory minimum lot size, the court wrote: "the size of lots upon which a one-family, two-family, or four-family, building may be erected was a subject for police regulation and when not unreasonable, such regulations do not deprive a person of his property without due process of law."

67. Id. at 670-71.
68. Id. at 670.
69. Id. at 671. In noting that the exercise of the police power may be reasonable and yet still take property, Moviematic was logically correct. The United States Supreme Court later agreed, recognizing that even a valid exercise of the police power may seriously interfere with private property rights. Penn Cent. Transp. Co. v. City of New York, ___ U.S. ___, 98 S. Ct. 2646 (1978). Accord, Graham 1981 Fla. L. Weekly 275 (April 16, 1981).
70. 59 So. 2d 360 (Fla. 1952).
71. Id. at 362.
72. Id.
73. Id. at 364-65. Garvin is not a definitive holding. It involved a petition for mandamus. The Supreme Court of Florida noted that the granting of a writ of mandamus was largely discretionary and would be granted only where "[t]he legal right . . .
In Wald Corp. v. Metropolitan Dade County, the Third District Court of Appeal sustained a county ordinance requiring dedication of drainage ways, streams, and rights-of-way as a condition of approval of a subdivision plat. These dedications, the court held, had a "rational nexus" to community needs. More recently, the Supreme Court of Florida upheld the constitutionality of the Marketable Record Title Act. In sustaining the Act's validity, the court wrote in City of Miami v. St. Joe Paper Co.: [D]ue process has never been an absolute prohibition against state legislation adversely affecting property rights. It has been held over and over again that general limitations on state actions do not extinguish the state's police power to enact legislation "reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community."

In determining whether state action violates due process principles, a court must choose between protecting the individual's guaranteed rights on one hand, and the welfare of the general public on the other. This method of determining whether a state meets the requirements of due process is called the 'balancing of interests' test.

Environmental restrictions have also been sustained as reasonable exercises of the police power. In Sarasota County v. Barg, certain landowners filed a complaint in circuit court, claiming that the statute

to an order compelling the performance of some particular act [is] clear and complete." Id. at 361.

74. 338 So. 2d 863 (Fla. 3d Dist. Ct. App. 1976).
75. Id. at 868.
76. City of Miami v. St. Joe Paper Co., 364 So. 2d 439 (Fla. 1978) (sustaining FLA. STAT. § 712.01 (1979)).
77. Id.
78. Id. at 444.
80. 302 So. 2d 737 (Fla. 1974).
creating the Manasota Key Conservation District\textsuperscript{81} was unconstitutional. The litigants argued, among other things, that section four of that law took their property. Among the law’s prohibitions are (1) that no land in the district may be used for commercial or multi-family purposes; and (2) that newer structures within the district may not be constructed over two stories high.\textsuperscript{82} The circuit court found the law unconstitutional.\textsuperscript{83} On appeal, the Supreme Court of Florida sustained the statute’s validity, holding that section four did not violate the due process clause.

Section four of the Act does not deprive appellees of their property, or of the use of their property; it simply regulates the use of that property. Reasonable restrictions upon the use of property in the interest of the public health, welfare, morals, and safety are valid exercises of the State’s police power. . . . The restrictions imposed by Section 4 of the Act are reasonable, in light of the legislative intent—expressed in Section 1 of the Act—to preserve the natural beauty of Manasota Key.\textsuperscript{84}

Nor does loss of business due to competition with the government deserve constitutional protection. In \textit{Coast Cities Coaches, Inc. v. Dade County},\textsuperscript{85} the county planned to extend its bus service in an area already worked by a common carrier. Plaintiff claimed that the competition would reduce its business, eventually causing the company to fail. The Supreme Court of Florida, citing precedent from the United States Supreme Court,\textsuperscript{86} held that “loss of business, through competition with a governmental agency, is not a taking of property. . . .”\textsuperscript{87} The court admitted a taking would have occurred had the county taken the common carrier’s physical property or certificate of necessity; but the “harsh impacts” to the common carrier were merely “damnum absque injuria.”\textsuperscript{88}

\begin{itemize}
  \item \textsuperscript{81} \textit{Id.}
  \item \textsuperscript{82} \textit{Id.}
  \item \textsuperscript{83} \textit{Id.}
  \item \textsuperscript{84} \textit{Id.} at 741.
  \item \textsuperscript{85} 178 So. 2d 703 (Fla. 1965).
  \item \textsuperscript{86} Skaneateles Water Works Co. v. Village of Skaneateles, 184 U.S. 354 (1902).
  \item \textsuperscript{87} 178 So. 2d at 709.
  \item \textsuperscript{88} \textit{Id.} at 710.
\end{itemize}
OTHER FACTORS THAT MAY DETERMINE WHETHER A TAKING HAS OCCURRED

[a] Physical Invasion.

It is well-established that the state may take land without physically invading it, although Florida courts incline to find a taking where there is a physical encroachment.

[b] Deprivation of Beneficial Use.

In order to constitute a taking, some courts indicate that the plaintiff must be "deprived of the beneficial use of his property." Other cases imply that the landowner must suffer "total" deprivation before compensation will be paid. Florida courts, however, have never defined the word taking to mean a total deprivation. In *Graham v. Estuary Properties*, the Supreme Court of Florida found there was no taking in part because the developer could still construct almost 13,000 residential units and commercial facilities; on the other hand, the court specifically noted that "[w]e do not hold that anytime the state requires a proposed development to be reduced by half it may do so without compensation to the owner..." In *Griffin v. Sharpe*, the Su-

89. See, e.g., Benitez v. Hillsborough County Aviation Auth., 26 Fla. Supp. 53 (Fla. 13th Cir. Ct. 1966) (a landowner could recover for taking of an aviational easement even though jets did not fly directly over his property), aff'd, 200 So. 2d 194 (Fla. 2d Dist. Ct. App. 1967), cert. denied, 204 So. 2d 328 (Fla. 1967).


91. City of Miami v. Romer, 58 So. 2d 849, 852 (Fla. 1952) (condemnation of a ten-foot strip for street purposes not considered a taking because the landowner was "free to use such strip of land in any lawful manner and for any lawful purpose, except for the construction of a building thereon").


The Supreme Court of Florida held, *inter alia*, that a statute extending certain platted restrictions against any buildings other than apartments and residences had taken plaintiff’s contractual rights to develop his land. The plaintiff had intended to build a medical office and clinic on his property. Even though his land retained substantial value despite the statutory restrictions, the court awarded the plaintiff compensation. In *Benitez v. Hillsborough County Aviation Authority*, the Second District Court of Appeal affirmed a circuit court decision which found a taking of an aviational easement from certain landowners. Even though the property retained substantial value, i.e., persons continued to live on it, the court backed the award of compensation.

[c] Systematic Impacts.

Florida courts have also considered the impacts that finding a taking would have on governmental planning and developing. In *Northcutt v. State Road Department*, the plaintiffs alleged that the construction and operation of a highway near them had deprived them of the beneficial use of their property. In particular, the complainants argued that the highway had caused excessive shock waves, vibrations, and noises in their homes. The complaint read that the disturbances impaired the

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93. 65 So. 2d 751 (1953).
94. Id. at 751-52. The court, in rejecting the argument that the statute involved was purely an exercise of the police power, wrote:

This court has long recognized [the principle of the police power], but with the qualification that there must be present a reasonable use of such power and reasonable limitations thereto, else we let the gates down, as advocated here, and the whole field of private contract would be invaded and infected to the extent that security of contract in this respect would be lost and irreparable harm and damage to the legal, constitutional, and economic facets of what we know as the business and financial world of the State and the Nation, would inevitably and necessarily follow.

Id. at 752.
95. 26 Fla. Supp. 53 (Fla. 13th Cir. Ct. 1966), aff’d, 200 So. 2d 194 (Fla. 2d Dist. Ct. App. 1967), cert. denied, 204 So. 2d 328 (Fla. 1967).
96. Id. at 200. In *Pinellas County v. Austin*, 323 So. 2d 6 (Fla. 2d Dist. Ct. App. 1975), the court held that the existence of some access to the property would not preclude the finding of a taking even though it might reduce the amount of recovery.
plaintiffs’ health and welfare, causing them to become ill and nervous and depriving them of the maximum use and aesthetic beauty of their property. The trial judge dismissed the plaintiffs’ amended complaint, which sought injunctive relief, for failure to state a cause of action. In affirming the dismissal, the Third District Court of Appeal made it clear that the plaintiffs’ reliance on City of Jacksonville v. Schumann was misplaced. The court wrote: “there is a substantial difference between the use of an airport by airplanes and the use of highway and access roads by motor vehicles. The noise intensity factor is different; the safety factors are different; and the use factors are different.”

The complaint, however, had alleged that the plaintiffs had been permanently deprived of the use, benefit, and enjoyment of their property. The Third District Court of Appeal overlooked these allegations, yet these averments and the inferences which could have been drawn from them should have been accepted as true in testing the sufficiency of the complaint; instead, the perceived possibility of virtually unlimited liability appears to have influenced the district court’s decision to dismiss. The court commented:

An airport may be placed at a considerable distance from a city while it is a public necessity for roads and highways to be built close to, or directly through a city, and sometimes through its most heavily populated areas. To sustain the amended complaint of the plaintiffs as sufficient for inverse condemnation would bring to an effective halt the construction, operation and maintenance of access roads and highways within the State of Florida. It would be impossible to determine and prepare with any degree of accuracy, a reasonable budget for the construction of highways and access roads in the future in Florida. After the access roads and highway were constructed and in operation, each individual land owner adjacent thereto could seek damages from the state for a “taking” of their property resulting from the increased noises, dust and vibrations, coming from the motor vehicles using the adjacent highway.

98. Id.
99. 167 So. 2d 95 (Fia. 1st Dist. Ct. App. 1964), cert. denied, 172 So. 2d 597 (Fia. 1965).
100. 209 So. 2d at 711.
101. Id. at 710.
102. Id.
Notwithstanding the position of the Third District Court of Appeal, the impacts of overflights and the impacts of highway traffic on the beneficial use of property may be similar. A taking can occur in both situations. Commentators have rightfully criticized the reasoning in Northcutt.103

[d] Fraud or Abuse of Discretion.

Courts have at times applied improper standards to determine whether a taking has occurred. In Northcutt v. State Road Department,104 the plaintiffs alleged, inter alia, that the state did not condemn sufficient land for a highway. In spite of the fact that purely legal and constitutional issues were raised by the complainants,105 the Third District Court of Appeal focused exclusively on whether a “clear showing” of fraud or abuse of discretion106 colored the state’s decision to condemn. The court, in citing two Florida cases,107 failed to recognize that the fraud or abuse of discretion standard is a proper standard only for determining the propriety of a decision to initiate condemnation proceedings and not for testing a decision to refrain from initiating those proceedings.108

[e] Profit-seeking Activity.

Until recently, single-family residence owners may have had a better chance of sustaining a condemnation claim than large-scale developers. In Wald Corp. v. Metropolitan Dade County,109 the Third District Court of Appeal intimated that a taking will be found more often in a private setting than in a business setting. The district court, in

104. 209 So. 2d 710.
105. The Northcutts requested the court to order the State Road Department to institute eminent domain proceedings against their property so that they could recover compensation for the agency’s taking. Id.
106. Id.
108. 209 So. 2d 710.
sustaining the constitutionality of a county ordinance requiring a subdivider to dedicate certain rights of way,\(^\text{110}\) wrote that "[w]hile the [individual landowner] may not ordinarily have his property appropriated without an eminent domain proceeding, the [subdivider] may be required to dedicate land where the requirement is part of a valid regulatory scheme."\(^\text{111}\) But the Supreme Court of Florida recently noted that investment-backed expectations may be a factor in finding a taking.\(^\text{111.1}\)

\[f\] Miscellaneous Considerations.

For a taking to occur, the governmental action must be pursuant to a plan or program. Damages caused by the commission of a tort do not in and of themselves constitute a compensable injury. For example, allegations that an agency sprayed plaintiff’s land with a chemical herbicide, damaging and destroying his crops, do not state a cause of action under inverse condemnation.\(^\text{112}\) The recurrence of a tort may be one factor in favor of finding an appropriation.\(^\text{113}\)

*Kirkpatrick v. City of Jacksonville*\(^\text{114}\) presents an interesting study of the distinctions sometimes made between a taking and damages. In that case, the complaint contained allegations that the city had destroyed buildings without sufficient proof that these buildings were adversely affecting the health or safety of the public. Holding that a one-year statute of limitations governing trespass actions was applicable to the case, the trial court dismissed the complaint.\(^\text{115}\) In explaining the distinction between a taking and damage, the First District Court of Appeal wrote:

Compensation to the owner [is] required as to [a taking], but not as to

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110. *Id.*

111. *Id.* at 868.


112. *Rabin v. Lake Worth Drainage Dist.*, 82 So. 2d 353 (Fla. 1955). See *White v. Pinellas County*, 185 So. 2d 468, 471 (Fla. 1966) (cutting down trees and shrubs on plaintiff’s land pursuant to a planned program of highway development was a taking).


114. 312 So. 2d 487 (Fla. 1st Dist. Ct. App. 1975).

115. *Id.*
[a damage]. The distinction is valid but does not necessarily prohibit appellants from recovering herein. "Taking" has been defined as "entering upon private property for more than a momentary period and 'under the warrant or color of legal authority,' devoting it to public use or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof."116

As was noted in Graham, Florida courts are likely to consider certain intangibles in determining the existence of a taking. For example, where a private person purchases land from the state which can be used for limited purposes, and then the state restricts those uses, these actions will be a factor in favor of finding a taking. Conversely, where a person purchases land knowing that it is subject to certain restrictions, that knowledge will be a factor against finding an appropriation.116.1

C. Owner

The Florida Constitution requires that a person be an "owner" of property before he may recover for the taking of that property.117 The owner of a fee simple absolute estate obviously satisfies the ownership requirement.118 The holder of a valid leasehold also is an owner within contemplation of the constitution, regardless of whether he is a tenant for a term of years,119 or a tenant at will,120 or even a tenant at sufferance.121 A vendor under a contract for deed does not possess sufficient indicia of ownership to be able to assert a claim for inverse condemnation.122 Only the owner at the time of the taking may sue for inverse

116. Id. at 489 (emphasis in original, citing 12 Fla. Jur. Eminent Domain § 68 (1957)).
118. Id.
119. Carter v. State Rd. Dep't, 189 So. 2d 793 (Fla. 1966); State Rd. Dep't v. White, 161 So. 2d 828 (Fla. 1964).
122. Florida Dep't Transp. v. Trost Int'l Ltd., 47 Fla. Supp. 175 (Fla. 2d Cir. Ct. 1978). Trost characterized the vendor's title under an agreement for deed as "a
condemnation, unless the deed of conveyance specifies otherwise or unless there has been an assignment of the cause of action from the owner at the time of the taking.\textsuperscript{123} Department of Transportation \textit{v. Burnette}\textsuperscript{124} provides a good illustration. The plaintiff purchased the land in 1977, approximately eight years after the government’s interference with the property deprived the prior owners of its beneficial use. The First District Court of Appeal, in reversing the lower court’s finding that the plaintiff’s property had been taken, quoted with approval from the Minnesota case of Brooks Investment Co. \textit{v. City of Bloomington}.\textsuperscript{125} In that case, the Supreme Court of Minnesota reasoned that

\begin{quote}
[w]hen the government interferes with a person’s right to possession and enjoyment of his property to such an extent so as to create a “taking” in the constitutional sense, a right to compensation vests in the person owning the property at the time of such interference. This right has the status of property, is personal to the owner, and does not run with the land if he should subsequently transfer it without an assignment of such right. The theory is that where the government interferes with a person’s property to such a substantial extent, the owner has lost part of his interest in the real property. Substituted for the property loss is the right to compensation. When the original owner conveys what remains of the realty, he does not transfer the right to compensation for the portion he has lost without a separate assignment of such right. If the rule was otherwise, the original owner of damaged property would suffer a loss and the purchaser of that property would receive a windfall. Presumably, the purchaser will pay the seller only for the real property interest that the seller possesses at the time of the sale and can transfer.\textsuperscript{126}
\end{quote}

The subsequent owner is not, however, without protection. First, the rationale for the rule enunciated in \textit{Burnette} lacks persuasion when the transferor and transferee do not know of the taking at the time of


\textsuperscript{124} 384 So. 2d 916 (Fla. 1st Dist. Ct. App. 1980).

\textsuperscript{125} 305 Minn. 305, 232 N.W.2d 911 (1975).

\textsuperscript{126} \textit{Id.} at 315, 232 N.W.2d at 918.
the conveyance. Moreover, the equities in such a case rest with the plaintiff because the sales price would not reflect the diminution in the value of the property for the taking, that is, it is the plaintiff who bears the ultimate burden.

Second, as previously noted, the subsequent owner may sue if he has received an assignment of the cause of action. In Florida Power Corp. v. McNeely, the action which formed the basis of a taking claim occurred in 1955, one year prior to the purchase of the lot by the plaintiffs. Plaintiffs in this case were permitted to sue because they had "bought an assignment of the cause of action [which the earlier owner] had against the defendant." Third, the subsequent owner may have remedies other than a suit in inverse condemnation. He may seek to enjoin the state from continuing its conduct. In Burnette, although the plaintiff was unsuccessful in making out a case for inverse condemnation, he nevertheless succeeded in enjoining the state from continuing to burden his land. The court, in answering the defendant's argument that the plaintiff was not the proper party to assert ownership, stated that "[i]t is no defense to this action, so conceived, that the drainage system was already in place when Burnette bought this acreage and so 'came to the nuisance.'" Of equal interest was the court's intimation that it may be necessary to the state to use its eminent domain powers should the tort continue.

Quite possibly the Department is unable to restore the old northwest drainage pattern without casting unmanageable water on North Florida Junior College. Condemnation of some land or easements may be appropriate to manage this drainage and compliance with the injunction, but

127. In Burnette, Judge Booth wrote: "the rule [holding that the owner of the property at the time of the taking is entitled to compensation] does not apply in inverse condemnation proceedings in the absence of a showing that the plaintiff and his predecessor in title were aware of the existence of a cause of action at the time title was transferred." 384 So. 2d at 924 (citing Cox Enterprises v. Phillips Petroleum, 550 P.2d 1324 (Okla. 1976)).

128. Id. at 924-25.
129. 125 So. 2d 311 (Fla. 2d Dist. Ct. App. 1960).
130. Id. at 313.
131. 384 So. 2d 916.
132. Id. at 922 (citing Lawrence v. Eastern Airlines, Inc., 81 So. 2d 632, 634 (Fla. 1955)).
the manner and method of so relieving [plaintiff's] land are for the Department to determine in the exercise of its lawful powers.\textsuperscript{133}

Regardless of whether the subsequent purchaser acquires an assignment or sues in tort, his conduct should be beyond reproach because courts hesitate to provide a remedy if they find that the purchaser did not buy in good faith, but rather for "the sole purpose of [instituting] a vexatious lawsuit."\textsuperscript{134}

D. Public Purpose

The Florida Constitution specifically provides that no property may be taken except for a "public purpose" without full compensation.\textsuperscript{135} The requirement of a public purpose limits the government's right to take and may not be used defensively by the state in an inverse condemnation proceeding.\textsuperscript{136} In \textit{Kirkpatrick v. City of Jacksonville},\textsuperscript{137} the city argued that the plaintiff was not entitled to compensation because the government did not have a public purpose for destroying his building. The First District Court of Appeal rejected the city's argument because the constitutional requirement that private property be taken only for public purpose serves to protect the landowner, and not the municipality.\textsuperscript{138} The state may avoid altogether the issue of whether a public purpose exists if it can prove that the damage stems from an isolated trespass or tort rather than from a planned governmental program.\textsuperscript{139}

\begin{itemize}
\item \textsuperscript{133} Id. at 923.
\item \textsuperscript{134} Id. at 922 (quoting Prosser, \textit{Law of Torts} 611 (4th ed. 1971)).
\item \textsuperscript{135} Fla. Const. art. 10, \S 6(a).
\item \textsuperscript{136} \textit{See}, e.g., Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451 (Fla. 1975); City of Lakeland v. Bunch, 293 So. 2d 66 (Fla. 1974); Demeter Land Co. v. Florida Pub. Serv. Co., 99 Fla. 954, 128 So. 402 (1930); Brest v. Jacksonville Expressway Auth., 194 So. 2d 658 (Fla. 1st Dist. Ct. App.), aff'd, 202 So. 2d 748 (Fla. 1967). What constitutes a "public purpose" may be broad. \textit{See}, e.g., Deseret Ranches of Florida, Inc. v. Bowman, 349 So. 2d 155 (Fla. 1977); Stein v. Darby, 126 So. 2d 313 (Fla. 1st Dist. Ct. App. 1961).
\item \textsuperscript{137} 312 So. 2d 487 (Fla. 1st Dist. Ct. App. 1975).
\item \textsuperscript{138} Id.
\item \textsuperscript{139} \textit{See} White v. Pinellas County, 185 So. 2d 468 (Fla. 1966). In \textit{Kirkpatrick}, 312 So. 2d 487, the First District Court of Appeal misconstrued \textit{White}. \textit{White} held that a plaintiff would prevail in inverse condemnation only if governmental action was
\end{itemize}
E. Full Compensation

If a plaintiff succeeds in making out a prima facie case of inverse condemnation, the Florida Constitution demands that "full compensation [be] paid to each owner."\textsuperscript{140} The public body is liable to the same extent in an inverse condemnation proceeding as it is in a direct condemnation proceeding.\textsuperscript{141} The award of compensation seeks to make the property owner "whole so far as is possible and practicable."\textsuperscript{142} The constitutional provision does not seek to put the owner in a better position than he would have been in if there had been no taking.\textsuperscript{143}

Full compensation generally means the fair market value of the property taken.\textsuperscript{144} If less than the complete parcel is taken, severance damages should be awarded for the remainder of the parcel.\textsuperscript{145} The government bears the burden of proving the value of the property; the property owner has the burden of proving damage to the remainder of pursuant to a valid government program.

\textsuperscript{140} FLA. CONST. art 10, § 6(a).
\textsuperscript{141} Flatt v. City of Brooksville, 368 So. 2d 631, 632 n.1 (Fla. 2d Dist. Ct. App. 1979) (citing State Rd. Dep't v. Lewis, 190 So. 2d 598 (Fla. 1st Dist. Ct. App. 1966)). See Division of Administration v. West Palm Beach Garden Club, 352 So. 2d 1177, 1180 n.3 (Fla. 4th Dist. Ct. App. 1977).
\textsuperscript{142} Dade County v. General Waterworks Corp., 35 Fla. Supp. 71, 73 (Fla. 11th Cir. Ct. 1971) (citing Dade County v. Brigham, 47 So. 2d 602, 604 (Fla. 1950)), rev'd on other grounds, 267 So. 2d 633 (Fla. 1972). Accord, Division of Bond Fin. v. Rainey, 275 So. 2d 551, 554 (Fla. 1st Dist. Ct. App. 1978); Cheshire v. State Rd. Dep't, 186 So. 2d 790, 791 (Fla. 4th Dist. Ct. App. 1966); Jacksonville Expressway Auth. v. Bennett, 158 So. 2d 821, 827 (Fla. 1st Dist. Ct. App. 1964) ("the guiding light . . . is to secure to the owner of the property taken full compensation - to make him whole - nothing less, nothing more").
\textsuperscript{143} See Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954).
\textsuperscript{144} Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972) (stating that the property might have been acquired for less than fair market value is immaterial).
\textsuperscript{145} Kendry v. Division of Administration, 366 So. 2d 391 (Fla. 1978); Daniels v. State Rd. Dep't, 170 So. 2d 846 (Fla. 1964); City of Hollywood v. Jarkesy, 343 So. 2d 886 (Fla. 4th Dist. Ct. App. 1977). But see Stanton v. Morgan, 127 Fla. 34, 172 So. 485 (1937) (government liable for property taken but not for tort damages to other property). If the taking directly enhances the value of the remaining parcel, the enhancement may be offset against the severance damages. Limmiatis v. Canal Auth., 253 So. 2d 912 (Fla. 1st Dist. Ct. App. 1971).
his property.\textsuperscript{146} Once a taking has occurred, the landowner may recover for consequential damages to the remainder of his parcel.\textsuperscript{147} Fair market value may be insufficient in certain circumstances.\textsuperscript{148} Full compensation may at times require replacement value.\textsuperscript{149} Any evaluation methods serve merely as tools in ascertaining full compensation.\textsuperscript{150} If the court determines a taking has occurred, it may order the state to pay compensation. Some courts will give the state the option of discontinuing its action; other courts will enjoin the state from appropriating.\textsuperscript{151}

The Florida Legislature occasionally has tried to establish artificial limits on the amount of compensation for a governmental taking.\textsuperscript{152} Courts generally exhibit an antipathy towards these ceilings, occasionally striking them down as unconstitutional in violation of the full compensation requirement and of the separation of powers mandate in the Florida Constitution.\textsuperscript{153} Despite their negative reception, legislative determinations of full compensation, "while not conclusive or binding, are persuasive and will be upheld unless clearly contrary to the judicial

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\item \textsuperscript{146} Kendry, 366 So. 2d 391. \textit{See} City of Fort Lauderdale v. Casino Realty, Inc., 313 So. 2d 649, 652 (Fla. 1975) (Overton, J., concurring).
\item \textsuperscript{148} Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972) (citing Jacksonville Expressway Auth. v. Henry J. Dupree Co., 108 So. 2d 289 (Fla. 1959)). \textit{But see} State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959).
\item \textsuperscript{149} State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941). \textit{See} Rice v. City of Fort Lauderdale, 281 So. 2d 36 (Fla. 4th Dist. Ct. App. 1973). \textit{But see} Hill v. Marion County, 238 So. 2d 163 (Fla. 1st Dist. Ct. App. 1970).
\item \textsuperscript{150} Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972); Division of Bond Fin. of the Dep't of Gen. Servs. v. Rainey, 275 So. 2d 551 (Fla. 1st Dist. Ct. App. 1973).
\item \textsuperscript{151} Mayer v. Dade County, 82 So. 2d 513 (Fla. 1955); City of Ormond Beach v. Lamar-Orlando Outdoor Advertising, 49 Fla. Supp. 196 (Fla. 7th Cir. Ct. 1979); Field v. City of Miami, 18 Fla. Supp. 179 (Fla. 11th Cir. Ct. 1961).
\item \textsuperscript{152} Daniels v. State Rd. Dep't, 170 So. 2d 846 (Fla. 1964).
\item \textsuperscript{153} \textit{Id.}
The jury takes its directions from the trial judge in determining the amount of money which should be awarded an injured plaintiff. The jury may not make an independent determination of the value of the property, but may evaluate, interpret, and weigh expert testimony. In Behm v. Division of Administration, the Supreme Court of Florida made it clear that "compensation . . . is by our constitution committed for final determination to the jury, not to an expert." Three limitations still exist to check the principle enunciated in Behm. First, substantial evidence must support the jury determination. Second, the jury verdict must be at least equal to the state's admission of damages. Third, the judge may grant a new trial if the verdict "shocks" him by being contrary to the manifest weight of the evidence, even where the jury returns a verdict within the range of testified values.

Florida law grants reasonable attorney's fees in inverse condemnation and eminent domain proceedings. In State Road Department v. Lewis, the government argued that an award of attorney's fees was improper in an inverse condemnation action. The First District Court

154. Id. at 853.
155. State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959) (citing Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926)). Accord, Behm v. Division of Administration, 383 So. 2d 216 (Fla. 1980); Daniels v. State Rd. Dep't, 170 So. 2d 846 (Fla. 1964); State ex rel. State Rd. Dep't v. Wingfield, 101 So. 2d 184 (Fla. 1st Dist. Ct. App. 1958); Dade County v. General Waterworks Corp., 35 Fla. Supp. 71 (Fla. 11th Cir. Ct. 1971), rev'd on other grounds, 267 So. 2d 633 (Fla. 1972); Pitz v. State Rd. Dep't, 32 Fla. Supp. 55 (Fla. 11th Cir. Ct. 1966).
156. Behm v. Division of Administration, 326 So. 2d 579 (Fla. 1976).
157. Id.
158. Id. at 582.
160. Meyers, 158 Fla. 859, 30 So. 354.
163. 190 So. 2d 598 (Fla. 1st Dist. Ct. App. 1966).
of Appeal called the state’s argument “absurd.”

[W]e find [the state’s] position to be that if [the state] complies with the law of this State by instituting an eminent domain action, it is liable for attorneys’ fees; but if it unlawfully appropriated a citizen’s property without instituting such an action, it thus escapes liability for the attorneys’ fees incurred by the aggrieved owner. The absurdity of this argument disposes of this point contra to the [state’s] contention.

The services performed by attorneys and experts in attempting to obtain federal relocation payments have been held not to be compensable.

Attorneys may receive sizeable amounts in inverse condemnation cases. In State of Florida v. Gables-By-The-Sea, Inc., the Third District Court of Appeal rejected the state’s argument that fees must be calculated upon a time and hourly-rate basis. The court noted that “[i]n an inverse condemnation proceeding, attorneys’ fees must be viewed as entirely contingent until a ‘taking’ is judicially determined.” Rejecting the contention that $850,000 in attorney’s fees for legal services over a five-year period was excessive, the district court cited to a number of factors which are permissible in establishing the propriety of a fee: the benefit to the client, the novelty, difficulty, and importance of the questions involved, and the attorney’s skill and talent may all influence the amount of the award given.

Expert witnesses must testify at trial concerning the value of ser-

164. Id. at 600.
165. Id. Because attorney’s fees in an inverse condemnation proceeding remain contingent until a taking has been determined and the proceeding itself is more complex than in eminent domain, the fees should be substantially greater than in a suit for eminent domain. See generally cases cited notes 167-69 infra.
167. 374 So. 2d 582 (Fla. 3d Dist. Ct. App. 1979), cert. denied, 383 So. 2d 1203 (Fla. 1980).
168. Id. at 584.
169. Id. The court used in part the factors outlined in the Code of Professional Responsibility and in FLA. STAT. § 73.092 (1977) as guidelines for determining the appropriate fee. As one expert testified in the litigation, “the skill required” to prevail in this complex case was “ten” on a one-to-ten scale. Id.
services performed by the attorney.\textsuperscript{170} One should also keep accurate records of time and expenses.\textsuperscript{171}

Full compensation also includes interest on the value of the property taken from the time of its appropriation.\textsuperscript{172} A property owner may also recover his costs.\textsuperscript{173} These include reasonable and necessary expenses for appraisers and expert witnesses, at least when the testimony relates directly to the establishment of the prima facie case.\textsuperscript{174}

Business losses are not compensable injuries under section 6(a). Arguably, a plaintiff suffers just as much when he loses the goodwill of his trade and future income as he does when he must relinquish a fee simple interest.\textsuperscript{175} But Florida courts have adhered rigidly to the general rule that the proprietor lacks a complete remedy. Several ratio-


\textsuperscript{171} City of Miami Beach v. Manilow, 253 So. 2d 910 (Fla. 3d Dist. Ct. App. 1971); Division of Administration v. Condominium Int'l, 317 So. 2d at 812 n.2. See State v. Gables-By-The-Sea, Inc., 374 So. 582 (Fla. 3d Dist. Ct. App. 1979).

\textsuperscript{172} State Rd. Dept' v. Lewis, 190 So. 2d 598 (Fla. 1st Dist. Ct. App. 1966); FLA. STAT. § 74.091 (1979).

\textsuperscript{173} FLA. STAT. § 73.091 (1979); State Rd. Dept' v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941). But see Corneal v. State Plant Bd., 101 So. 2d 371 (Fla. 1958).

\textsuperscript{174} Florida Coast Ry. Co. v. Martin County, 171 So. 2d 873 (Fla. 1965); Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950); City of Miami Beach v. Manilow, 253 So. 2d 910 (Fla. 3d Dist. Ct. App. 1971); Cheshire v. State Rd. Dept', 186 So. 2d 790 (Fla. 4th Dist. Ct. App. 1966); City of Miami Beach v. Belle Isle Apartment Corp., 177 So. 2d 884 (Fla. 3d Dist. Ct. App. 1965) (expert witness fees part of costs). But see Inland Waterway Dev. Co. v. City of Jacksonville, 38 So. 2d 676 (Fla. 1948).

\textsuperscript{175} Behm v. Division of Administration, 383 So. 2d 216 (Fla. 1980); Division of Administration v. Grant Motor Co., 345 So. 2d 843 (Fla. 2d Dist. Ct. App. 1977); State Rd. Dept' v. Abel Inv. Co., 165 So. 2d 832 (Fla. 2d Dist. Ct. App. 1964). See City of Tampa v. Texas Co., 107 So. 2d 216, 225 (Fla. 2d Dist. Ct. App. 1970). Where an interest of less duration than a fee is taken, the value of that interest has been held to be the loss in rental income. Pitz v. State Rd. Dept', 32 Fla. Supp. 55 (Fla. 11th Cir. Ct. 1966).
nales have been offered, none compelling. For the most part, courts fear that permitting recovery in a commercial setting would expand the scope of liability to unmanageable limits. As a final argument, the state may claim that because the proprietor can relocate and continue his business elsewhere, he never suffers a true loss.

Although business losses themselves rarely constitute compensable injuries, the value of the property to be condemned may reflect the property's earning potential. The court, in calculating the size of an award, considers all those items in which a "willing buyer" would be interested if he were "purchasing the entire package." Thus, factors such as past investments and projected future income influence the amount of compensation awarded.

Relief may also exist by statute; one in particular authorizes recovery for certain types of business losses under limited circumstances. As one court has noted "the right to business damages is a matter of legislative grace . . . ." It follows, then, that in order to receive an award under this enactment, the injured businessman bears the burden of proving his entitlement. And he may not use this statute for a "second recovery" of severance damages: "such a result, upon principles of justice and fair play, should not be allowed."

176. See, e.g., State Rd. Dep't v. Bramlett, 189 So. 2d 481, 483-84 (Fla. 1966) ("[W]e think we would be less than cautious and far from practical if we were to sanction what could well lead to a stampede into the field of damages in eminent domain proceedings. Allowing [business damages] could start the rush. We would hold the line."). See also Northcutt v. State Rd. Dep't of Fla., 209 So. 2d 710 (Fla. 3d Dist. Ct. App. 1968).


179. Id. at 554.


3. DEFENSES

First, the state may claim that it has merely committed a trespass or other tort. Such an allegation, if successfully maintained, is fatal to a suit for inverse condemnation.

Second, the state may claim that it did not take property but merely exercised its police power.184 The First District Court of Appeal has suggested that the state has the burden of proving as an affirmative defense the proper exercise of its police power.185

A defense may exist if the landowner gave the property interest to the state or otherwise "consented" or "acquiesced" to the taking.186 Similarly, if the taking conferred a privilege to the owner, the state may use this reciprocal exchange as a defense.187 Prescription, laches, and dedication may also be asserted by the state,188 although the one-year statute of limitations for tort actions does not apply to an equitable action in inverse condemnation.189 An estoppel can, according to at least one court, prevent a private property owner from asserting that a taking has occurred.190

184. Fla. Const. art 10, § 6(a).
190. Compare Division of Administration v. West Palm Beach Garden Club, 352 So. 2d 1177 (Fla. 4th Dist. Ct. App. 1977), with Mayer v. Dade County, 82 So. 2d 513 (Fla. 1955). See also City of Miami v. Romer, 73 So. 2d 285 (Fla. 1954).
4. Procedures

In general, the judge determines whether governmental action has resulted in a taking.\textsuperscript{191} If compensation is to be awarded, the judge should order the state to institute condemnation proceedings.\textsuperscript{192} At these proceedings, the jury determines the extent of the appropriation and the amount of damages.\textsuperscript{193} The Florida Administrative Procedure Act cannot, consistent with the state constitution, relegate questions concerning a taking to administrative determination.\textsuperscript{194} Finally, the court, as part of its inherent power to enforce judgments and pursuant to the constitution, may order the agency to issue the necessary authorization to the state treasurer to pay the award, at least in those situations in which funds are available.\textsuperscript{195}

5. Practice Pointers

In preparing an inverse condemnation lawsuit, the attorney should not overlook other federal and state constitutional guarantees. Government action may violate the due process or equal protection clauses of the fourteenth amendment to the United States Constitution. Other obvious challenges also exist. For example, in \textit{State ex rel. Furman v. Searey},\textsuperscript{196} the Fourth District Court of Appeal invalidated permit re-

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  \item \textsuperscript{192} State Rd. Dep't v. Bender, 147 Fla. 15, 2 So. 2d 298 (1941); Florida Power Corp. v. McNeely, 125 So. 2d 311 (Fla. 2d Dist. Ct. App. 1960) (citing Broward County v. Douldin, 114 So. 2d 737 (Fla. 2d Dist. Ct. App. 1959) and State Rd. Dep't v. Tharp, 146 Fla. 745, 1 So. 2d 868 (1941)); Askew v. Gables-By-The-Sea, 333 So. 2d 56 (Fla. 1st Dist. Ct. App. 1976).
  \item \textsuperscript{193} FLA. STAT. § 73.10 (1979). Flatt v. City of Brooksville, 368 So. 2d 631 (Fla. 2d Dist. Ct. App. 1979). But there is no constitutional right to a jury determination. \textit{See Carter v. State Rd. Dep't}, 189 So. 2d 793 (Fla. 1966).
  \item \textsuperscript{194} Department of Rev. v. Young American Builders, Inc., 330 So. 2d 864 (Fla. 1st Dist. Ct. App. 1976); State v. State, 326 So. 2d 187 (Fla. 1st Dist. Ct. App. 1976); FLA. CONST. art. 2, § 3.
  \item \textsuperscript{195} State Rd. Dep't v. Bankers Life & Casualty Co., 166 So. 2d 234 (Fla. 3d Dist. Ct. App. 1964).
  \item \textsuperscript{196} 225 So. 2d 430 (Fla. 4th Dist. Ct. App. 1969).
\end{itemize}
quirements on a substantive due process ground. Ordinances have also fallen to vagueness and overbreadth challenges.\textsuperscript{197}

Both the Florida and the United States Constitutions may be relied upon by the property owner. Because no election problem exists, the attorney should attempt to base his claim on both constitutional guarantees. If federal case law gives less protection to his client, the attorney may still prove his case under the Florida Constitution.\textsuperscript{198}

Courts should hesitate before granting summary judgment in an inverse condemnation action.\textsuperscript{199} Authority exists for the proposition that all doubts should be resolved against the state.\textsuperscript{200} As with other cases, legally competent, substantial evidence must support the plaintiff's prima facie case.\textsuperscript{201} The attorney should exhaust his available administrative remedies.\textsuperscript{202}

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\item \textsuperscript{197} Admiral Dev. Corp. v. City of Maitland, 338 So. 2d 867 (Fla. 1st Dist. Ct. App. 1972).
\item \textsuperscript{199} Wilson v. State Rd. Dep't, 201 So. 2d 619 (Fla. 1st Dist. Ct. App. 1967).
\item \textsuperscript{200} Alford v. Finch, 155 So. 2d 790 (Fla. 1963); \textit{Benitez}, 26 Fla. Supp. 53 (citing \textit{Alford}), \textit{aff'd}, 200 So. 2d 194 (Fla. 2d Dist. Ct. App. 1967), \textit{cert. denied}, 204 So. 2d 328 (Fla. 1967).
\item \textsuperscript{201} Walters v. State Rd. Dep't, 239 So. 2d 878 (Fla. 1st Dist. Ct. App. 1970).
\item \textsuperscript{202} See Kasser v. Dade County, 344 So. 2d 828 (Fla. 3d Dist. Ct. App. 1977).
\end{itemize}
Electoral Graffiti: The Right to Write-in

Robert Batey*

The election of 1980 focused unprecedented attention on the discontented voter. The presidential candidacies of John Anderson, Ed Clark of the Libertarian Party, and Barry Commoner of the Citizen’s Party appealed directly to those unhappy with the choice offered by the two-party system.1

While the presence on the ballot of an independent or third-party candidate can provide the discontented with an alternative to not voting, this option is not frequently available. When it is not, the voter’s only affirmative way of expressing his discontent is to write on the ballot the name of an individual who meets the qualifications for the office involved, but who is not a declared candidate. The right to cast such a “write-in vote,” and to have that vote counted, is the subject of this article.

The implementation of electronic voting2 sparked recent legal interest in write-in voting in Florida. First permitted in 1973,3 electronic voting did not become a significant part of Florida’s electoral system until 1977, when the earlier legislation was overhauled.4 Also in 1977, the Legislature systematically removed virtually every reference in the election laws to write-in voting.5 Robert L. Shevin, then Florida’s At-
torney General, concluded that "[s]ince . . . there are no longer any provisions in the election code for write-in ballots . . . , they have been effectively prohibited."8

One can only guess at the motivations of the 1977 legislators who voted to prohibit write-in voting. One factor, however, may have been the recognition that write-in voting complicates the electronic tabulation of votes.7 Accordingly, a prohibition on write-in votes would facilitate the adoption of electronic voting.

This article describes methods of resisting the Florida Legislature's attempt to ban write-in voting. Part I explores the federal constitutional challenge to such a ban. Part II considers the impact of the Florida Constitution on the action of the 1977 Legislature. In the latter context, the 1979 decision in Smith v. Smathers,8 which partially revived the practice of write-in voting, will be discussed.

I

Although no specific language exists in the United States Constitution guaranteeing the right to vote, this right has long been accorded constitutional status.9 It can be argued persuasively that this right includes the right to cast a write-in vote.

8. 372 So. 2d 427 (Fla. 1979).
A

To restrict a voter to only those candidates whose names appear on the ballot arguably denies him any affirmative method of expressing his dissatisfaction with the listed candidates. He faces one choice: he must either select from a group of candidates, all of whom he deems unworthy, or not vote at all. In Socialist Labor Party v. Rhodes,\textsuperscript{10} a three-judge panel of the United States District Court for the Southern District of Ohio recognized that forcing such a choice on a voter is constitutionally intolerable. Under then prevailing Ohio law, a voter could cast a write-in ballot in a given election only if there were no names on the ballot for that contest. Members of the Socialist Labor Party and of the American Independent Party, unable to have the names of their parties' presidential and vice-presidential nominees placed on the official Ohio ballot, sought injunctive relief assuring that they would at least be able to write in the names of their candidates. In a per curiam opinion, the three-judge court ordered such relief:

Voters are often not content to vote for one of the candidates nominated by the two major parties. A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise . . . . A blanket prohibition against the use of the write-in ballots denies . . . qualified electors . . . the right to freely participate in the electoral process as guaranteed by the Constitution . . . .\textsuperscript{11}

The plaintiffs in Socialist Labor Party appealed because they sought not just the right to write-in but also a place on the official ballot for their respective nominees. The United States Supreme Court granted this additional relief to the American Independent Party plaintiffs, but not to the Socialist Labor Party plaintiffs. In its opinion, the Supreme Court did not address the write-in voting question because no appeal had been taken from that portion of the three-judge panel's opinion granting plaintiffs the right to write-in.\textsuperscript{12}


\textsuperscript{11} 290 F. Supp. at 987 (citation omitted).

\textsuperscript{12} 393 U.S. at 26. Other readings of the Supreme Court's opinion are possible. See text at notes 36 & 37 infra.
Socialist Labor Party is one of only three reported cases that fully considers the claim that there is a federal constitutional right to write-in. The others are Thompson v. Willson, a Georgia case, and Kamins v. Board of Elections, a case arising in the District of Columbia.

As in Socialist Labor Party, the court in Thompson found that the United States Constitution guarantees the voter "the right to write the name of his choice and to strike the name presented to him..." In voiding a statute that prohibited write-in voting, the Georgia Supreme Court wrote, "We have heard of similar methods of holding elections in other so-called democratic countries... but this is not the American way..." In Kamins, the District of Columbia Court of Appeals all but upheld the federal constitutional claim asserted by the plaintiff. Faced with a statute that allowed the counting of votes only for candidates "whose name[s] appear on the general election ballot," plaintiff objected, alleging a violation of the constitutional right to vote for an otherwise qualified candidate whose name was not on the ballot. Quoting extensively from Socialist Labor Party, the court construed the relevant statutory language to permit write-in voting. Considering the plain language of the statute and the court's heavy reliance on Socialist Labor Party, the result in Kamins is tantamount to a holding that a prohibition on write-in voting would be unconstitutional.

Numerous reported cases have dealt with the right to write-in as a matter of state constitutional law. Indeed, Thompson held that the statute struck down in that case violated both the United States and the Georgia Constitutions. These state constitutional law holdings are relevant to the federal constitutional question because few of these cases rely on specific constitutional language regarding the right to write-in; instead, the cases consider whether this right derives from the general concept of a right to vote. Thus, these decisions are persuasive authority for a similar interpretation of the federally guaranteed right.

15. 223 Ga. at __, 155 S.E.2d at 404.
16. Id.
18. 324 A.2d at 193-94.
19. 223 Ga. at __, 155 S.E.2d at 404.
to vote.

Besides the Georgia Supreme Court, the highest courts in Colorado, Florida, Iowa, and Maryland have invalidated statutes prohibiting write-ins on state constitutional grounds. Four courts have reinterpreted statutes that appear to outlaw write-in voting, specifically in order to save the enactments from violating state constitutional law. Furthermore, several other courts have expressed in dicta that their state constitutions guarantee the right to write-in.

Of all the cases dealing with write-in voting as a matter of state constitutional law, the most thorough discussion appears in Jackson v. Norris, a 1937 decision of the Maryland Court of Appeals. In that case, a voter sued to nullify a contract, executed by the Baltimore City Voting Machine Board pursuant to statute, for the purchase of voting machines that did not permit write-in voting. The trial court granted the desired relief, and the court of appeals affirmed. The appellate court emphatically determined that the right to vote included the right to write-in: "An election is not free, nor does the elector enjoy a full and fair opportunity to vote, if the right of suffrage is so restricted by statute that he may not cast his ballot for such persons as are his choice for the elective office."

Considering the argument that one vote is a trivial concern, the court responded that it was "no minor matter."

21. Smith v. Smathers, 372 So. 2d 427 (Fla. 1979); State ex rel. Lamar v. Dillon, 32 Fla. 545, 14 So. 383 (1893). But see Pasco v. Heggen, 314 So. 2d 1 (Fla. 1975). For a detailed discussion of these cases, see text at notes 51-71 infra.
27. Id. at __, 195 A. at 586.
28. Id.
It must be considered in this connection that every voter has but a single vote to cast. This vote, whether cast with the majority or the minority, is as important in terms of personal value and constitutional significance as every other vote. The futility of the elector's vote is not the measure of his constitutional right. The civic and political importance of an unabridged and unhampered choice lie in the freedom of the elector to exercise fully this right on any occasion. . . .

From this argument of a single vote's insignificance, the court in Jackson turned to a consideration of the would-be write-in voter's main alternative: seeking a place on the official ballot for his candidate. But this, according to the Maryland Court of Appeals, was not an "equivalent . . . constitutional substitute. . . . [D]eprivation of [the elector's] right to vote for his own choice is not compensated by the privilege to make the costly, precarious, and laborious efforts to unite the large group of voters . . . which would be necessary . . . ." 30

Not all courts have followed this reasoning. 31 The contrary decisions lack support for the conclusion that write-in voting may be prohibited without abridging the right to vote; typically, there is only reference to the legislature's general power to regulate the conduct of elections. 32 Surveying these cases, one can conclude, as did the Maryland Court of Appeals in Jackson, that "[t]he decisions of [these] states . . . are opposed by a preponderance of authority, and the grounds on which they rest are not persuasive in view of the reasons assigned in support of the majority view." 33

29. Id. at __, 195 A. at 587.
30. Id. at __, 195 A. at 586.
32. See, e.g., Davidson v. Rhea, 221 Ark. at __, 256 S.W.2d at 746, quoting Chamberlin v. Woods, 15 S.D. at __, 88 N.W. at 111. Pasco v. Heggen, see note 31 supra, is not typical of such cases. Pasco develops a unique restriction on the right to write-in and supports it with unique reasoning. See text at notes 56-65 infra.
33. 173 Md. at __, 195 A. at 588.
Examination of the cases dealing with the right to write-in reveals substantial recognition of that right. No reported case explicitly dealing with a federal constitutional argument questions the existence of such a right. In addition, a preponderance of the cases considering a state constitutional argument supports the proposition that the right to vote includes the right to cast a write-in ballot. Thus, there is considerable force to the contention that the United States Constitution guarantees the right to write-in.

B

In an unreported decision rendered in November of 1978, the United States District Court for the Middle District of Florida rejected this contention, finding no federal constitutional violation in Florida's prohibition on write-in voting. The district court reached this conclusion, which is of major significance in Florida, in two main steps.

First, the court considered the significance of Socialist Labor Party v. Rhodes, the only other federal court decision directly on point. The court considered the opinion of the three-judge panel in Socialist Labor Party undercut by the action taken by the United States Supreme Court on appeal.

The plaintiffs in Socialist Labor Party sought either a place on the ballot for their candidates or the right to write-in those candidates' names. The three-judge panel considered each of these claims separately. According to the Florida federal court, however, "[T]he Supreme Court's analysis . . . took a different approach. There was no discussion of the right to vote as a matter completely distinct from ballot access." Rather, continued the district court, the reasoning of the Supreme Court implied that "the right to vote is intimately related to the right of access to the ballot (indeed, The Supreme Court has . . . stated [in another case] that the rights of voters to vote and of candidates to ballot access are 'intertwined')." Thus, the Florida federal court concluded that the constitutional status of the right to write-in could not be judged without reference to those constitutional decisions.
concerning a candidate's right of access to the ballot. Because the lower court's decision in *Socialist Labor Party* had not done this, the district court reasoned that case's holding was questionable.

This reasoning foreshadowed the second step in the federal district court's analysis: examination of the ballot access cases. The district court emphasized the recognized right of a state to "keep its ballots within manageable, reasonable limits" by "limiting places on the ballot to those who can demonstrate substantial popular support." Then the court related these holdings to the "intertwined" right to vote. The court wrote: "If the number of places on the ballot can be so limited, it follows that there cannot simultaneously exist an unrestricted right to cast write-in votes for whomever the voter thinks should be a candidate."

This sentence forms the crux of the district court's opinion, and its logic is quite simple. The state's power to keep a candidate's name off the official ballot necessarily includes the power to prevent individual voters from adding that name to their ballots. While simple, this logic is not unassailable. Indeed, both steps in the district court's analysis invite criticism.

The federal court erred in its reading of the action taken by the Supreme Court in *Socialist Labor Party*. First, the district court failed to consider the fact that the defendants in *Socialist Labor Party* did not appeal. Thus, the only issue properly before the Supreme Court was the three-judge panel's refusal to place plaintiffs' candidates on the official ballot. Not surprisingly, the Supreme Court did not view the right to vote as a matter separate from ballot access.

Nonetheless, considerable authority does exist to support the proposition that the rights to vote and to ballot access are intertwined. But attentive reading of the ballot access cases shows that they are not as

38. *Id.* at 6, (citing Bullock v. Carter, 405 U.S. 134 (1972)).
39. *Id.* (citing Buckley v. Valeo, 424 U.S. 1 (1976)).
40. *Id.*
41. This oversight is understandable because both parties to the Florida lawsuit also overlooked this fact in the memoranda they filed with the district court. See, e.g., Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, Batey v. Krivanek, No. 78-815, slip op. at 2-3 (M.D. Fla., filed Sept. 28, 1978) (arguing erroneously that the Supreme Court had affirmed the write-in holding of the three-judge panel).
closely interrelated as the district court found.

A state may, under certain circumstances, deny a candidate a place on its official ballot without violating the federal constitution.\(^{42}\) But the state interest that is served by such a limitation is the desire to keep "ballots within manageable, understandable limits."\(^{43}\) The concern is that "'laundry list' ballots [will] discourage voter participation and confuse and frustrate those who do participate. . . ."\(^{44}\) Seen in this light, a limit on ballot access does not conflict with the right to write-in. Allowing write-in votes does not expand the ballot (except to add a blank space under each office), nor does it confound or deter the would-be voter. Thus, the ballot access cases do not implicitly deny the right to write-in.

In fact, the ballot access cases provide arguments supporting the right to write-in, rather than reasons for denying that right. The United States Supreme Court has frequently cited the fact that a state permits write-in votes as a reason for allowing that state to limit a candidate's access to the ballot. In \textit{Jenness v. Fortson},\(^{45}\) the Court upheld a set of Georgia laws keeping off the ballot any minor-party or independent candidate who could not garner the signatures of five percent of the voters in the previous general election. In approving these laws, the Court noted:

\begin{quote}
[T]hese procedures relate only to the right to have the name of a candidate or the nominee of a "political body" printed on the ballot. There is no limitation whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted.\(^{46}\)
\end{quote}

Therefore, the fact that a voter could write in the name of a candidate denied ballot access was one reason for allowing the state to limit that access. Similar reliance on the availability of write-in votes is found in \textit{Storer v. Brown},\(^{47}\) and in \textit{American Party v. White},\(^{48}\) companion cases

\begin{footnotes}
\footnotetext[42]{Jenness v. Fortson, 403 U.S. 431 (1971).}
\footnotetext[44]{Id.}
\footnotetext[45]{403 U.S. 431 (1971).}
\footnotetext[46]{Id. at 434.}
\footnotetext[47]{415 U.S. 724, 736 n.7 (1974) (upholding California's requirement that}
\end{footnotes}
applying the ballot access principles of Jenness. Considering Jenness, Storer, and American Party, one court has concluded that they lend credence to the argument that there is a federal constitutional right to write-in.48

Contrary to the reasoning of the United States District Court for the Middle District of Florida, the ballot access cases decided by the Supreme Court do not necessitate denial of the existence of a constitutional right to write in. This right and the right to a place on the ballot are not that closely intertwined. Rather, the rights are complimentary. The Supreme Court's cases imply that, because a state may limit one of these political rights, access to the ballot, it must honor the other the right to cast a write-in vote.

II

The case for write-in voting draws support not only from the United States Constitution, but also from the constitutions of the several states.50 In Florida, the status of write-in voting as a matter of state constitutional law has developed in a decidedly distinctive fashion. With respect to this issue, no other state's constitutional documents have been interpreted as Florida's have. Almost a century of Florida jurisprudence has produced this result: there is a state constitutional right to cast a write-in vote, but only if the vote is cast for someone who has "qualified" as a write-in candidate.

This interpretation of the Florida Constitution, while better than a denial of the right to write-in, is unsatisfactory on many counts. The Florida Supreme Court should abandon this interpretation, replacing it with a broader recognition of the right to cast a write-in vote.

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48. 415 U.S. 767, 772 n.3 (1974) (upholding Texas's requirement that minor-party and independent candidates show substantial support through either previous balloting, nominating conventions, or petitions).


50. See text at notes 19-25 supra.
The right to write-in was first found in the state constitution in 1893. In *State ex rel. Lamar v. Dillon*, the state attorney general brought a quo warranto action against thirteen councilmen of the city of Jacksonville. Attorney General Lamar contended that the councilmen had been elected pursuant to an unconstitutional statute and, therefore, had unlawfully usurped the offices of their predecessors. Among the allegedly unconstitutional features of the statute was a prohibition on write-in voting in the Jacksonville election.

While rejecting the rest of the attorney general's challenges to the election statute, the Florida Supreme Court agreed that the ban on write-in voting violated the state constitution's pledge that "in all elections by the people, the vote shall be by ballot." Construing this general recognition of the right to vote, the court held: "[T]he legislature cannot, in our judgment, restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases. . . ." After finding one portion of the statute unconstitutional, the state supreme court went on to uphold the challenged election, because there was no allegation by the attorney general that any Jacksonville voter had wanted to cast a write-in vote.

The broad language of this 1893 decision, recognizing a right to vote as one "pleases," remained an unchallenged facet of Florida's jurisprudence for more than eighty years. For this reason, the plaintiffs in *Pasco v. Heggen*, a 1975 decision of the state supreme court, must have been surprised to find that court undercutting its previous position.

51. 32 Fla. 545, 14 So. 383 (1893).
52. There was no explicit prohibition; however, the state supreme court concluded that "the only fair and reasonable construction [of the statute] restrict[s] the voter to a choice of candidates printed on the ballot." *Id.* at 582, 14 So. at 394.
53. This provision appeared in article VI, section 6, of the 1885 Constitution.
54. 32 Fla. at 579, 14 So. at 393-94. This language echoes an earlier decision, *State v. Anderson*, 26 Fla. 240, 8 So. 1 (1890): "The distinguishing theory of the ballot system is that every voter shall be permitted to vote for whom he pleases. . . ." *Id.* at 259, 8 So. at 5, quoted at 32 Fla. at 579, 14 So. at 393.
55. 32 Fla. at 585-86, 14 So. at 396.
56. 314 So. 2d 1 (Fla. 1975).
Plaintiffs Pasco and Perkins wanted to cast write-in votes in a Tallahassee city commission election. They were prevented from doing so by the combined effect of two state statutes: one prescribing the means by which a person may qualify as a write-in candidate, and another providing a space on the ballot for write-in votes only when a write-in candidate has qualified. Because no one had registered as a write-in candidate for the Office of Tallahassee City Commissioner, Group I, Pasco and Perkins were not allowed to write in any name for the office. Their lawsuit claimed that the operation of these two statutes violated the right to vote guaranteed them by the state constitution. Despite the broad language of *State ex rel. Lamar v. Dillon*, the Florida Supreme Court disagreed, upholding the statutes in question.

The court, in an opinion written by Justice Ben Overton, cited *Dillon* with approval, but then indicated two major reasons why the challenged statutes did not offend the principle enunciated in that case. First was the need "to protect the integrity of [the] political process from frivolous or fraudulent candidacy." Requiring write-in candidates to register prior to an election and prohibiting write-in votes unless someone does register are constitutionally permissible means of guarding against the last-minute candidate and the nonexistent one.

The second reason offered by the supreme court was the need "to protect the right of privacy for the individual who does not desire to be a candidate." A decade before Pasco, the state supreme court had held in *Battaglia v. Adams* that an individual had a legal right to keep his name off the official election ballot. According to Justice

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58. Under the qualification statute, Fla. Stat. § 99.023 (1975), a write-in candidate must file a notice of his candidacy forty-five days prior to the election.

59. 314 So. 2d at 3.

60. *Id*.

61. *See* note 58 supra.

62. 314 So. 2d at 3.

63. 164 So. 2d 195 (Fla. 1964). For a further discussion of *Battaglia*, see text at notes 82-91 infra.

64. *But see* Yorty v. Stone, 259 So. 2d 146 (Fla. 1972). For a discussion of
Overton, the right not to be on the ballot was equivalent to a right not to be voted for, and this second right applied whether or not the individual’s name appeared on the official ballot.65

_Pasco_ undoubtedly emboldened those in the state legislature who wanted to do away with write-in voting entirely. Within two years, even the limited form of write-in voting upheld in _Pasco_ was gone; in 1977 the Legislature repealed the statutes at issue in that case, leaving no provision for write-in votes in the election code.66

In the first general election following this repeal, Lee Smith, a minor party candidate for the United States House of Representatives, sought to become a write-in candidate when he failed to meet Florida’s requirements for ballot access. When informed that write-in votes would not be allowed in the general election, Smith brought suit, claiming a violation of his state constitutional rights. In _Smith v. Smathers_,67 the Florida Supreme Court agreed that Smith’s rights had been abridged.

Justice Overton’s opinion in _Smith_ adhered closely to the reasoning he used for the court in _Pasco_. Once again, the court cited with approval _State ex rel. Lamar v. Dillon_.68 The _Smith_ opinion underscored the importance of _Dillon_ by establishing the similarity of the constitutional provisions at issue in both cases.69 Because the concerns mentioned in _Pasco_ are absent when there is an active write-in candidate (the candidate exists, he must be considered serious, and he has waived any privacy right), the principle enunciated in _Dillon_ controlled, and Smith’s constitutional claim was upheld.70

Yorty, see text at notes 82-91 infra.

65. A third reason, the need to keep “ballots within manageable limits,” was also mentioned. 314 So. 2d at 3. For a critique of another court’s use of the same argument, see text at notes 42-44 supra.

66. _See_ text at notes 5-6 _supra_.

67. 372 So. 2d 427 (Fla. 1979).

68. _Id._ at 429.

69. _Id._ at 429 & n.2. Article VI, section 1, of the 1968 constitution provides: “All elections by the people shall be by direct and secret vote.” In dissent, Justice Alderman argued that the omission from the 1968 constitution of the word “ballot,” which appeared in the 1885 constitution, see text at note 53 _supra_, rendered _Dillon_ irrelevant to the constitutional issue in _Smith v. Smathers_. _Id._ at 430-31 (Alderman, J., dissenting).

70. Nevertheless, Smith was denied the relief he sought. Because of the brief
The supreme court's solution to the problem posed by this finding of unconstitutionality was novel. The court declared certain of the repealed statutes relating to write-in voting "revived," to "remain in force and effect... until properly changed by the legislature." In other words, the court made part of the statutory scheme upheld in Pasco unrepealable.

The Florida Supreme Court has thus recognized only a limited right to write-in. If there exists a qualified write-in candidate seeking write-in votes, there is a right to cast a vote for such a person, even though his name does not appear on the official ballot. But if no such candidate exists, there is no right to write-in.

B

Florida's limited recognition of a state constitutional right to cast a write-in vote should no longer be followed. In an appropriate case, the Florida Supreme Court should overrule its decision in Pasco and return to the more expansive right to write-in recognized in Dillon. The limited right now accorded Florida citizens does not give full scope to the right to vote, nor is the limitation necessary to support the two goals mentioned in Pasco.

Florida's limited right to write-in fails to give adequate scope to the right to vote. The rights of the potential write-in voter are contingent upon the actions of another, the would-be write-in candidate. This places the candidate in a position superior to the voter, violating the cardinal principle of Dillon that the voter "must be left free to vote for time period between the filing of the lawsuit and the general election, the state supreme court denied Smith's application for a writ of mandamus. See 372 So. 2d at 428. The court's declaration that Smith's rights had been violated came months after the election.

71. *Id.* at 429. The revived provisions are *Fla. Stat.* §§ 99.023, 101.011(2), 101.151(5)(a), (b) (1975), which were amended by Ch. 77-175, 1977 Fla. Laws 903. Section 99.023 deals with the qualification of write-in candidates, see note 58 supra, while §§ 101.151(5) and 101.011(2) concern the preparation and marking of official ballots, respectively.

72. These steps would necessarily undercut the language in *Smith v. Smathers* restricting its holding to situations in which there is a qualified write-in candidate.

73. *See* text at notes 59-65 supra.
whom he pleases." Furthermore, Florida’s current conception of the constitutional right to write-in suggests that the process for qualifying a write-in candidate somehow provides an adequate substitute for writing in the person most qualified, whether a candidate or not. But the process is burdensome, requiring persuasion of the desired candidate substantially in advance of the election. The court in *Jackson v. Norris*, an influential decision regarding write-in voting, held that such substitutes cannot justify abridging the right to vote for any qualified person, on the ballot or off. The Florida Supreme Court would do well to adopt the expansive concept of the right to vote recognized by the Maryland courts in *Jackson*.

*Pasco v. Heggen* cited the need to maintain the integrity of the election process as a reason for recognizing only a limited right to write-in. While it is appropriate to be concerned about a “frivolous or fraudulent candidacy,” this concern does not provide an adequate reason for restricting write-in voting. Some thirty-eight jurisdictions manage to maintain the integrity of their electoral process while permitting virtually unrestricted write-in voting. The number of states

74. 32 Fla. at 579, 14 So. at 394 (emphasis added). See text at note 54 supra.
75. See note 58 supra.
77. Id. at _, 195 A. at 586. See text at note 30 supra.
78. See text at note 60 supra.
79. 314 So. 2d at 3.
allowing such voting suggests that the practical problems posed by write-in votes are far from insurmountable; a state can find ways of resolving these problems without restricting the scope of the right to vote.81

A potentially more compelling reason for limiting the right to write-in is mentioned in Pasco: the need to protect the privacy rights of the person for whom the write-in vote is cast.82 On close examination, however, this reason loses its appeal. Being the recipient of a write-in vote is a negligible intrusion on privacy, one which does not justify a limitation on write-in voting.

In Battaglia v. Adams,83 the state supreme court held that putting Richard Nixon's name on the 1964 Republican presidential primary ballot over his objection violated Nixon's right to privacy.84 In Pasco, the court cited Battaglia in holding that a person has a privacy interest in not receiving a write-in vote.85 While case law in another jurisdiction does support the idea that including a person's name on the official election ballot can violate his right of privacy,86 the dictum in Pasco extending this reasoning to write-in voting is unprecedented. The "intrusion" upon privacy occurring when one is the recipient of a write-in vote seems much too slight to meet the threshold requirement of privacy law that the intrusion be "highly offensive to a reasonable person."87 Furthermore, the risk of such an intrusion could justly be characterized as part of the price we each pay for our system of free elections.


81. For example, the Oregon Legislature was concerned about the campaign expenditures of write-in candidates. Rather than requiring such candidates to file expenditure statements prior to the election and prohibiting write-in votes for candidates who did not file, Oregon provided that no write-in candidate who won would be deemed elected until he had filed a campaign expenditure statement. OR. REV. STAT. § 260.245 (1977). Accord, WYO. STAT. § 22-16-120 (1977).
82. See text at notes 62-65 supra.
83. 164 So. 2d 195 (Fla. 1964).
84. Id. at 197 (following OP. ATT'Y GEN. FLA. 060-171 (1960)).
85. 314 So. 2d at 3-4.
The Florida Supreme Court recognized as much in a related context. In *Yorty v. Stone*, a presidential candidate who wanted to compete in some states’ primaries, but not Florida’s, sought to remove his name from the Florida presidential primary ballot. In 1972, candidate Sam Yorty relied on 1964 noncandidate Richard Nixon’s success in obtaining similar relief in *Battaglia v. Adams*. The state supreme court distinguished *Battaglia* because Yorty (unlike Nixon in 1964) remained an announced candidate. His interest in privacy was thus lessened, and this reduced interest was outweighed by the public interest: “A matter of such magnitude as the selection of the best possible candidate for the highest position in this nation should be controlled by the public’s right to a complete expression of their views and not by the individual’s personal and tactical choices.”

Just as the public’s right to express its views through voting outweighed Yorty’s privacy interest in keeping his name off the primary ballot, so the public’s right to vote should outweigh the far smaller privacy interest of the citizen who desires not to receive any write-in votes. In deciding *Pasco v. Heggen*, the Florida Supreme Court should have given as much attention to *Yorty* as it gave to *Battaglia*. The result would have been a less limited concept of write-in voting.

C

The reasons offered for limiting the state constitutional right to cast a write-in ballot are not compelling, and the Florida Supreme Court should abandon its limited conception of that right. Furthermore, even for those who consider the proffered reasons sufficient to justify some limitation on the right to write-in, there is no reason to go as far as the supreme court has gone. The goals of maintaining the integrity of elections and preserving personal privacy can be attained by permitting the disgruntled voter to cast a ballot for “None of the

88. 259 So. 2d 146 (Fla. 1972).
89. Id. at 147-48.
90. Id. at 149.
91. This balancing is analogous to that performed by the United States Supreme Court when weighing privacy rights against freedom of speech and of the press. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (recognizing freedom-of-expression limitations on the law of libel).
None-of-the-above voting is currently allowed in general elections only in Nevada.\textsuperscript{92} If adopted in Florida, none-of-the-above voting could operate in this fashion: under each office listed on the official ballot would be the names of the qualified candidate or candidates, plus a slot marked “None of the above.” Votes for “None of the above” would be tallied just like votes for a candidate. “None of the above” could win an election or earn a place in a runoff. If “None of the above” did win, the office would become vacant, to be filled as any office vacated by death or resignation would be.\textsuperscript{93}

None-of-the-above voting poses none of the problems seen in write-in voting. There is no threat to the integrity of the electoral system through fraudulent or frivolous candidates, nor is anyone’s right of privacy breached. If the Florida Supreme Court must allow some limitation on write-in voting, substituting none-of-the-above voting would be the limitation least violative of the right to vote. If the court will not recognize an unlimited right to cast a write-in ballot, it should recognize a state constitutional right to cast a “None of the above” vote.\textsuperscript{94}

III

The discontented voter has a right to affirmatively express his disappointment with the elective choices offered him. A right to write-in derives from the federal Constitution and should be recognized by the federal courts. Dissatisfied Florida voters may also rely on the state constitution, which should be interpreted as granting an unrestricted right to write-in (or at least as recognizing a right to cast a “none-of-

\textsuperscript{92} NEV. REV. STAT. § 293.269 (1979). The provision applies only to statewide contests, however, and none-of-the-above votes do not affect the outcome of these contests. \textit{Id.}

\textsuperscript{93} See W. ADAMS, A SUGGESTED NEW ARTICLE ON ELECTIONS 11 (August, 1977) (testimony before the Florida Constitutional Revision Commission): the state constitution should “guarantee the right of every voter to cast a negative vote [and] the right to have the vote counted with the same dignity as votes for candidates.”

\textsuperscript{94} Some may object that there is no basis for reading such a requirement into the state constitution. While the point is well-taken, the court’s action in so reading the constitution would be no more extreme than its holding that the state constitution makes certain election statutes dealing with write-in voting unenforceable. \textit{See} text at note 71 \textit{supra}. 
the-above” vote). Without some judicial action of the sort advocated, the right to vote will most often be meaningful only for those pleased with the choices offered by the two-party system, a group whose number grows smaller with every passing day.
Advertising, Solicitation, And Indication Of
Specialization: Recent Proposed Rules And Supreme
Court Mandate

Steven J. Greenwald*

A Lawyer who advertises or solicits . . . is regarded by his brethren at
the bar as one with whom it is not pleasant to associate on the terms of
cordial intimacy characteristic of the relationship of Lawyers to one
another.¹

INTRODUCTION

The American Bar Association (ABA), on January 3, 1980, circulated
a proposed draft for the complete revision of the Model Rules of Pro-
fessional Conduct.² The proposal, now under consideration, contains a
section which would expand the permissible scope of attorney advertis-
ing and solicitation. This new tolerance is the result of a growing inter-
est in expanding public awareness to legal services.

The limitations upon advertising and solicitation have, in the past,
been intended to deter overreaching by unscrupulous lawyers. These
restrictions, however, have been limited by three recent United States
Supreme Court cases which have limited the scope of the ban on com-
mercial advertising: Bates v. State Bar of Arizona,³ Ohralik v. Ohio
State Bar Association,⁴ and In re Primus.⁵ According to these cases,

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Detroit.
1. H. DRINKER, LEGAL ETHICS 211 n.6 (1953).
2. This discussion draft, circulated by the ABA Commission on Evaluation of
Professional Standards, has not yet been officially adopted. The final version of the
Rules were scheduled for submission to the ABA’s House of Delegates at its February,
1981 meeting.
(1) commercial speech, which includes attorney advertising, is entitled to first amendment protection; (2) a state may constitutionally regulate potentially harmful in-person solicitation; and, (3) only upon a showing of a compelling interest and requisite specificity may a state regulate solicitation implicating political or associational freedoms. After analyzing these cases, this article will examine the ABA Proposed Model Rules to determine whether the limitations it places upon attorney advertising and solicitation are constitutional in light of these recent Supreme Court decisions.

**Bates: The Supreme Court Permits Attorney Advertising**

In *Bates v State Bar of Arizona*, the Supreme Court considered whether a newspaper advertisement which listed prices for routine legal services fell within the confines of protected speech, or constituted a form of commercial speech which remained outside the scope of first amendment protection. J. Bates and Van O'Steen were attorneys licensed to practice in Arizona. They operated a legal clinic which provided standardized legal services for moderate fees. In an attempt to attract clients for their clinic, they placed an advertisement in a newspaper, offering routine legal services at reasonable rates. The state bar considered the ad to be in violation of the Arizona Code of Professional Responsibility, and recommended a six-month suspension. The United States Supreme Court, however, reversed, basing its decision on first amendment issues which it had reserved in two earlier cases: *Valentine v Chrestensen* and *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*.

In *Chrestensen*, the Supreme Court stated that although the Con-

7. Routine legal services were deemed to include such matters as personal bankruptcies, name changes, uncontested divorces, and uncontested adoptions. *Id.* at 354.
8. "[A] lawyer shall not publicize himself, or his partner, or associate as a lawyer through newspaper or magazine advertisements, radio and television announcements or other means of commercial publicity." *ABA Canons of Professional Ethics*, DR 2-101(B) (incorporated into Rule 29(a) of the Supreme Court of Arizona).
9. The Arizona Supreme Court's final sanction was only a censure.
10. 316 U.S. 52 (1942).
stitution afforded protection to speech concerning social, political, and economic ideas, the first amendment did not restrain government regulation of purely commercial advertising.\textsuperscript{12} This view continued until 1975, when the Court held in \textit{Bigelow v. Virginia}\textsuperscript{13} that the first amendment guarantees of speech and press were applicable to a paid commercial advertisement. The transition from its prior position in \textit{Chrestensen} was made complete one year later when the Court in \textit{Virginia Pharmacy} held that commercial speech did indeed come within the ambit of the first amendment.\textsuperscript{14} This case involved a challenge by a consumer group to a statute which prohibited pharmacists from advertising prices of prescription drugs, declaring such advertising to be unprofessional conduct of the type that could result in disciplinary action.\textsuperscript{15} In support of the statute, the Virginia Board of Pharmacy maintained that the ban on advertising was necessary to preserve the professional character of the occupation. In addition, the Board speculated that advertising would have such an adverse effect on prices as to destroy some pharmacists' profit margin.\textsuperscript{16} Although these considerations were viewed as adequate to justify regulation absent first amendment protection, the Court found them to be unconvincing when balanced against the need of the consumer for the information; especially since the effect of the regulation would be to totally suppress information concerning the prices of prescription drugs.\textsuperscript{17}

The majority opinion in \textit{Virginia Pharmacy} was the first clear indication that the interests of the listener (i.e., the consumer) could be considered in deciding whether to extend protection to commercial

\textsuperscript{12} 316 U.S. at 54.
\textsuperscript{13} 421 U.S. 809 (1975). The Court held as unconstitutional a Virginia statute which made it a misdemeanor to encourage or prompt the procuring of an abortion through the sale or circulation of any publication.
\textsuperscript{14} 425 U.S. at 761.
\textsuperscript{15} VA. Code § 54-524.35 (1974) provides in part:

\begin{quote}
Any pharmacist shall be considered guilty of unprofessional conduct who
\end{quote}

(3) publishes, advertises or promotes, directly or indirectly, in any manner whatever, any amount, price, fee, premium, discount, rebate or credit term for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by a prescription.
\textsuperscript{16} 425 U.S. at 766-68.
\textsuperscript{17} Id. at 770.
speech. The free flow of commercial information was seen as necessary to aid consumers in making intelligent, well-informed economic decisions. 18

Relying upon the rationale advanced in Virginia Pharmacy, the Court in Bates held that the justifications for prohibiting the advertising of "routine legal services" were insufficient to override the public interest in maintaining the free flow of information. 19 As the Court stated in Griswold v. Connecticut, 20 "[t]he right of freedom of speech and press include not only the right to utter or print, but [also] . . . the right to receive, [and] the right to read. Without these peripheral rights, the specific rights would be less secure." 21 Proponents for the continued restrictions upon attorney advertisement, however, argued that the public would lose respect for the profession (as one geared to the concerns of justice) if lawyers were allowed to advertise for financial gain. Rejecting this argument, the Supreme Court stated that the relation between advertising and loss of professional respect was quite tenuous since respect for a lawyer is determined to a great extent by the individual lawyer's own competency. 22

Also argued was the possibility that misrepresentation through advertisement would become so prevalent that a regulation short of an outright ban would be impossible to enforce. The Court, however, felt that most lawyers would behave as they always have:

they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system and, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those who abuse their trust. 23

Moreover, the Court determined that the states have in the past been able to regulate the professions quite sufficiently. 24

The Court, however, did not rule out all regulation of advertising,

18. Id. at 763.
19. 433 U.S. at 363.
20. 381 U.S. 479 (1965).
21. Id. at 482-83.
22. 433 U.S. at 369.
23. Id. at 381.
24. Id. at 384.
Advertising, Solicitation and Specialization

stating that speech which is false, deceptive, or misleading is still subject to restraint.\textsuperscript{25} Even truthful statements may warrant restraint if they have a potential to mislead the public; e.g., statements relating to the "quality of services," which are often incapable of measurement or verification.\textsuperscript{26} This problem provided the genesis to another argument in support of the ban: that the advertisement of legal services will inevitably be misleading due to the consumer's inability "to determine in advance just what services he needs."\textsuperscript{27} The Court, however, did not believe that the present alternative (the prohibition of advertising) left the client with any better information with which to select an attorney. Instead the Court believed that the organized bar should educate the public about legal services, especially the kind of "routine" services at issue. The Court also felt that although laymen may not understand the technicalities of a certain legal problem, they usually are aware of the general nature of the service to be performed. As such, the advertisement of an understandable schedule of services and their corresponding prices could aid the consumer in making an initial decision to hire a particular lawyer.\textsuperscript{28} A binding agreement as to price could then be reached during the lawyer's initial consultation with the client.

The Court was also concerned with the ABA's estimate that "the middle 70\% of [the] population [was] not being reached or served adequately by the legal profession."\textsuperscript{29} The Court noted that the reasons for this underutilization included the fear of prohibitive costs and the inability to locate a suitable lawyer.\textsuperscript{30} The Court maintained that the disciplinary rule in question, DR 2-101(B),\textsuperscript{31} served to restrict the public's access to legal services, especially for the "not-quite-poor and

\begin{itemize}
\item \textsuperscript{25} Id. at 383.
\item \textsuperscript{26} Id. at 383-84.
\item \textsuperscript{27} Id. at 374.
\item \textsuperscript{28} Generally speaking, the public's failure to engage the legal profession is due to their misapprehension of the cost of legal services and their unawareness of "contingency" payment possibilities. See Smith, \textit{Making the Availability of Legal Services Better Known}, 62 A.B.A. J. 855 (1976).
\item \textsuperscript{29} 433 U.S. at 376.
\item \textsuperscript{30} Id. \textit{See also} Smith, \textit{Cannon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,"} 48 TEX. L. REV 285 (1970).
\item \textsuperscript{31} \textit{See ABA Canons of Professional Ethics, DR 2-101(B), supra} note 8.
\end{itemize}
unknowledgeable." The rule was seen as being in conflict with the bar’s ethical obligation to “facilitate the process of intelligent selection of lawyers, and to assist in making legal services available.” In addressing this issue, along with the first amendment issue of the consumer’s interest in the free flow of commercial information, the Court determined that the lawyer’s professional duty to make counsel available outweighed the restriction imposed by DR 2-101(B), and that permitting “restrained advertising” might well contribute to greater availability of legal services.

This policy argument provided the basis for the *Bates* decision: advertising could no longer be considered an unmitigated source of harm to the administration of justice; rather, advertising might offer great benefits. Even though advertising may increase the use of judicial machinery, the notion that “it is always better for a person to suffer a wrong silently than to redress it by legal action” could no longer be accepted.

Recently, however, the United States Supreme Court has indicated what arguably is a mounting reluctance to protect commercial speech. The 7 to 2 decision in *Friedman v. Rogers* rejected a first amendment attack on a Texas law prohibiting the practice of optometry under a trade name. The Court was convinced that the law was a constitutionally permissible state regulation which protected the public from deceptive and misleading use of optometrical trade names. The Court insisted that a trade name is “a significantly different form of commercial speech from that considered in *Virginia Pharmacy* and *Bates*. Here we are concerned with a form of commercial speech that has no intrinsic meaning.” Unlike the advertisements in those cases, the advertisement of a trade name conveys no information about prices, products, or services offered.

32. 433 U.S. at 376-77.
34. 433 U.S. at 376-77
35. Id. at 376.
37 Id. at 12.
38. Id.
Ohralik: Advertising and Solicitation Are Distinguishable

Although the Supreme Court's decision in Bates granted first amendment protection to the commercial speech of attorneys, questions still remained as to exactly what kind of speech could be afforded protection, and in what contexts. The Court in Bates held only that the justifications advanced for prohibiting truthful advertising of the availability and terms of "routine legal services" are insufficient to override the public interest, protected by the first amendment, in maintaining the free flow of information. 39 The Bates decision did not, and its authors expressly declined to consider, the state's right to ban attorney solicitation of clients. 40 In spite of this silence, however, proponents of solicitation have been encouraged by the Court's handling of the commercial speech concept. 41 In citing a line of cases including Virginia Pharmacy and Chrestensen, the Court in Bates demonstrated that it had never withdrawn protection from speech "merely because it proposed a mundane commercial transaction." 42 Commentators have argued that the Court's analysis could apply to solicitation as well, in that solicitation involves the same relation-of-interests between the speaker and the consumer as direct advertising. 43

The distinction between advertising and solicitation has long been a point of controversy. 44 However, although gray areas may occasionally appear which will fit within both contexts, the characteristics of the terms are distinguishable: advertising is a form of notice-giving or information-giving, 45 while solicitation is the equivalent of asking or enticing or making an urgent request. 46 Solicitation clearly portends a more aggressive and more direct form of communication than advertising. It is this aggressiveness and directness of contact on which the fears of lawyer overreaching are based.

40. Id. at 366.
42. 433 U.S. at 363-64.
43. Simet, supra note 41, at 104.
44. See Suchman, Ethics and Legal Ethics, 37 GEO. WASH. L. REV 244 (1968).
45. WEBSTER'S THIRD NEW WORLD DICTIONARY 31 (1971).
46. Id. at 2169.
In *Ohralik v Ohio State Bar Association* the defendant (Ohralik) argued that his solicitation was indistinguishable from the advertising in *Bates*. Ohralik, an Ohio lawyer, personally approached the victims of an automobile accident and succeeded in obtaining them as clients for the prosecution of their claims arising out of the accident. He even approached one of the victims while she was still in traction in the hospital and offered to represent her. The Supreme Court considered the attorney's behavior to be a blatant example of "in-person solicitation," prohibited under the Code of Professional Responsibility.

The Court pointed out that because the potential for abuse is greater when a lawyer, a "professionally trained person in the art of persuasion," is doing the selling, for purposes of constitutional analysis, in-person solicitation will not be considered the equivalent of advertising. As such, if information concerning a lawyer's availability (including such items as telephone number, address, and office hours) was to be disseminated to the general public or a large group of people, the communication would be considered an allowable advertisement; however, an in-person communication suggesting the quality of a lawyer's work and directed to one person or a small group of people goes beyond the dissemination of general information and thus would be considered an unallowable solicitation.

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48. *ABA Code of Professional Responsibility*, DR 2-104(B) provides in pertinent part: "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice" (Adopted by the Supreme Court of Ohio.)

*ABA Code of Professional Responsibility*, DR 2-103(A) provides: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate, to a non-lawyer who has not sought his advice regarding employment of a lawyer." (Adopted by the Supreme Court of Ohio.) 436 U.S. at 453 n.9.

49. 436 U.S. at 465. The Court noted that, unlike advertising, there is little opportunity to publicly scrutinize in-person solicitation, because there are often no witnesses other than the person being solicited. *Id.* at 466.

50. *Id.* See also *ABA Code of Professional Responsibility*, DR 2-103 and DR 2-104.
Primus: “Benign” Solicitation Is Allowed

In In re Primus, the Supreme Court considered whether any special dispensation should be given to solicitation if done for purposes of political expression. Primus was a lawyer affiliated with the American Civil Liberties Union (ACLU). The ACLU had been acknowledged by the Supreme Court to engage in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. Primus presented a briefing to certain welfare recipients, informing them of their legal rights with respect to a sterilization program which was instituted as a condition to their continued receipt of medical assistance. Subsequently, he mailed a letter to a woman who had attended the briefing, informing her that free legal assistance was available from the ACLU. The Disciplinary Board of the South Carolina Supreme Court found the mailing of the letter constituted solicitation, for which Primus was given a public reprimand. The United States Supreme Court reversed, stating that “[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs.”

Justice Marshall, in his concurring opinion, noted that, unlike the situation in Ohralik, the solicitation in Primus “[was] presented in a noncoercive, non-deceitful, and dignified manner to a potential client who [was] emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that [was] not frivolous.” Justice Marshall called this kind of solicitation “benign” commercial solicitation and contended that since there are significant benefits that can accrue to society from benign solicitation, such activity should not be stifled with a sweeping non-solicitation rule. In addition, he stated that when directly confronted with the question of the extent to which benign commercial solicitation can constitutionally be restricted, the courts might afford greater protection to such solicitation than would be allowed

52. Id. at 434.
53. Id. at 472 n.3 (Marshall, J., concurring).
54. Id. at 473.
under traditional court doctrine or the current ABA Disciplinary Rules. Thus, while a showing of potential abuse was sufficient to justify the disciplinary action taken in Ohralik, the Court required a showing of actual harm, in light of the protection afforded by the first amendment, to justify the disciplinary action taken in Primus.

These cases reflect the latest views of the Court on the propriety of attorney solicitation. However, although the two cases may be helpful in predicting the outcome of solicitation cases involving "ambulance-chasing" or civil liberties activity, they offer little guidance in determining the outcome of cases which fall between these polar extremes. In an effort to solve this problem, the ABA has indicated that it may adopt a rule which would expand the permissible scope of attorney solicitation.

ABA PROPOSED RULES ALLOWING ADVERTISING BY LAWYERS

In January, 1980, the American Bar Association Commission on Evaluation of Professional Standards circulated a proposed draft for a complete revision of the Model Rules of Professional Conduct. In this proposal are several subsections which have a strong bearing on advertising and solicitation. Proposed Rule 9 is designed to "assist the public in obtaining legal services." Specifically, Proposed Rule 9.2 is directed to permitting public dissemination of information "that directs attention to the need for legal services or which might assist in finding a lawyer." The rule would permit a lawyer to advertise services through various public communications media, such as radio, newspaper, television, direct mailing, and telephone directories. In addition, the advertisement may include lawyer's fees for specific services, names of references, and, with their consent, names of regularly represented clients. The proposed rule is an attempt to codify the Bates and Virginia Pharmacy mandates that the public be provided with

55. Id. at 477
56. See ABA PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT Rule 9, Introduction (Discussion Draft 1980) [hereinafter referred to as PROPOSED MODEL RULES].
57. See PROPOSED MODEL RULE 9.2, Comment.
58. Id. 9.2(a).
59. Id. 9.2, Comment.
complete information on the availability, nature, and prices of products and services.\(^\text{60}\)

"The First Amendment, . . . [however], does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."\(^\text{61}\) Since the adoption of the first Canons of Professional Ethics, the ABA has been concerned with the possibility that unscrupulous lawyers could mislead the public through inflated claims of legal skills.\(^\text{62}\) Following the recognition in *Virginia Pharmacy* that freedom of speech is not an unlimited license to talk,\(^\text{63}\) all attorney advertisements allowed under Proposed Rule 9.2 will be subject to the requirements of Proposed Rule 9.1, which makes clear that misleading or untruthful speech will not be allowed.\(^\text{64}\) These limitations are well within that allowed by the Supreme Court, which has recognized that the content of a communication may affect the measure of protection afforded to the speech.\(^\text{65}\) As the Court pointed out in *Virginia Pharmacy*, "[s]ome forms of commercial speech regulation are surely permissible. . . . Untruthful speech, commercial or otherwise, has never been protected for its own sake."\(^\text{66}\)

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60. In *Bates*, Justice Blackmun, delivering the opinion of the Court, stated: "[t]he only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, [and] the uncontested personal bankruptcy. " 433 U.S. at 372.


62. *See Drinker, supra* note 1, at 112.


64. PROPOSED MODEL RULE 9.1 provides:

A lawyer shall not make any false, fraudulent, or misleading statement about the lawyer or the lawyer's services to a client or prospective client. A statement is false, fraudulent or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement as a whole not misleading;

(b) is likely to create an unjustified expectation, or states or implies that the lawyer can achieve results by legally improper means; or

(c) compares the quality of the lawyer's services with that of other lawyers' services, unless the comparison can be factually substantiated.


66. 425 U.S. at 770-71.
ABA PROPOSED RULES ALLOWING SOLICITATION

As noted above, the Court in Primus held that the solicitation of prospective litigants by nonprofit organizations which engage in litigation as a form of political expression and political association is entitled to first amendment protection. In response to this mandate, the ABA has included within its proposal Rule 9.3(b)(3), which permits a lawyer to initiate contact with a prospective client if “under the auspices of a public or charitable legal services organization or a bonafide political, social, civic, fraternal, employee, or trade organization whose purposes include but are not limited to providing or recommending legal services.”^67 Clearly this rule goes beyond what was called for in Primus, for not only would the provision encompass those organizations who engage in litigation as a vehicle for political expression and association, such as the ACLU and the NAACP, but would also extend to a host of other organizations whose purposes are not limited to providing or recommending legal services (e.g., labor unions, college or professional fraternities, and religious organizations). The proposed rule, however, does not specify exactly what relationship the attorney must have to the organization or define under the auspices. It invites much abuse by lawyers whose sole purpose in associating with such an “approved” organization is to find a loophole in the rule against in-person solicitation.

There are, however, certain limitations placed upon allowable forms of solicitation. Since the common law originally banned solicitation proponents for the continued ban have asserted that solicitation may harm the client by hindering his free choice in the selection of a lawyer.^68 Recognizing these concerns, the Court in Primus took great care in pointing out that the solicitation in that case was allowed to go undisciplined only because there was no overreaching, misrepresentation, coercion, duress, or harassment involved.^69 In light of these considerations, Proposed Model Rule 9.3(a) provides that:

A lawyer shall not initiate contact with a prospective client if: (1) The lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person solicited could not

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67 PROPOSED MODEL RULE 9.3(b)(3).
68. DRINKER, supra note 1, at 210-12.
69. 436 U.S. at 434-37.
exercise reasonable judgment in employing a lawyer; (2) the person solicited has made known a desire not to receive communications from the lawyer; or (3) the solicitation involves coercion, duress, or harassment.\textsuperscript{70}

Although these provisions will work to bar those forms of solicitation characteristic of harassment, undue influence, and "ambulance chasing," they by no means speak to all of the problems. Advocates for the continued ban on solicitation maintain that the restrictions are necessary in order to avoid the stirring up of litigation.\textsuperscript{71} Although Proposed Rule 9.3 does not address this issue, there are other provisions within the Proposed Model Rules which will provide a sufficient hedge against such improper behavior.\textsuperscript{72} In any event, however, the United States Supreme Court has indicated that the interest in preventing the "stirring up" of frivolous or vexatious litigation no longer offers a reasonable justification for the discipline administered to the lawyer who solicits.\textsuperscript{73}

ABA MODEL RULES AND RECENT STATE CASES ON SOLICITATION BY MAIL

The ABA Proposed Model Rules also address the issue of whether and in what situations an attorney may solicit clients by mail. Specifically, Proposed Rule 9.3(b)(2) states that a lawyer may initiate contact with a prospective client "by a letter concerning a specific event or transaction if the letter is followed up only upon positive response by the addressee."\textsuperscript{74} The rule clearly extends the scope of protection afforded by Primus since it does not require the solicitation to be under the auspices of a non-profit "political" organization. In addition, the

\begin{itemize}
  \item \textsuperscript{70} Proposed Model Rule 9.3(a).
  \item \textsuperscript{71} The common law referred to this type of behavior as "barratry." See Note, Advertising, Solicitation, and Prepaid Legal Services, 40 Tenn. L. Rev 439, 451 (1973).
  \item \textsuperscript{72} See, e.g., Proposed Model Rule 3.2 (mandating a spirit of fairness in dealing with opposing party and counsel), Proposed Model Rule 2.3 (proscribing the giving of advice to a client concerning wrongful conduct), and Proposed Model Rule 3.1 (mandating a high degree of candor in the lawyer's representations to a tribunal).
  \item \textsuperscript{73} See 436 U.S. at 436-37.
  \item \textsuperscript{74} Proposed Model Rule 9.3(b)(2).
\end{itemize}
letter may even concern a specific event, such as a traffic accident; and the purpose of any resulting litigation would not have to amount to a form of "political expression," as was required in Primus. However, although Primus involved a solicitation by mail, the Court did not specifically address this issue, as the case was decided on the basis of first amendment rights of association and political expression. The issue has been addressed, however, in several post-Primus state court decisions.

In Kentucky Bar Association v. Stuart, the Kentucky Supreme Court cited Bates, Ohralik, and Primus in holding that a law firm's letter to real estate agencies describing the firm's qualifications, services, and process for title searches and deed and mortgage preparations did not constitute a violation of the Kentucky State Bar Association's rule prohibiting "in-person solicitation," but rather fell within the confines of constitutionally protected advertisements. In dismissing the complaint, the court stated that the letters did not pose the threats of any of the noted evils of solicitation since there was no pressure or demand which would encourage a person to make a hasty, uninformed decision. The court pointed out that the potential for deception exists in all forms of advertising, not just letters, and the fact that this case was prosecuted demonstrated that the enforcement of ethical standards would not be impossible. This was the rationale used to codify Proposed Model Rule 9.3(b)(2). The reasoning stems from the fact that solicitation by mail appears reasonably subject to control and therefore can be made almost completely free of the potential for over-reaching of in-person solicitation.

It should be noted that the letters sent in Stuart were of a "generalized" nature, i.e., the letters were not directed to potential clients with an identified present need for legal services. As mailings become more specifically drafted and provide more of a quasi-personal link, however, courts have been less tolerant of them as a form of solicitation. Letters which are directed to targeted potential clients concerning "specific events or transactions" have been held to constitute improper

75. 568 S.W.2d 933 (Ky. 1978).
76. See ABA Code of Professional Responsibility, DR 2-103(A), supra note 48 (adopted by the Supreme Court of Kentucky).
77. 568 S.W.2d at 934.
78. Id.
79. Id.
solicitation. 80

Although such letters would be allowed under Proposed Rule 9.3(b)(2), it is not clear whether the states would be quick to adopt its provisions. In *Allison v. Louisiana State Bar Association*, 81 the Louisiana Supreme Court reached a holding that was directly antithetical to the ABA proposed codification. In that case, a group of attorneys had mailed to certain employers a letter describing services offered as part of a prepaid employees' "legal plan" which the attorneys were attempting to market. Although there was no direct solicitation to the employees, the court found that there was a "private" solicitation (by letter) to the employer to engage in a specific transaction. 82 Considering the difficulties in regulating the potential for abuse, the court denied the injunctive relief requested by the attorneys that would have prevented the Louisiana State Bar Association from enforcing its disciplinary rule. 83 In addition, the court held that the state's prohibition against direct solicitation of this kind had no adverse impact upon the attorney's first amendment rights. 84

The *Allison* and *Stuart* cases, however, are distinguishable. The letters in *Allison* were not of a "generalized" nature as they were in *Stuart*; rather, the letters were directed to potential clients with an identified present need for legal services. In addition, the offer in the *Allison* letter was privately made and not in the public domain for all to receive, as in *Bates* (newspaper ad) and *Stuart* (real estate agencies).

New York has also indicated its reluctance to expand the permissible scope of solicitation by mail beyond that of a "generalized" letter. *In re Koffler* 85 concerned a group of attorneys who mailed approximately eight thousand letters to homeowners and real estate brokers.

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80. See, e.g., *In re Lee*, 242 Or. 302, 409 P.2d 337 (1965) (holding as improper a solicitation by letter to represent an accident victim); Bayton Bar Ass'n v. Herzog, 173 Ohio St. 313, 181 N.E.2d 880 (1962) (holding as improper the solicitation by mail of individuals who had filed claims for workmen's compensation benefits).
81. 362 So. 2d 489 (La. 1978).
82. *Id.* at 496.
83. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 (adopted by the Supreme Court of Louisiana).
84. 362 So. 2d at 496.
The court stated that it was concerned not because the mail had been used to contact certain interested individuals, but because the "content" of the letters indicated a seeking out of those people interested in a transaction. The court believed that if such letters are sent, there should not be a statement in the letter asking to establish a "personal and private relationship . . . peculiarly geared to a particular legal transaction." As the court pointed out, "[a] member of the Bar must never forget that he is a lawyer first and only then, if proper, an entrepreneur".

**COMPARISON: RECENT STATE RULES ALLOWING SOLICITATION**

Not all states have been as conservative in their approach toward solicitation as have Louisiana and New York. Since *Primus*, several jurisdictions have attempted to codify extremely liberal and controversial rules toward solicitation. The most dramatic revision has been the District of Columbia Court of Appeals' amendment to its Code of Professional Responsibility. Under these newly enacted provisions, solicitation will be prohibited only if it involves the use of "false, fraudulent or deceptive claims, if it involves the use of undue influence or if the potential client is apparently in a physical or mental condition that would make it unlikely that he or she could exercise a reasonable, considered judgment as to the selection of a lawyer." These limitations are quite similar to the ABA Proposed Model Rules' limitation on solicitation. The D.C. rules, however, do not require the lawyer to be "under the auspices" of a public, charitable, or legal services organization, that his solicitation be by letter, or that the lawyer not solicit those who make known a desire not to be solicited. This "right to be let alone" was considered by the United States Supreme Court in *Rowan v Post Of-

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86. *Id. at ___*, 420 N.Y.S.2d at 573.
87. *Id. at ___*, 420 N.Y.S.2d at 575.
90. This requirement is included in PROPOSED MODEL RULE 9.3(a)(2), *infra* note 95.
office Department. In that case, a group of direct mail advertisers challenged a federal statute under which an individual could restrain a particular sender from mailing advertisements to his home if he found such mailings to be offensive. In upholding the statute the Court held that a householder has the right to determine what material enters the zone of privacy surrounding his home and refused to allow any greater protection for material consigned to the mail. To do so would be to permit a form of trespass, a result found to be untenable since the Constitution guarantees only the right to speak, not the right to force others to listen.

The D.C. Rule's disregard for the solicited person's right "to be let alone" would permit offensive behavior on the part of some lawyers. For example, in situations where the need for legal services is readily identifiable (e.g., where there has been an automobile accident or a death in the family), the race to be the first lawyer on the scene may be most offensive to the victim or his family. By including limitations, such as rules 9.3(a)(2) and 9.3(a)(3) against forced solicitation, the ABA's proposed rules seek to avoid these kinds of problems.

93. 397 U.S. at 736.
94. Id.
95. PROPOSED MODEL RULE 9.3 reads in its entirety:
   (a) A lawyer shall not initiate contact with a prospective client if:
   (1) the lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment in employing a lawyer;
   (2) the person solicited has made known a desire not to receive communications from the lawyer; or
   (3) the solicitation involves coercion, duress, or harassment.
   (b) Subject to the requirements of paragraph (a), a lawyer may initiate contact with a prospective client in the following circumstances:
   (1) if the prospective client is a close friend or relative of the lawyer;
   (2) by a letter concerning a specific event or transaction if the letter is followed up only upon positive response by the addressee; or
   (3) [under the auspices] of a public or charitable legal services organization or a bona fide political, social, civic, fraternal, employee, or trade organization whose purposes include but are not limited to providing or recommending legal service.
   (c) A lawyer shall not give another person anything of value to initiate contact
The District of Columbia, however, is not alone in its liberal approach toward attorney solicitation. In 1978, the Board of Governors of the California State Bar tentatively approved a change in its Rules of Professional Conduct to permit in-person solicitation. The twelve to six vote tentatively adopted a rule change very similar to that of the District of Columbia. Once finally approved, California lawyers may seek out clients and offer to represent them in specific cases unless the statements the lawyer makes are false, misleading or tend to confuse the client; the potential client is in such a physical, mental or emotional state that he or she would not be expected to exercise reasonable judgment in hiring a lawyer; or the lawyer’s approach to the client involves any kind of intrusion, coercion or harassment.96

With this last provision, the California rule is very similar to the ABA proposed rule. It is noteworthy that this influential jurisdiction has gone as far as it has toward adopting a rule which is no less radical than the ABA's proposed rule.97

The ABA rules would prove a better guide than the District of Columbia or California rules in determining the legality of solicitations falling between these two poles, but all three attempts can be seen as providing some assistance. All three require that the solicitation be truthful and presented in a noncoercive, nondeceitful manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation. In the average case where honest unpressured commercial solicitation is involved, i.e., in a situation not presented in either *Primus* or *Ohralik*, these three attempts will serve their States' interests in protecting the public, while avoiding those sweeping nonsolicitation rules which only prevent the free flow of information.


97 One lawyer-member of the California Board of Governors, who voted for the proposal, commented: "[i]t is about time we give the little guy a chance to hustle and get a little business." *Id.* at 6-7
INDICATION OF SPECIALIZATION IN ADVERTISEMENT SOLICITATION

Although the current ABA Disciplinary Rules prohibit a lawyer from holding himself out as limiting his practice to specified areas of law, the ABA has recently adopted the position that indications of specialization are useful in assisting the public in obtaining information about legal services and are deserving of first amendment protection. According to Proposed Rule 9.4(b), a lawyer whose practice is limited to a specified area of law may communicate that fact in accordance with the provisions on designation of the particular state.

Seven states currently have specialization programs which permit the lawyer to be “certified” or “designated” in more than one field of law if he meets the established standards. Florida’s “designation” program is the current proposed model for most other states. It requires, among other things, the designation of certain board-approved areas of specialty, a minimum of three years practice of law, and substantial experience in the designated specialty area. In addition, no more than three areas of specialty can be designated, and renewal of the right to designate is required every three years.

The “certification” programs alluded to in ABA Proposed Rule 9.4 have their genesis in the pilot programs adopted in Texas, California and Arizona. These programs are limited to only a few areas of law and require recertification, peer ratings, continuing education, specific practice time requirements in the area of specialty, and most importantly, an examination. “Certification” plans obviously involve a more demanding procedure for recognition of specialization than do “designation” plans. This is due to the obvious fact that the states have a different definition of, and different standards for, specialization. This is the reason why Rule 9.4(b) of the ABA Proposed Model Rules re-

98. See ABA COMM. ON ADVERTISING AND SPECIALIZATION DISCUSSION DRAFT, 35 BUS. LAW. 303 (1979).
100. Id. The states are Florida, Iowa, New Mexico, Connecticut, Arizona, California, and Texas.
101. FLA. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-105.
quire the particular state to insert its own provisions of specialization, and therein lies its greatest fault, i.e., the failure to provide uniform standards for attorney specialization programs.103 The ABA should have included within its proposal some form of compromise specialization plan or choice of plans which would involve elements of both “certification” and “designation.” The states, of course, would not be bound to adopt this ABA Model Rule, but at least the states would have some national guide as to how to model their own rules. This is, after all, the purpose of the Model Rules. By leaving Rule 9 4(b) in its present form, however, the ABA will be inviting much confusion as states choose between countless variations of the Florida and California plans.

CONCLUSION: THE STATES ARE FREE TO CHOOSE

In response to the recent Supreme Court decisions of Virginia State Board of Pharmacy v Virginia Citizens Consumer Council and Bates v State Bar of Arizona, granting commercial speech (which includes attorney advertising) first amendment protection, the ABA has proposed a complete revision of their Model Rules of Professional Conduct. The Proposed Rules are extremely liberal with respect to their applicability to attorney advertising, more than satisfying the mandate in Bates that information which brings the public’s attention to the need for legal services flow freely. The limitations in the Proposed Rules facilitate this mandate by proscribing only those advertisements which contain misrepresentations or unjustified statements concerning the quality of a lawyer or his services.

The Proposed Rules, however, are more restrictive in their regulation of attorney solicitation. This is due to the greater potential for abuse in permitting a lawyer, a professional trained in the art of persuasion, to initiate in-person contact with a prospective client. The constitutionality of this position is well established, considering the Supreme Court’s recognition in Ohralik v. Ohio State Bar Association that for purposes of constitutional analysis, in-person solicitation in not equivalent to advertising, and that the State may regulate in-person

103. Even proponents of bar-operated specialization plans recommend the establishment of uniform national and regional education programs to assist the public in interpreting these designations. See ABA COMM. ON SPECIALIZATION, INFORMATION BULL. NO. 5 (Sept. 1978).
solicitation for pecuniary gain under those circumstances likely to result in adverse consequences.\textsuperscript{104}

However, the Proposed Rules are still quite liberal in their approach, going beyond the Supreme Court's mandate in \textit{In re Primus,} allowing solicitation as a means of political expression, by permitting an attorney to solicit if done "under the auspices" of a bar-approved organization, and not limiting the organization or the attorney to a strictly non-profit motive. In addition, the Proposed Model Rules would permit an attorney to solicit by mail even though not done under the auspices of a bar-approved organization. Although several states have indicated a willingness to permit solicitations of this nature, most have required that the content of the solicitation be of a generalized nature and not restricted to a specific event or circumstance.

It appears, nonetheless, that the ABA Proposed Model Rules will be considered, in large part, acceptable to many states. Two influential jurisdictions, California and the District of Columbia, have recently adopted solicitation rules which are even more liberal than the Proposed Model Rules. This trend will, in all probability, continue until a more sensible code is adopted which will permit more liberated forms of advertising. That code will in all likelihood have a form quite similar to the ABA Proposed Model Rules.

\textsuperscript{104} 436 U.S. at 462.
Videotape As A Tool In The Florida Legal Process

Florida is one of the pioneer states using videotape as evidence in the courtroom. Commenting that "[t]he rule governing admissibility into evidence of photographs applies with equal force to the admission of motion pictures and video tapes," the Florida Supreme Court gave the Florida jurisprudential system a new tool to use in its search for justice. In the intervening years since videotape's introduction into the courtroom, there has been more conjecture than actual evidence regarding the nature of that tool and its place in the legal system.

Videotape has been used to overcome such diverse problems as unavailable witnesses, preservation of reliable testimony for use at trials, demonstrations for discovery and trial, and as a means of demonstrating the mental state of a defendant.

Judge McCrystal of Erie County, Ohio, long an advocate of using videotape to present the entire trial testimony to the jury in certain types of litigation, proposes the use of videotape to record wills, contracts, police bookings, criminal arraignments, pleas, sentencing, proba-

2. Id. at 859.
4. Id. at 408. A plea of manslaughter was accepted by the judge after viewing a videotape of the defendant's session with a psychiatrist.
tion hearings, and even surgical procedures. Completely videotaped testimony in civil trials has been optionally employed in Erie County courts for the past six years. The result has been a reduction in pending cases; and although filings have increased, there has been no concomitant increase in court facilities or personnel. Thus PRVTT's have helped to ease burdens on the judiciary, while preserving a jury trial for the litigants.

Opponents of videotape voice concern over its effect on jurors, fearing that trials will become confused with entertainment and that valuable elements of the judicial process will become distorted in an overprocessed one-eyed view of courtroom interactions. Additionally, videotape in criminal trials raises numerous constitutional problems pertaining to self-incrimination, the right to confront one's accusers, to have assistance in one's defense, and the right to a public trial.

This survey will discuss the scope, present use, and possible future adaptations of videotape in the legal system; and will distinguish fact from fiction in evaluating the strengths and weaknesses of videotape in the judicial system.

THE MECHANICS OF VIDEOTAPE EVIDENCE

Many courts simply lump videotape together with pictures and motion pictures. Scott clearly distinguishes videotape from movie

7. Such trials are generally referred to as PRVTT's (pre-recorded video tape trials). See text accompanying notes 87-100 infra.
8. Erie County is the twelfth largest in Ohio for personal injury litigation; sixteenth largest for total civil litigation. McCrystal, The Case for PRVTT's, 12 TRIAL 56 (July 1976).
10. Id. at 246 n.15.
13. See text accompanying notes 52 to 72 infra.
Videotape In Florida Legal Process

film: on videotape "there are no individual pictures or frames, the image and the sound are both recorded in the form of electronic impulses on a magnetic tape. Like a sound tape recording these videotapes require no processing and can be played back immediately."16

Videotape is recorded with a video camera connected to a video recorder. This equipment is commonplace and is now sold for home use as a more expensive alternative to home movie cameras.17 Playback is accomplished by using a player and a video screen (a television). Tapes can be in color, or black and white, and a time/date generator can be used to record a readout on the film which is useful in locating specific portions on the film.18 The tape cannot be edited easily by splicing, thus making it an excellent vehicle for evidence. Objectionable material can be removed, if necessary, by blanking out the sound on a copy, blacking out pictures and sound on a copy, or re-recording only the acceptable parts of the material. The original tape can be preserved as a full record.19

While videotape equipment is still relatively costly, it is now readily available to the legal community. Court reporters often use the equipment, or have sufficient information to direct an attorney to local facilities where taping can be performed. Current taping costs range from $90-$250/hour20 including technician time and purchase of the tape. Playback charges are $50-$75/hour, but playback equipment is inexpensive enough to purchase if desired. While in the early days of videotape use, stringent requirements were adopted by some courts regarding the type of equipment that could be used,21 today the test is whether the tape gives an accurate representation of what had actually

16. Id. § 714. However, he concludes that as long as the tape presents a verifiably fair representation of its subject it can be admitted into evidence on the same basis as movie film. Id. at § 1294.
occurred. In criminal investigations, such as undercover surveillance or automatic monitors in banks and stores, tapes may be of poor quality. When the tape has both video and audio tracks, one can be used without the other if one is of unacceptable quality.

Deposition tapes should be taken with an eye toward possible use at trial. An uncluttered desk is a possible setting for the deposition, as is an actual courtroom. Several cameras may be used for the witnesses, attorneys, and for an overall view. It is possible to project all images at once to the viewer, using a split screen technique. Special lighting is unnecessary, but it has been reported that a black and white tape of a black witness in a poorly lighted situation may lose some of the facial expression present.

**USES OF VIDEOTAPE IN CIVIL PRACTICE**

In 1970 the Federal Rules of Civil Procedure were amended to include depositions by videotape on motion of a party to the litigation.

22. 229 So. 2d at 859.
24. Miller, Videotaping the Oral Deposition, 18 PRAC. LAW. 45 (1972).
25. Merlo and Sorenson, Video Tape: The Coming Courtroom Tool, 7 TRIAL 57, 55 (Nov. 1971) (suggesting a flag in the background for a more formal effect).
26. See text accompanying notes 128-43 infra.
27. Bermant, Chappel, Crockett, Jacobovitch & McQuire, Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio, 26 HASTINGS L.J. 975, 984 (1975).
29. FED. R. CIV. P. 30(b)(4): The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.
These motions are now routinely granted, overcoming the early confusion surrounding the guidelines for granting them. The court's order may include provisions for signing or authenticating the tape, mechanical specifications, operator qualifications, storage, filing and duplication requirements. Presently, the use of depositions at trial is limited to impeachment, or circumstances where a witness is unavailable, or under extraordinary circumstances. Videotaped demonstrations may be admitted as photographs in federal courts.

In Florida, videotaped depositions are permitted by court order under Rule 1.310(b)(4). They may be used at trial pursuant to Rule 1.330, based on its federal rule counterpart, but allowing routine use when the witness is an expert or skilled witness.

Depositions can be taken for two different purposes. When used simply for discovery, the scope of inquiry can be broad, even permitting inadmissible matter to be discovered if its use is calculated to lead to the discovery of admissible material. Videotaped depositions can be valuable in situations where movement contributed to or caused the injury which is the subject matter of the pending suit.

30. Proposed Amendments to Civil Rules, 43 F.R.D. 211, 239-40 (1967). The Advisory Committee Notes state "in order to facilitate less expensive procedures." This prompted one court to refuse a motion for a videotaped deposition unless such cost savings were shown. Perry v. Mohawk Rubber Co., 63 F.R.D. 603 (D.S.C. 1974).

31. FED. R. CIV. P. 30(b)(4).
32. FED. R. CIV. P. 32(a)(1).
34. FED. R. CIV. P. 32(a)(3)(E) requires "that such exceptional circumstances exist as to make it desirable . . . to allow the deposition to be used."
35. FED. R. EVID. 1001(2).
36. FLA. R. CIV. P. 1.310(b)(4):
   Upon motion, the court shall, subject to the provisions of Rule 1.280(c) and the guidelines provided by Fla. R. Jud. Admin. 2.070(d), order that the testimony at a deposition be recorded on videotape and may order that the testimony at a deposition be recorded by other than stenographic means at the initial cost of the movant. A party may also arrange for a stenographic transcription at his own initial expense.
40. Brown v. Brigges, 327 So. 2d 874, 875-76 (Fla. 1976) (defendant instructor was ordered to participate in a videotaped exhibition of karate maneuvers with an ex-
Depositions may also be taken expressly for trial presentation. Videotaped depositions of geographically distant experts for use as trial testimony can help expand the range of an attorney's presentation. It may conceivably be much cheaper for attorneys to travel to the expert's locale and tape his testimony at local facilities rather than bring him to the trial. Scheduling is simplified, performed at the convenience of the participants without reference to docket openings. Also the impact of charts and graphs used by the expert can be significantly enhanced by the use of zoom lenses. 41

As insurance against the possibility of a witness' unavailability at a later date, fresh testimony of the witness can be preserved on videotape for use at trials held years later. 42

Demonstrations are an excellent area for the use of videotapes. Line of sight at an accident, the operation of a piece of machinery, product failure under stress, and other experiments are considerably more impressive on videotape than in photos or verbal descriptions. 43 Evidence of the appearance of the injured party shortly after the accident can also be preserved for later use at trial.

Judge McCrystal envisions videotape for recording the "execution of wills, contracts and other legal documents," to preserve the intent, competence and volition of the parties. 44 Videotaped execution of wills is currently available in Florida. 45 However, under the Florida Probate

42. See 23 AM. JUR. Trials § 109-10 (1976); Kennelly, supra note 28, at 186-95.
43. In one striking case, Zollman v. Symington, 438 F.2d 28 (7th Cir. 1971), a car fell from a garage hoist. Taped experiments made by the defendant hoist manufacturer showed that the car would fall only if improperly positioned on the hoist. These tapes were shown to the jury. At trial plaintiff claimed that the hoist had spontaneously shifted, a defect that could have been cured by a simple design modification. That evening the defense modified the hoist and taped new tests. The results were unchanged. Since the tape needed no processing, it was ready for use at trial the next morning. On appeal, the court ruled that the laws of science demonstrated on defendant's tapes, challenged only by plaintiff's unsupported claims, left no question of fact for the jury on that matter. Id. at 31. See Stewart, Videotape: Use in Demonstrative Evidence, 21 DEF. L.J. 253 (1972).
44. McCrystal & Maschari, supra note 6, at 249.
45. Id.
46. Dickerson, supra note 20, at 3, col. 3.
Code, a will must be in writing and executed by the correctly performed signatures of the testator and witnesses. Any taping is purely optional and has no legal effect on the will's validity. While taping may preserve a record of the mental state and intent of the testator, it would only be admissible as evidence in rare circumstances under the statute. Nevertheless it does personalize an event that the law has served to depersonalize.

It has even been suggested that all surgical procedures be videotaped, making frivolous malpractice claims easier to detect; and possibly providing useful evidence in the event of actual malpractice.

**USES OF VIDEOTAPE IN CRIMINAL PRACTICE**

Generally, material that would be admissible in writing or photographic form is admissible in videotape form. However, special problems bear further consideration. A defendant has the right to have an attorney aid in his defense. Thus, a videotaped booking cannot be used for identification of the suspect by the victim if the suspect had not had counsel available at the booking. The use of tapes in such a matter constitutes a lineup thereby requiring counsel to be present. Tapes have been used for confessions, booking, interrogations, surveillance, and to record a defendant's presence or behavior at the scene of the alleged crime. After viewing these tapes, many defendants do not contest the charges against them and plead guilty.

It has been asserted that the use of videotape infringes on a defen-

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47. FLA. STAT. § 732.502 (1976).
49. "A lot of people just want to sound off." Dickerson, supra note 20, at 3, col. 4.
50. Peters & Wilkes, supra note 12.
51. Id. at 361-62.
52. 229 So. 2d at 859. State v. Lusk, 452 S.W.2d 219 (Mo. 1970).
Defendant's right against self incrimination. While the courts have admitted videotapes of the defendant under the same restrictions that apply to use of his oral statements, which can be read or testified to, it has been suggested that the defendant may not be aware of the breadth of his videotaped admission. The defendant's demeanor and appearance may work against him in a manner that no written transcript could. Harsh lighting can exaggerate facial irregularities or scars. In fact, a videotaped confession may be the functional equivalent of "requiring the defendant to take the stand and testify against himself."

Notwithstanding, videotape may offer more protection to a suspect. Jurors can see the actual event, not the prosecution's retelling of it. For example, videotape may show how a confession was obtained. In one case a defendant used a videotape of his session with a psychiatrist to convince a judge of his diminished capacity, thus permitting him to plead guilty to a lesser charge of manslaughter. The psychiatrist stated that his testimony was simplified by having the judge view the taped session.

The use of videotaped witness testimony presents special constitutional problems, particularly in light of the constitutional requirement that a criminal defendant has the right to confront any witnesses against him. Previously the courts had vacillated in deciding whether this confrontation must occur before the jury; the decisions now hold that it need not be. The defendant may demand to be present at any

56. U.S. Const. amend. V, cl. 8 provides in pertinent part: "nor shall be compelled in any criminal case to be a witness against himself. . . ."


58. Id. at 509.

59. Id.

60. McCrystal & Mascari, supra note 6, at 248.


62. Id. at 408.


64. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

deposition that will be used at trial in lieu of live testimony, and any videotaped depositions taken without the intent to use them instead of live testimony at trial cannot be used. One court has held that the use of videotape does not filter the testimony so as to deprive the criminal defendant of due process.

As long as the rights of the defendant are protected, videotape can be an extremely important tool in criminal trial work. It could be used for example, to preserve the testimony of witnesses who might be unavailable at trial, including experts, officers with conflicting subpoenas and speedy trial deadlines to meet, laboratory personnel, or hospitalized victims. An application that might have particular use in Florida involves the testimony of aliens subject to deportation, who are potential witnesses in cases involving the smuggling of drugs or illegal aliens. If the government can detain and even incarcerate those aliens it wishes to use as potential witnesses and deport all others who may have witnessed the same acts, the rights of the defendant are violated. To avoid the necessity of keeping all potential witnesses available until the trial date, videotaped depositions made expressly for use at trial may be an excellent alternative.

VIDEOTAPE TO PRESERVE THE RECORD IN CIVIL OR CRIMINAL TRIALS

Alaska, faced with a shortage of court reporters, uses videotape for

66. FED. R. CRIM. P. 15(a); FLA. R. CRIM. P. 3.190(j).
71. United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971).
72. The defendant's right to a public trial (U.S. CONST. amend. VI) includes a corollary right of the public to attend the trials. Extensive use of taped testimony may violate this right if provision is not made for public access to the depositions. This may be difficult to effectuate. Cunningham, supra note 63, at 246.
trial transcripts. Videotape has an advantage over voice recordings since it is easy to see who said what. The behavior of trial participants that might constitute reversible error may not be sufficiently preserved on stenographic transcripts for an appellate court to rule on it. Nevertheless, by allowing appellate judges to see the witnesses as the jury saw them, the nature of the appellate process might be significantly changed. Most appeals should be decided on questions of law, without reviewing the jury's decision on the credibility of the witnesses.

Appellate judges seem to prefer written transcripts to compare different parts of the record. For example, appellate judges reviewing Judge McCrystal's videotaped trials requested written transcripts. Transcription of the audio part of the tape is much slower than transcription of stenographic notes. An eighteen month experiment with videotape transcripts with no written transcripts was discarded when judges found that it actually slowed down the appeal process.

Since Florida presently allows cameras in courtrooms, videotapes can be used to preserve court records with no legal barriers. A rape trial, where the victim is deaf, retarded and suffering from cerebral palsy has been videotaped so that the victim's testimony, through gesture and sign language to an interpreter, can be fully preserved "in case there's an appeal."


74. Id. at 458.

75. Shelley v. Clark, 267 Ala. 621, 103 So. 2d 743, 747 (1958) (attorney's shaking finger in face of witness not noted in trial record, therefore not grounds for appeal. See generally Morrill, *supra* note 11, at 240 n.3.

76. Cunningham, *supra* note 63, at 239.

77. Id.

78. Kosky, *Videotape in Ohio*, 59 *Judicature* 230, 233 (1975). Mr. Kosky was past president of the National Shorthand Reporters Association. Id. at 238.

79. Id. See text accompanying notes 87-100 *infra* for a description of these trials.

80. Id. at 233. Transcription of tapes yields 20-25 pages per day; transcription of stenonotes yields 80-120 pages per day.

81. Burt, *The Case Against Courtroom TV*, 12 *Trial* 62, 63 (July 1976). All the cases were from a county criminal court in Tennessee.

82. Petition of Post Newsweek Stations, Fla., Inc., 370 So. 2d 764 (Fla. 1979).

TECHNIQUES FLORIDA COURTS DO NOT USE

Proponents of videotape in trial settings have long championed the option of litigating trials wherein all of the testimony is videotaped. PRVTT's are seen as an answer to reducing overcrowded dockets and long delays for trial dates. For comparison purposes, Judge McCrystal compared a hypothetical simple personal injury case tried in the traditional manner with a PRVTT trial. The study reveals the major changes in the trial process.

Testimony is taken from all parties and witnesses at their convenience. The completed tapes are given to the judge together with a list of objections keyed to their location on the tape. The objections can be ruled on at the convenience of the judge, and can often be done quickly. Complicated rulings can be made after careful evaluation, thereby reducing the chances of reversal on appeal. However, since all objections must be made in writing, an additional burden may be cast upon the attorneys. If the case is proper for a directed verdict, no jury need be impaneled. The edited tape might form the foundation for a settlement based on a "realistic evaluation of an accurate picture of the trial." The editing date would be the effective date of settlement, and would shorten the length of the case. If the case does proceed to trial, the attorneys select a jury, then give opening statements.

84. See note 5 supra.
85. McCrystal & Maschari, supra note 6, at 246. With an increase of 33% in filings, the number of pending cases was reduced 31%. Brennan, Videotape-The Michigan Experience, 24 Hastings L.J. 1, 5 (1972). A three-day trial yielded one day of admissible material after deletion of inadmissible material, conferences and motions.
86. McCrystal & Maschari, supra note 6, at 241-46.
87. Id. at 242.
88. Id.
89. McCrystal, Videotape Trials: Relief for Our Congested Courts, 49 Den. L.J. 463, 469 (1973). Fifteen minutes were needed to rule on all of the motions submitted at the first videotape trial that J. McCrystal did.
90. Morrill, supra note 11, at 242.
93. Morrill, supra note 11, at 247.
94. McCrystal, Videotaped Trials: A Primer, supra note 19, at 254.
based on what the evidence accurately reflects, not on what they hope it will show.\footnote{95} The jury then views the edited tape. The jury can be left alone to view the trial with a tape viewer and a bailiff, saving the presiding judge’s time;\footnote{96} alternatively, the judge, attorneys and parties could remain with the jury.\footnote{97} The possibility of mistrial from misconduct is significantly lessened in either case.\footnote{98} The attorneys then give their summation; the judge charges the jury; and deliberation begins. Appeals can be made based on the trial tape and unedited tape.\footnote{99} If retrial is necessary, the same tape, edited in compliance with the appellate court’s ruling could be used.\footnote{100} This would prevent a change in tactics on retrial, not necessarily a beneficial result. If the new edition of the tape is acceptable for retrial, the saving of time and money would be significant.

Opponents of PRVTT’s note that depositions are not the proper place for impeaching witnesses, and that two encounters with each witness or party would still be necessary,\footnote{101} thus rendering some of the time savings illusory. Since objections are not ruled on immediately, attorneys may pursue long lines of inadmissible material when making the trial tape.\footnote{102} Alternate approaches to information may have to be taped, a tedious and frustrating situation.\footnote{103} Additionally, videotape is not ideal for use in complicated trials, although simple personal injury cases have proven amenable to PRVTT.\footnote{104} While some attorneys fear

\footnote{95} McCrystal, \textit{Videotape Trials: Relief for Our Congested Courts}, supra note 89, at 476.
\footnote{96} \textit{Id.} at 473.
\footnote{97} Bermant, Chappell, Crokett, Jacobovitch & McGuire, \textit{supra} note 27, at 986.
\footnote{98} Note, \textit{Videotape Trials: Legal and Practical Implications}, \textit{supra} note 92, at 363.
\footnote{99} McCrystal & Maschari, \textit{supra} note 6, at 239.
\footnote{100} \textit{Id.} Fla. Evid. Code § 90.803 (22) already provides that in retrial of a civil case, the former testimony of a witness given at the original trial can be used as evidence at the retrial, regardless of whether the witness is available. “Thus, in a retrial of a case it is unnecessary to call as a witness a person who testified during the first trial.” Fla. Stat. § 90.803, Sponsor’s note (22) (1979).
\footnote{101} Kornblum, \textit{Videotape in Civil Cases}, 24 Hastings L.J. 9, 29 (1972).
\footnote{103} \textit{Id.}
\footnote{104} McCrystal & Maschari, \textit{supra} note 6, at 246.
that television is regarded as "entertainment" in the public's mind,\textsuperscript{105} the increased business uses of computer display terminals may be changing that image.\textsuperscript{106}

The use of PRVTT's in Ohio came after the Ohio Supreme Court changed that state's rules of civil procedure.\textsuperscript{107} It is the function of the judges and attorneys to adapt the legal processes necessary to meet the needs of the people.\textsuperscript{108} If valid results can be obtained with the increased use of technology, the increased efficiency may provide an alternative to further expansion of the courts. Nevertheless, there is a need to be sure that a "canned"\textsuperscript{109} trial produces valid results. This is an area which, although presently filled with conjecture, is nonetheless yielding to scientific study.

**THE EFFECT OF VIDEOTAPE EVIDENCE ON THE TRIAL PROCESS**

Some attorneys feel that a trial solely using taped testimony would be sterile, interfering with the traditional interaction between attorney, jury and witnesses. Their carefully calculated courtroom presence may lose its effectiveness on videotape,\textsuperscript{110} especially if the camera focuses on

\textsuperscript{105} Doret, *Trial by Videotape - Can Justice Be Seen to Be Done?* 47 TEMP. L.Q. 228, 249 (1974).

\textsuperscript{106} Id.

Also, a medium which has brought us such events as the funeral of assassinated President John F. Kennedy, the landing of the first man to reach the moon, and the Hearings on Watergate and Related Activities Before the Senate Select Committee on Presidential Campaign Activities cannot be altogether without serious content.

Petition of Post Newsweek Stations, Fla., Inc., 370 So.2d 764, 776 (Fla. 1979).

\textsuperscript{107} See McCrystal, *supra* note 89, at 478-82.

\textsuperscript{108} Courts are the only branch of the government operated by a single profession. McCrystal & Maschari, *supra* note 6, at 239. The court has the power to change its own rules. Morrill, *supra* note 11, at n.14.

\textsuperscript{109} Brennan, *supra* note 85, at 5.

\textsuperscript{110} Note, *Videotape Trials: Legal and Practical Implications, supra* note 92, at 390 (citing an address by Judge McCrystal at the 1972 Sixth Circuit Judicial Conference, Cincinnati, Ohio, May 18, 1972:

[T]he first thing that occurs to the trial lawyer is, "This takes me right out of the trial and my good looks, and my gray hair, and my new suit, and my theatrical skills and dramative abilities are all gone." Well, gentlemen, the an-
the witness and not the attorney. Nevertheless, it is the jury’s function to consider the testimony of the witnesses, not the charm of the attorney, and the “live parts” of the trial still present a sufficient opportunity for personal interaction. Attorneys may be against PRVTT’s until they actually try one.\textsuperscript{111}

Useful data about attorney response to PRVTT’s is sketchy. Judge McCrystal notes that only 25\% of those cases automatically set for PRVTT’S based on the nature of the case are removed from the taped docket by the parties.\textsuperscript{112} This would seem to indicate satisfaction with PRVTT’S by those who use them regularly.

A massive survey of attorney’s attitudes regarding the use of PRVTT’S has been conducted.\textsuperscript{113} Various factors which distinguish PRVTT’S from traditional trials were rated as desirable, neutral or undesirable. A few of the factors were worded in less than neutral terms, actually amounting to unsupported conclusions.\textsuperscript{114} The results showed that attorneys generally approved of the time and money savings that could be realized by the appropriate use of PRVTT’s,\textsuperscript{115} and of the protection PRVTT’s provide for the jury by excluding inadmissible material and reducing long trial delays,\textsuperscript{116} and of the degree of pretrial control attorneys had over their trial presentation.\textsuperscript{117} Attorneys were unhappy however, over any proceeding done without a judge present to aid the jury\textsuperscript{118} and were generally negative concerning the jury’s reac-

\textsuperscript{111} McCrystal, \textit{Videotaped Trials: A Primer, supra} note 94, at 254 (noted this effect).

\textsuperscript{112} McCrystal & Maschari, \textit{supra} note 6, at 246 n.14.

\textsuperscript{113} Comment, \textit{Opening Pandora’s Box: Asking Judges and Attorneys to React to the Videotape Trial,} 1975 B.Y.U. L. Rev. 487 (1975). Eight hundred members of the Defense Research Institute and eight hundred members of the Association of Trial Lawyers of America were polled. About one third of those polled had used videotapes in some aspect of trial work. \textit{Id.} at 517.

\textsuperscript{114} \textit{Id.} at 505. For example, “Jurors enjoy a taped trial less than a live one.”

\textit{Id.}

\textsuperscript{115} \textit{Id.} at 495.

\textsuperscript{116} \textit{Id.} at 503.

\textsuperscript{117} \textit{Id.} at 499.

\textsuperscript{118} \textit{Id.} at 503.
tion to PRVTT's. 119

The judges surveyed in the same study were generally more favorable to all the factors present in PRVTT's except for their inability to question the witnesses. 120 They did not feel as strongly as the attorneys that their own presence was as necessary during the viewing of the tape. 121

Witnesses in Ohio's first PRVTT 122 claimed to be less nervous in front of the camera than they would have been in court. 123 An attorney noted the same effect in a San Francisco PRVTT. 124 A large scale in-court taping of witness testimony at preliminary hearings showed no difference in stress between courtroom appearances untaped or taped. 125 If only some of the testimony is pretaped, the witnesses most likely to be taped are those who already spend a significant amount of time in court, people whose testimony would be little affected by the change in procedure. For witnesses unaccustomed to the courtroom, a quiet room with the parties, attorneys and technician is less distracting than a public room with strangers coming and going. 126 Reliability of testimony remains basically unchanged. 127

Jury reaction is the main concern of the trial lawyers surveyed. 128 There is now available data that should allay their worst fears and show that the use of videotape may not be such a radical departure from traditional jury trials as once was feared.

119. Id. at 507. This was the area where the factors became less objectively worded. Plaintiff's attorneys were less negative about jury response.

120. Id. at 499. Judges find videotape better for depositions presented at live trial than the reading of transcripts. Jurors are instructed to evaluate the demeanor and frankness of the witness—an impossibility using readings of written transcripts.

121. Id.

122. McCall v. Clemens, Civil No. 39301 (C. P. Erie County, Ohio, Dec. 6, 1971.).


125. Short, Florence & Marsh, supra note 55, at 447. "[S]eventy three percent of the attorneys sampled agreed with the statement, 'witnesses behave the same whether they are being videotaped or not.'" (footnote omitted).

126. Morrill, supra note 11, at 246. Doret, supra note 105, at 246.


128. See text accompanying note 119 supra.
Judge McCrystal notes that an independent survey of 250 jurors who participated in 45 PRVTT's showed that 75% of the respondents would actually prefer a videotaped trial if they were a party in a similar civil suit\(^{129}\) (simple personal injury action). The jurors in the San Francisco PRVTT\(^{130}\) generally felt that the conduct of the trial and the presentation of the case were satisfactory and gave them sufficient information to decide the case.\(^{131}\)

Jurors from both of the above surveys were asked if they would choose a videotape trial if they were a criminal defendant. Sixty-five percent of the jurors over 40 years of age answered affirmatively, as did 26% of those under 40,\(^ {132}\) leading to the possibility that the “video generation” is more skeptical of videotape.\(^ {133}\)

The most exhaustive research of juror response to videotape has been carried out in Michigan.\(^ {134}\) Surveys of large numbers of actual jurors, in what they perceived as actual trials, showed few significant differences in how trial evidence and participants in the trial were perceived by the jurors. A live presentation was compared to the same presentation videotaped and replayed in color or black and white, with one camera, and on split screen three camera presentations. Black and white seemed to yield greatest retention of fact, color next, and live the least.\(^ {135}\) As the length of the presentation increased, fact retention improved with videotaped presentation.\(^ {136}\) A test of the effect of deleting inadmissible material showed no appreciable difference between retaining and deleting it,\(^ {137}\) whether the material was deleted by clean edit-

\(^{129}\) McCrystal, *The Case for PRVTT’s*, supra note 8, at 57.


\(^{131}\) Bermant, Chappell, Crockett, Jacobovitch & McGuire, *supra* note 27, at 985. The judge, attorneys and parties remained with the jury during viewing of the tape.

\(^{132}\) *Id.* at 993.

\(^{133}\) *Id.*


\(^{135}\) *Id.* at 680. But this must be traded off against the loss of perception of flushed faces; these are more perceptible in color presentation. Hartman, *supra* note 102, at 257.


\(^{137}\) *Id.* at 671.
ing using retaping, blacking out only sound, or blacking out sound and picture, although the latter was considered more distracting.\(^{138}\)

In another series of experiments, the same researchers found that the ability of a subject to detect lies told by strangers remained unaffected by different modes of communication (live, videotape, written transcript or audio tape) even where the subjects were forewarned that lies would be told.\(^{139}\) In fact, in all modes, detection of lies was poor.\(^ {140}\)

While results of jury perception surveys dealing with large numbers of jurors show little difference between traditional and PRVTT trials,\(^ {141}\) evaluation of a trial where only the opposing experts were presented either live or taped showed differences in juror response based on the mode of presentation.\(^ {142}\) One witness was more effective for the client he was testifying for live, one taped. Full length shots were preferred over close-ups in this survey.\(^ {143}\)

**Conclusion**

Videotape is not the salvation of an overburdened legal system, but it is a useful tool that lawyers should not be afraid to use under the proper circumstances. Early fears regarding the undesirable effects of videotaped testimony have been greatly allayed by sound research in the field. It is the responsibility of the legal profession to best use the tools available to it to serve the needs of the people. "The legal profession did not stop using scriveners until 300 years after the Gutenberg flatbed press had been developed. . . . (I)t is hoped that the time be-

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138. *Id.* at 677. Other jurors have noted that courtroom noises may be amplified to an annoying degree (paper rustling). Murray, *Use of Videotape in the Preparation and Trial of Lawsuits*, 11 Forum 1152, 1158 (1976).

139. Miller, Fontes & Dahnke, *supra* note 134, at 693. The speakers were also put under stress to approximate a witness situation. Audio tape was the least effective mode for detection of lies.

140. *Id.*


143. *Id.* at 695.
tween availability and use [of videotape] will be somewhat less than in the earlier case.” 144

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144. Salvan, supra note 91, at 229.
COLLATERAL SOURCE RULE:
FLORIDA STATUTE § 627.7372.

In an attempt to reduce automobile insurance rates¹ and the cost of automobile accidents² in Florida, the legislature enacted the “Florida Automobile Reparations Reform Act” in 1971.³ This act, which became effective in 1972, contained basic concepts of no-fault insurance, personal injury protection (PIP) benefits, and certain “threshold requirements.”⁴ The plan, however, did not serve to reduce the cost of automobile insurance, causing the Florida Legislature to modify the act.⁵

Though innovative in some regards, the modified no-fault legislation failed to produce the reduction in insurance rates promised by its drafters. Once again, the Florida Legislature attempted to resolve the problem, and in 1977 the “Florida Automobile Reparations Reform Act of 1977” emerged.⁶ It was here that section 627.7372 of the Florida Statutes, regarding the admissibility of payments made by collateral sources, was initially created.⁷ Since 1977, the Legislature has seen fit to amend this act⁸ and it is likely that legislative innovation, as well as experimentation, will continue in this field.⁹

². J. Alpert & P. Murphy, Florida Automobile Reparations § 1-1 (1980).
⁵. J. Alpert & P. Murphy, supra note 2.
⁷. Change will in fact occur by virtue of the automatic repeal of the Act on July 1, 1982.
⁸. Id. § 34.

I. THE EVOLUTION OF SECTION 627.7372

The 'collateral source rule' states that "total or partial compensation for an injury received by an injured party from a collateral source wholly independent of the wrongdoer will not operate to lessen the damages recoverable from the person causing the injury." With few exceptions, this rule has been adhered to by the Florida courts and continues to be in use today. However, in recent years, an exception to this rule has emerged in cases involving the operation of a motor vehicle within the confines of the no-fault act.

A. 1977: Florida Statute § 627.7372

Florida Statute § 627.7372 entitled "Collateral Sources of Indemnity" became effective on July 1, 1977 and provides that:

(1) In an action for personal injury or wrongful death arising out of the ownership, operation, use or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources which have been paid to the claimant prior to the commencement of the trial. The court shall also admit into evidence any amount paid by the claimant to secure such collateral source.

The second part of the statute enumerates payments to the claimant that will be considered "collateral sources." An illustration of this

10. 15 AM. JUR. Damages § 198 (1938); 25 C.J.S. Damages § 99 (1941).
13. The Florida Insurance and Tort Reform Act of 1977, § 34, FLA. STAT. § 627.7372 (1977). Exception to the collateral source rule has also been taken in medical malpractice suits by virtue of FLA. STAT. § 768.50 (1979). Much of the information in this note may be applied to section 768.50. However, some underlying differences do exist between the two statutes. This note will be confined to a discussion of section 627.7372.
15. (2) For purposes of this section, "collateral sources" means any payments made to the claimant, or on his behalf, by or pursuant to:
(a) The United States Social Security Act; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits.
Collateral Source Rule

rule is as follows:

Plaintiff is injured in an automobile accident with defendant causing plaintiff to institute a suit against the defendant tortfeasor. However, prior to the commencement of the trial, plaintiff collects $10,000 through her PIP benefits provided under her insurance policy. Section 627.7372 provides that this $10,000 payment will be admissible evidence at the time of trial.16

B. 1978: Florida Statute § 627.7372

Upon the continuation of soaring insurance rates in Florida, in 1978 the legislature, once again, amended the collateral source statute to read:

(1) In any action for personal injury or wrongful death arising out of the ownership, operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources paid to the claimant, and the court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source.17

Two major changes were adopted in the 1978 amendment. First, the statute no longer allows into evidence amounts paid to secure the collateral source. Second, the court must now instruct the jury to deduct from its verdict the value of all collateral source benefits received by the claimant. This statute became effective January 1, 1979 and remains in effect at the time of publication of this note.18

(b) Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits except life insurance benefits available to the claimant, whether purchased by him or provided by others.
(c) Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.
(d) Any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability.

16. This hypothetical assumes compliance with all aspects of the no-fault act.
17. FLA. STAT. § 627.7372 (Supp. 1978) (emphasis supplied). It should be noted that section 627.7372(2) remained the same.
18. Effective August 1, 1979, the statute was amended to include: “(3) Notwith-
II. RECENT CONSTITUTIONAL CHALLENGES

"The constitutionality of most no-fault laws has been based on a 1916 United States Supreme Court decision. . . ."19 The first constitutional challenge to reach the Florida Supreme Court, however, occurred in 1973.20 The court in Kluger v. White ruled that Florida Statute § 627.73821 was unconstitutional.22 The court held that this statute denied a plaintiff the right of access to the courts for redress of a particular injury without providing a reasonable alternative to protect that right.23 The threshold requirements of the Florida no-fault act24 faced constitutional challenges in Lasky v. State Farm Ins. Co.25 However, the court rejected all the arguments set forth in Kluger and upheld the provisions of no-fault. "We now hold, however, that with one exception, the personal injury aspects of F.S. 627.737, F.S.A., are valid and constitutional."

Recently, there has been a great deal of controversy concerning the collateral source provision of the no-fault act. A growing number of circuit court judges throughout the state have held the statute unconstitutional, thus prohibiting the admission into evidence at trial of collat-
eral source benefits paid to the claimant. In so doing, the courts have embraced the constitutional arguments as set forth in Kluger and Lasky. These arguments include: denial of access to courts, invasion of the court's rulemaking authority, impairment of the right to contract, denial of equal protection and due process.

A. Access to Courts

Article I, Section 21 of the Florida Constitution guarantees every citizen his day in court. “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”

In Kluger v. White, the Supreme Court of Florida determined that the legislature could not abolish a common law or statutory cause of action “without providing a reasonable alternative to protect the rights of the people... unless the legislature can show an overpowering public necessity...” The same argument is now sought to be applied to the collateral source statute.

In applying this argument to the collateral source statute, it must be noted that the statute was intended to prevent the duplication of

27. Puchaty v. Teague, No. 79-5183 (Fla. 18th Cir. Ct., filed Feb. 26, 1980); Womble v. Liberty Mutual Ins. Co., No. 79-9107 (Fla. 9th Cir. Ct., filed Mar. 21, 1980) (prohibiting the admission of collateral sources, but not explicitly declaring the statute unconstitutional); Berman v. Poole, No. 78-21175 (Fla. 17th Cir. Ct., filed Apr. 23, 1980); Jenkins v. Rafferty, No. 79-4593 (Fla. 17th Cir. Ct., filed Oct. 1, 1980) (prohibiting the admission of collateral sources, but not explicitly declaring the statute unconstitutional); Cooper v. Pepper, No. 79-8819 (Fla. 17th Cir. Ct., filed Oct. 21, 1980). These orders represent part of a growing number. But see note 69 infra.

31. U.S. Const. amend. XIV.
32. Fla. Const. art. I, § 9, U.S. Const. amend. XIV. This challenge, although asserted, has not been expounded on by either plaintiffs' or defendants' motions or the respective orders. See cases cited in note 27 supra. This article will not therefore specifically address this challenge.
34. 281 So. 2d at 4.
35. See plaintiffs' motions in connection with their respective orders for the cases cited in note 27 supra.
There is, however, no Florida law, statutory or otherwise, which grants the right of a claimant to a double recovery. Secondly, the statute continues to preserve a claimant’s right to seek legal redress against a tortfeasor. It is the threshold requirements that may deny a claimant his day in court, but it is the collateral source statute that limits claimant’s damages to a single recovery.  

An argument has been asserted that the admission of evidence regarding a claimant’s receipt of collateral sources "involves a substantial likelihood of prejudicial impact." However, the possibility of prejudice should be weighed (as a matter of public policy) against the possibility of double recovery. This will further have to be balanced with the underlying purpose of the “Florida Insurance and Tort Reform Act of 1977,” which is to reduce insurance premiums.  

Another problem arises when a particular collateral source insurer maintains a subrogated interest in the claimant’s recovery, thus resulting in a double reduction. The courts have not addressed this issue with respect to the constitutional validity of Section 627.7372. One viable approach is the argument that since a plaintiff does not have the right to recover these amounts, an insurance company, thus, cannot maintain the right to subrogation.  

The question of whether Section 627.7372 denies a claimant’s constitutional right of access to the courts raises some valid arguments on both sides of the issue. When this statute is reviewed by higher courts in Florida, this concern may very well be the focus in determining the constitutional validity of the statute.

36. This would in turn, hopefully, assist in decreasing insurance rates.
37. The statute states in part: "[T]he court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source." FLA. STAT. § 627.7372(1) (Supp. 1978) (emphasis supplied). The collateral source statute becomes moot if a jury does not find the defendant liable.
39. FLA. S.B. 1181 (1977). Furthermore, it would not be in the province of the courts to decide that these conditions no longer exist. "When the validity of the law depends on the existence of certain facts necessary to be determined by the legislature, the court will presume the requisite facts are established to that body's satisfaction." Florida State Bd. of Architecture v. Wasserman, 377 So. 2d 653, 657 (Fla. 1979).
40. CONTINUING LEGAL EDUCATION, supra note 5, at § 5.31.
41. Id.
B. Invasion of the Court's Rulemaking Authority

Article II, Section 3 of the Florida Constitution espouses the separation of powers doctrine and reads in part:

"No person belonging to one branch shall exercise any power pertaining to either of the other branches ...." 42

Article V, Section 2(a) of the Florida Constitution enumerates certain powers of the Supreme Court:

"The Supreme Court shall adopt rules for the practice and procedure in all Courts ...." 43

As a result of these two constitutional provisions, the state legislature is prohibited from adopting any statute which regulates practice and procedure in the courts. 44 Whether this collateral source statute is substantive or procedural is another basis for determining its validity.

The area of substance versus procedure has been described as a "twilight zone." 45 In Parker v. Wideman, 46 the Fifth Circuit addressed this issue and held that the question of admissibility of collateral sources is a substantive one. "But the fact of the matter is that under Florida law the rule is a substantive rule of law which applies whether or not evidence of collateral compensation is introduced." 47

However, the portion of the statute which requires the court to instruct the jury on the effect of the evidence presents a more difficult substantive versus procedural problem. This mandatory jury instruction clearly seems procedural in nature. As Justice Adkins noted, "[p]ractice and procedure pertains to the legal machinery by which substantive law is made effective." 48 If this portion of the statute is determined by the courts to be a matter of procedure, it would be possible for the Supreme Court to adopt it in their rules of practice and

42. Fla. Const. art. II, § 3.
46. 380 F.2d 433 (5th Cir. 1967).
47. Id. at 436. See Finley P. Smith, Inc. v. Schectman, 132 So. 2d 460 (Fla. 2d Dist. Ct. App. 1961); Annot., 68 A.L.R. 2d 876 (1959); Restatement of Torts § 92, Comment e at 620.
48. 272 So. 2d at 65 (Adkins, J., concurring).
procedure. When the Civil Rules of Procedure were adopted, statutes which were procedural but did not supersede or conflict with the rules, remained in effect.

The admissibility of collateral sources is arguably substantive in light of the holding in Parker. However, the purpose of admitting this evidence is effectuated if the jury is instructed to deduct the amount from its verdict. This mandatory instruction, which was added to the original statute in the 1978 amendment, expanded the collateral source rule with the intention of reducing final verdicts and aiding in the overall intent of reducing automobile insurance rates. The statute could be amended, however, to eliminate the jury instruction, which would result in a statute similar to the one in 1977.

C. Impairment of the Plaintiff's Right to Contract

It is undisputed that legislative enactments impairing a person's right to contract are a constitutional violation. Article I, Section 10 of the Florida Constitution reads:

"No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." It has been argued that the collateral source statute violates this provision by impairing the value of a plaintiff's contract with his insurer.

The term impairment has been defined in Florida as "[a]ny conduct on the part of the legislature that detracts in any way from the

51. FLA. STAT. § 627.7372 (Supp. 1978).
53. "If, when the unconstitutional part of a statute is striken, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, the valid portion of the statute will be sustained." Lasky v. State Farm Ins. Co., 296 So. 2d at 21.
54. FLA. CONST. art. I, § 10.
55. Id.
56. See Memorandum of Law in support of plaintiff's motion in limine, Lang v. Halfpenny, No. 79-3470 (Fla. 17th Cir. Ct., filed Sept. 11, 1980).
value of the contract . . . .”\(^{57}\) The Florida Supreme Court was confronted with a similar situation when they considered the question whether the enactment of the anti-stacking statute\(^{58}\) impaired the value of a claimant’s pre-existing insurance policy.\(^{60}\) The court upheld the statute and decided it was “a reasonable exercise of the state’s undisputed authority to regulate the insurance industry in furtherance of the public welfare.”\(^{60}\) It is possible the court will follow this reasoning when considering the collateral source statute.

**D. Equal Protection**

It has been advanced that Section 627.7372 violates the equal protection clause of the United States Constitution\(^{61}\) and Article I, Section 2 of the Florida Constitution as it applies only to actions for personal injury or wrongful death arising out of the operation, use or maintenance of a motor vehicle.\(^{62}\) However, “[w]hen the difference between those included in a class and those excluded from it bears a substantial relationship to the legislative purpose, the classification does not deny equal protection.”\(^{63}\)

It is undisputed that Section 627.7372 creates a classification of persons injured in motor vehicle accidents. However, this classification is probably not arbitrary since it is a valid legislative response to the

57. Pinellas County v. Banks, 19 So. 2d 1, 3 (Fla. 1944) (emphasis supplied).

Although this issue was brought up a year earlier, the question of the statute’s constitutional validity was left open. The court merely invalidated the application of the statute to the particular facts at bar. Dewberry v. Auto-owners Ins. Co., 363 So. 2d 1077 (Fla. 1978).

60. 374 So. 2d at 526 (emphasis supplied).
61. U.S. Const. amend. XIV.
62. See Memoranda of Law filed on behalf of plaintiffs’ motions in connection with the cases cited in note 27 supra. Some of these memoranda suggest the statute also discriminates against tortfeasors by providing an unwarranted benefit to the negligent motor vehicle operator and not to one who is negligent in some other manner, but causes identical injuries. However, research did not reveal any cases whereby a tortfeasor, or his insurance company, asserted a claim based on a denial of equal protection because his unfortunate victim is without collateral source benefits, which could have been deducted from a potential judgment rendered against him.

63. 296 So. 2d at 18.
insurance crisis which confronted the public in the 1970's. Furthermore, classifications which discriminate between persons injured in motor vehicle accidents are not unconstitutional. The Florida Supreme Court in *Lasky* was called upon to examine this identical classification to determine whether the threshold requirements of the no-fault act were a denial of equal protection. The court decided this classification did not violate the equal protection clause even though the classification determined a person's right of access to the courts.

In addition to being non-arbitrary, Section 627.7372 must bear a substantial relationship to the legislative purpose in order to sustain its validity. This requirement is arguably met after viewing this statute as an overall scheme to resolve the insurance crisis. "Merely because the Legislature has seen fit to remedy a perceived evil in one area, it is not compelled to extend that remedy to all areas in which it might be applied." Compelling the legislature to pursue an all or nothing approach would not be favorable. In light of the holding in *Lasky*, it seems unlikely that higher courts in Florida will find this statute to be in violation of the equal protection clause.

*Lori M. Lapin*

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64. *Id.*
65. *Id.* at 22.
66. *Id.* at 18.
67. *Id.* at 22.
68. *Id.*
69. Shortly before publication of this note, a unanimous First District Court Appeal upheld the constitutionality of section 627.7372. The court rejected all the arguments raised in this note except the constitutionality of the jury instruction, which was not raised. McKee v. City of Jacksonville, 1981 Fla. Law Weekly 4 (Fla. 1st Dist. Ct. App. Jan. 6, 1981).
Post-Majority Support In Florida: An Idea Whose Time Has Come?

In this age of sophisticated technology and economic complexity with the necessity of development of special skills to qualify for pursuit of a trade, profession or to obtain employment, a person over 18 and less than 21 may indeed be dependent on the help of others to obtain what education and training is needed to be competitive in the economic system in which he must make his way.¹

Despite these words of the state Supreme Court, Florida courts have not expressly held that a divorced parent, with the financial ability to do so, is required to provide his child with a college education.² Generally, the obligation of a parent to support a child ceases when the child reaches majority.³ The issue of support to provide college funds became pertinent in Florida in 1973 when the age of majority was lowered from twenty-one to eighteen.⁴ Prior to that time most children were close to completion of a college education when they reached majority and the question of support during college was seldom raised.⁵

Although Florida does not yet recognize a duty of support beyond the age of majority, recent decisions indicate that the courts are not totally opposed to the idea of requiring a divorced parent to provide

1. Finn v. Finn, 312 So. 2d 726, 731 (Fla. 1975).
2. In Finn, the court recognized the importance of education in dictum. See notes 7-9 & 22-24 infra and accompanying text.
3. Perla v. Perla, 58 So. 2d 689, 690 (Fla. 1952).
4. FLA. STAT. § 1.01(14) (1979) states: “the word ‘minor’ includes any person who has not attained the age of 18 years.” FLA. STAT. § 743.07(1)(1979) provides: The disability of nonage is hereby removed for all persons in this state who are 18 years of age or older, and they shall enjoy and suffer the rights, privileges and obligations of all persons 21 years of age or older except as otherwise excluded by the state constitution immediately preceding the effective date of this section. These sections were created by Ch. 73-21, 1973 Fla. Laws 59, effective July 1, 1973.
funds for a child's college education. This note will examine Florida cases dealing with this issue, and will explore the ramifications of a finding of a duty of post-majority support, including the possibility of an equal protection challenge, by examining decisions of other states whose courts have ordered divorced parents to provide support beyond majority for educational purposes.

I. FLORIDA DECISIONS

A. Pre-Existing Support Obligations

Florida Statute § 743.07, which removes the disability of nonage for persons who are eighteen years of age or older, operates prospectively rather than retrospectively. In *Finn v. Finn*, the Supreme Court held that a final judgment in a dissolution proceeding rendered prior to July 1, 1973, the effective date of section 743.07, was not affected by the statute. The 1971 judgment, in addition to granting dissolution of the marriage of the parties and awarding custody of the adoptive children to the mother, ordered the father to pay weekly child support. The Court rejected the father's contention that section 743.07, by operation of law, modified the duration of the child support ordered so as to terminate it when the children reached eighteen, and held that the final judgment, rendered when the age of majority was twenty-one, had impliedly set the duration of legal dependency to extend until the children reached twenty-one.

The District Courts of Appeal have adhered to the view that judgments for support entered prior to the effective date of the statute lowering the age of majority, and which provide for support to "majority,”

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6. FLA. STAT. § 743.07(3) (1979) provides “[t]his section shall operate prospectively and not retrospectively and shall not affect the rights and obligations existing prior to July 1, 1973.”

7. 312 So. 2d 726 (Fla. 1975).

8. The court in a dissolution proceeding has authority to order child support per FLA. STAT. § 61.13(1) (1979) which provides in part that “[i]n a proceeding for dissolution of marriage, the court may at any time order either or both parents owing a duty of support to a child of the marriage to pay such support as from the circumstances of the parties and the nature of the case is equitable.”

9. 312 So. 2d at 729. See also Daugherty v. Daugherty, 308 So. 2d 24 (Fla. 1975).
“until emancipation,” or “until age twenty-one,” are binding and enforceable. The new age of majority does not affect the duration of support payments ordered by such judgments.10

B. Agreements to Provide Post-Majority Support

In spite of the general rule that a parent does not owe support to children after they reach majority, specific agreements to support children beyond majority or through college will be enforced.11 A father who has agreed to pay for a child’s college education under the terms of a separation agreement will be required to pay for these educational benefits regardless of the statutory age of majority. The court will not remake an agreement.12 A wife, as custodial parent and a contracting party, has standing to seek enforcement of such an agreement.13

C. What is a “Dependent Person?”

Although the age of majority, and consequently the duration of the parental obligation of support, has been lowered to eighteen. Florida Statute § 743.07(2) provides that a court may require support for a dependent person beyond the age of eighteen years.14 Much litigation


12. Martinez, 383 So. 2d at 1155. See also Mohammed v. Mohammed, 371 So. 2d 1070 (Fla. 1st Dist. Ct. App. 1979) (trial court’s order of support, based on father’s offer to pay for his two children’s college expenses for four years, affirmed).


14. FLA. STAT. § 743.07(2) (1979) states:
This section shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years; and any crippled child as defined in chapter 391 shall receive benefits under the provisions of said chapter until age 21, the provisions of this section to the contrary notwithstanding.
has focused on the meaning of "dependent person" as used in the statute.

It has long been recognized that a parent's support obligation may continue after a child has reached majority when the child is, from physical or mental deficiencies, unable to support himself.\(^\text{18}\) Dependency in this sense has not been equated with incompetency. Evidence that a child was able to hold a part-time job under close supervision while attending a junior college, but was unable to be self-sustaining because of his mental condition, has been held sufficient to uphold a finding of dependency and requirement of support.\(^\text{16}\) Florida courts are divided, however, as to whether a full-time student without physical or mental disabilities may be a dependent person and therefore entitled to support after reaching the age of eighteen, per §743.07(2).

In *White v. White*,\(^\text{17}\) a case decided shortly after the age of majority was lowered to eighteen, the First District Court of Appeal reversed an order of the trial judge which required a father to pay support for his eighteen year old son who in the trial court's opinion was entitled to a college education at the expense of his parents.\(^\text{18}\) The appeal court postulated that the term "dependent person" in section 743.07 was intended by the legislature to mean a person over eighteen years of age unable by reason of physical or mental incompetency or inability to be independent,\(^\text{19}\) and held that it was not empowered to require the father to support his able-bodied son. In a dissent which was subsequently cited and approved by the state Supreme Court,\(^\text{20}\) Judge McCord expressed the view that if the legislature intended to limit dependent persons to disabled persons it would have done so, and that the reasonable pursuit of an education is relevant to the question of

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15. Perla, 58 So. 2d at 690. *Accord*, Fincham v. Levin, 155 So. 2d 883 (Fla. 1st Dist. Ct. App. 1963) (father ordered to support unmarried adult daughter who had been an epileptic since birth and was mentally and physically unable to care for or support herself).


17. 296 So. 2d 619 (Fla. 1st Dist. Ct. App. 1974).

18. *Id.* at 621.

19. *Id.* at 623.

20. Finn, 312 So. 2d at 731.
dependency. 21
The Supreme Court of Florida, in Finn v. Finn, 22 stated in dictum 23 that the interpretation of "dependent person" as one who is dependent because of physical or mental incompetence or inability is too narrow 24 and that one pursuing an education in good faith with a need for help beyond his own reasonable capacity to provide for himself may be a dependent person. 25 Nevertheless, the District Courts of Appeal have held that "the mere fact that a person is attending a university or college does not render him or her dependent" 26 and they have failed to hold that financial inability to support oneself while pursuing a college education may constitute dependency within the meaning of the statute.

D. No Support Beyond Age Twenty-One

While the supreme court's dicta in Finn indicates that a student without physical or mental disabilities may nevertheless be dependent, and therefore entitled to parental support beyond the age of eighteen, it also implies that dependency in this situation ends at age twenty-one. 27 Shortly after Finn was decided, the Fourth District Court of Appeal reversed that portion of a marriage dissolution judgment which ordered the husband to pay the college tuition of the parties' twenty-three year old son. The court recognized Finn's apparent holding that dependency as a result of the bona fide pursuit of education may exist as to one between eighteen and twenty-one years of age, but did not interpret either section 743.07 or Finn "as authorizing a court to require a parent to support a child over twenty-one years of age, whether for educa-

21. 296 So. 2d at 625.
22. 312 So. 2d 726 (Fla. 1975).
23. The holding, enforcing a judgment ordering child support until the parties' children reached age twenty-one, was based on the fact that the judgment was rendered prior to the effective date of § 743.07. See notes 7-9 supra and accompanying text.
24. 312 So. 2d at 731.
25. Id. at 730.
27. See note 1 supra and accompanying text.
tional purposes or otherwise, unless the child is dependent as a result of physical or mental deficiencies.”

Other Florida courts are in agreement that orders of support for education beyond the age of twenty-one are not justified. In a recent case, the Second District Court of Appeal commented “that while the legislature in lowering the age of majority to eighteen did not intend to eliminate any requirement for parents to pay their children’s way through college, there is nothing to indicate that the legislature wished to enlarge parental obligations.”

E. Is There A Duty to Educate Adult Children?

Florida courts have based their refusal to order support to healthy children beyond the age of eighteen on the general rule that the obligation of parental support ends at majority, and on the holding that attendance at college does not necessarily make a person “dependent,” within the meaning of Florida Statute § 743.07. In 1978, the Fourth District Court of Appeal went a step further by declaring that a parent does not owe a duty to an adult child to provide a college education. Although recognizing that a full-time college student in active and sincere pursuit of an education may be dependent upon his parents for support, the court reversed a lower court order requiring a father to provide a college education for his adult child upon a finding of no

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31. See, e.g., Genoe v. Genoe, 373 So. 2d 940 (Fla. 4th Dist. Ct. App. 1979); Rollings v. Rollings, 362 So. 2d 700 (Fla. 2d Dist. Ct. App. 1978); Krogen v. Krogen, 320 So. 2d 483 (Fla. 3d Dist. Ct. App. 1975); Kowalski v. Kowalski, 315 So. 2d 497 (Fla. 2d Dist. Ct. App. 1975). See also Cyr v. Cyr, 354 So. 2d 140 (Fla. 2d Dist. Ct. App. 1978); Baldi v. Baldi, 323 So. 2d 592 (Fla. 3d Dist. Ct. App. 1975) (holding the trial court was without authority to order child support beyond age of eighteen years and that question of support as dependent children should be determined by the court, if requested, at the time of the attainment of majority of each child).
legally enforceable obligation.34 The court noted that Florida Statutes §§ 61.1338 and 743.0738 must be read together and that before a court may order support for an adult child, "it must find (1) that the parent owes a duty of support, and (2) that the child is dependent upon that parent for such support."37

While parents have a duty to educate minor children,38 no such duty has been recognized as to children beyond the age of majority. Providing a college education for children may be a moral obligation of some parents, but it is not presently recognized as a legal one.39

F. Indirect Provision for Post-Majority Support

The Second District Court of Appeal in a 1980 decision, Nicolay v. Nicolay,40 gave the first inkling that Florida is willing to recognize a child's needs for higher education by affirming an order of increased alimony to a mother for the sole purpose of allowing her to furnish her daughters with a college education.41 After reviewing the decisions of all the district courts of appeal regarding post-majority support, as well as the supreme court's decision in Finn v. Finn, the court stated its

34. The court also held that even if a duty of support for an adult child does exist, a dissolution proceeding is not the proper forum in which to establish the existence of that obligation. Id. at 485. This case should be distinguished from those involving an agreement to support an adult child. A dissolution proceeding is the proper forum in which to seek enforcement of an agreement. See note 13 supra and accompanying text.
35. See note 8 supra for text of statute.
36. See note 14 supra for text of relevant portion of statute.
37. 360 So. 2d at 484.
38. FLA. STAT. § 744.361 (1979) provides in part: "(1) It is the duty of the guardian of the person to take care of the person of the ward, to treat him humanely, and, if he is a minor, to see that he is properly educated and that he has the opportunity to learn a trade, occupation or possession." (emphasis added).
40. 387 So. 2d 500 (Fla. 2d Dist. Ct. App. 1980).
41. The upward adjustment in alimony was ordered to help Mrs. Nicolay maintain the standard to which she was accustomed while married. The standard, according to the court, "was such that she could rightfully expect to be able to provide her children with a college education, particularly since they were exceptionally bright and hence were outstanding candidates for college." Id. at 506.
belief that the legislature, in lowering the age of majority, did not intend to deprive worthy children of the funds needed to attend college.\textsuperscript{42} Since the appeal was based on alimony rather than child support, the court was not required to overrule any prior decisions. However, they stated that if the case had been an appeal from an order raising child support, they would have been "inclined to hold that in a dissolution proceeding a court could find a child under the age of twenty-one dependent by reason of attendance at college and order one or both of his parents to provide support" since "there is no\textit{fixed} rule forbidding an order of increased child support to finance a child's college education up to the age of twenty-one."\textsuperscript{43}

It remains to be seen whether Florida's courts will expand upon the logic of the Second District Court of Appeal's decision and find full-time college students dependent and therefore entitled to parental support beyond the present age of majority. The remainder of this note will deal with the possible consequences of such a finding.

\section*{II. \textbf{Equal Protection Challenge}}

As support for their refusal to order post-majority support to finance a child's education, Florida courts have noted that since offspring of married parents do not have a legal right to parental support while attending college, children of divorced parents should not have this right.\textsuperscript{44} As Judge Boyer of the First District Court of Appeal phrased it, "[t]he fact that domestic whirlwinds cause a severance of the marriage does not enhance the rights of the children nor alter the obligations of the parents."\textsuperscript{45}

In\textit{Kern v. Kern}, the court recognized the potential equal protection problem in noting that the state would have no reasonable grounds to treat the adult children of divorced parents any differently than the adult children of married parents.\textsuperscript{46} This rationale, however, overlooks the fact that children whose parents are still married often continue to receive support beyond the age of majority and therefore have an ad-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{42} Id. at 505.
\item \textsuperscript{43} Id. (footnote omitted) (emphasis supplied by the court).
\item \textsuperscript{44} Dwyer, 327 So. 2d at 75; White, 296 So. 2d at 623.
\item \textsuperscript{45} 296 So.2d at 623.
\item \textsuperscript{46} 360 So. 2d at 485.
\end{itemize}
\end{footnotesize}
vantage over children of divorced parents.47

Under an equal protection challenge, the rational relationship test is applied to a statutory classification and, if shown to be rationally related to some legitimate government interest, the statute is upheld.48 State statutes which specifically permit courts to order support for adult children who are pursuing an education have withstood equal protection attacks.

The Supreme Court of Iowa, in In re Marriage of Vrban,49 noted the state’s recognition of the increasing importance of education, as evidenced by ever-increasing appropriations for educational purposes, and concluded that higher education was a matter of legitimate state interest.50 Next, the court found that the state statute51 allowing a trial court to order a divorced parent to pay support for an adult child who is a full-time student bore a rational relationship to the state interest. In making this determination, the court took note of the differences in circumstances between married and divorced parents.52

Similarly, in Kujawinski v. Kujawinski,53 the Illinois Supreme Court upheld the constitutionality of a state statute which permits a court in a dissolution proceeding to order post-majority support to chil-

47. Washburn, supra note 39, at 329 n.55.
48. Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978). For a complete discussion of post-majority support and equal protection, see Veron, supra note 11, at 668-78.
49. 293 N.W.2d 198 (Iowa 1980).
50. Id. at 202.
51. IOWA CODE § 598.1(2) (1977) provides in part: “Support” or “support payments” means any amount which the court may require either of the parties to pay under a temporary order or a final judgment or decree, and may include . . . child support . . . and any other term used to describe such obligations. Such obligations may include support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an approved school . . . , or is, in good faith, a full-time student in a college, university, or area school; or has been accepted for admission to a college . . . ; or a child of any age who is dependent on the parties to the dissolution proceeding because of physical or mental disability.
52. 293 N.W.2d at 202. The court noted that married parents usually support their children through college years while divorced parents, when deprived of custody, sometimes react by refusing support. See also Harris v. Harris, 585 P.2d 435 (Utah 1978).
53. 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).
children for educational purposes, by finding that "the imposition of such an obligation upon divorced parents is reasonably related to a legitimate legislative purpose." The court noted the major economic and personal impact of divorce on the lives of those involved, including the fact that divorced parents are often unwilling to voluntarily provide support to the same extent as married parents.

In a frequently cited case on the issue of post-majority support, Childers v. Childers, the Supreme Court of Washington held that requiring a divorced parent, under certain circumstances, to support a child beyond the age of majority while a college education is pursued, is not violative of equal protection. Like Florida, Washington does not have a statute specifically empowering a court to order support for education of an adult child, but does allow a court to order support to a dependent child to whom a duty of support is owed.

In Childers, the court defined dependent in this context as "one who looks to another for support and maintenance, one who is in fact dependent, [or] one who relies on another for the reasonable necessities of life," and held that this definition encompassed full-time college students. In support of their finding of a duty of post-majority support for higher education, the court cited earlier cases which found a duty to educate minor children, and to provide a college education if the parent would suffer no significant hardship and the child showed aptitude. The duty was based in part on the court's recognition of the state's public policy that a college education should be had, as evidenced by the maintenance of several institutions of higher learning at public ex-

54. Id. at __, 376 N.E.2d at 1389.
55. Id. at __, 376 N.E.2d at 1389-90.
57. The court stated that the factors to be considered before support is ordered include the child's age, needs, prospects, desires, aptitudes, abilities, and disabilities, and the parents' level of education, standard of living, and current and future resources. A court should also consider the amount and type of support the child would have been afforded had his parents remained married. 89 Wash. 2d at __, 575 P.2d at 205.
58. Wash. Rev. Code § 26.09.100 (1973) provides in part: "the court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support."
59. 89 Wash. 2d at __, 575 P.2d at 205.
pense. Since the new statute used the term "dependent" rather than "minor," the court reasoned that the parental duty to educate is no longer limited by minority and that trial courts should now have discretion to determine when a duty of support is owed, based on the facts and circumstances of each case. The court then held that this interpretation of the statute does not violate equal protection since it is rationally related to the legitimate governmental interest of minimizing the disadvantages of children whose parents have divorced.

It appears that the establishment of a duty of post-majority support for education of offspring, whether done explicitly by enactment of a new statute or through judicial interpretation of an existing statute, can withstand an equal protection challenge. Courts have recognized the impact of divorce on children and the need for higher education in today's society in upholding decisions ordering a divorced parent to contribute toward the education of his adult child.

III. FACTORS WHEN ORDERING SUPPORT

No court has held that the duty to support an adult child while he is pursuing an education is absolute. The decision as to whether post-majority support should be ordered, in those states which recognize the allowance of such an order, is within the sound discretion of the trial court. Several factors must be considered, including the parent's ability to pay, the child's aptitude and willingness to further his education, and whether the child would have received the education if the marriage had not been dissolved. In addition, courts have recognized the

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60. Id. at _, 575 P.2d at 206. See also Marriage of Eusterman, 41 Or. App. 717, 598 P.2d 1274 (1979).
61. 89 Wash. 2d at _, 575 P.2d at 204, 207.
increasing importance of higher education:

[W]e are living today in an age of keen competition, and if the children of today who are to be the citizens of tomorrow are to take their rightful place in a complex order of society and government, and discharge the duties of citizenship as well as meet with success the responsibilities devolving upon them in their relations with their fellow man, the church, the state and nation, it must be recognized that their parents owe them the duty to the extent of their financial capacity to provide for them the training and education which will be of such benefit to them in the discharge of the responsibilities of citizenship. It is a duty which the parent not only owes to his child, but to the state as well, since the stability of our government must depend upon a well-equipped, a well-trained, and a well-educated citizenship.64

IV. CONCLUSION

The Supreme Court of Florida has not definitively ruled on the issue of post-majority support for education. The district courts of appeal are divided in their views as to whether a court should order a divorced parent, in the absence of a specific agreement, to provide support to an adult child for college expenses. Florida Statute § 743.07 empowers a court to order support to a dependent person beyond the age of eighteen years, but no court has based an order of support on the finding that a full-time college student is dependent.

Other states have recognized the special needs of children whose parents have divorced and the increasing importance of education, by imposing, under certain circumstances, a duty on divorced parents who can afford it, to support their children through college. The statutes establishing this duty have withstood equal protection challenges.

Florida courts have recognized that an adult college student may be dependent upon others for support. Perhaps they will soon acknowledge the growing trend toward providing post-majority support to children of divorced parents to enable them to obtain an education and

64. Pass v. Pass, 238 Miss. 449, 458, 118 So. 2d 769, 773 (1960). See also Finn v. Finn, 312 So. 2d 726 (Fla. 1975).
overcome the disadvantage they presently suffer in relation to their peers with married parents.

Barbara B. Wagner
Right To Appointed Counsel: The Outer Limits.
Davis v. Page

Abandoned, abused, neglected, surrendered, run-away, truant, and uncontrollably disobedient children in Florida are neatly categorized by the law as "dependent."1 Dependency proceedings are diverse and complex attempts by the court to
delicately balance a number of conflicting claims: the need to protect the health, safety and welfare of the child; the right of the parent to have custody of and to care for the child; and the state's sometimes conflicting interest in protecting both the family unit and the best interest of the child.2

This comment examines whether due process, under the fourteenth amendment to the United States Constitution, requires the provision of court-appointed counsel to protect the interest of indigent parents in all Florida dependency proceedings.3

1. FLA. STAT. § 39.01(9) (1979) reads in full as follows:
   (9) "Child who is found to be dependent" means a child who, pursuant to this chapter, is found by the court:
   (a) To have been abandoned, abused, or neglected by his parents or other custodians.
   (b) To have been surrendered to the department or a licensed child-placing agency for purpose of adoption.
   (c) To have persistently run away from his parents or legal guardian.
   (d) To be habitually truant from school while being subject to compulsory school attendance.
   (e) To have persistently disobeyed the reasonable and lawful demands of his parents or other legal custodians and to be beyond their control.
3. The conjunctive issue of the source for payment of fees for court-appointed counsel was treated in detail by the Florida Supreme Court which determined a formula recognizing both "[t]he common law obligation of the profession to represent the poor without compensation . . [and the government's] obligation to provide legal representation when such appointment is required by the constitution . . " In the Interest of D.B., 385 So. 2d 83, 92 (Fla. 1980).
Decisions of the United States courts on the right to counsel are not in accord. Recently, in a closely divided opinion, the United States Court of Appeals for the Fifth Circuit, sitting \textit{en banc} in the case of \textit{Davis v. Page},\textsuperscript{4} recognized an absolute right to counsel for indigent parents in all dependency proceedings.\textsuperscript{5} The Ninth Circuit has, however, recognized only a qualified right to counsel, adopting a case-by-case approach.\textsuperscript{6}

At the time the federal court decided \textit{Davis}, the only Florida Supreme Court decision on point had applied the case-by-case approach under the rationale of the Ninth Circuit.\textsuperscript{7} Directing the judges of Florida's Eleventh Judicial Circuit (Dade County, Florida) to follow the absolute rule, the federal district court had repudiated the reasoning of both the Ninth Circuit and the Florida Supreme Court.\textsuperscript{8} Less than six months later came the Florida Supreme Court's reply. Expressly rejecting the federal district court's \textit{Davis} decision, the Supreme Court of Florida explicitly instructed the judiciary of the state (with the exception of the Eleventh Circuit) to utilize the case-by-case approach.\textsuperscript{9} A second major issue was thus raised by the Fifth Circuit's panel opinion: whether it was an abuse of the federal courts' discretion to hear the \textit{Davis} case in the first place, since "it would have been more prudent to leave the ultimate disposition of this case to the Florida State courts."\textsuperscript{10}

\textbf{Davis v. Page: Background}

Hilary Davis spent the night of January 30, 1976 in the hospital with her fourteen-month-old son, Carl Thor Davis, who was suffering

\textsuperscript{4} No. 78-2063 (5th Cir. Mar. 23, 1981) (13-11 decision), \textit{aff}g 618 F.2d 374 (5th Cir. 1980), \textit{aff}g 422 F. Supp. 258 (S.D. Fla. 1977).

\textsuperscript{5} Other federal district court cases which have recognized an absolute right to counsel are: Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977) and United States \textit{ex rel.} Reed v. Tinder, No. 75-0454 (S.D. W. Va. 1975).

\textsuperscript{6} Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974).

\textsuperscript{7} Potvin v. Keller, 313 So. 2d 703 (Fla. 1975).

\textsuperscript{8} 442 F. Supp. 258 (S.D. Fla. 1977).

\textsuperscript{9} 385 So. 2d at 95. It is noted in this opinion that the Dade County judges had responded to the \textit{Davis} district court decision by appointing counsel not only for indigent parents but for the indigent child as well, "whose interests may be adverse to the desires of his parents and the State . . . in order to protect the interest [sic] of the child." \textit{Id.} at 88-89.

\textsuperscript{10} 618 F.2d at 387 (partially dissenting opinion).
from a broken arm. Carl's arm had been fractured as a result of a beating by his father. After she turned to the state for assistance, the Florida Department of Health and Rehabilitative Services initiated a dependency proceeding to obtain custody of the child. The facts surrounding Hilary Davis' initial involvement with the State Department of Health and Rehabilitative Services, leading up to the initiation of formal dependency proceedings, are in dispute.

Custody of the child was granted to the Florida Department of Health and Rehabilitative Services at a "detention hearing" held in the Dade County Circuit Court, Family Division, on February 4, 1976. Custody of the child had been awarded to the state on a temporary basis, pending the "adjudicatory hearing" scheduled to take


12. According to the court records, Mrs. Davis voluntarily sought foster care placement for her son to assure that he would be cared for while she relocated and obtained work. Mrs. Davis' attorneys, however, contend that a hospital staff member initiated contact with the State Department of Health and Rehabilitative Services by filing a child abuse report with that agency. Relying on this report, agency representatives decided that the child should be removed from the custody of his parents. Case Note, Juvenile Dependency Proceedings - Critical Analysis Used In Criminal Proceedings Governs Timing Of Right To Counsel In Child Dependency Proceedings (Davis v. Page, S.D. Fla. 1977), 8 FLA. ST. U.L. REV. 99 (1980).

It is possible that this factual dispute may have arisen from either the social worker's misunderstanding the nature of the type of assistance Hilary Davis was requesting, or the social worker's unwillingness to accept, without further investigation, the claim that it was the child's father, rather than Hilary Davis herself, who beat and injured the infant.

13. Ch. 75-48, § 15, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39.01(15) (1979)) reads in full: "'Detention hearing' means a hearing at which the court determines whether it is necessary that the child be held in detention care, shelter care, some other placement outside his own home, or in his own home under court-imposed restrictions, pending a hearing to adjudicate delinquency or dependency. . . ."

14. 618 F.2d at 375.

15. Ch. 75-48, § 15, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39.01(3) (1979)) reads in full: "'Adjudicatory hearing' means a hearing at which the court makes its finding of fact and enters an appropriate order dismissing the case, withholding adjudication, or adjudicating the child to be a delinquent child or a dependent child."

The adjudicatory hearing is a formal court proceeding conducted by the judge without a jury. The Florida Rules of Juvenile Procedure and the rules of evidence used in civil cases are applied. FLA. STAT. § 39.09(1)(b) (1975) (current version at FLA.
place on March 4, 1976. Thus, Carl Davis was released by the hospital, not to his mother, but to the State of Florida.

Mrs. Davis appeared at the February 4, 1976 detention hearing without an attorney. It is undisputed that she was indigent at that time. The judge did not offer to appoint an attorney on that date, but he did advise her to have counsel present at the adjudicatory hearing set for March 4, 1976. Because of her lack of funds, however, Mrs. Davis was unable to hire an attorney to represent her at the adjudicatory hearing. She made some attempts to obtain a lawyer through Legal Services of Greater Miami, but appeared at the March 4, 1976 hearing without counsel. At that time, Carl was adjudicated dependent and committed to the temporary legal custody of the Florida Department of Health and Rehabilitative Services. 16 Hilary Davis was advised, at the conclusion of the hearing, to contact a lawyer. She was not advised of her right to appeal from the adjudication of dependency.17

Two weeks after the expiration of the thirty-day period allowed for filing an appeal to the Florida District Court of Appeal, Mrs. Davis obtained the services of Florida Rural Legal Services, Inc. 18 On May 11, 1976, she filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida, which was denied by Order on May 18, 1976, without opinion.19

On June 24, 1976, a petition was filed by Mrs. Davis for Writ of

\[\text{STAT.} \, \text{§} \, 39.408(1)(b) \, (1979)).\]

16. When a child is adjudicated dependent, the court may place him under protective supervision in his own home, commit him to a licensed child-caring agency, commit him to the temporary legal custody of the state, or under specified circumstances, permanently commit the child to the Department of Health and Rehabilitative Services or a licensed agency to receive the child for subsequent adoption. OFFICE OF EVALUATION, FLA. DEP'T OF HEALTH AND REHABILITATIVE SERVICES, AN EVALUATION OF FLORIDA'S CHILD WELFARE SERVICES (1979).

When the child is committed to the temporary legal custody of the state, the commitment continues until terminated by the court, which may be done at any time, or until the child reaches the age of eighteen years. Ch. 75-48, § 16; 1975 Fla. Laws 104 (current version at FLA. STAT. § 39.41(4), (6) (1979)).

17. 442 F. Supp. at 261.

18. Supplemental Brief for Plaintiff-Appellee at 13, Davis v. Page, 618 F.2d 374 (5th Cir. 1980). Mrs. Davis' attorney certified therein that he was retained by Hilary Davis on April 19, 1976.

19. Id.
Habeas Corpus and Complaint seeking declaratory and injunctive relief in addition to class action status in the United States District Court for the Southern District of Florida. On December 22, 1976, Mrs. Davis' motion for class action status was granted by the district court. Subsequent to filing her petition and complaint in federal court, Mrs. Davis filed a petition in the Dade County Circuit Court seeking the return of custody of her son. Her petition was granted and the court returned custody to Mrs. Davis, subject to continuing supervision of the Department of Health and Rehabilitative Services and the continuing jurisdiction of the Dade County Circuit Court.

The federal district court concluded that there is an absolute right to counsel for indigent parents in dependency proceedings in Florida. Defendants in the federal district court action (the Florida judges of the Eleventh Judicial Circuit) appealed the district court's decision, and on June 6, 1980, the United States Fifth Circuit Court of Appeals affirmed the decision. On March 23, 1981, this decision was affirmed by the Fifth Circuit sitting en banc.

RIGHT TO COUNSEL IN DEPENDENCY HEARINGS

Due process, as accorded by the fourteenth amendment, is the basis upon which the Fifth Circuit rested its holding. To determine whether due process requirements applied, the court looked "not to the 'weight' but to the nature of the interest at stake . . . to see if the interest [was] within the Fourteenth Amendment's protection of liberty and property." The right to family integrity as a fundamental right is

20. Supplemental Brief for Appellants at 3, Davis v. Page, 618 F.2d 374 (5th Cir. 1980).
21. Pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, the class was defined as "all indigent persons who have been or may be defendants in dependency and neglect proceedings in the Juvenile and Family Division of Dade County Circuit Court, without being afforded the right to counsel at state expense and without being advised of their right of counsel." Id. at 4, citing Record on Appeal at 124-28.
22. Supplemental Brief for Appellants at 3-4, 618 F.2d 374 (5th Cir. 1980).
23. Supplemental Brief for Plaintiff-Appellee at 49, 618 F.2d 374 (5th Cir. 1980).
25. 618 F.2d 374 (5th Cir. 1980).
27. 618 F.2d at 378 (emphasis in the original) (restated in Davis v. Page, No.
well established and was not at issue in the clash between the federal judiciary and the Florida Supreme Court. Rather, at issue was the proper method to employ to adequately safeguard that fundamental right. The Florida Supreme Court, subsequent to the district court's decision in Davis, reaffirmed its own recognition of a "constitutionally protected interest in preserving the family unit and [in] raising one's children." However, the court also indicated that "the extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved."

In examining the nature of the proceedings involved in cases in which the United States Supreme Court has established an absolute right to counsel, the Florida Supreme Court concluded that this right applies only in criminal cases and flows principally from the sixth amendment right to counsel, applied to the states through the fourteenth amendment, rather than from the fourteenth amendment due process guarantee. Right to counsel in dependency proceedings, on the other hand, is governed by due process considerations, rather than the sixth amendment.

According to the Florida Supreme Court, due process considerations flowing from the fourteenth amendment are adequately safeguarded by application of the criteria adopted by the Ninth Circuit in Cleaver v. Wilcox, but rejected by the Fifth Circuit in Davis v. Page. The court

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29. 385 So. 2d at 90.
31. Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel in a capital case); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel for serious noncapital offenses); In re Gault, 387 U.S. 1 (1967) (right to counsel for juveniles in juvenile delinquency proceedings where the issue is commitment of the juvenile for criminal conduct); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel for petit offenses whenever imprisonment could be imposed).
32. 385 So. 2d at 89.
33. 499 F.2d 940 (9th Cir. 1974).
expressly affirmed the use of these criteria on a case-by-case basis in its landmark decision of *Potvin v. Keller.* It recently reaffirmed its position in *In the Interest of D.B.*, decided subsequent to the district court's decision in *Davis.* The Florida Supreme Court, however, expressed partial agreement with the *Davis* decision in *In the Interest of D.B.*, indicating that to meet due process considerations counsel is "always required in proceedings where permanent termination of custody might result [or] when the proceedings . . . may lead to criminal abuse charges." Proper application of the *Potvin* test will always require appointment of counsel in these situations, so an absolute rule is not viewed as necessary. In other dependency situations, under the *Cleaver* analysis, due process requirements may be met by the statutory provision for notice and opportunity to be heard. Another Florida case on point prior to *In the Interest of D.B.* reversed an adjudication of dependency on the grounds that the indigent parent was not afforded counsel at the adjudicatory hearing. This decision was reached by a Florida District Court of Appeal, utilizing the *Potvin* case-by-case approach.

Examining the nature of dependency proceedings in Florida, the Fifth Circuit concluded that the case-by-case approach is "unworkable." The court based this holding upon an analysis of a dependency

34. 313 So. 2d at 706 (footnotes omitted). The criteria include:
   (i) the potential length of parent-child separation,
   (ii) the degree of parental restrictions on visitation,
   (iii) the presence or absence of parental consent,
   (iv) the presence or absence of disputed facts, and
   (v) the complexity of the proceeding in terms of witnesses and documents.
   The *Cleaver* criteria not only comport with constitutional due process requirements, they offer a sensible set of guidelines for determining the inherent unfairness of a custody proceeding.

35. 385 So.2d at 90-91.
36. Id. at 90.
37. The essence of due process is the requirement that one in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it. Matthews v. Eldridge, 424 U.S. 319 (1976).
39. Id.
40. 618 F.2d at 383.
action as one which is procedurally comparable to a criminal court proceeding. The court started by noting that the United States Supreme Court rejected the case-by-case rule of Betts v. Brady\(^4\) in its landmark decision, Gideon v. Wainwright,\(^4\) which established the absolute right of indigent criminal defendants threatened with imprisonment to appointed counsel.\(^4\) From Gideon, the Supreme Court found an absolute right to counsel for indigent juveniles faced with delinquency proceedings in the case of In re Gault.\(^4\) The Fifth Circuit, recognizing the potentially serious consequences to the parent, held that the indigent parent involved in a dependency proceeding stands in virtually the same position as the indigent juvenile faced with a delinquency proceeding.\(^4\) The court concluded that the parent in this situation “needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”\(^4\)

Does the parent in a dependency hearing, who is not referred to as a “defendant,” require a defense? “As a practical matter . . . the state through the Department of Health and Rehabilitative Services accuses the parent of abuse or neglect of a child.”\(^4\) However, the language from Gault may not be as broad as interpreted by the Fifth Circuit. Gault continues: “[t]he child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”\(^4\) This language appears to emphasize the formal accusations lodged against the juvenile defendant. The Supreme Court in Gault quoted from its decision establishing an absolute right to appointed counsel for an indigent defendant in a capital case.\(^4\) The Gault Court stressed heavily the fact that a juvenile in a delinquency hearing, like an adult in a criminal prosecution, is

\(^{41}\) 316 U.S. 455 (1942).
\(^{42}\) 372 U.S. 335 (1963).
\(^{43}\) 618 F.2d at 384.
\(^{44}\) 387 U.S. 1 (1967).
\(^{45}\) 618 F.2d at 381.
\(^{46}\) Id., citing 387 U.S. at 36.
\(^{47}\) CONTINUING LEGAL EDUCATION COMMITTEE, THE FLA. BAR, FLORIDA JUVENILE LAW AND PRACTICE 218 (1979-80)(emphasis added). See note 1 supra, demonstrating that the parent is not always the accused in a Florida dependency action.
\(^{48}\) 387 U.S. at 36, citing Powell v. Alabama, 287 U.S. at 69 (emphasis added).
\(^{49}\) Id.
confronted with the "awesome prospect of incarceration."  

In a partially dissenting opinion, Judge John R. Brown of the Fifth Circuit pointed out that "[e]very case on which the majority . . . relied in support of its holding of an absolute right to counsel for parents in a child dependency proceeding, is a criminal case involving the sixth amendment, or at least involving the potential confinement of the person to whom the absolute right is granted." Judge Brown reflects the position of the Florida Supreme Court that the right to counsel in a dependency hearing flows, not from the sixth, but from the fourteenth amendment, and is therefore a right of different constitutional dimensions.

A criminal defendant's right involves his protection of his own liberty; a parent's right in a dependency proceeding involves maintaining custody of his child. In the latter case, it is the child's best interest which is paramount. A dependency proceeding, unlike a delinquency proceeding, is not against the child. To the contrary, Samuel P. Bell, majority leader of the Florida House of Representatives, stated, "[b]roadly defined, the 'delinquent' is a child who has committed an act in violation of the law; the 'dependent' is the innocent victim of actions or conditions over which he has little or no control." A dependency hearing is against neither parent nor child, rather, it is for the child. Bell indicates that the attorney representing a parent in a dependency action must be cautious because "[t]he natural tendency is to want to represent the adult against an agency or professionals who are questioning the adult's behavior, rather than recognizing there is a deep-seated problem with the family or the child."

The Fifth Circuit in *Davis*, however, concentrates on the severe consequences which may flow to the parent after the adjudication of dependency is made. In order to regain custody of the child, the parent must petition the court to return the child through a "disposition hearing." At this hearing, the parent bears the burden of proof to demon-

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50. 387 U.S. at 36.
51. 618 F.2d at 388-89. Judge Brown, joined by ten of his colleagues, reiterated this position in a strong dissent in the *en banc* decision.
52. Bell, *supra* note 2, at 652.
53. *Id.* at 658.
strate that, because of subsequent developments, restoration of custody is in the best interest of the child. The effect of shifting the burden can be disproportionate.

In a recent evaluation of Florida’s child welfare services, the Florida Department of Health and Rehabilitative Services found that the mean stay in foster care for dependent children is two years and ten months. Cases were documented in which children had been in foster care for over seventeen years. In over thirty-six percent of the cases examined, children had remained in foster care for more than five years. The effect of an adjudication of dependency can be a commitment of the child to the temporary custody of the state, which continues until terminated by the court, following a disposition hearing, or until the child reaches the age of eighteen years. Since temporary custody may encompass the entire period prior to a child’s reaching legal adulthood, Davis raises the question of whether a temporary commitment might always carry the potential of permanently terminating a parental custody. Viewed in this light, temporary commitment proceedings would always come under the Florida Supreme Court’s post-Davis rule, requiring appointment of counsel to indigent parents whenever permanent termination of parental rights is threatened.

55. 618 F.2d at 380.
56. Evidence inadequate to support a finding of dependency may nevertheless be “adequate to support [a] . . . refusal to restore custody,” even when the parents demonstrate their fitness, ability, and willingness to properly rear their child. Pendarvis v. State, 104 So. 2d 651, 652 (Fla. 1st Dist. Ct. App. 1958).
58. Id. at 30-31.
59. Id. at 71-73.
60. See discussion at note 16 supra.
THE JURISDICTION QUESTION: SHOULD THE ISSUE BE RESOLVED BY FLORIDA COURTS OR BY FEDERAL COURTS?

Hilary Davis was not advised by the Dade County Circuit Court of her right to appeal the adjudication of her child's dependency under Florida law. She did not obtain the services of an attorney until the expiration date for filing a state appeal had passed. Her petition for habeas corpus to the Florida Supreme Court was denied. At that point, she had exhausted her state remedies and consequently, sought federal habeas corpus relief.

Whether the federal district court abused its discretion in adjudicating Mrs. Davis' claim is an issue raised by Judge John R. Brown of the Fifth Circuit in his partially dissenting opinion. The Dade County judges in their supplemental brief for the rehearing en banc, argued that although no particular petition was before the state court at the time Mrs. Davis filed her federal action, the jurisdiction of the state circuit court had been invoked and was continuing. Therefore, arguably, she had not exhausted state remedies. In fact, acting upon a petition subsequently filed by Mrs. Davis, the state circuit court returned custody of her child to her, exercising its continuing jurisdiction. In contrast, Mrs. Davis argued that she was properly before the district court.


63. See Supplemental Brief for Plaintiff-Appellee at 13, Davis v. Page, 618 F.2d 374 (5th Cir. 1980). Mrs. Davis' attorney certified therein that he was retained by Hilary Davis on April 19, 1976.
64. Id.
65. 618 F.2d at 387-89.
66. Supplemental Brief for Appellants at 39, 618 F.2d 374 (5th Cir. 1980).
67. Id. at 3-4.
68. See Supplemental Brief for Plaintiff-Appellee at 49, 618 F.2d 374 (5th Cir. 1980).
court, having satisfied the requirements of Younger v. Harris and Moore v. Sims, since there were adjudicatory proceedings pending. The jurisdiction question was dealt with by the Fifth Circuit Court of Appeals in its rehearing of the case en banc. A bare majority acknowledged the propriety of federal habeas corpus jurisdiction in the case.

CONCLUSION

The Florida Supreme Court's rule (based on the Ninth Circuit's case-by-case approach) has now been declared unconstitutional by the Fifth Circuit Court of Appeals. Judicial fireworks may yet be anticipated in view of the split which now exists between the Ninth Circuit, which maintains the case-by-case approach, and the Fifth Circuit's absolute rule.

As noted in the beginning of this comment, Florida law classifies a great many different types of children as "dependent." This complicates the question of whether the indigent parents of a child involved in dependency proceedings should always, or only under certain circumstances, be granted the right to court-appointed counsel. For example, a child may have been abandoned by the parents, or may find himself presented to the court by his parents, who charge that he is "ungovernable" in that he persistently disobeys their reasonable and lawful demands. In these situations, should the state pay for the parent's attorney? Certainly there are dependency situations in which the child needs legal counsel at least as much as the parent, such as the case of alleged parental abuse. In dependency proceedings, there are always three interests: the child, the parent, and the state. These interests may align and realign in various permutations, particularly according to the category of dependency involved. To achieve fairness of all parties, a rule should be adopted with sufficient flexibility to adequately protect each interest within the context of each dependency situation. How-

70. 442 U.S. 415 (1979), extending the Younger doctrine to matters involving child custody.
72. FLA. STAT. §39.01(9)(c) (1979). Regardless of the category involved, an adjudication of dependency can result in loss of parental custody. See note 16 supra.
ever, in the adoption of such a rule, the protection of the child’s best interests must not be sacrificed out of concern for the rights of his parents.

Lucy Chernow Brown
The Demise Of Lex Loci Delicti: Bishop v. Florida Specialty Paint Co.

Where a Florida resident incurs injuries as a result of tortious conduct perpetrated by another Florida resident in a foreign state, and an action to recover for the injuries is subsequently initiated in Florida, should the law of the place of the wrong\(^1\) govern the substantive rights and liabilities of the parties concerned? Prior to the decision rendered by the Supreme Court of Florida in *Bishop v. Florida Specialty Paint Co.*,\(^2\) state courts were mandated to adhere to the doctrine of *lex loci delicti* and apply the law of the place of the wrong irrespective of any other factors.\(^3\) In *Bishop*, guest passengers in an aircraft were injured when the aircraft, en route from Jacksonville, Florida to North Carolina, experienced engine difficulties and crashed in South Carolina. The trial court, applying the doctrine of *lex loci delicti*, granted a summary judgment in favor of the defendants. The court held that the law of South Carolina\(^4\) governing the standard of care imposed on a pilot and an owner of an airplane should be the controlling guideline rather than the law of Florida.\(^5\) Whereas Florida law merely required a showing of

2. 389 So. 2d 999 (Fla. 1980), answering the certified question issued by the First District Court of Appeal in 377 So. 2d 767 (Fla. 1st Dist. Ct. App. 1979).
4. S.C. Code § 55-1-10 (1976) provides in pertinent part:
   No person transported by the owner or the operator of an aircraft as his guest without payment for such transportation shall have a cause of action for damages against such aircraft, its owner or operator for injury, death or loss in case of accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or reckless disregard of the rights of others.
5. *Fla. Stat.* § 320.59 (1940), the Florida guest statute, was repealed by ch. 72-
ordinary negligence, South Carolina law required a showing of either "heedless or reckless disregard of the rights" of others or that the accident was intentional. Plaintiffs conceded they could not satisfy the burden imposed by South Carolina law.

On appeal, plaintiffs, relying on Hopkins v. Lockheed Aircraft Corporation, argued that a modern approach to choice-of-law problems in tort actions should be adopted by the court. They advocated the adoption of the "most significant relationship" approach. Upon affirming the trial court's decision, the District Court of Appeal, First District, articulated:

Despite the uncertainties created by the court's action in Hopkins of first receding from the lex loci delicti rule (by a vote of 4 to 3) and then, on rehearing granted, reversing its original opinion (by a vote of 4 to 3), we conclude that the net effect of the decision was to leave in the rule as


7. 201 So. 2d 743 (Fla. 1967). In Hopkins, the plaintiff urged the Supreme Court of Florida to adopt a modern approach to choice-of-law problems. The Court agreed with the plaintiff, but on rehearing, it reversed its decision stating that it was not yet time to recede from the doctrine of lex loci delicti given the objectivity with which the doctrine could be applied. Id. at 752.

8. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). Section 145 reads as follows:

§ 145. The General Principle
(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
   (a) the place where the injury occurred,
   (b) the place where the conduct causing the injury occurred,
   (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
   (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.
previously established and generally followed by the Florida courts.\textsuperscript{9}

The district court, in light of the “great public interest”\textsuperscript{10} attached to the issue, then certified to the Supreme Court of Florida the following question:

Does the lex loci delicti rule govern the rights and liabilities of the parties in tort actions, precluding consideration by Florida courts of other relevant considerations, such as the policies and purposes underlying the conflicting laws of a foreign jurisdiction where the tort occurred, and the relationship of the occurrence and of the parties to such policies and purposes?\textsuperscript{11}

As previously indicated, the Supreme Court of Florida responded to the certified question in the negative. The Court acknowledged the “consistency and stability [promoted] by [the] application of a stable and objective standard [i.e., the doctrine of lex loci delicti] for choice-of-law determinations.”\textsuperscript{12} However, it also stated that there were several factors in the Bishop case which disclosed the need for and prompted the Court to adopt a more flexible rule. The Court noted:

In the present case, for instance, the weekend trip was to begin and end in Florida, plaintiffs and defendants are all Florida residents, and the host-guest relationship between the parties arose in Florida. The relationship of South Carolina to the personal injury action is limited to the happenstance of the plane coming into contact with South Carolina soil after developing engine trouble in unidentified airspace.\textsuperscript{13}

In light of these factors, the Court announced that the time had arrived for a choice-of-law rule which would encompass factors of this nature. It therefore proclaimed the adoption of the “most significant relationship” approach.

To evaluate and fully comprehend the impact that the Bishop case will have upon future litigation, one needs to analyze the roots, criti-

\textsuperscript{9} 377 So. 2d at 768.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980).
\textsuperscript{13} Id.
cisms and applications of the two concepts — the doctrine of *lex loci delicti* and the “most significant relationship” approach. This comment initially seeks to trace the birth of the traditional rule and to elaborate upon the factors which justified its original popularity as well as those which ultimately provoked its demise. Thereafter, it examines the modern approach to ascertain whether it will rectify the problems encountered under the traditional rule.

**The Doctrine of *Lex Loci Delicti***

The doctrine of *lex loci delicti* was conceived as early as the mid-nineteenth century. It emanated from the “vested rights” theory which dictated that “a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law.” Its chief proponent was Professor Joseph H. Beale. Courts and legal scholars have articulated numerous and varied justifications for the doctrine. In *First National Bank in Fort Collins v. Rostek*, the Supreme Court of Colorado justified the doctrine on the basis that “[i]n the mid-nineteenth century, conditions were such that people only occasionally crossed state boundaries. Under those circumstances, there was legitimacy in a rule which presumed that persons changing jurisdictions would be aware of the different duties and obligations they were incurring when they made the interstate journey.” In *Hopkins v. Lockheed Aircraft Corporation*, the Supreme Court of Florida was impressed by the doctrine’s objectivity, consistency and stability. The Court stated that “[t]here are obvious virtues, in consistency and stability, supporting the application of laws whenever possible in a cohesive rather than piece-

15. For a treatment of this theory, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 Harv. L. Rev. 361 (1945).
19. *Id.* at ___, 514 P.2d at 316.
20. 201 So. 2d 743 (Fla. 1967).
meal fashion. In other words, the applicability or inapplicability of foreign law should so far as possible be based on objective and stable standards.”21 It has also been suggested by William Reese, one of the Reporters of the Restatement (Second), that the doctrine was justified by man’s proclivity to make things as easy as possible:

For it is in the nature of men to seek certainty and simplicity in the law. They will wish to regulate a field by a few simple rules if rules of this nature can be devised to handle adequately the problems involved. And if a few simple rules will handle all, or at least the great majority, of problems that have arisen in a great field, men will be tempted to believe that the same rules can satisfactorily be applied to handle all other problems with which they may thereafter be faced.22

Finally, supporters of the doctrine emphasized the expediency, uniformity, certainty and predictability23 which the doctrine promoted.24

As society grew increasingly mobile, and even before Professor Beale had completed his task of embodying the doctrine of lex loci delicti into the first Restatement, the doctrine was subjected to strict scrutiny by legal scholars in the field.25 The criticism proved warranted. While application of the doctrine appeared to pose no inequities to sin-

21. Id. at 752.
22. Reese, supra note 17, at 680.
23. But see Reese, supra note 17, at 681. Reese contends that “rules cannot bring certainty and predictability to a subject in which these values do not exist. Of necessity, many conflicts rules must be fluid in operation and leave much to be worked out by the courts.” On another occasion, Reese expanded upon his criticism of the traditional rule:

In retrospect, it seems clear that rules of this sort, at best in areas of contract and torts, could not prove successful. There are many different kinds of contracts and torts. The number of issues that can arise in these two areas of law and the variety of ways that relevant contacts can be grouped among the interested states border on the infinite. Certainly it would be miraculous if all issues could be satisfactorily decided by application of the law of the place of [the wrong].

gle state torts, the perfunctory application of the doctrine to cases where several states, especially the forum state, were significantly related to the occurrence proved problematic and frequently produced harsh results. To circumvent these unjust decisions, and frequently to invoke their own state laws, courts began to employ "manipulative devices" including characterization, public policy, and renvoi. As

26. See Note, supra note 24, at 464-65, analyzing Tom v. Messinger, 203 So. 2d 357 (Fla. 2d Dist. Ct. App. 1967). In Messinger, two Florida residents, who had embarked on a round-trip journey to Washington, D.C., were killed when their automobile collided with a bridge abutment in North Carolina. The passenger's minor child brought a wrongful death suit under sections 768.01 and 768.02, Florida Statutes, against the driver's estate. The suit was subsequently dismissed with prejudice when the court concluded that North Carolina law governed, precluding suit by individuals other than the representative of a decedent's estate. Acknowledging that the decedents were both residents of Florida, that the guest-host relationship originated in Florida, that the journey was commenced and terminated in Florida, the court articulated that nevertheless it had an inviolable duty to adhere to the doctrine of lex loci delicti. The inequity manifested itself in the court's refusal to consider these factors and the fact that North Carolina had no interest in applying its law. The policy behind its law — distribution of recovery through the law of descent and distribution — would not have been advanced by the interjection of North Carolina law into an action involving Florida residents and Florida property.


It is an essential early step in almost any legal analysis, but the step is one that can serve the purposes of the legal artist as well as the legal logician. If more than one characterization is logically available on a set of facts and permissible, the choice between the characterizations may turn on a judicial desire to achieve justice in the particular case, on a public policy preference for one rule of law over another, on a preference for the forum state's own law or on something else other than pure logic.

Id. at 212.

[It] is an elementary aspect of legal reasoning. But it should not be made to perform functions beyond its own purpose, which is classificatory only. Characterization is a proper initial step in any legal problem, including choice-of-law problems. If more than one traditional characterization is available on a given set of facts, all possible characterizations should be identified and brought into the open. Not until this is done is it possible to see what proper choice influencing
the courts' propensity to employ these devices increased, the once advocated virtues of the doctrine of *lex loci delicti* became progressively illusory. This judicial propensity to escape the strict application of the doctrine indicated that with the "horse and buggy days" gone, the time had ripened for the adoption of new choice-of-law theories which would embrace considerations of policy, fairness and other relevant factors.32

**THE MOST SIGNIFICANT RELATIONSHIP APPROACH**

In 1963, a response to the overwhelming dissatisfaction with and the harshness of the doctrine of *lex loci delicti* was articulated by the New York Court of Appeals. In *Babcock v. Jackson*,33 that court proclaimed its abandonment of the doctrine and its adoption of the most significant relationship approach posited in the *Restatement (Second).*34 Elaborating upon his theory selection, Judge Fuld declared:

> Justice, fairness and "the best practical result" . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.

.Id. at 215.

29. The public policy manipulative device was employed when a forum deemed the law of the jurisdiction whose law was to govern to be "shocking." See Sedler, *supra* note 27, at 841 (1978). According to Judge Cardozo in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918), a law was deemed "shocking" if enforcement thereof would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of common weal." Sedler, *supra* note 27, at 841 n.68. It is demonstrated in *Gillen v. United Servs. Auto. Assoc.*, 301 So. 2d 613 (Fla. 1974) and *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967) that Florida courts do subscribe to the use of this device.

30. *See, e.g., Richards v. United States*, 369 U.S. 1 (1962). In *Richards*, the Court, by employing the renvoi device, ruled that a federal district court was obligated to apply not only the internal law of the state where the negligent act or omission transpired, but the whole law, including the choice of law rules of the state.

31. *Ideal Structures Corp. v. Levine Huntsville Dev. Corp.*, 396 F.2d 917, 922 (5th Cir. 1968).

32. *See 377 So. 2d at 768.*


The merit of such a rule is that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context. . . ." 35

Since Judge Fuld rendered his decision in Babcock, numerous states, Florida now among them, have adopted one of several modern approaches to conflicts-of-law problems.36 As applied, the most significant relationship approach entails a two-prong test. Failure to respect either prong will only be counterproductive.37 It is imperative that those variables listed under Section 14538 of the Restatement (Second) be examined in light of the vari-

35. 191 N.E.2d at 283.
37. See Leflar, supra note 27, at 269.
38. The variables listed under Section 145 include:
   (a) the place of the injury,
   (b) the place where the conduct causing the injury occurred,
   (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
   (d) the place where the relationship, if any, between the parties is centered.

Reinstatement (Second) of Conflict of Laws § 145 (1971).
ables enumerated under Section 6 of the Restatement (Second). It was from these factors that the approach derived its flexibility and earned judicial respect and recognition. This flexibility permitted courts to eliminate "false conflicts," minimize the use of manipulative devices and determine the applicable law on an issue by issue basis.

Irrespective of the obvious attributes of the new approach as compared with the doctrine of *lex loci delicti*, critics have revealed that the most significant relationship is not the anticipated conflicts panacea, for its viability is threatened by a few inherent infirmities. It has been suggested that the language of Sections 6 and 145 of the Restatement (Second) is rather indeterminate and without direction. Interpretation of terminology is left to the discretion or "idiosyncratic analysis" of courts. This discretion militates against the choice-of-law policies of predictability of result and uniformity of application. Moreover,

39. Section 6 provides for consideration of the following factors:
   (a) the needs of the interstate and international systems,
   (b) the relevant policies of the forum,
   (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
   (d) the protection of justified expectations,
   (e) the basic policies underlying the particular field of law,
   (f) certainty, predictability and uniformity of result, and
   (g) ease in the determination and application of the law.

Id.

For a discussion of these factors, see Reese, *supra* note 17, at 682-91.

40. For a discussion on false conflicts, see Note, *supra* note 24, at 464 n.7.


42. *Id.* at 273; Babcock v. Jackson, 191 N.E.2d at 283-84. In other words, it is conceivable that in a single case, one state's law may govern with respect to one issue and another state's law may govern with respect to another issue. In contrast, the doctrine of *lex loci delicti* appeared omnipotent. Leflar states:

[The doctrine] covered all such aspects of the act and injury in question as the state of mind with which the act was done, the motive if any, the surrounding circumstances tending to indicate negligence or non-negligence, including contributory negligence, privilege or other legal justification for the act, its causal connection with produced results . . . and all other matters inherent in the act and injury which go to determine their legal characteristics.

LEFLAR, AMERICAN CONFLICTS LAW 317 (1968).

43. *See* Note, *supra* note 24, at 472.

44. Leflar, *supra* note 37, at 273.

45. *See* 514 P.2d at 318.
Courts may be prone to construing the variables in a self-serving, as opposed to neutral, fashion. 46

Critics also warn that the absence in the Restatement (Second) of any direction as to the relative weight to be accorded to the variables of Sections 6 and 145 will have adverse consequences. 47 They point out that although the approach requires that the variables be qualitatively, not quantitatively, 48 weighed, the absence of any direction allows the courts, on a carte blanche basis, to subjectively assign greater significance to one factor than to another. 49 They predict that the ultimate result of this exercise of judicial subjectivity will be a return to the doctrine of lex loci delicti. Courts will be forced to place a premium on the first consideration of Section 145, to wit, the place of the wrong. 50

Finally, the critics warn the legal community that this complex approach cannot be applied in a simplistic manner. They advise the community that the approach should not be transformed into a mechanism by which the factual contacts of each state involved are counted and the law of the state with the greatest number of contacts be held applicable. 51

CONCLUSION

By exposing the infirmities of both the doctrine adhered to in the past and the newly adopted approach, it is hoped that this comment has defined the boundaries within which the Florida courts should venture in order to achieve the justice and fairness sacrificed in the past. At this point, Florida courts enter into a transitional period during

48. LEFLAR, AMERICAN CONFLICTS LAW 221 (1968).
50. See Reese, supra note 17, at 704. Reese states that “again we are entangled in the circular reasoning which refers us to the law under which the ‘cause of action’ is alleged to have vested, and again the place of wrong, so often fortuitous, assumes its predominant importance.” Id. at 704.
51. LEFLAR, supra note 48, at 330.
which they will learn to implement the requirements of this newly adopted approach and learn from the experiences of sister courts in other states who adopted the approach long ago.

Deborah Ohman-Zimet

Reviewed by Michael M. Burns*

Since embarking on a career in the law, I have regarded William O. Douglas as one of a handful of outright “heroes.” Such unsophisticated adulation — or at least the admission thereof — hardly befits my professorial station. As academics, we tend to be observers, not participants — self-appointed social critics, often cynical, arrogant and judgmental, removed from the fray, attuned to our intellects but rarely to our hearts. We forget to have fun, and having heroes is fun. That is not to say that I, as an adult, have felt the same way about William O. Douglas as I did, as a child, about Willie Mays. What I admired, and virtually all that I knew, about Mr. Mays were his professional accomplishments at homeplate and in centerfield. On the contrary, my admiration for Justice Douglas has less to do with his judicial opinions than with the inspirational quality of his broad-ranged, extrajudicial life experiences and, in turn, his deeply-held personal values.

Given these predilections, it is not surprising that I found The Court Years far less interesting than Justice Douglas’s first volume Go East, Young Man. The Court Years is largely a collection of disjointed anecdotes, some of which are noteworthy, loosely gathered under poorly selected chapter headings. In addition, the stylistic inconsistencies, due to the editors’ contributions following the author’s death, disturb the flow and take their toll on the reader. Lawyers will find the discussion of cases rather elementary and largely unrevealing; general readers will understand the explanations of cases but will find little of interest regarding the legal process or the human frailty of the justices, especially if their bubbles have already been burst by The Brethren. Notwithstanding these criticisms, I recommend the book, although I

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3. I would be greatly surprised to learn that there are, in fact, people who read
am sure that even Justice Douglas himself would not regard it as a great work.

On a purely informational level, there are some interesting anecdotes and observations. For example, Justice Douglas expresses his regrets about his Korematsu opinion, explains his writing both the majority and minority opinions in Meyer v. U.S., and gives a behind-the-scenes view of the justices negotiating prior to the decision in Brown v. Board of Education. He discusses the offers he received from two presidents of the United States to be their running mates and the movement to draft Justice Douglas as a presidential nominee, and reveals the naivety of the Bible-toting, proselytizing Robert F. Kennedy traveling through Russia.

Many of us will find passing enjoyment in the tidbits of personal gossip — information which is of admittedly marginal intellectual value but which is no less intriguing than the slick pages which we skim in the waiting room of our dentist’s office or at the supermarket check-out counter. Who among us can deny a sense of gleeful voyeurism when a person of Justice Douglas’s stature describes Lyndon Baines Johnson as “Machiavellian,” “obsessed with the desire to be loved,” and as one who “gave the heritage of America away to the fat cats and the official vandals who have despoiled us;” or Richard Nixon as an “underhanded,” “deceitful,” “amoral,” “unethical,” book reviews in the back pages of law journals for the purpose of obtaining advice on whether to invest the necessary time and money in a book, but if such an audience exists, it deserves an opinion.

2. Id. at 173-74.
3. Id. at 113-15.
4. Id. at 281-83, 289-90.
5. Id. at 306-07.
6. Id. at 317.
7. Id. at 333.
8. Id. at 318.
9. Id. at 342.
10. Id. at 343.
11. Id. at 351.
expedient liar with an ego whose appetite was "devastating;" or General Curtis E. LeMay as "The Stone Age Man." In the category of celebrity trivia, is it widely known that Justice Douglas's butler Rochester was the man "after whom Jack Benny was to name a famous radio and movie character?"

The book does contain, in addition, numerous thought-provoking ideas and inspiring passages. The source of this inspiration is, I suggest, the depth of Justice Douglas's own life experience, particularly his childhood poverty and polio and his wilderness trips and world travels throughout his life, references to which we find primarily in his earlier books. If we are to accept Chief Justice Hughes's piece of advice to the newly arrived Justice Douglas — "[Y]ou must remember one thing, at the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections" — one's life experience, one's developing instinct, and one's view of mankind, become the vital ingredients in judicial decisionmaking.

A marvelous feature of teaching constitutional law is the opportunity each year to share anew with students the values which have inspired the first amendment and the views of those who have shaped its meaning. In a chapter in which Justice Douglas observes that "[b]ehind the Nixon drive for conformity was a hasty disrespect for the First Amendment," the author reflects upon his own world travels and upon the views of Thoreau, Gandhi, Faulkner and Solzehnitsyn,

16. Id.
17. Id.
18. Id. at 250.
19. Id. at 269.
20. Id. at 8.
21. For example, Justice Douglas suggests that the mass picketing of Justice Hugo Black's house in response to the revelation that he once had been a member of the Ku Klux Klan "colored his decisions in all subsequent cases involving picketing, mass demonstrations, and protest marches." Id. at 20. Legal commentators have had difficulty in reconciling Justice Black's professed "absolutism" with his position in "symbolic speech" cases, which, as Professor Alan Dershowitz observes, "is little more than speech on a stick." Dershowitz, Inside the Sanctum Sanctorum, N.Y. Times, Nov. 2, 1980, at 9, col. 1. Justice Douglas's explanation may be the best we are going to get.
22. The Court Years at 262.
noting that:

The philosophy of the First Amendment marks a bold venture, judged by the problems of this troubled world. It is bold because ideas are dangerous — more dangerous than guns. Ideas unite people; they pass over borders in spite of the battalions that guard those borders. They live on and on — throughout time. Many still walk to the measure of the ideas of Zoroaster, Buddha, Jesus, Mohammed and other men and women with powerful concepts in religious, political or educational work. So when we honor Gandhi, we honor the best in Eastern and Western civilization — the power of the mind and the right of the mind to be free — to consider, believe and speak what one thinks is the truth. . . . The values the First Amendment protects are necessary in a multiracial, multireligious, multi-ideological society of the kind we profess to be. The First Amendment sets us apart from most other nations. It marks the end of all censorship, it allows the ability of the mind to roam at will over the entire spectrum of ideas, and the sanctity of one's beliefs. It — not our bombs or air force or missiles or manufacturing skills or merchandising methods or GNP — sets us apart. A symbol of our health is the respect we show to First Amendment values.23

Perhaps the one institution most readily associated with free speech and independent thought is the university. During the McCarthy "witch hunt" era, this was not the case, and Justice Douglas emphasized the invaluable quality of debate and conflict:

With the passage of the loyalty security programs, university environments did not relax; rather they hardened. The lessons of conformity and the rewards it brought became subtle influences in academic circles. Faculties walked more and more in goose step to the tunes of the Establishment. Universities were no longer places of ferment but became more and more institutions dispensing information on how to get ahead and sedatives that made students less and less responsive to the mighty forces of rebellion that were making the nation seethe.

I believed, with William M. Birenbaum, that 'a campus without disruption is polluted, like a river without fish or a defoliated forest along the Ho Chi Minh Trail. . . . '24

23. Id. at 263, 266.
24. Id. at 110.
Justice Douglas’s travels helped mold his views on foreign policy as well, views which stood in vivid contrast to the parochialism and provincialism of our nation during the Korean War period:

[T]o understand what was happening, a person would have to leave the country, go into the back regions of the world, lose himself there and become absorbed in the problems of the peoples of different civilizations. When he returned to America after a few months, he would probably be shocked. He would be shocked not at the intentions or purposes or ideals of the American people, but at the arrogance and intolerance . . . reflected in many of our attitudes toward Asia. He would find that thought was being standardized, that the permissible area for calm discussion was being narrowed, that the range of ideas was being limited, that many minds were closed to the reception of any ideas from Asia. . . .

We thought of Asia in terms of military bases, not in terms of peoples and their aspirations. We wanted the starving people of Asia to choose sides, to make up their minds whether they were for us or against us, to cast their lot with us and against Russia.

We did not realize that to millions of these people the difference between Soviet dictatorship and the dictatorship under which they lived was not very great. We did not realize that in some regions of Asia it was the Communist Party that had identified itself with the so-called reform programs, the other parties being mere instruments for keeping a ruling class in power. We did not realize that the choice between democracy and Communism was not, in the eyes of millions of illiterates, the critical choice it was for us.

We forgot that democracy in many lands was an empty word; that its appeal was hollow when made to illiterate people living at the subsistence level. We ask them to furnish staging grounds for military operations whose outcome, in their eyes had no perceptible relation to their own welfare. 25

Unfortunately, Justice Douglas, with so rich and varied a background, is not our average lawyer. The legal profession, which exerts such disproportionate power over people’s lives, includes among its members many who have never left the halls of academia and/or the halls of justice, to say nothing of our nation’s borders. I see lawyers and judges making decisions for people whose life experiences are light

25. Id. at 65-66.
years removed from their own. I see applicants for law professorships who appear to have acquired nothing but fees and degrees and who rarely define their "experience" as including anything beyond the law. I see law students with little sense of the "renaissance person" which the fine tradition of our profession rightfully demands. And I know personally that along with the intellectual excitement and comfort of academia can come a subtle strangulation from stale air behind ivy-covered walls. If I am fortunate, I will get that periodic kick in the rear from Justice Douglas, pushing me out the office door and reminding me of the differences between experience and understanding, between empathy and sympathy.

Provocative ideas which challenge our complacency are laced throughout The Court Years. When "[m]any people in the nation felt a glow of sadistic satisfaction"\(^{26}\) in viewing newspaper photographs of Ethel Rosenberg's face as the electric charge hit her, showing "visible liquid excretions through the skin,"\(^{27}\) Justice Douglas was reminded of having witnessed the custom in Afghanistan whereby a murderer was put in a wire cage and hung from a tree while passersby assaulted him with rocks and denouncements until he died of pneumonia.\(^{28}\) While concluding that "capital punishment is barbaric,"\(^{29}\) the author dares us to acknowledge our "orgasm of delight,"\(^{30}\) to admit to our societal hypocrisy, and, if I may extrapolate, to consider televising our executions.

Self-important lawyers will undoubtedly cringe when Justice Douglas reminds us that "nothing in the Constitution"\(^{31}\) requires the President to appoint a lawyer to the Supreme Court; and that during his final year on the Court, in an attempt "to see if fresh air blowing from other disciplines would ventilate the law,"\(^{32}\) he selected law clerks from fields other than law: sociology, government, psychiatry and economics.\(^{33}\) Alternatively, he once suggested that the justices "experiment

\(^{26}\) Id. at 82.
\(^{27}\) Id.
\(^{28}\) Id. at 83.
\(^{29}\) Id.
\(^{30}\) Id.
\(^{31}\) Id. at 281.
\(^{32}\) Id. at 174.
\(^{33}\) Id.
with doing our own work"34 without the aid of clerks.

In numerous writings and speeches throughout his lifetime, Justice Douglas attributed his well-known concern for "the underdog" to his childhood polio and poverty, including, of course, his experiences riding freight and his contacts with society's outcasts. Another manifestation of these experiences is less attractive — that is, the insecurity which breeds an apparent self-righteousness and vindictiveness, qualities which surface periodically in The Court Years. There is a preoccupation with personal attacks, noted above, which says as much about the speaker as the subject, and, at times, with self-serving, bitter remarks ("[Ike] of course, had the palatial suite in Ward 8 and I was in the ordinary room down the hall.").35 To be sure, Justice Douglas, if not entirely forthright, at least acknowledged this insecurity in a revealing passage about his friendship with Joseph Kennedy's four daughters:

But though I admired them all, I never dated any of them. It would have surprised Joe to know that his friend who took a freight train across the country to law school could never marry a rich woman. The barrier was too great for me to surmount; and I never allowed it to be tested by becoming intimate with any of these wonderful Kennedy women.36

When speaking of Robert F. Kennedy, he noted sympathetically that "Bobby, being small in stature, was always overcompensating,"37 behavior which Justice Douglas himself exhibited as a polio-victim-turned-avid hiker, but which he might well have denied while preferring a description carrying less Napoleonic connotations.

Perhaps the most striking, though not entirely unexpected, aspect of The Court Years — and one which is particularly difficult to accept in a "hero" — is Justice Douglas's failure to acknowledge women. The one exception is, predictably, his mother, Julia Fisk Douglas, a strong-willed, self-sacrificing woman with deep New England roots, who alone raised the children after their father's early death.38 "[O]ut of reverence for Father . . . [she] drummed into my ears from my earliest

34. Id. at 172.
35. Id. at 300.
36. Id. at 302.
37. Id. at 305.
38. Go East, Young Man, Chapters I and II.
days” her conviction that through the Douglas blood stream was acquired “an indomitable will and capacity for achievement.” She would even recite a little speech nominating her son William for President of the United States. The pressure on a child of meeting such expectations — especially in a household where venting emotion was deemed inappropriate — was bound to create a festering anger, which eventually seeped out, coloring not only his personal relationships but his view of gender roles in society.

When a man chooses to write about thirty-six years of his life, it is not insignificant that he refers to his wife only three times, never by name, and only in passing as part of an unrelated anecdote. It may be that Justice Douglas chose to write about his public, not his private, life. That, however, does not explain the nature and the infrequency of his reference to women in public life. Of the 612 people whom the author mentions by name in this volume, only forty-one are women and, of those, twenty-one are noted merely as wives, mistresses and secretaries. Of the remaining twenty, only a handful are recognized for qualities which would complement either sex: Lady Bird Johnson for strength and wisdom, Rose Kennedy for nobility, Bessie Margolin and Constance Motley for superb advocacy in arguments before the Supreme Court. Other women were noted for delicious crab chowder, loveliness, modesty and reticence, and for unreasonable nervousness about bears.

Justice Douglas does not discuss his opinion in De Funis v. Odegard and Kahn v. Shevin, yet they are relevant in this context. De Funis involved a challenge to a law school “affirmative action” admissions program designed to help members of certain racial and ethnic

39. THE COURT YEARS at 393.
40. Id.
41. Id. at 312.
42. Id. at 309.
43. Id. at 184-85.
44. Id. at 185.
45. Id. at 224 (Mrs. Harlan Fiske Stone).
46. Id. at 292 (Mrs. Harry Truman).
47. Id. at 220 (Mrs. Charles Evans Hughes).
groups who were perceived to have suffered from societal discrimina-
tion. Justice Douglas wrote at length in opposition to the program, as-
serting that implicit in such "benign" discrimination is the assumption
that the preferred minorities "cannot make it on their individual
merit," thereby creating an impermissible "stamp of inferiority." 

In Kahn, however, decided just one day later, Justice Douglas re-
jected a challenge to Florida's $500 property tax exemption for widows
but not for widowers, deferring to the state's remedial policy of "cush-
tioning the financial impact of spousal loss" on women in an effort to
rectify the effects of past discrimination. There is no mention of perpet-
uating the perception of inferiority, and we are left to ponder why of-
fensive paternalism in one context is regarded as a generous helping
hand in another. Old-fashioned chivalry, perhaps.

Justice Douglas would have us believe that he was in the vanguard
of promoting women's rights. He reminds us that in 1944 he became
"the first Justice to have a female law clerk . . . the very able and the
very conscientious Lucille Lomen." Twenty-eight years later he hired
two more female clerks. Of the fifty-four clerks he employed during
his tenure on the bench, three were women. Although expressing the
view that any law which drew a line between men and women was
inherently suspect, Justice Douglas alluded to oral arguments by "four
wondrous Amazons . . . who droned on and on in whining voices."

Judging from his comment that a "wife [is] more dependent on
social affairs," I would surmise that, in his introspective moments,
Justice Douglas would have acknowledged a certain discomfort with
women outside their traditional roles. He may have shared more than a
love for the first amendment with his "hero," former Senator Sam Er-
vin of North Carolina, who said of his opposition to the proposed Equal
Rights Amendment: "I am trying to protect women and their fool

50. 416 U.S. at 343.
51. Id.
52. 416 U.S. at 355.
53. THE COURT YEARS at 171.
54. Id. at 416. Justice Douglas hired Janet Meik and Carol Bruch for the 1972-73 term. An account of the abusive manner in which he treated the outspoken Bruch is provided in THE BRETHERN at 240-43.
55. Id. at 185.
56. Id. at 129.
friends from themselves.”

Justice Douglas declined invitations to be a guest at the “summer encampment” of the Bohemian Club, an exclusive men’s club in California, because “I knew I would chafe as a captive of an elitist group of men, most of whom I did not admire.” His objection was apparently grounded on his perception of the club’s practices regarding social class — perhaps including implicit qualifications of race, national origin and religion — but not on the club’s policy of excluding women. For though he rejected the Bohemian Club, he was a member of the Order of the Jungle Cock, whose members were to bring to each annual meeting “a young man fifteen years of age and teach him fly casting.” This club could hardly be described as having an influential membership, yet helping to perpetuate these “rites of passage” for young men did little to stem the tide of sexism.

Whatever the effects of Justice Douglas’s childhood on his view of women, his exposure to the wilderness surrounding Yakima, Washington was the source of satisfaction and enrichment throughout his life. His love for the outdoors and involvement in environmental causes is legendary and is manifest in his earlier writings, both on and off the bench. In only a few brief passages in The Court Years does Justice Douglas write of his deep appreciation of nature, but the passages are significant for they succeed in expressing a perspective which transcends the sense of professional self-importance which he might otherwise have maintained. When he returned home and shut out the world at the end of a work day, it was with humility that he regarded the bevy of quail, the Canadian geese, and “[m]ost impressive of all . . . the white whistling swans that often settle for a rest on the river below me and then take off in a tremendous armada.” These lesser species, he concluded, are “not craven, corrupt or deceitful,” but are simply “bent on using the biosphere to sustain and perpetuate their lives, not to destroy it nor to exclude all others.”

Those who have read Justice Douglas’s earlier works know that he pulls few punches when speaking about other public figures and about

58. THE COURT YEARS at 241.
59. Id. at 182.
60. Id. at 391-92.
61. Id. at 392.
controversial issues, yet he does not readily reveal much of himself, and we are forced to read between the lines. So often, it seems, we are best able to acquire a feeling for Justice Douglas's human qualities through his accounts of others. In one remarkable passage, he speaks with deep affection of a friend, whose description, in the eyes of this reader, bears an uncanny resemblance to the Justice himself:

I had been drawn to Frank Dobie, distinguished author and teacher, by his book *The Voice of the Coyote*. Dobie loved that canine as did I; and out of his love grew an expertise in the importance of coyotes to our environment and the up-lift that their calls give the spirit of man. . . . Dobie was a free spirit like Walt Whitman in many ways; he was steeped in Texas folklore, he was teacher extraordinary. He also spoke out on controversial issues and made clear his stand. . . .

Dobie criticized universities that suppress plays, as well as newspapers that suppress news or distort it. . . . When the [Texas] legislators proposed to close the university to students from other states on the ground that they occupied housing needed for Texans, Dobie spoke up. The danger of outside students, Dobie said, was that "they bring new ideas," and he added, "There are few people who need ideas more than Texans do."

As a result of this kind of statement, Dobie was a ready target for Texas orthodoxy. The powers that be denounced him as a troublemaker (which he was, in the same sense that Socrates was), and manipulated their rules and squeezed Dobie out of the faculty. He was a true Jeffersonian and his life was a dramatic illustration of First Amendment values. He would say, "Positive zest for life and positive opposition of the strangling of life go together." He once wrote in the student paper, the *Texas Ranger*: "I do not see how anybody who cherishes liberty for others as well as for himself can be intolerant of ideas. I do not see how a vast country, the life of which is bound up in vast complexities, can be governed wisely except by intellectual ability."

I was always indebted to the coyote for bringing Frank Dobie and me together. We communicated not through letters but through that wondrous canine and through the golden eagle, which was being cruelly slaughtered by ignorant and lawless Texans, and through the gnarled mesquite trees and live oaks which distinguish the Southwest. "I have never smelled incense in a church as refreshing to the spirit as the spring laden with aroma from a field of those wild lupines called bluebonnets," Frank once said.
His love for that environment was a part of his love of life. Another part was his love for the emancipators of the human mind — including Jefferson, Paine, Emerson and Thoreau. Freedom of the mind was beauty to Frank Dobie, a beauty he considered essential to all men who desire to stay fully alive.62

Justice Douglas has been a hero of mine because of his commitment to the free flow of ideas and to the free flow of rivers. One who believes in the first amendment and in the environment is willing to listen to the words and sounds which surround us. Lawyers, in particular, are not good at listening. I guess what we have to say is too important.

62. Id. at 89-90.