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Admissibility of Refusal to Submit to Blood Alcohol Test

James C. Hauser*

Introduction

Neither the United States Supreme Court nor the Florida Supreme Court has yet ruled whether a defendant’s refusal to take the Blood Alcohol Test is admissible evidence. The legal issues involved came into focus in Schmerber v. California, where the Supreme Court ruled that a defendant did not have a fourth or fifth amendment right to resist the withdrawal of blood which would be tested to measure the alcoholic content of his bloodstream. Justice Brennan, speaking for the majority, ruled that the results of the blood alcohol test were not testimonial in nature and did not infringe on the defendant's fifth amendment right not to incriminate himself. However, the Court left unanswered the question of whether admission into evidence of a defendant’s refusal to submit to the blood alcohol test would violate his fifth amendment rights.

After Schmerber, Florida’s legislature passed an Implied Consent Statute. The statute stated that any person accepting the privilege of driving in Florida consented in advance to permit a blood test if he were arrested for driving under the influence of alcohol [DUI]. If the alcohol level equalled or exceeded 0.10% by weight of his blood, the defendant was presumed to be under the influence of alcohol. If a de-

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1. The term “test”, unless otherwise stated, means any and all tests given to the defendant to determine the level of alcohol in his bloodstream.
3. Id. at 763, citing Holt v. United States, 218 U.S. 245 (1910).
fendant refused to take the test, his license was suspended for six
months.7

In order to determine whether a defendant's refusal to take the
test is admissible, four issues must be examined. The analysis will focus
on the courts' choice of words in expressing their holdings.

First, does introduction of a defendant's refusal violate his fifth
amendment right concerning self incrimination? Since the defendant is
required to take the test, his refusal may be testimonial in nature,
thereby compelling him to testify against himself.8 Introduction of his
refusal might be impermissible comment by the prosecutor on the right
of the defendant to remain silent.9

Second, does a defendant have the statutory right not to take the
test?10 If a defendant does have such a right, it would be unfair and a
denial of fundamental due process to penalize his exercise of that right
by admitting his refusal.11 Since the Florida Statute requires informing
a defendant his license will be suspended for three months, but does not
specify his refusal would be admissible, the legislature may have in-
tended to prohibit the refusal from being admitted into evidence.

Third, would the probative value of such a refusal be outweighed
by its prejudicial effects?12

Fourth, regardless of a defendant's statutory or constitutional
rights, are there instances where admitting a defendant's refusal would
be fundamentally unfair?13

suspension period to three months. FLA. STAT. § 322.261(1)(a) (1979).
8. See text accompanying notes 16-27 infra at 210-15.
10. See text accompanying notes 44, 50-77 infra at 219-29.
Orlando, 202 So. 2d 896 (Fla. 4th Dist. Ct. App. 1967); but see State v. Duke, 378 So.
2d 96 (Fla. 2d Dist. Ct. App. 1979). Neither case fully explains the legal consequences
of admitting or not admitting such evidence. The conflict was resolved in Miller v.
State, 403 So. 2d 1307 (Fla. 1981) discussed in text accompanying notes 99-102 infra
at 236-37.
12. See text accompanying notes 79-94 infra at 230-34.
13. See text accompanying notes 95-110 infra at 235-38.
Fifth Amendment Right

Background

In Schmerber, the defendant refused to take a breathalyzer test; the refusal was admitted into evidence by the trial court. Because the defendant failed to object to the admission of his refusal at trial, the Supreme Court declined to decide whether the refusal was admissible. The Supreme Court nevertheless discussed the issue in a footnote:

This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any testimonial products of administering the test - products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case.

Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a 'breathalyzer' test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under Griffin v. California. We think general Fifth Amendment principles, rather than the particular holding of Griffin, would be applicable in these circumstances, see Miranda v. Arizona. Since trial here was conducted after our decision in Malloy v. Hogan, . . . making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.14

14. 384 U.S. at 765 n.9 (citations omitted) (emphasis in original).
Decisions in Foreign Jurisdictions

First, since the defendant is required to take the test, his refusal may be "testimonial" in nature thereby compelling him to testify against himself.

The majority of cases hold that a defendant's refusal to take the test is \textit{not} testimonial in nature.\footnote{People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1967); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); Commonwealth v. Rutan, 229 Pa. Super. 400, 323 A.2d 730 (1974); Welch v. District Ct. of Vermont, 594 F.2d 903 (2d Cir. 1979); People v. Thomas, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978) \textit{appeal dismissed sub nom} Thomas v. New York, 444 U.S. 891 (1979); Newhouse v. Misterly, 415 F.2d 514 (9th Cir. 1969); Davis v. State, 367 N.E.2d 1163 (Ind. 1st Dist. Ct. App. 1977); Hill v. State, 366 So. 2d 299 (Ala. Crim. App. 1978); State v. Meints, 189 Neb. 264, 202 N.W.2d 202 (1972); City of Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W.2d 314 (1969); State v. Holt, 261 Iowa 1069, 156 N.W.2d 884 (1968); State v. Dugas, 252 La. 345, 211 So. 2d 285 (1968).} Since the fifth amendment right not to incriminate oneself protects testimony but not conduct, such decisions permit a court to admit the defendant's refusal. In deciding this delicate issue, it is necessary to determine what the United States Supreme Court meant in footnote nine in \textit{Schmerber}.

\textit{Newhouse v. Misterly} offered an explanation of the \textit{Schmerber} footnote:

'If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any \textit{testimonial} products of administering the test - products which would fall within the privilege.' In context the Court seems here to be talking of an incriminating statement by the accused which is induced by the requirement that the test be taken. See \textit{United States v. Wade}.

The second portion of footnote 9 muddies up the waters somewhat. It discusses a 'similar issue,' i.e., the consequences of refusing to take the test.

Read together to us the two portions of the \textit{Schmerber} footnote indicate that a refusal to take a blood test is not a testimonial 'statement' within the Fifth Amendment; rather, it is best described as conduct indicating a consciousness of guilt. See \textit{People v. Ellis}. Nonetheless, the reference to the \textit{Miranda} footnote can be read to imply that where an underlying right to refuse such a blood
test is present, it would be improper to draw adverse inferences from failure of the accused to respond to a request for a blood test because the accused would thereby be penalized for exercising his rights to refuse the test.\textsuperscript{16}

A similar view was expressed by Chief Justice Traynor of the California Supreme Court in \textit{People v. Ellis}.\textsuperscript{17} That decision held admissible a defendant's refusal to submit to voice exemplars.\textsuperscript{18} Justice Traynor explained why footnote nine of \textit{Schmerber} never intended to suppress a defendant's refusal to do a legally required act.

We are aware that the United States Supreme Court in \textit{Schmerber v. State of California} has cautioned that in some cases the administration of tests might result in "testimonial products" proscribed by the privilege. We do not believe, however, that the inferences flowing from guilty conduct are such testimonial products. Rather, the court's concern seemed directed to insuring full protection of the testimonial privilege from even unintended coercive pressures. In the case of a blood test, for example, the court considered the possibility that fear induced by the prospect of having the test administered might itself provide a coercive device to elicit incriminating statements. Such a compelled testimonial product would of course be inadmissible.\textsuperscript{19}

Justice Traynor explained that unlike confessions, which might be coerced, no useful purpose would be served in excluding a defendant's refusal to take a voice identification test.

A suspect asked to speak for voice identification is not subjected to the same psychological pressures said to be generated by a demand for testimony. It is no more unfair to ask a suspect to speak for voice identification than to ask him to appear in a lineup for visual identification. The psychological pressures are reduced to the same degree, through a limitation of alternatives. \textit{Deceit is improbable; the simple choice for a guilty person is between conduct

\textsuperscript{16} 415 F.2d at 518 (citations omitted).
\textsuperscript{17} 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
\textsuperscript{18} The Court in United States v. Dionisio, 410 U.S. 1 (1973), held that voice exemplars were admissible.
\textsuperscript{19} 65 Cal. 2d at 538, 421 P.2d at 398, 55 Cal. Rptr. at 390 (citations omitted).
likely to expose incriminating evidence and inferences as to guilt likely to flow from a successful refusal to participate.

A voice test, however, contemplates no such intrusion into privacy; no disclosure of thought or privately held information is requested. One’s voice is hardly of a private nature. It is constantly exposed to public observation and is merely another identifying physical characteristic.

It thus appears that an extension of the privilege to voice identification would serve none of the purposes of the privilege. It would only exclude evidence of considerable importance when visual identification is doubtful or impossible . . . denial of access to a pertinent identifying trait can only weaken a system dedicated to the ascertainment of truth.20

A small minority of cases have held that a defendant’s refusal to take the alcohol test is testimonial in nature;21 thus to permit his refusal into evidence would violate his fifth amendment right against self-incrimination. These courts have also ruled that since the defendant is required to take the test, his decision to take or not to take the test is “compelled” by the state.

In Clinard v. State the Texas appellate court reasoned:

A defendant’s silence or negative reply to a demand or request by an officer made upon him while under the necessary compulsion attendant with custodial arrest, which demand or question reasonably called for an immediate reply by the defendant is clearly a tacit or overt expression and communication of the defendant’s thoughts in regard thereto. Doyle v. Ohio. The obvious purpose and certain result of proving a person accused of intoxication refused a request to take a blood test is to show the jury that the accused, with his full knowledge of the true amount he had consumed, thought that

20. Id. at 535, 421 P.2d at 396, 55 Cal. Rptr. at 388 (emphasis added) (footnote omitted).
he could not afford to take said test. Such was the only reason for its relevancy. Thus said evidence is without doubt of communicative and testimonial character and not mere factual proof of a then existing physical characteristic. . . .

But that does not appear to be a fair reading of what Justice Brennan had in mind when he wrote footnote nine in Schmerber. This author is persuaded by the reasoning of Newhouse\textsuperscript{23} and Ellis\textsuperscript{24} that what Brennan intended was to forbid actual statements made by the defendant out of fear of taking the test. For example, if the defendant stated he did not want blood withdrawn because he had consumed ten beers, the statement concerning how much beer he had consumed would not be admissible.

Even if defendant’s refusal were considered “testimonial” in nature, there remains the question of whether the defendant is really compelled to refuse the test. Numerous courts have compared refusal to take the test with a defendant’s attempted escape.\textsuperscript{25} Both have been held admissible as indicating a course of conduct by the defendant. However, one court distinguished a defendant’s escape which was admissible from a defendant’s refusal to take a test.

\begin{quote}
[T]he distinction lies in the fact that the escape and flight are not compelled or even requested; whereas, if an accused under custodial arrest is requested or offered a chemical test for intoxication, anything he does other than affirmatively agree to same is a refusal to submit. Thus escape and flight are not ‘compelled’, a necessary factor under the fifth amendment, but a refusal to take a chemical test by silence or negative reply to a State’s request or offer is compelled.\textsuperscript{26}
\end{quote}

Is it truly fair to say that a defendant is compelled \textit{not} to take the test? \textit{People v. Thomas} explained why there is no such compulsion:

\begin{quote}
In no way in such a circumstance is there any compulsion on the
\end{quote}

\textsuperscript{22} 548 S.W.2d at 718 (emphasis added) (citations omitted).
\textsuperscript{23} 415 F.2d 514 (9th Cir. 1969).
\textsuperscript{24} 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
\textsuperscript{25} See text accompanying notes 88-92 infra.
\textsuperscript{26} 548 S.W.2d at 718-19.
defendant to refuse to take the test - the conduct which is the subject of the challenged evidence; on the contrary the compulsion is to take the test. Submission to the test, not its evasion, was what was desired by the police officers in this case.27

Second, does admission into evidence of a defendant's refusal to take the test constitute impermissible comment on a defendant's right to remain silent?

In Griffin v. California,28 the Supreme Court ruled that a prosecutor could not comment on a defendant's refusal to testify at time of trial. The Court recently ruled that this principle is so important that if the defendant requests, a judge must inform the jury that a defendant's refusal to testify can not be considered by the jury as inferring his guilt.29

One court has ruled directly that admission of a defendant's refusal to take the test constitutes impermissible comment on his right to remain silent.30 As authority for this position, Johnson v. State cited the Florida case of Gay v. Orlando.31 However, the Georgia court misunderstood Gay, which specifically held comment on a defendant's refusal to testify was not comment on his right to remain silent. Judge Eberhardt's dissent (in a 4-3 decision) strongly criticized the majority:

The refusal to take the test is not to be equated with the failure of the accused to take the stand and make an unsworn statement or testify in his own behalf. We agree readily that it is improper for the court or the state's counsel to make reference to that. But that is not a circumstance connected with the arrest - it is something which happens in the course of the trial itself.32

The majority of cases have held that admission of a defendant's refusal does not constitute impermissible comment on a defendant's

27. 46 N.Y.2d at 108, 385 N.E.2d at 588, 412 N.Y.S.2d at 849 (emphasis in original).
32. 125 Ga. App. at 617, 188 S.E.2d at 422.
right to remain silent. In explaining why admitting a defendant's refusal would not be an impermissible comment on the right of a defendant to remain silent, the Supreme Court of California stated in *People v. Sudduth*:

> The sole rationale for the rule against comment on a failure to testify is that such a rule is a necessary protection for the exercise of the underlying privilege of remaining silent . . . . A wrongful refusal to cooperate with law enforcement officers does not qualify for such protection. A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time . . . , should not be encouraged as a device to escape prosecution.

**Decisions by Florida Courts**

First, no Florida appellate court has ruled that comment by a prosecutor on a defendant's refusal to do a lawfully required act constitutes impermissible comment on the defendant's right to remain silent.

Second, with one exception, the Florida appellate courts have ruled that a defendant's refusal to do a lawfully required act is not testimonial in nature; therefore, a defendant's refusal is admissible. In following the majority trend, the Florida Supreme Court explained why


34. 65 Cal.2d at 546, 421 P.2d at 403, 55 Cal. Rptr. at 395.

such refusal is not testimonial in nature:

[Defendant's] privilege against self-incrimination would not have been violated by compelling him to speak the words spoken by the extortionist, and therefore his refusal to speak was not an exercise of this right. Since the fifth amendment offers no protection against compulsion to submit to a voice exemplar and since it does not privilege refusal to submit, the admission of [defendant's] refusal into evidence was not error. 36

The only Florida appellate court to state that a defendant’s refusal was "testimonial" in nature was Gay v. Orlando, 7 decided prior to the passage of Florida’s Implied Consent Law. The Fourth District Court of Appeal stated: "In the case before us petitioner was confronted with a choice of either voluntarily submitting to the test or refusing and thereby making a self-incriminating statement. While the results of a properly admitted breathalyzer test are not within the privilege, self-incriminating testimonial by-products are." 38

The Gay rationale was strongly criticized by the Second District Court of Appeal in State v. Esperti. 39 In admitting evidence of defendant’s obstruction of police attempts to administer a test measuring gun powder burns, the court stated that “his actions were a direct by-product, not of the administration of the test, but of the wrongful refusal to submit thereto; and wrongful conduct poisons its own fruit.” 40 Esperti pointed out that Gay’s statement that defendant’s refusal was testimonial was pure dicta. The Second District declined to be bound by such dicta. 41

Thus Florida courts other than Gay have uniformly ruled that a defendant’s refusal to do a lawfully required act is admissible evidence. Comment on a defendant’s refusal does not constitute comment on a

36. 379 So. 2d at 102.
38. Id. at 898.
40. Id. at 419.
41. Id. The dicta in Gay was also criticized in Becker, Admissibility of Testimonial By-Products of a Physical Test, 24 U. MIAMI L. REV. 50 (1969). Becker prophesied that future Florida courts would follow Esperti rather than Gay. His prediction proved correct.

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defendant's right to remain silent. Nor is the defendant's refusal to do a lawfully required act "testimonial" in nature. Florida is in accord with the majority of states throughout the country which have decided this issue; the majority position is the better reasoned one. In Florida the fifth amendment self-incrimination clause should not constitute a barrier to admission of a defendant's refusal to take the test.

Statutory Right Not to Take the Test

Decisions From Foreign Jurisdictions

In order to fully understand whether in Florida a defendant has the statutory "right" to refuse the test, it is necessary to compare Florida's Implied Consent Law with those of other states. Some states statutorily permit a defendant's refusal to be admissible evidence,42 other states statutorily prohibit such refusal to be admissible evidence.43 Unfortunately, Florida Statute Section 322.261 fails to specifically indicate whether a defendant's refusal to take the test would be admissible.

First, does the state statute give the defendant the "right" to refuse the alcohol test? A large number of state statutes, while not specifically stating whether a defendant's refusal is or is not admissible, do state that a defendant has the right not to take the test.44 In states with


44. a) State v. Oswald, 90 S.D. 342, 345, 241 N.W.2d 566, 568 (1976) quoting
such statutes, courts held that a defendant’s refusal is not admissible. They did so on fundamental fifth amendment due process grounds. These courts reasoned that since a defendant has a statutory right to refuse the test, it would be grossly unjust to penalize a defendant, other than by statutorily suspending his license, for exercising that right. In *State v. Oswald,* 46 the South Dakota Supreme Court explained:

In the case before us the Defendant was informed of his statutorily guaranteed right and, for whatever reason we do not know, he elected not to submit to the test. Certainly it is unfair to create by statute a right not to submit to a chemical test and to allow the accused to exercise that right and then in open court before a jury to permit testimony concerning that refusal which can all too easily work in the minds of the jury members to the prejudice of the defendant. 46

The court went on to adopt the position of the Oklahoma Supreme Court in *Duckworth v. State:* 47

‘[T]he defendant’s refusal to take the test was used by the state in its case in chief for purely prejudicial purposes. The accused’s refusal should have ended the inquiry on the subject. It ill behooves the courts to say you have a right to refuse to do something, which may prove either beneficial or detrimental to you, and yet, notwith-

S.D. COMP. LAWS ANN. § 32-23-10 (1976): “such person shall be requested by said officer to submit to such analysis and shall be advised by said officer of his right to refuse to submit to such analysis.” (emphasis added). b) People v. Hayes, 164 Mich. App. 203, 235 N.W.2d 182 (1975); Mich. COMP. LAWS ANN. § 257.625(a) (1967); Collins v. Secretary of State, 384 Mich. 656, 663, 187 N.E.2d 423, 426 (1971) quoting Mich. COMP. LAWS ANN. § 257.625(d) (1967): “A person under arrest shall be advised of his right to refuse to submit to chemical tests; and if he refuses the request of a law enforcement officer to submit to chemical test no test shall be given.” (emphasis added). c) State v. Stuart, 157 A.2d 294 (D.C. 1960). See also Washington v. Parker, 16 Wash. App. 632, 633, 558 P.2d 1361, 1362 (1976); Wash. REV. CODE § 46.61-505 (repealed 1968): “Evidence of the chemical analysis or scientific breath test of any kind of such person’s blood shall not be admissible unless such person shall have been advised by the person given the test . . . that such person has a constitutional right not to submit to such test.” (emphasis added).

46. Id. at 346, 241 N.W.2d at 569.
47. 309 P.2d 1103 (Okla. 1957).
standing your right to do so, we will permit your refusal to be shown and enable the state to destroy your right and achieve indirectly by innuendo what it was prevented by law from accomplishing directly. We can conceive of no greater inconsistency.\(^{48}\)

An appellate Michigan court took a similar view in *People v. Hayes*:

Under § 625a, an individual arrested for drunk driving has a choice. He can either submit to a test the results of which could create a virtually irrefutable presumption of guilt against him, or he can refuse the test and suffer the revocation. If the fact that a defendant has chosen not to submit to a test can be placed before the jury as an inference of his guilt, then he will be put in the position of having to risk providing evidence for the prosecution by submitting to the test or of certainly providing it by refusing to submit. It would be fundamentally unfair to put a defendant in such a 'damned if he does, damned if he doesn’t' position. The Legislature provided a definite choice, and we cannot render a decision which would make that choice an illusory one.\(^{49}\)

Where a defendant is told he has a *right* to refuse the test, it would be unfair to punish the defendant for exercising that statutory right. Therefore, I believe these cases are correctly decided.

However, in states where a defendant is not specifically given a statutory or constitutional “right” to refuse, the refusal may be admissible. The majority of states whose statutes do not confer on the defendant the right to refuse the test have permitted such refusal to be admitted into evidence.\(^{50}\) These courts reasoned that it is a misnomer to

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\(^{48}\) 90 S.D. at 347, 241 N.W.2d at 569.

\(^{49}\) 164 Mich. App. at 208, 235 N.W.2d at 185. Although Michigan gave the defendant the statutory right to refuse the test (see note 44(d) *supra*), the *Hayes* court never relied on that statute. In fact, the court found that whether a particular state statute gave the defendant a “right” to refuse the test was essentially irrelevant. *Id.*

state a defendant has a "right" to refuse the test. The best explanation of how the term "right" has been misused was discussed by Justice Jasen in his concurring opinion of People v. Paddock:

[The] 'right' of refusal is not really a right in the sense of a fundamental personal privilege, but rather was merely an accommodation to avoid a distasteful struggle to forcibly take blood. Since the statute itself equates a refusal with guilt (by revoking the driver's license) and expresses a strong policy to protect the public from the threat of drunken driving, there appears no compelling reason to forbid comment on a person's refusal to take a blood test. 51

Justice Jasen hit the nail on the head. In general, legislatures recognized that people under the influence of alcohol tend to be more abusive, obtrusive and combative than they would be if sober. To require law enforcement officials to withdraw blood or make an accused take a breath test could easily lead to a pitched battle between police and the accused. Injuries to either or both could easily occur; hence the necessity for permitting the defendant not to take the test. Others have reached the same conclusion:

[If] it be admitted that the privilege of refusal stems from a legislative effort to eliminate unreasonable force in terms of police action, the accused has received all benefits due him when he is granted merely the right [sic] of refusal. For the sake of peace and order the State has surrendered evidence of significant value and beneficence at the sacrifice of effective law enforcement should not be compounded by denying the state the privilege of comment. 52

This explanation for not forcing a defendant to take a blood alco-


hol test was adopted in *Hill v. State*:

Therefore, it seems that the act does not contemplate a per se right of refusal, rather this acquiescence in refusal is in the posture of avoiding potential violent conflicts. . . . See *Campbell v. Superior Court* . . . 'this language does not give a person a 'right' to refuse to submit to the test only the physical power [to].'

By informing the defendant his license will be suspended, but not specifying in the statute that a refusal to take the test could be used against him, legislatures may have intended to prohibit as evidence a defendant's refusal to take the test.

A small minority of non-Florida courts have held a defendant's refusal inadmissible, even though the state statute does not specifically grant a defendant the “right” to refuse. These courts reasoned that when the state legislature imposed a mandatory license suspension that was the only penalty intended. Legislative silence on the issue of admissibility indicated that refusal would not be admissible. This view was expressed by the Alaska Supreme Court in *Puller v. Municipality of Anchorage*:

An intrinsic aid to statutory construction is found in the maxim expressio unius est exclusio alterius. The maxim establishes the inference that, where certain things are designated in a statute, ‘all omissions should be understood as exclusions.’ The maxim is one of long-standing application, and it is essentially an application of common sense and logic.

With respect to AS 28.35.032, we find that the enumeration of cer-

53. 366 So. 2d 318, 323 (Ala. 1979).

54. a) *Puller v. Anchorage*, 574 P.2d 1285, 1286 (Alaska 1978). **Alaska Stat.** § 28.35.032 (1978): "If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test of his breath . . . after being advised by the officer that the refusal will result in the suspension, denial or revocation of his license, a chemical test shall not be given." b) *City of St. Joseph v. Johnson*, 539 S.W.2d 784 (Mo. Ct. App. 1976). **Mo. Rev. Stat.** § 577.050 (1979): "If a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, which request . . . shall inform the person that his license may be revoked upon his refusal to take the test, then none shall be given." c) *Kansas v. Wilson*, 5 Kan. App. 2d 130, 613 P.2d 384 (1976). **Kan. Stat. Ann.** § 8-1001(c) (Supp. 1980): "If the person so arrested refuses a request to submit to a test of breath or blood, none shall be given."
tain sanctions, suspension or revocation of license, and the require-
ment that those sanctions be included in a warning preclude the
imposition of additional consequences. The admissibility of evi-
dence of the fact of refusal would constitute such an additional
consequence.55

These courts have interpreted their statutes to mean that a defen-
dant has a real choice to refuse and is not merely revoking his previ-
ously granted implied consent to the test. In City of St. Joseph v. John-
sen the court commented:

Acceptance by a motorist of a license to operate a vehicle upon the
highways of this state does not amount to an implied consent to
submit himself to chemical analysis when charged with driving in
an intoxicated condition. The sobriquet ‘implied consent law’ both
misnominates § 566.444 and also misleads as to its legal effects.56

Of course, whether a legislature intended its silence to prohibit a
defendant’s refusal to be admissible is a matter of interpretation for
each state. One could just as easily argue that by never specifically
stating a defendant’s refusal is “not admissible” the legislature inten-
tended that it be admissible.

Comparison of Florida Statute to Other State Statutes

Florida’s Implied Consent Statute does not give a defendant the
“right” to refuse to take a chemical test to determine his blood alcohol
level. Florida’s statute has virtually the same language as statutes in
those states which have ruled that a defendant has no statutory “right”
to refuse the breath test. There is no substantial difference between
Florida’s Implied Consent Statute and New Jersey’s 39:4-50.2(a),
which State v. Tabisz57 held did not grant the defendant a statutory
right to refuse.

55. 574 P.2d at 1288.
56. 539 S.W.2d at 786.
Kansas v. Wilson, 5 Kan. App. 2d 130, 132 n.17, 613 P.2d 384, 385-86 n.17, citing
KAN. STAT. ANN. § 8-1001(a) (Supp. 1980). The Wilson court was an appellate court
which felt bound by dicta of the Kansas Supreme Court in State v. Haze, 218 Kan. 60,
Refusing Blood Alcohol Test

FLA. STAT. § 322.261 Suspension of license; chemical test for intoxication.
(1)(a) Any person who shall accept the privilege extended by the laws of this state of operating a motor vehicle within this state shall by so operating such vehicle be deemed to have given his consent to submit to an approved chemical test of his breath for the purpose of determining the alcoholic content of his blood if he is lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of alcoholic beverages. The test shall be incidental to a lawful arrest and administered at the request of a peace officer having reasonable cause to believe such person was driving a motor vehicle within this state while under the influence of alcoholic beverages. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of three months.

When the implied consent statute is read in its entirety, it is clear the legislature never intended to give a suspected DUI defendant the "right" to refuse the test. In enacting Florida Statute Section 322.262, the Florida legislature specifically gave an individual a "statutory right" to refuse a pre-arrest breath test to determine the percentage of alcohol in his blood. "Prior to administering any pre-arrest breath test, a law enforcement officer shall advise the motor vehicle operator that

N.J. STAT. § 39:4-50.2(a):
Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood. . . .

542 P.2d 720 (1975). Ironically, this same situation exists in Florida with State v. Sambrine, 386 So. 2d 546 (Fla. 1980) discussed in text accompanying notes 72-78 infra.
he has the right to refuse to take such test, and, prior to administering such test, a law enforcement officer shall obtain the written consent of the motor vehicle operator."

Significantly, no such "right" is given a defendant after he has been arrested for DUI pursuant to Florida Statute Section 322.261(a).

[W]here language is used in one section of a statute different from that used in other sections of the same Chapter, it is presumed that the language is used with different intent. Accordingly, the presence of a provision in one portion of a statute and its absence from another are an argument against reading it as implied by the section from which it is omitted.

The Florida legislature has specifically mandated that a pre-arrest breath test is not admissible evidence. "The results of any [pre-arrest] test administered under this section shall not be admissible into evidence in any civil or criminal proceeding." Since the Florida legislature specifically excluded as evidence a pre-arrest test, by its silence it appears the legislature intended that a post-arrest test should be admissible.

It is also necessary to look at the overall purpose of Florida Statute 322.261 in conjunction with Florida's DUI Statute. The supreme court asserted this in Bender v. State: "The overall purpose of this chapter [322] is to address the problem of drunk drivers on our public roadways and to assist in implementing Section 316.193 which provides that driving while intoxicated is unlawful." Thus, when viewing the legislative purpose as a whole, it does not appear the Florida legislature ever intended to prohibit as evidence a defendant's refusal. The Wisconsin court commenting on legislative silence concerning a defendant's refusal to take the test stated in State v. Albright:

"[T]he clear policy of the [implied consent] statute is to facilitate the identification of drunken drivers and their removal from the highways [and] the statute must be construed to further the legis-

58. FLA. STAT. § 322.261(b)(2) (1979) (emphasis added).
59. 30 FLA. JUR. Statutes § 96 (1974).
60. FLA. STAT. § 322.261(1)(b)(1) (1979) (emphasis added).
62. 382 So. 2d 697, 699 (Fla. 1980).
Evidence of refusal is relevant and constitutionally admissible. We do not interpret the silence of a legislature which maintained a strong desire to remove drunk drivers from Wisconsin roads to mean that this relevant evidence is inadmissible in a proceeding for driving while intoxicated.63

In Florida, unless specifically excluded by the legislature, "all relevant evidence is admissible except as provided by law."64 Thus, if the refusal to take the test is relevant, the Florida legislature could have prohibited admitting this evidence by explicitly saying so.65 Its silence could easily be interpreted to mean the evidence is admissible.

Florida case law has constantly interpreted the Florida Implied Consent Statute to require a defendant to take the test unless he revokes his previous consent.66 Thus, the theory used by Missouri in City of St. Joseph v. Johnson,67 which indicated that a driver does not agree in advance to take the test, would not apply in Florida. Seemingly, Florida courts should adopt the rationale used in People v. Thomas: "The admissibility of refusal evidence may also be viewed as a permissible condition reasonably attached to the grant of permission to operate a motor vehicle on the highways of the state."68

During the 1981 legislative session, a bill69 was introduced which would have substantially amended Florida Statute Section 322.261. One of the many revisions of this bill contained statutory language specifically permitting as evidence a defendant's refusal to take a blood alcohol test. The bill passed the House, but was never voted on by the Senate. Since the bill contained numerous revisions and was never actually rejected by the Senate, the failure to pass this bill sheds no new light on legislative intent regarding the admissibility of the refusal to

63. 98 Wis. 2d at 672-73, 298 N.W.2d at 201, quoting State v. Neitzel, 95 Wis. 2d 191, 193, 289 N.W.2d 828, 830 (1980).
64. FLA. STAT. § 90.402 (1979).
65. See note 44 supra for statutes so worded.
66. Sambrine v. State, 386 So. 2d 546 (Fla. 1980); State v. Smith, 278 So. 2d 281 (Fla. 1976); State v. Riggins, 348 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1977). "[T]hus it appears that the implied consent in this state may be revoked at the time the chemical test is suggested by an officer." Id. at 1210.
67. 539 S.W.2d 784 (Mo. Ct. App. 1976). See note 54 supra.
68. 46 N.Y.2d at 110, 385 N.E.2d at 589, 412 N.Y.S.2d at 851.
take a blood alcohol test.

Florida Decisions on the “Right” to Refuse a Blood Alcohol Test

Three Florida appellate decisions, State v. Duke, State v. Sambrine and State v. Ducksworth, have now dealt with the legal issue of whether Florida Statute 322.261 gives a defendant the “right” to refuse a blood alcohol test. None of the courts discussed foreign cases in their written opinions.

Duke adopted the theory that a defendant may have the physical power to refuse the blood alcohol test, but not the “right” to do so. In addition, Duke felt that it would be better public policy not to reward those who refuse to take the test:

A driver retains the physical power to refuse a sobriety test, but not the legal right to withdraw his implied consent. Public policy considerations favor the physical power/legal right distinction. If Section 322.261(1)(a) is concluded not to be compulsory, the driver who refuses the test is penalized only by the suspension of his license for 3 months. However, the driver who takes the test faces a greater penalty as the results could be evidence against him at trial. This non-compulsory interpretation would lead to drivers not taking the test.

The Duke court went on to hold that a defendant’s refusal to take the test is generally admissible.

In Sambrine the Florida Supreme Court never ruled on the issue of whether a defendant’s refusal is admissible evidence. The issue in Sambrine was whether a sample of blood taken over the defendant’s objection was admissible evidence. The court held that the legislature intended to exclude such evidence: “The legislature may have concluded that it was preferable to enforce the implied consent law through this method [license suspension] than mandate that law enforcement officials be required to physically restrain every individual


71. 378 So. 2d at 98.
who refused to submit to the test.\textsuperscript{72} This author's research of other states' implied consent statutes indicates that such a conclusion was correct. Unfortunately, the \textit{Sambrine} court muddied this entire area of law by stating:

\begin{quote}
The Court is not free to ignore such plain language and obvious legislative intent. Any careful reading of Section 322.261 leads to the inescapable conclusion that a person is given the \textit{right} to refuse testing. If this were not so, it is unclear why the legislature provided for a definite sanction and a detailed procedure for the enforcement of such sanction.\textsuperscript{73}
\end{quote}

The court's use of the word "right" is troubling for a number of reasons. First, the court's analysis of the legislature's "obvious" intent was less than thorough, for it did not consider the legislative intent evidenced in the different statutory language for pre- and post-arrest tests.\textsuperscript{74}

Second, the court never bothered to cite, much less distinguish or overrule, \textit{Duke}. Had it done so, it might have seen the difference between saying a defendant can not be physically forced to take a blood test and saying he has a "right" not to do so.

Third, the court never analyzed decisions from other jurisdictions with statutes which did not use the term "right" (and which generally permit admission of a defendant's refusal) and those states with statutes which used the term "right" (and generally exclude admission of such a refusal).

What is even more perplexing is that the "right" language was not essential to the court's decision, hence dicta. Although not binding, since it emanated from the Florida Supreme Court such language is considered highly persuasive.\textsuperscript{75}

In \textit{State v. Ducksworth}\textsuperscript{76} the Second District Court of Appeal, because of \textit{Sambrine}, retreated from \textit{Duke}. In a terse two paragraph opinion, it ruled a defendant's refusal to take a breathalyzer test inad-

\begin{itemize}
\item \textsuperscript{72} 386 So. 2d at 549.
\item \textsuperscript{73} \textit{Id}. at 548.
\item \textsuperscript{74} \textit{See} text accompanying notes 58-60 \textit{supra}.
\item \textsuperscript{75} \textit{Milligan v. State}, 177 So. 2d 75 (Fla. 2d Dist. Ct. App. 1965).
\item \textsuperscript{76} 408 So. 2d 589 (Fla. 2d Dist. Ct. App. 1981) \textit{reh. denied} Jan. 25, 1982.
\end{itemize}
missible. It upheld a trial court decision that admired the Duke analysis but felt bound by Sambrine.\textsuperscript{77} Whether the Second District Court thought Sambrine's use of the term "right" was binding or dicta was not discussed.

Thus, if the dicta in Sambrine is taken at face value, a defendant has a right to refuse to take the test. With such a right a defendant's refusal would be inadmissible since it would violate fundamental fairness by penalizing a defendant for exercising his right.\textsuperscript{78}

However, if the term "right" as used by Justice Atkins is a misnomer, then the better reasoning would be to admit the refusal. The purpose of the implied consent statute is to prevent violence by not physically forcing a defendant to take the test; it is not to give the accused a better chance to avoid conviction of DUI. Further, public policy dictates that a defendant not be "rewarded" for refusing to take the test: to do so would simply nullify the legislative intent.

Prejudicial Effects Outweighing Probative Value

Decisions in Other Jurisdictions

Courts which have ruled there is no constitutional nor statutory "right" to refuse the test have uniformly ruled that a refusal has sufficient probative value to be admissible.\textsuperscript{79} These courts have ruled that a refusal indicates a consciousness of guilt on the part of the defendant. It infers that the defendant knew if he took the test, he would fail. This was expressed by the Supreme Court of Ohio in Westerville v. Cunningham:

Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such

\textsuperscript{77} Duckworth v. State, # 80-3029-AP-01 at 2 (Fla. 12th Cir. filed Mar. 2, 1981).

\textsuperscript{78} See text accompanying notes 45-49 supra.

\textsuperscript{79} See notes 33 and 50 supra. Conversely, those courts which held that a defendant has either a statutory or constitutional right to refuse have ruled that the results of such tests have no probative value. See text accompanying notes 83-87 infra.
a test will provide evidence for him; but, if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt, especially where he is asked his reason for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt.\(^{80}\)

These courts have also ruled that no undue prejudice is borne by the defendants. As Justice Traynor explained in *People v. Ellis*:

Evidence of the refusal is not only probative; its admission operates to induce suspects to cooperate with law enforcement officials. Only the overriding interest in protecting the privilege against compulsory self-incrimination, itself the result of a delicate balance, prohibits evidence or comment in the refusal to testify cases. But the privilege itself is not at issue here. Without exception, none of the reasons that support the privilege lends support to a rule that would exclude probative evidence obtained from an accused's effort to conceal nonprivileged evidence.\(^{81}\)

Some courts have argued that a defendant is never required to cooperate with the police, but Justice Traynor rejected this argument:

It has been urged that the privilege reflects an ultimate sense of fairness that prohibits the state from demanding assistance of any kind from an individual in penal proceedings taken against him. . . . Criminal proceedings are replete with instances where at least passive cooperation of an accused may be constitutionally required.\(^{82}\)

Most courts holding that a defendant's refusal does not have sufficient probative value have based their decisions on the defendant's statutory or constitutional "right" not to take the test.\(^{83}\) This was ex-

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80. 15 Ohio St. 2d 129, 130, 239 N.E.2d 40, 41 (1968).
81. 65 Cal. 2d at 538, 421 P.2d at 398, 55 Cal. Rptr. at 390.
82. *Id.* at 534, 421 P.2d at 395, 55 Cal. Rptr. at 387.
pressed by the Missouri court in *St. Joseph's*:

The admissibility of the refusal as evidence of intoxication in a collateral criminal proceeding, therefore, depends upon whether the probative value of such evidence outweighs its prejudicial effect. Our decisions recognize that a motorist must make his choice to refuse or submit in the atmosphere of his arrest and restraint. . . . In this environment, the refusal may result equally from rational causes of disquiet as from a consciousness of guilt.84

One state, Oklahoma, went so far as to say that a defendant's refusal is of no evidentiary value. In *Duckworth v. State*, the Oklahoma Supreme Court said:

The defendant [would be] the victim of prejudice created by no real fact produced by the test, but by surmise, speculation and innuendo based only on the assertion by the defendant of his fundamental right to refuse the test. In no other way can the right to refuse have any meaning or constitute more than a mere shadow of substance.85

It must be remembered that this decision came prior to *Schmerber* and at a time when the reliability of such tests were seriously in question.88

One court, in *State v. Annonymous*, ruled that such evidence was incompetent:

Implicit in such testimony of refusal is the irremediable suggestion that had the test been given, the results would have been as nearly infallible on the issue of intoxication, providing either guilt or innocence of the accused, as scientific ingenuity could devise, and, thus, from a mere refusal to submit to such test, fairly and reasonably, could be derived an inference of guilt. With this basic assumption we do not agree. The evidence objected to was incompetent for the

84. 539 S.W.2d at 787.
85. 309 P.2d at 1105.
86. The theory in *Duckworth* was severely criticized at Note, *Effect of Comment on Refusal to Submit to Intoximeter Test*, 10 Okla. L. Rev. 331 (1957).
purpose for which it was offered and should have been excluded.\textsuperscript{87}

But the Connecticut court failed to state why it was incompetent. Justice Traynor relied upon Professor Wigmore in \textit{Ellis}:

> The inferential chain here is no different from that which makes any event that does not directly illuminate the circumstances of the crime charged a relevant fact. The trier of fact must reason from, for example, an escape from jail, to a consciousness of guilt that would motivate the escapee's conduct, and, from that premise, to the conclusion that such conduct is relevant to the ultimate issue of guilt or innocence.\textsuperscript{88}

\textbf{Florida Decisions}

No appellate Florida court has yet ruled directly on the prejudicial aspect of admitting the refusal to take an alcohol test. It is, therefore, important to look at how Florida courts have ruled in analogous situations.

In \textit{Young v. State} the Florida Supreme Court held certain photographs inadmissible because of their inflammatory nature:

> Where there is an element of relevancy to support admissibility then the trial judge in the first instant and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence.\textsuperscript{89}

Florida appellate courts have ruled that a defendant's refusal to take a "required" test is of sufficient probative value to be admissible.\textsuperscript{90} In making these decisions the courts necessarily have ruled that the evidence had sufficient probative value to outweigh any prejudicial ef-

\textsuperscript{87} 6 Conn. Cir. Ct. 470, \textemdash, 276 A.2d 452, 455 (1971).
\textsuperscript{88} 65 Cal. 2d at 538 n.12, 421 P.2d at 398 n.12, 55 Cal. Rptr. at 390 n.12.
\textsuperscript{89} 234 So. 2d 341, 348 (Fla. 1970) quoting Leach v. State, 132 So. 2d 324, 331-32 (Fla. 1961).
\textsuperscript{90} State v. Esperti, 220 So. 2d 416 (Fla. 2d Dist. Ct. App. 1969) (nitrate test); Clark v. State, 379 So. 2d 97 (Fla. 1980) (voice identification).
fects. In describing why the possession of recently stolen property by the defendant had probative value, the Florida Supreme Court stated in *State v. Young*:

Moreover, the inference of guilt that the jury may infer from the unexplained possession of recently stolen goods does not arise from the possessor's failure to explain or demonstrate by evidence of exculpatory facts and circumstances that his possession of the recently stolen goods is innocent. It is the fact of possession that provides the basis for the inference of guilt. This inference is founded on '... the manifest reason that when goods have been taken from one person, and are quickly thereafter found in the possession of another, there is a strong possibility that they were taken by the latter'.

The court went on to explain the probative value of such evidence:

It can be seen, therefore, that the rule of evidence respecting possession of recently stolen goods is no different, in kind, from the rule respecting the probative value of any other circumstantial evidence. Flight, concealment, resistance to a lawful arrest, presence at the scene of the crime, incriminating fingerprints - the whole body of circumstantial evidence relevant in a given case - are all incriminating circumstances which the jury may consider as tending to show guilt if evidence thereof is allowed to go to the jury unexplained or unrebutted by evidence of exculpatory facts and circumstances.

Florida has a low threshold for admitting evidence of probative value. In most states, a court must balance whether the probative value of evidence outweighs the possible prejudice to the defendant. In Florida, the proof necessary to admit such evidence is much lower; a defendant's refusal will be admitted unless its prejudicial effect substantially outweighs its probative value.

Thus, in determining whether a defendant's refusal to take the test has sufficient probative value, courts will look to whether the defendant

92. *Id.* at 571.
93. FLA. STAT. § 90.403 (1979).
has a statutory or constitutional "right" to refuse. As stated previously, there is confusion at the appellate level in Florida whether a defendant has such a statutory "right" to refuse.\footnote{94} If there is no "right" the evidence will have sufficient probative value; if there is a "right" the evidence would probably be considered too prejudicial.

Violation of Fundamental Due Process

Florida Statute Section 321.261(1)(e) requires a defendant be told that if he refuses to take the test his license will be suspended for three months; he need not be told that his refusal might be used against him at trial. It would, therefore, be possible for a defendant to be misled into believing that the only consequence of his refusal would be the suspension of his license.

Decisions in Other Jurisdictions

In \textit{Washington v. Parker}\footnote{95} the Washington Supreme Court reasoned that a defendant would have to be told that his refusal could be used against him.

In other words, had the statute intended evidentiary use of the right of refusal, it is logical that the arresting officer would be required to inform [defendant] that his refusal could be used as evidence in a criminal proceeding as well as the consequential loss of the privilege to drive. Since the statute does not require such warning, we conclude that the legislation did not contemplate the additional consequence.\footnote{96}

In \textit{Puller v. City of Anchorage} the Alaska Supreme Court adopted a similar rational: "We view the warning requirement as a protective device to assure an informed choice on the part of the motorist. It would be unfair to have the driver believe that refusal would have one consequence and then permit the state to assert an additional

\footnote{94} For discussion, \textit{see} notes 50-77 \textit{supra}.

\footnote{95} 558 P.2d 1361 (Wash. 1976).

\footnote{96} \textit{Id.} at 1363. Washington specifically gives the defendant the statutory "right" to refuse the test.
consequence."  

Whether the police are required under the due process clause of the fifth amendment to give such a warning is an open question. In answering this question one must first determine what due process requires. The United States Supreme Court set forth a three prong test in *Mathews v. Eldridge*:  

1. The private interest at stake.
2. The government interest at stake.
3. The risk that procedures used will lead to erroneous decisions.

Applying the first prong, a defendant has a substantial interest in being warned that his refusal could be used against him at trial. His refusal might have been based solely on his willingness to accept a three month suspension for not taking the test; had he known the refusal could be used at trial he might have taken the test. Applying the second prong, the “cost” to government is minimal; in fact, the only possible cost might be the exclusion of such evidence where the police fail to warn the defendant. Finally, applying the third prong, there is a risk that a defendant might refuse under the mistaken impression the refusal could not be used at trial. The number of individuals who will be misled is probably minimal. But common sense teaches us that it would be better to avoid constitutional problems by requiring such a warning.

In dealing solely with the issue of whether the police must give the defendant a warning, the comparison of a defendant’s refusal to give a voice or handwriting exemplar with refusal to give a blood alcohol test is inappropriate. In the former cases, the defendant is told to take the test, but he is told nothing else. There is no need to tell him his refusal could be used against him; there is no possibility he could be misled. In the latter case, the defendant is told his license will be suspended for three months if he does not take the test. Without being informed that his refusal could be used against him at trial, the defendant could be misled.

**Florida Decisions**

No Florida court has directly addressed the degree of warning the

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97. 574 P.2d at 1288.
state must give the defendant before he takes the breathalyzer test.\textsuperscript{99} Recently the Florida Supreme Court in \textit{Miller v. State}\textsuperscript{100} resolved a conflict between the Second and Fourth District Courts of Appeal\textsuperscript{101} as to the type of warning necessary in vehicle impoundment cases. Miller was arrested for not having a valid driver’s license. The police impounded his car since there was no one else to drive it away. The defendant was never warned by the police that he could prevent impoundment by telephoning a friend to drive the vehicle away. The court required the warning: “[A]n officer, when arresting a present owner or possessor of a motor vehicle, \textit{must advise} him or her that the vehicle will be impounded unless the owner or possessor can provide a reasonable alternative to impoundment.”\textsuperscript{102}

When there is the possibility that a defendant was \textit{overtly} misled as to whether he was required to take the blood alcohol test, Florida courts have held a defendant’s refusal inadmissible. In \textit{Gay v. Orlando}, the Florida Fourth District Court stated: “Petitioner was told he had a \textit{right} not to take the breath analysis test. He chose not to and this fact was brought out at trial.”\textsuperscript{103} \textit{Gay} held the evidence was suppressable. Commenting on \textit{Gay}, the Second District Court in \textit{State v. Esperti} said:

> In that case the defendant refused to take a breathalyzer test; but it is patent therein that such refusal did not occur until after the officer told the defendant that \textit{he need not take the test}. Evidence of such refusal was said to be inadmissible, as it should have been, since if for no other reason, it was violative of due process and fair

\textsuperscript{99.} In \textit{State v. Duke}, 378 So. 2d 96 (Fla. 2d Dist. Ct. App. 1979) the court discussed warnings but did not address the issue of warning a defendant that his refusal to take an alcohol test could be used against him.  
\textsuperscript{100.} 403 So. 2d 1307 (Fla. 1981).  
\textsuperscript{101.} The Second District Court of Appeal held that police need not inform defendants whose vehicles were being impounded that if they could locate a friend to drive the vehicle away there would be no impoundment. \textit{State v. Sanders}, 387 So. 2d 391 (Fla. 2d. Dist. Ct. App. 1980); \textit{State v. Dearden}, 347 So. 2d 462 (Fla. 2d Dist. Ct. App. 1977). The Fourth District Court of Appeal held that police must give such warnings. \textit{Session v. State}, 353 So. 2d 854 (Fla. 4th Dist. Ct. App. 1977); \textit{Jones v. State}, 345 So. 2d 809 (Fla. 4th Dist. Ct. App. 1977).  
\textsuperscript{102.} 403 So. 2d at 1314 (emphasis added).  
\textsuperscript{103.} 202 So. 2d at 898 (emphasis added).
In *State v. Duke* the arresting officer told the defendant “I am now offering to give an approved chemical test of your breath for the purpose of determining the alcoholic content of your blood. If you refuse to take this test your privilege of operating a motor vehicle will be suspended for a period of 3 months. . . .” The Second District Court concluded that the defendant could have believed that he had a choice. Therefore, his refusal could not be admitted. “The defendant should have been told that the officer was prepared to give an approved chemical test; that the driver did not have a right to refuse, but if he did refuse, his license would be revoked for a period of 3 months.”

The police of Orange County, Florida, have adopted the warning suggested in *Duke*:

You are required by the applicable provision of Chapter 322 of The Florida Statutes to submit to a breathalyzer test and your failure to submit to the same will result in the suspension of your driving privileges for a period of three months. This breathalyzer test is being given to you as a result of your being charged with the offense of driving while under the influence and is not being given to you as a continuation of the accident investigation or accident report in this case. Further, *the results of this breathalyzer test may be used against you as evidence in any subsequent criminal proceeding for the offense of driving while under the influence.*

**Other Factors**

A defendant’s refusal to take a breathalyzer test or have blood withdrawn may be based on arguably valid grounds. A defendant might not want blood withdrawn for religious reasons or out of a genuine fear of needles. The defendant might not trust the test or testing

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104. 220 So. 2d at 419 (emphasis added).
105. 378 So. 2d at 98 (emphasis added).
106. *Id.*
107. *Id.*

Orange County, Florida, Sheriff’s Department Form “Alcohol Influence Report Interviewer’s Dialogue” (emphasis added). In December of 1981 the form was amended to include the words “[t]he result of this . . . test or your refusal to submit to this test may be used against you as evidence . . . .”
procedures. If that were in fact proven, one court, *Michigan v. Hayes*,\(^{108}\) would suppress the results. Of course, the refusal might also be because he was so intoxicated that he was unable to make the “choice.” In that case admission of the refusal should be permitted.

Other constitutional rights of the defendant might have been violated, which would warrant suppression. Suppose, before deciding whether to take the test, the defendant asked to talk to an attorney. If the police prevented him from doing so he would be denied his Fifth Amendment right to consult with an attorney.\(^{109}\) The violation of this right would require the evidence be suppressed.

Of course, whether a defendant’s refusal is or is not admissible must be decided on a case by case basis. The Alabama Supreme Court in *Hill v. State*\(^{110}\) ruled that deciding the reason a defendant refused is ultimately an issue for the jury. This, of course, might require the defendant to take the stand. However, pursuant to Florida Statute 90.612(2), the trial court would have the authority to limit any cross-examination by the state to the question of why the defendant refused the test.

Thus, for the sake of due process and fair play, a defendant should be told prior to the test that in addition to having his license suspended, his refusal could be used against him. If a defendant refuses for some other reason, whether his refusal is admissible must be decided on a case by case basis. The burden for proving a valid reason for refusing is on the defendant.

**Conclusion**

A defendant’s refusal to take a breathalyzer test should be admissible evidence in Florida courts. Its admission would neither violate the defendant’s right not to incriminate himself nor impinge on his right to remain silent. A proper reading of Florida’s Implied Consent Statute indicates that a defendant has no statutory “right” to refuse the test; thus admission would not violate a defendant’s fundamental due pro-

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109. In *State v. Roche*, 50 Fla. Supp. 127 (Fla. Orange Cty. Ct. 1980), if prior to deciding whether to take the test, the police denied the defendant’s request to talk to an attorney, the defendant was deemed *not* to have refused to take the test.
110. 366 So. 2d 299 ( Ala. 1978).
cess rights; but this issue has been confused by the dicta of Justice Atkins in Sambrine v. State. A defendant's refusal has sufficient probative value to be admissible in Florida courts.

Unless a defendant is somehow misled, and this will be substantially avoided if a defendant is told that his refusal could be used against him at trial, there is no reason why the defendant's refusal should not be admitted.\footnote{While this article was being printed, the Florida Legislature declared its position on the admissibility of refusal to take the alcohol test. "Refusal to submit to a chemical breath or urine test upon request of a law enforcement officer . . . shall be admissible into evidence in any criminal proceedings." FLA. C.S.-C.S.-C.S.-S.B. 69, 432, 312, 351, 39, 285 (1982), passed by the legislature awaiting the governor's signature, to be effective July 1, 1982, as FLA. STAT. § 316.1932(1)(a). Blood test refusal will be admissible under subsection (1)(c) of the statute.}
Florida No-Fault Insurance: Ten Years of Judicial Interpretation

Patricia V. Russo*

Introduction

The Florida Automobile Reparations Reform Act has been in place for ten years.1 Although the statement of purpose in the Act itself is terse,2 the Florida Supreme Court, reviewing the constitutionality of the Act, gave an enumeration of "permissible legislative objectives."3 Most important among these was the intent to reduce fault-based automobile accident litigation and to facilitate the timely compensation of auto accident victims for out-of-pocket losses.4 In the main, the Act has

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2. FLA. STAT. § 627.731 (1979) provides:
The purpose of §§ 627.730-627.741 is to require medical, surgical, funeral and disability insurance benefits to be provided without regard to fault under motor vehicle policies that provide bodily injury and property damage liability insurance, or other security, for motor vehicles registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish and inconvenience.


4. 296 So. 2d at 16. A study by the United States Department of Transportation, completed in 1970, disclosed that auto accidents contributed more than 200,000 cases a year to the nation's court load, and consumed 17% of the country's judicial resources. [Reported in Hearings Before the U.S. Senate Commerce Comm., 91st Cong., 2d Sess. 7 (1970)]. (Hereinafter cited as Commerce Comm. Report.)

A study of 1,000 bodily injury claims conducted by the Department of Insurance for the State of New York disclosed that one out of four people injured in auto accidents recovered nothing under the fault-based compensation system. STATE OF NEW
met these objectives.5

Amendments of the Act in the intervening years have significantly reduced no-fault benefits.6 The question whether the reduced benefits

YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOMSE BENEFIT?, A Report to Governor Nelson A. Rockefeller, 1970, at 18. (Hereinafter cited as Rockefeller Report). "[V]ictims . . . face[d] average delays in collecting under auto liability insurance that [were] ten times as long as delays in collecting under collision, homeowners, or burglary insurance and forty times as long as delays under accident and health insurance." Id. at 19. On the average it took 15.8 months to settle liability claims, and at the end of three years, 12% of claims remained unpaid. Id. at n.26.

Other objectives of the Act enumerated by the Lasky court included the reduction of automobile insurance premiums and inefficiency in the liability insurance industry; reduction in public relief rolls; remedy of the inequities in the traditional tort compensation system, whereby minor claims were overcompensated and major claims were undercompensated relative to their true economic value; and remedy of the pressure brought to bear upon an injured party to "accept an unduly small settlement of his claims [to meet] the pressing necessity of paying medical bills. . . ." 296 So. 2d at 16.

That these were worthy objectives is well documented. Under the traditional tort system, victims whose economic losses were more than $25,000 only recovered about a third of their losses, while those with losses of less than $500 recovered an average of four and a half times their economic loss. Commerce Comm. Report at 4-5. Of each dollar paid into the system for liability protection, only forty cents went to compensate accident victims. Commerce Comm. Report at 21. From 1960 to July 1970, the cost of auto insurance went up sixty-five percent while the take-home pay for nonsupervisory and factory workers during the same period went up only forty percent. Id. at 23.

5. See J. Little, No-Fault Auto Reparation in Florida: An Empirical Examination of Some of Its Effects, 9 U. Mich. J. Law Reform 1 (1975). Professor Little reported a significant reduction in the time elapsing between accidents and the first receipt of no-fault benefits, and a settling of claims in amounts much closer to verified medical losses than under the common law system. Id. at 4. “[C]overage for personal injury benefits was expanded and the cost of processing claims was reduced.” Id. at 5. “[T]he Florida [no-fault] system can reduce the frequency of personal injury litigation measurably.” Id. at 3.

provide an adequate alternative to rights taken away by the original legislation (principally, the right to recover for pain and suffering) has recently been addressed by the Florida Supreme Court. This article does not review the constitutionality of the Act, as it is probable that no-fault, in one form or another, is here to stay. Rather, I examine a number of specific cases and issues decided under the Act, highlighting the patterns and irregularities found in courts’ interpretations of the Act and suggesting instances where the irregularities warrant attention.

This article covers three broad areas: (1) the availability of no-fault benefits to those injured in or by a vehicle which was not a statutorily defined “motor vehicle”; (2) the availability of no-fault benefits to those injured in an insured vehicle, who own, or live with one who owns, an uninsured vehicle, and the availability of benefits to those injured in uninsured vehicles; and (3) the availability of benefits to those who constructively “own” an uninsured vehicle.

**Vehicles Not Statutorily Defined as “Motor Vehicles”**

The availability of personal injury protection (PIP) benefits to
those injured in or by a vehicle which was not a statutorily defined "motor vehicle" may be derived from five important decisions: Negron v. Travelers Insurance Co., Camacho v. Allstate Insurance Co., Heredia v. Allstate Insurance Co. (both the district court and supreme court decisions), and Lumbermens Mutual Casualty Co. v. Castango a supreme court case which is out of step with all that had gone before. The disharmony between the Supreme Court's opinion in Heredia and its opinion in Lumbermens emerges from an analysis which must begin with Negron.

Negron, an employee of the United States Post Office, was injured when the government's tractor-trailer, which he was driving in the scope of his employment, was struck by a private passenger automobile. The court allowed Negron to recover PIP benefits from the insurer of his personal automobile (which was not involved in the accident), reasoning that (1) Negron was not an occupant of a "motor vehicle" as that term is defined in the Act; (2) Negron's injury was "caused by physical contact with a motor vehicle"; therefore (3) Negron was en-

\[\text{\text{\footnotesize 10. FLA. STAT. § 627.732(1) (1977):}}\]
\[\text{\footnotesize "Motor vehicle" means a sedan, stationwagon, or jeep-type vehicle not used as a public livery conveyance for passengers and includes any other four-wheel motor vehicle used as a utility automobile and a pickup or panel truck which is not used primarily in the occupation, profession, or business of the insured.} \]

This definition was changed. Ch. 78-374 § 2, 1978 Fla. Laws 1042. See note 58 infra.

\[\text{\text{\footnotesize 11. See also Cavalier Ins. Corp. v. Myles, 347 So. 2d 1060 (Fla. 1st Dist. Ct. App. 1977) in which Cavalier attempted to deny PIP benefits because the car that struck its insured was registered in another state. The court held that a vehicle registered in another state is a "motor vehicle" nonetheless, and awarded PIP benefits. Id. at 1062.}}\]

\[\text{\text{\footnotesize 12. 282 So. 2d 28 (Fla. 3d Dist. Ct. App. 1973).}}\]

\[\text{\text{\footnotesize 13. 310 So. 2d 330 (Fla. 3d Dist. Ct. App. 1975).}}\]

\[\text{\text{\footnotesize 14. 346 So. 2d 1230 (Fla. 3d Dist. Ct. App. 1977) and 358 So. 2d 1353 (Fla. 1978).}}\]

\[\text{\text{\footnotesize 15. 368 So. 2d 348 (Fla. 1979).}}\]

\[\text{\text{\footnotesize 16. 282 So. 2d at 29.}}\]

\[\text{\text{\footnotesize 17. Id. at 30.}}\]
titled to recover. 18

The court supported its conclusion that Negron was not an occupant of a "motor vehicle" by considering the statutory definition of the term and an administrative interpretation of the statute by the Department of Insurance. 19 The court rejected the Department's administrative interpretation, which reasoned that because Negron was the occupant of a vehicle not statutorily defined as a "motor vehicle," the coverage of the Act did not apply to him. 20

The court opined: "[W]e take the words '... if the injury is caused by physical contact with a motor vehicle' to mean if the injury results from a collision with a motor vehicle." 21 The court did not require that Negron himself come into actual physical contact with a motor vehicle because it felt such a construction would be "technical," and out of keeping with the ordinary meaning of the language of the Act. 22 By so holding, the court declined to limit the benefits of Section 627.736(4)(d) 4 to pedestrians—a limitation the legislature may have intended, because the Act was later amended to make benefits available to one injured "while not an occupant of a self-propelled vehicle" rather than "while not an occupant of a motor vehicle." 23

In Camacho, 24 the plaintiff was injured when the truck he owned and was driving collided with another truck. Like Negron, he applied

18. Id.
19. Id. at 29.
20. Id. at 30.
21. Id. (emphasis added).
22. Id. For other cases in which PIP benefits were awarded to passengers injured in a vehicle which was not a statutorily defined "motor vehicle", see Gateway Ins. Co. v. Butler, 293 So. 2d 738 (Fla. 3d Dist. Ct. App. 1974)(passenger in a "public conveyance" injured when it was struck by an automobile); and State Farm Mut. Auto Ins. Co. v. Butler, 340 So. 2d 1185 (Fla. 4th Dist. Ct. App. 1976)(passenger in a "utility vehicle used in transporting passengers for hire" injured when it hit an automobile). In both cases, PIP benefits were paid by the insurers of the automobiles involved because the passengers in the commercial vehicles did not own a car. Thus they had no insurance from which they could collect on a first-party basis. See also Greyhound Rent-A-Car, Inc. v. Carbon, 327 So. 2d 792 (Fla. 3d Dist. Ct. App. 1976) in which the court held that a rental car is a "motor vehicle," thus allowing those injured in it to recover PIP benefits.
for PIP benefits from the insurer of his personal auto. Unlike Negron, the trial and appellate courts denied coverage. 28

The appellate court supported its decision by emphasizing that "the plaintiff [was] operating a truck used primarily in his business [and] was involved in an accident with another truck which counsel stipulated was a 'commercial vehicle.' " 26 "Due to the stipulation of counsel . . . it is undisputed that the plaintiff was involved with a vehicle which is not a motor vehicle as defined in the Florida Automobile Reparations (No-Fault) Act." 27

Why the court attached so much significance to counsel's stipulation is unclear. Counsel merely stipulated a commercial vehicle was involved; this is not tantamount to a conclusion of law that the commercial vehicle was not a motor vehicle as defined in the Act. 28 The Act's definition of "motor vehicle" includes "a pickup or panel truck . . . ." 29 What the definition does not include is "a pickup or panel truck which is . . . used primarily in the occupation, profession, or business of the insured." 30

Camacho, like Negron, sustained injury "while not an occupant of a motor vehicle" (because he was occupying a "truck used primarily in the occupation, profession, or business of the insured"). And because Camacho's injury was caused by physical contact 31 with a truck used primarily in the occupation, profession, or business of the owner, not of the insured, it would appear to be caused by physical contact with a "motor vehicle." Like Negron, Camacho should have recovered under the benefits section of the Act which provides:

The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for: 1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a motor vehicle if the injury is caused by physi-

25. Id. at 332.
26. Id. at 331.
27. Id.
28. For the definition of "motor vehicle", see note 10 supra.
29. 310 So. 2d at 331.
30. Id.
31. See the discussion of "physical contact" in text accompanying notes 21-23 supra.
cal contact with a motor vehicle.\textsuperscript{32}

This reasoning may seem strained, but in the concurring opinion in \textit{Heredia v. Allstate Insurance Co.},\textsuperscript{33} Judge Carroll suggested such an analysis to the Florida Supreme Court;\textsuperscript{34} the court apparently adopted it.\textsuperscript{35}

In \textit{Heredia}, the Third District Court of Appeal held that an injured pedestrian, hit by a panel truck used primarily in the business of its corporate owner, could not recover PIP benefits from his family's auto insurer.\textsuperscript{38} The concurring judge reluctantly followed precedent he had approved in earlier cases,\textsuperscript{37} but admitted the earlier cases might have been wrong, because the statutory definition of motor vehicle excluded only vehicles "used primarily in the occupation, profession, or business of the insured."\textsuperscript{38} Since the pedestrian was not injured by a motor vehicle used in his own business (the business of the insured pedestrian), he should recover his statutory first-party insurance benefits.\textsuperscript{39} The concurring judge believed the majority members were reading the statute as if it exempted vehicles "used primarily in the occupation, profession, or business of the owner,"\textsuperscript{40} an inappropriate

\begin{itemize}
\item \textsuperscript{32} FLA. STAT. § 627.736(4)(d) (1971) (emphasis added). This provision was amended in 1977. \textit{See note 58 infra.}
\item \textsuperscript{33} 346 So. 2d 1230 (Fla. 3d Dist. Ct. App. 1977).
\item \textsuperscript{34} \textit{Id.} at 1231-32. Judge Carroll called into question the wisdom of the \textit{Camacho} decision:
\[ \text{[H]aving been a member of the panels of this court which decided \textit{Camacho} . . . although I now see some justification for appellant's argument that the language of the statute does not support the result reached . . ., I concur in this court's judgment of affirmance based on the authority of \textit{Camacho} . . ., with the decision in this case being certified as one of public interest, whereby the Supreme Court of Florida will have jurisdiction to review the decision, on certiorari.} \]
\item \textit{Id.} at 1232.
\item \textsuperscript{35} 358 So. 2d 1353, 1355 (Fla. 1978).
\item \textsuperscript{36} The Act provides PIP benefits for statutorily defined relatives living in the same household with the insured. FLA. STAT. § 627.736(4)(d) 3 (1979).
\item \textsuperscript{37} \textit{Camacho} v. Allstate Ins. Co., 310 So. 2d 330 (Fla. 3d Dist. Ct. App. 1975) and \textit{Saborit} v. Deliford, 312 So. 2d 795 (Fla. 3d Dist. Ct. App. 1975).
\item \textsuperscript{38} 346 So. 2d at 1251 (emphasis in original).
\item \textit{Id.} at 1232.
\item \textsuperscript{39} \textit{Id.} at 1231 (emphasis in original).
\end{itemize}
judicial revision where the legislation is clear.\(^{41}\)

The Florida Supreme Court agreed with the reasoning of Judge Carroll’s concurring opinion. It read the statute literally, reversed the district court, and awarded Heredia his PIP benefits.\(^{42}\) The court noted that the legislature expressly exempted vehicles used in the business of the insured.\(^{43}\) If the legislature had intended to exempt vehicles used in the business of the owner it would have said so.\(^{44}\) Thus the pedestrian was injured by a motor vehicle and could recover under the Act.

The opinion reversing *Heredia* did not mention the *Camacho* decision, even though the majority in the district court had relied upon it. But impliedly, the *Camacho* decision was wrong, for it held that the Act did not apply to commercial vehicles.\(^{45}\) At a minimum, the supreme court opinion in *Heredia* holds that the Act applies to a pedestrian hit by a commercial vehicle.

Putting *Heredia* and *Negron* together, one might expect the occupant of a commercial vehicle (Negron) hit by a commercial vehicle (Heredia) to recover. Not so.

In *Lumbermens Mutual Casualty Co. v. Castagna*,\(^{46}\) Castagna was injured when his van, which he used primarily in his business, was struck by a lunch truck. The lunch truck had collided moments before with a Chevrolet automobile. Castagna sought PIP benefits from his own insurer,\(^{47}\) Lumbermens, who denied coverage, claiming the in-

\(^{41}\) *Id.* at 1232.

\(^{42}\) 358 So. 2d at 1355.

\(^{43}\) *Id.*

\(^{44}\) The court notes that “[t]he Legislature . . . also employed the term ‘owner’ throughout the same statute, in a variety of contexts. In the face of this selectivity, courts generally are not free to replace one term with the other . . . .” *Id.*

\(^{45}\) Another case in which PIP benefits were awarded to a pedestrian hit by a commercial vehicle is *Century Ins. Co. of N.Y. v. Fillmore*, 306 So. 2d 548 (Fla. 3d Dist. Ct. App. 1974), which was expressly overruled by *Camacho*. *Camacho*, 310 So. 2d at 332. Because the supreme court decision in *Heredia* agrees with *Century* on the same facts, and because *Century* was expressly overruled by *Camacho*, impliedly *Camacho* was incorrectly decided. On the other hand, it may be possible to distinguish *Camacho* because, while *Century* and *Heredia* involved a pedestrian and a commercial vehicle, *Camacho* involved two commercial vehicles.

\(^{46}\) 368 So. 2d 348 (Fla. 1979).

\(^{47}\) *Id.* at 349.
sured's injuries were not incurred "while occupying a motor vehicle" and were not "caused by physical contact with a motor vehicle."

Instead of deciding whether Castagna had been injured by physical contact with a "motor vehicle," the lunch truck, (a question the supreme court in Heredia would have answered in the affirmative because the lunch truck was not owned by the insured), the court discussed whether the injury was "caused by physical contact" with the Chevrolet. Having focused on the wrong issue, the court concluded that the physical contact with the Chevrolet was too remote to meet the traditional proximate cause requirements of tort law, which of course is true, but irrelevant. The court stated, without analysis, that "[t]he Chevrolet is a 'motor vehicle' within the statutory definition. The van and lunch truck are not."

The conclusion that the lunch truck is not a "motor vehicle" di-

48. Id.
49. Id.
50. Id. at 350.
51. A discussion of proximate cause is not totally out of place in the context of the No-Fault Act. For example, see Royal Indemnity Co. v. Government Employees Ins. Co., 307 So. 2d 458 (Fla. 3d Dist. Ct. App. 1975) in which a woman sitting on a park bench was injured when a moving vehicle struck a parked vehicle and the parked vehicle struck her. The insurer of the parked vehicle paid her PIP benefits and sought reimbursement from the insurer of the moving vehicle. The insurer of the moving vehicle argued that the plain language of the statute required that benefits be paid only when injury is "caused by physical contact with" a motor vehicle (FLA. STAT. § 627.736(4)(d) 4 (1971)), and no contact occurred between the moving vehicle and the park bench-sitter. The Third District Court of Appeal held that the insurer of the moving vehicle should pay, reasoning that the No-Fault Act did not replace common law concepts of causation, "particularly proximate causation." Id. at 460. The court said the parked car was "in reality an extension of the [moving] car," and therefore the proximate cause of the injury. Id. See also Padron v. Long Island Ins. Co. 356 So. 2d 1337 (Fla. 3d Dist. Ct. App. 1978), and Auto-Owners Ins. Co. v. Pridgen, 339 So. 2d 1164 (Fla. 2d Dist. Ct. App. 1976).

But cf. Feltner v. Harford Accident & Indemnity Co., 336 So. 2d 142 (Fla. 2d Dist. Ct. App. 1976) in which the Second District Court of Appeal held that injury sustained by a man, who after driving a young woman home was struck across the face with a piece of pipe by her irate father, who thought the man was a seducer, was not injury "arising out of the ownership, maintenance or use" of the car. The court did not find a sufficient "causal connection between the use of the automobile and the attack." Id. at 143.

52. 368 So. 2d at 349.
rectly contravened the holding in *Heredia*. In a footnote in *Lumbermens*, the court acknowledged that *Heredia* construed the word “insured” in the definition of “motor vehicle.” But this acknowledgment failed to distinguish *Heredia*, for in *Heredia* the court only construed the word “insured” to reach the conclusion that the statutory term “motor vehicle” included a commercial truck. *Castagna*’s injury, like *Heredia*’s, was caused by physical contact with a motor vehicle (a commercial truck). The statutory definition of “motor vehicle” was satisfied because the truck that struck *Castagna* was not used in the business of the insured, *Castagna*, but rather in the business of its owner.

Assuming *Heredia* had precedential effect, the only issue in *Lumbermens* should have been whether *Castagna* was the occupant of a “motor vehicle.” *Negron* established that he was not. *Negron* permitted the occupant of a conveyance which was not within the statutory definition of “motor vehicle” (a post office tractor-trailer) to recover when hit by a “motor vehicle.”

In view of *Negron* and *Heredia*, the Florida Supreme Court should have either held for *Castagna*, or approved the holding in *Camacho*: the Act does not apply when two commercial vehicles collide. Instead, the Court discussed proximate cause, leaving the important issue unclarified.

53. Recall that *Heredia* concluded that the pedestrian hit by a commercial vehicle had been hit by a “motor vehicle” because the vehicle was not used primarily in the business of the insured, but rather used primarily in the business of the owner.

54. 368 So. 2d at 349 n.3. This footnote is the only acknowledgment the *Lumbermens* court makes in the *Heredia* decision. It states in part that “[t]he word ‘insured’ has been held to refer only to insureds who are injured by physical contact within commercial vehicles, and not to owners of commercial vehicles. . . .” *Id.*

55. *See* discussion of *Heredia* in text supra.

56. *See* discussion of *Negron* in text supra.

57. The appellant contended that the case fell under the no-recovery rule of *Camacho* because the collision involved only commercial vehicles. 368 So. 2d at 350. The opinion ignores this contention.

58. At the time of the decision, the legislature had amended the definition of “motor vehicle” to expressly include commercial vehicles. *See* Ch. 78-374 § 2, 1978 Fla. Laws 1042. The court acknowledged the change in a footnote without any discussion of how the change should affect *Castagna*. 368 So. 2d at 349 n.3. Although the court expressly stated it was construing FLA. STAT. § 627.736(4)(d) (1975), arguably, the 1978 amendment was merely a clarification of prior law. *See* Williams v. Hartford Accident and Indemnity Co., 382 So. 2d 1216 (Fla. 1980), where the court held that a
Uninsured Vehicles

The uninsured vehicle cases can be divided into four categories: 1) those determining the benefits due to children hurt in insured vehicles, while living with parents who failed to insure the family car, 2) those determining the benefits due persons injured while either driving, riding in, or "occupying" uninsured cars, 3) those determining the benefits due persons injured in an insured car who owned an uninsured car, and 4) those determining the benefits due persons who constructively "owned" an uninsured car. Basic to these cases is the statutory requirement that one cannot recover PIP benefits from a stranger if one owns an uninsured vehicle or is statutorily entitled to insurance benefits from a relative domiciled with him. 59

Cases in the first category stand for the proposition that children injured while riding in others' insured vehicles can recover PIP benefits in spite of their parents' failure to insure the family car. For example, in Farley v. Gateway Insurance Co., 60 a child, riding in a car insured by Gateway, was allowed to recover from Gateway, despite the fact that he lived with his stepfather, who owned an uninsured car. Gateway argued that Farley's stepfather, by failing to insure, had become a self-insurer under the Act. 61 The court rejected Gateway's construction

1973 modification of section 627.727 of the Florida Statutes (dealing with uninsured motorist coverage) was formal only, and "was intended by the legislature to clarify and secure from doubt" pre-existing law. 382 So. 2d at 1220. In so doing, the court "disapproved" five cases inconsistent with the opinion. Id.

At the time of the Lumbermens decision, the legislature had also amended FLA. STAT. § 627.736(4)(d)(1) to provide benefits for injury sustained "while occupying a motor vehicle" or "while not an occupant of a self-propelled vehicle." See ch. 77-468 § 33, 1977 Fla. Laws 2076. Although Castagna would not have fit into the category "while not an occupant of a self-propelled vehicle" under the amended law, he would have fit into the category "while occupying a motor vehicle" under the amended law, since the definition of motor vehicle had been expanded to include commercial vehicles.

60. 302 So. 2d 177 (Fla. 2d Dist. Ct. App. 1974).
61. FLA. STAT. § 627.733(4) (1979) provides:
   An owner of a motor vehicle with respect to which security is required . . . who fails to have such security in effect at the time of an accident shall have no immunity from tort liability, but shall be personally liable for the payment of benefits under § 627.736. With respect to such benefits, such an owner shall have all of the rights and obligations of an insurer under §
of the statute, reasoning that the “Act was intended to broaden insurance coverage.” The construction urged by Gateway would have reduced coverage. The court also rejected Gateway’s argument that the Act required Farley to look to his stepfather as an insurer, reasoning that the questioned provision of the Act was intended to prevent an injured party from collecting insurance benefits twice: once from the insurer of the car in which he was hurt, and once from the insurer of his family car. The court pointed out that there would be no double recovery for Farley. The court concluded that the legislature did not intend to acquiesce in the consequence of calamity to a relative [of one who ought to have insured] when such relative is injured in or by a stranger’s automobile and can recover [from] the stranger’s insurer if the stepfather didn’t even own an automobile. Farley should not in effect be penalized just because his stepfather bought an automobile; and the obvious practicalities in these cases preclude a response that he, Farley, can always go against his stepfather if the latter fails to procure insurance therefor.

Finally, the court observed that “insurer” is defined in the statute as one in the business of selling insurance. Farley’s stepfather was not in

§ 627.730-627.741
(emphasis added).

62. 302 So. 2d at 179 (emphasis in original).
63. Id.
64. Gateway argued Fla. Stat. § 627.736(4)(d)4b (1973):
(d) The insurer of the owner of a motor vehicle shall pay . . . for
4. . . injury sustained . . by any person . . while occupying the owner’s motor vehicle . . provided the injured person is not himself:
a. The owner of a motor vehicle with respect to which security is required
. . . or
b. Entitled to . . benefits from the insurer of the owner of such a motor vehicle.
65. 302 So. 2d at 179.
66. Id.
67. Id. Fla. Stat. § 624.03 (1973). In State Farm Mut. v. Pierce, 383 So. 2d 1184 (Fla. 5th Dist. Ct. App. 1980), the court cited Farley when it refused to make the husband, the owner of an uninsured vehicle, a co-defendant with the insurance company sued for PIP benefits by his wife. The husband was not an insurer and could not be made to share in payment of benefits.
that business.

Commercial Union Insurance Co. v. Williams is similar to Farley. Williams was injured while a passenger in an insured motor vehicle, and while residing in the household of a relative (her mother) who owned an uninsured motor vehicle. The First District, like the Farley court, allowed Williams to recover PIP benefits from the insurer of the vehicle in which she was a passenger. Commercial Union's argument that Williams' mother, by failing to insure her motor vehicle, had become a self-insurer was rejected by the court, as it had been in Farley. Instead, the court concluded that Williams had the option of suing either her mother, or, "if she prefers," Commercial Union.

In contrast, cases in the second category stand for the proposition that persons injured while either driving, riding in or "occupying" uninsured cars cannot recover PIP benefits. For example, in State Farm Automobile Insurance Co. v. Kraver, Carolyn Kraver was driving an uninsured Cadillac, registered and titled in her father's name, when she collided with an automobile insured by State Farm. Carolyn argued that she should recover PIP benefits from State Farm under the Farley decision. The court disagreed, reasoning that the plain language of the benefits section of the Act controlled.

68. 309 So. 2d 617 (Fla. 1st Dist. Ct. App. 1975).
69. Id. at 618.
70. Id. at 619. See also Gateway Ins. Co. v. Butler, 293 So. 2d 738 (Fla. 3d Dist. Ct. App. 1974) in which a child injured in a conveyance struck by a vehicle insured by Gateway was allowed to recover PIP benefits from Gateway, despite the fact that his father, in whose household he resided, owned an uninsured car.

The same result occurs when the child living in the household of a parent who owns an uninsured car is struck by an insured vehicle. See Witko v. Liberty Mut. Ins. Co., 348 So. 2d 52 (Fla. 4th Dist. Ct. App. 1977).
71. 364 So. 2d 1259 (Fla. 3d Dist. Ct. App. 1978).
72. The court pointed out that the Cadillac was "purchased" by Carolyn suggesting ownership might have been a latent issue. Id. at 1260. See FLA. STAT. § 627.736 (4)(d)4.a (Supp. 1976).
73. FLA. STAT. § 627.736(4)(d) (1979) provides:
(d) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:
4. Accidental bodily injury sustained in this state by any other person [than the owner] while occupying the owner's motor vehicle or, if a resident of this state, while not an occupant of a motor vehicle or motorcycle, if the injury is caused by phys-
Because Ms. Kraver was neither "occupying the [insured] owner's motor vehicle"\textsuperscript{74} (she was not occupying the car insured by State Farm) nor was she "not an occupant of a motor vehicle or motorcycle"\textsuperscript{78} (for she was in her dad's Cadillac), she did not come within the benefits provided by the statute.

The court found Farley inapplicable;\textsuperscript{78} sound logic because Farley was "occupying the [insured] owner's motor vehicle"\textsuperscript{77} and was not himself "[t]he owner of a motor vehicle with respect to which security is required,"\textsuperscript{78} although his stepfather was. Kraver was driving a vehicle which should have been insured and was not. Although both Farley and Kraver were children of parents who failed to insure, Kraver was old enough to know better—and she was 	extit{driving}. Farley was merely a passenger, and in an insured car at that.

The decision in \textit{South Carolina Insurance Company v. Rodriguez}\textsuperscript{79} is consistent with \textit{Kraver}, but the result is inconsistent with the policy of the Act. Rodriguez, injured when the uninsured motor vehicle in which he was riding collided with a motor vehicle insured by South Carolina Insurance Company, attempted to recover PIP benefits from South Carolina Insurance Company. Rodriguez is distinguishable from Farley, who sought benefits from the insurer of the vehicle in which he was a passenger, and thus was clearly within the description of the benefits section of the statute.\textsuperscript{80} Rodriguez did not own a vehicle, nor did he live with one who did. The \textit{Rodriguez} court, relying on \textit{Kraver} and

\begin{itemize}
\item a. The owner of a motor vehicle with respect to which security is required under §§ 627.730-627.741, or
\item b. Entitled to personal injury benefits from the insurer of the owner of such a motor vehicle. (emphasis added.)
\end{itemize}

\textsuperscript{74} \textit{Id.} at (4)(d)4.

\textsuperscript{75} \textit{Id.} This use of double negatives is not bad grammar, but rather a close tracking of the language of the statute. Recall that the court declined to limit benefits of the Act to pedestrians. See the discussion of Negron in text \textit{supra}.

\textsuperscript{76} 364 So. 2d at 1261.

\textsuperscript{77} \textsc{Fla. Stat.} § 627.736 (4)(d)4 a (1979).

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} 366 So. 2d 168 (Fla. 3d Dist. Ct. App. 1979).

\textsuperscript{80} \textsc{Fla. Stat.} § 627.736 (4)(d)4 (Supp. 1978).
the "clear dictates" of the statute,81 denied Rodriguez benefits. Presumably,82 Rodriguez was injured neither while "occupying the [insured] owner's motor vehicle"83 nor "while not an occupant of a motor vehicle,"84 thus he was not entitled to benefits. But there was no evidence that passenger Rodriguez was a relative of the uninsured owner (contrasted with the plaintiff in Kraver who was driving her father's Cadillac), nor that he had any control over the failure to insure (contrasted with Carolyn Kraver, who actually purchased the Cadillac, although it was registered in her father's name).85 Thus, Rodriguez fails to effect the intent of the Act as stated in Farley: "to broaden insurance coverage while at the same time reasonably limiting the amount of damages which could be claimed."86

Similarly, in Protective National Insurance Company of Omaha v. Padron,87 a passenger, Padron, was injured while riding in an an uninsured car. Padron, however, sought to recover from the insurer of the driver of the car in which he was riding rather than the insurer of the owner of the other car. The Third District Court of Appeal denied recovery,88 reasoning that the driver's policy provided benefits only for persons occupying the insured car,89 and the No-Fault Act only requires that the owner of a car purchase insurance, not the driver.90 The injured passenger did not have no-fault insurance of her own,91 but whether or not she owned a car was not disclosed. One who does not own a car is not required to have PIP insurance.92 Indeed, one cannot obtain no-fault protection without owning a car.93 Assuming the in-

81. 366 So. 2d at 169.
82. The decision is per curiam.
83. FLA. STAT. § 627.736 (4)(d)4. See language of statute at note 73 supra.
84. Id. See note 10 supra.
85. 364 So. 2d at 1260.
86. 302 So. 2d at 179.
87. 310 So. 2d 432 (Fla. 3d Dist. Ct. App. 1975).
88. Cf. Travelers Ins. Co. v. Smith, 328 So. 2d 870 (Fla. 3d Dist. Ct. App. 1976) in which an injured pedestrian was allowed to recover from the driver's insurer, despite the owner's failure to insure.
89. 310 So. 2d at 433.
90. Id. at 434.
91. Id. at 433.
92. FLA. STAT. § 627.733 (1979).
93. See McClendon v. United States Fire Ins. Co., 305 So. 2d 237 (Fla. 3d Dist.
jured passenger owned no car, it is not reasonable to deny her coverage under the Act; the exception of those similarly situated warrants legislative and judicial attention. Remedial statutes should be broadly construed so as to achieve their remedial purpose. In enacting the No-Fault Act, the legislature intended to reduce fault-based litigation and to facilitate compensation of accident victims. Leaving a blameless auto passenger to to her common law remedy does not further these goals.

Persons injured while “occupying” an uninsured car have been denied PIP benefits. In *Industrial Fire and Casualty Insurance Company v. Collier* the court interpreted the word “occupying.” Collier was injured when changing the tire of his uninsured VW. His disabled vehicle was struck by another car, causing the VW to strike him. He applied for PIP benefits from Industrial, the insurer of his other car, who denied benefits based on an exclusion in its policy which was authorized by the Act. The policy exclusion provided that coverage did not apply while the insured was occupying a motor vehicle which he owned, but had failed to insure under the policy. The policy defined “occupying” to mean “in or upon, or entering into, or alighting from a motor vehicle.” The appellate court found that Collier was “occupying” his VW, and thus was excluded from coverage.

Cases in the third category stand for the proposition that persons injured while driving, or riding in an insured car, who own an uninsured car, have been denied PIP benefits. In *McClendon v. Florida Rock & Insurance Co.* McClendon was injured driving another’s uninsured auto. He applied for PIP benefits from his own insurer under a non-owner policy issued to him. The insurer was held not liable for PIP benefits because McClendon did not own a car, even though his policy contained an uninsured motorist endorsement; presumably this coverage was available only upon a showing of fault. An insurer is not obligated to provide no-fault benefits in a policy of insurance if the insured does not own a car. *Id.* at 237-38.

95. *Id.* at 149. FLA. STAT. § 627.736(2) provides: “AUTHORIZED EXCLUSIONS—Any insurer may exclude benefits: (a) For injury sustained by the named insured ... while occupying another motor vehicle owned by the named insured and not insured under the policy ... .”
96. 334 So. 2d at 149-50.
98. The owner of a motor vehicle must insure it. FLA. STAT. § 627.733(1) (1979): “Every owner or regist size of a motor vehicle required to be registered and licensed in this state shall maintain security as required by subsection (3) in effect...
sured car, will also be denied the PIP benefits of the Act.

In Whitaker v. Allstate Insurance Co., Pam Whitaker did not recover from Allstate because she owned an uninsured Porsche. She lived with her sister and was injured while driving her sister’s car, insured by Allstate. The court affirmed Allstate’s refusal to pay PIP benefits based on the “unambiguous proviso” of Section 627.736(4)(d)3 of the Act: “provided the relative . . . is not [herself] the owner of a motor vehicle with respect to which security is required.

Tapscott v. State Farm Mutual Automobile Insurance Co. involved a woman who was injured while driving her father’s car. Her action against her father’s insurer failed because she was the owner of a vehicle for which security was required under the Act, and her “estranged husband cancelled the insurance on her automobile.” Thus she was involuntarily excepted from the benefits provision of the Act.

Because the security requirement is triggered by the requirement that a vehicle be registered in the state, Ms. Tapscott argued that

continuously throughout the registration or licensing period.” In addition, one must look to one’s own insurer for PIP benefits, even if injured in another’s insured auto. See Fla. Stat. § 627.736(4)(d) and Martinez v. Old Security Cas. Co., 327 So. 2d 786 (Fla. 3d Dist. Ct. App. 1976). Main Ins. Co. v. Wiggins, 349 So. 2d 638 (Fla. 1st Dist. Ct. App. 1977) interpreted the word “owner”. The First District held that Wiggins, who was injured while standing beside a motor vehicle he was leasing, was not an “owner” because his lease did not include an option to purchase. Id. at 639. Because Wiggins owned no other car, and because he lived with his daughter, he was allowed to recover PIP benefits from his daughter’s auto insurer. The decision is straightforward enough—one who leases is not an “owner.” But the fact that one who leases with an option to purchase is an “owner” as specifically defined in Fla. Stat. § 627.732(2) (1979) might well come as a surprise to an unwary lessee.

100. Id. at 857. See also Protective Nat’l Ins. Co. of Omaha v. Bergouignan, 335 So. 2d 871 (Fla. 3d Dist. Ct. App. 1976).
102. Id. at 476.
   (d) The insurer . . . shall pay . . . for 3. Accidental bodily injury sustained by a relative of the owner residing in the same household, under the circumstances described in subparagraph 1. or subparagraph 2., provided the relative at the time of the accident is domiciled in the owner’s household and is not [herself] the owner of a motor vehicle with respect to which security is required . . .
104. See Ochoa and Iowa Mut. Ins. Co. v. Lopez, 358 So. 2d 1173, 1174 (Fla.

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her car was not required to be registered because it had been inoperable for four days due to clutch and transmission disorders. The court conceded that prior cases excluded “motor vehicles which are neither operated over the public streets or highways of Florida nor maintained for that purpose” from the required security provisions of the Act, but found that Ms. Tapscott had not “abandoned her automobile as a means of transportation on public streets and highways.” The insurance on her car was cancelled because her husband abandoned her, not because she had abandoned her car. The court noted that “[a]fter recovery from her injuries, appellant repaired and reinsured her car,” evidencing her intent to maintain the car.

An opposite outcome but one consistent with the result in *Tapscott* was reached in *Malen v. American States Insurance Co.* Wayne Malen owned an uninsured Mercedes Benz. He was injured driving Diane Loos’ car, insured by American States. American States denied coverage because Malen was “the owner of a motor vehicle with respect to which security is required . . . .” On appeal, Malen recovered because the court determined that his Mercedes was not a vehicle “maintained for operation on the streets and highways . . . .” pointing to the fact that it had been left unrepaired at a repair shop for six months to be sold “as is.” Thus, security was not required for his Mercedes.
In *Staley v. Florida Farm Bureau Mutual Insurance Co.*, Staley was injured while a passenger in a car insured by Florida Farm. Staley owned an uninsured auto not involved in the accident. Staley argued that he was entitled to PIP benefits from Florida Farm because he, like Farley, was injured while a passenger in an insured vehicle. The court denied benefits, distinguishing *Farley*. Unfortunately, in distinguishing *Farley*, the court misreported it.

The logical rationale for the outcome in *Staley* is the plain language of the statute, which expressly excludes benefits where the injured person is himself "the owner of a motor vehicle with respect to auto had been inoperable and in storage for more than two months before the accident, and was not repaired until after the accident. The court relied upon *Fla. Stat.* § 627.733(1) which requires every owner of a motor vehicle required to be registered to maintain security on the motor vehicle. But the court failed to examine whether the motor vehicle was "required to be registered," and declined to follow *Staley v. Florida Farm Bur. Ins. Co.*, discussed in text accompanying notes 114-119 infra. *Id.* at 72. (In dictum, the *Staley* court had said: "Had appellant's motor vehicle been inoperable or had it been in storage it would not have been a vehicle required to be registered and licensed in Florida." 328 So. 2d at 243.) Apparently the *Williams* court was distracted by the fact that the car had not been insured for a year prior to its inoperability. *Id.* This shouldn't make any difference once the car is inoperable. The No-Fault Act sets penalties for failure to insure, and denial of benefits where they are legally available is not one of them.

115. *Id.* at 243.
116. *Id.*
117. The *Staley* court said Farley was "conceivably 'entitled to collect personal injury benefits from' his stepfather." 328 So. 2d at 243. This is error. The *Farley* court expressly found that the stepfather was not an "insurer," and that "the obvious practicalities" precluded the response that Farley could go against his stepfather. 302 So. 2d at 179. Further, the *Staley* court said that the policy of the Act in *Farley* is "to shift the burden of Farley's injury not to his stepfather but to a compensated seller of automobile insurance." 328 So. 2d at 243. The *Farley* court found "the act was intended to broaden insurance coverage while at the same time reasonably limiting the amount of damages in which could be claimed," 302 So. 2d at 179, a policy statement in Staley's favor, not against him. Furthermore, the *Farley* court found the "obvious reason" for Section 627.736(4)(d)4b is "to prevent an injured party from receiving a windfall by collecting benefits from the insurance carrier for the owner of a vehicle in which he is riding at the time of the accident and at the same time collecting benefits from the insurance carrier of another motor vehicle owner. . . ." *Id.* This interpretation too would favor Staley's recovery.
which security is required." The best way to distinguish Farley from Staley is also to refer to the plain language of the statute: Farley was neither the owner of a motor vehicle, nor entitled to PIP benefits from the insurer of the owner. If one is either, one is excluded from benefits. Staley fits the first exclusion. Unspoken, but perhaps relevant in Farley, is the fact that a child has no control over whether his parent (stepfather) insures or not; Staley should have insured. Spoken, and certainly very relevant in Farley, is the obvious practicality: a child doesn’t sue his stepfather.

**Constructively “Owned” Vehicles**

The final category of cases, those determining the availability of PIP benefits to those who constructively “own” an uninsured vehicle, is

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118. FLA. STAT. § 627.736(4)(d)4a.
119. Id.
120. FLA. STAT. § 627.736(4)(d)4b.
121. In contrast to the denial of PIP benefits in the above cases, persons have been allowed to collect medical payments benefits from the insurer of the car in which they were riding, in spite of failing to insure their own cars.

Ward v. Nationwide Mut. Fire Ins. Co., and Johnston v. United Services Auto. Ass’n, 364 So. 2d 73 (Fla. 2d Dist. Ct. App. 1978), consolidated for appeal, involved passengers injured in separate accidents, each in an insured vehicle. Both passengers owned automobiles which they had failed to insure, in contravention of the Act. The appellate court found that the injured plaintiffs were entitled to the insurance benefits they were seeking from the insurer of the owner of the vehicle in which they were injured—“additional and optional medical payments coverage for which a separate premium was charged.” Id. at 76. They were not seeking nor were they entitled to PIP benefits. Id. In response to United Services’ argument that it would be unfair to allow Johnston to recover because he had violated the required security provision of the Act, the court responded that the legislature had provided penalties for violation of the Act, and it was not the court’s role to fashion new ones, and that “between plaintiffs and defendants, there is nothing unfair in requiring defendants to make payment of benefits which they have contracted to pay under coverage for which they have been paid a premium.” Id. at 78. The court reminded the defendant that the purpose of provisions in insurance contracts which restrict coverage when other insurance coverage is available is to avoid duplication of coverage, not to escape coverage altogether, as defendant would do. The court warned that “[i]f an insurer intends to restrict coverage, it should use language clearly stating its purpose,” for “[w]here there are two interpretations which may fairly be given to language used in a policy, the one that allows the greater indemnity will govern.” Id. at 77.
perhaps the most disturbing in terms of outcome. These cases construe
the meaning of the phrase “named insured” in a policy of insurance in
order to impute constructive ownership of a vehicle. The holding of
each presents a disturbing result, at odds with consumers’ reasonable
expectations regarding insurance coverage.\footnote{122}

For example, in the consolidated cases of Rojas and Fonseca,\footnote{123}
Mrs. Rojas’ reasonable expectations were thwarted. Mrs. Rojas, driving
her husband’s uninsured Oldsmobile, and Mrs. Fonseca, her passenger,
were injured in an accident. Mrs. Rojas sought PIP benefits and Mrs.
Fonseca sought liability benefits under a policy issued to Mrs. Rojas by

\footnote{122 See R. Keeton, Insurance Law \S 6.3 (1971):

  Insurance contracts continue to be contracts of adhesion, under which
the insured is left little choice beyond electing among standardized provi-
sions offered to him, even when the standard forms are prescribed by pub-
lic officials rather than insurers. . . . Regulation is relatively weak in most
instances, and even the provisions prescribed or approved by legislative or
administrative action ordinarily are in essence adoptions, outright or
slightly modified, of proposals made by insurers' draftsmen.

  . . .

  Moreover, the normal processes for marketing most kinds of insurance do
not ordinarily place the detailed policy terms in the hands of the policy-
holder until the contract has already been made. . . . Thus, not only
should a policyholder's reasonable expectations be honored in the face of
difficult and technical language, but those expectations should prevail as
well when the language of an unusual provision is clearly understandable
unless the insurer can show that the policyholder's failure to read such
language is unreasonable.

  . . .

  It is important to note, however, that the principle of honoring reason-
able expectations does not deny the insurer the opportunity to make an
explicit qualification effective by calling it to the attention of a policy-
holder at the time of contracting, thereby negating surprise to him.
\textit{Id.} at 350-52. See also Ward v. Nationwide Mut. Fire Ins. Co., 364 So. 2d 73 (Fla. 2d
Dist. Ct. App. 1978): “An insurer will not be allowed, by the use of obscure terms, to
defeat the purpose for which the policy was procured. . . . (Citing, Roberson v. United
Services Auto. Assn., 330 So. 2d 745 (Fla. 1st DCA 1976). . . . If an insurer intends
to restrict coverage, it should use language clearly stating its purpose.” \textit{Id.} at 77. See
also Abraham, Judge-Made Law and Judge-Made Insurance: Honoring the Reasona-

123. Fidelity and Cas. Co. of N.Y. v. Fonseca, and Rojas v. Fidelity and Cas.
Co. of N.Y., 358 So. 2d 569 (Fla. 3d Dist. Ct. App. 1978) \textit{cert. denied} 365 So. 2d 711
(FLa. 1978).}
Fidelity. The policy covered Mrs. Rojas’ Ford, and “a temporary substitute vehicle.” Mrs. Rojas and Fonseca both argued that they were injured in a temporary substitute vehicle and should therefore recover from Fidelity, since Mrs. Rojas’ Ford was out of service and under repair on the date of the accident.\textsuperscript{124} The appellate court found that neither Mrs. Rojas nor Mrs. Fonseca could recover, \textsuperscript{125} because Mr. Rojas’ Olds was not a “temporary substitute vehicle” which the policy defined as a “non-owned” vehicle.\textsuperscript{126} It was an “owned,” rather than “non-owned”, vehicle because Mr. Rojas, by operation of the fine print, was a “named insured” under the policy. His name didn’t appear on the policy, but because the policy defined “named insured” to include the resident spouse of the named insured, ownership of the Olds was imputed to Mrs. Rojas.\textsuperscript{127} Thus coverage under the policy depended upon the interrelationship of three separate definitions in the policy—“named insured,” “non-owned,” and “temporary substitute vehicle.” By manipulating all these provisions, lawyers could retrospectively determine what coverage was available.

\textit{Rojas} is wrongly decided for two reasons: the clear and unambiguous language of the policy extends coverage, and the rationale underlying the decision fails to justify the denial of coverage.

The court focused on the wrong policy provision (“named insured”) to reach its erroneous conclusion. The insuring clause in Mrs. Rojas’ policy obligated Fidelity to pay for damages arising out of the “ownership, maintenance, or use of the owned automobile or any non-owned automobile.”\textsuperscript{128} The court decided that since Mr. Rojas was a “named insured” (defined in the policy to include a spouse who resided in the same household), the Olds could not possibly be a “non-owned” vehicle. But the court overlooked the clear and unambiguous definition of an “owned” vehicle contained in the policy: a vehicle “for which a specific premium charge indicates that coverage is afforded.”\textsuperscript{129} The language of the policy defined a “non-owned” vehicle as one “not

\begin{itemize}
\item \textsuperscript{124} 358 So. 2d at 570.
\item \textsuperscript{125} The policy tied the availability of PIP benefits to the availability of liability insurance under the policy. \textit{Id.} at 571 n.1.
\item \textsuperscript{126} \textit{Id.} at 571.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.} (emphasis in original).
\item \textsuperscript{129} \textit{Id.}
\end{itemize}
owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile.”

A “temporary substitute automobile” was one “not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile . . . when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.”

No premium was charged nor coverage afforded for the Olds. The policy unambiguously defined a “non-owned” vehicle as one “not owned;” a vehicle as to which no premium was paid. Rojas was indeed a named insured. But payment of benefits depended on the definition of “owned” and “non-owned,” not upon the definition of “named insured.” Neither Mr. nor Mrs. Rojas “owned” the Olds, because the policy gave a very specific definition to the word “owned,” and that definition was incorporated into the definition of “non-owned.”

This technical construction is a fitting response to Fidelity’s argument that the policy is “clear and unambiguous.” To see the fallacy of the insurer’s argument, one need only examine the rationale underpinning the court’s interpretation of the insurance policy provisions at issue in this case. The court said that the inclusion of both spouses in the definition of named insured “was intended to protect the insurer from assuming risks for which premium payments were not elicited in situations where such risks were likely to eventuate.” But in this

130. Id.
131. Id.
132. The court did not focus on the definition of “non-owned” as “furnished for the regular use of either the named insured or any other relative.”
133. 358 So. 2d at 574.
134. Id. at 575. Historically, the inclusion of both spouses as “named insureds” in the omnibus clause of an automobile insurance policy was intended to protect the insured, not the insurer. See R. Keeton, Insurance Law § 4.7 (1971) (Omnibus Clauses Generally):

Perhaps the major objective underlying the development of omnibus clauses has been to serve the interests of the insurance purchaser (usually the named insured) in having the benefits of the coverage extend to certain other persons as well as himself—persons who are natural objects of his concern.

A second objective—to serve the interests of potential victims of incidents to which the insurance coverage applies—has been at most a subsidiary influence in the voluntary expansion of coverage through omnibus
case, a premium was elicited for injury in a temporary substitute vehicle, which is precisely the risk that eventuated. Coverage under these facts is precisely what the insured would have expected she was paying for, whether her “loaner” came from her neighbor, her mechanic or, as in this case, her spouse. The court feared that if the definition of named insured did not include the spouse, “two or more vehicles could be covered by payment of a single premium.”

Ironically, in Boyd v. United States Fidelity and Guarantee Co., which the Rojas court relied upon, two premiums were paid to two different companies, one covering Mr. Boyd’s car, and one covering Mrs. Boyd’s. “The [Boyd] court acknowledged the incongruity of the fact that the husband would be covered in almost any car in the world which he drove with the owner’s permission except that of his wife.” Rojas repeats the irony, yet fails to recognize that this very incongruity defeats the reasonable expectations of the consumer with regard to the scope of coverage.

clauses, but it has been a primary influence upon legislation requiring or encouraging the inclusion of omnibus clauses in liability insurance coverages.

See also § 2.11(b) (The definition of Insured):

In general, an omnibus clause of an automobile insurance policy extends the definition of “insured” to persons using the automobile with permission. The earlier forms of omnibus clauses required that the permission be that of the named insured, express or implied.

The 1955 revision broadened the definition of “insured” to include the spouse of the insured even without proof of permission and any other person using the vehicle with the spouse’s permission.

135. 358 So. 2d at 575.
136. 256 So. 2d 1 (Fla. 1971) reh. denied (1972).
137. Id. at 2.
138. 358 So. 2d at 572. Cf. Protective Nat'l Ins. Co. of Omaha v. Bergouignan, 335 So. 2d 871 (Fla. 3d Dist. Ct. App. 1976) in which the court held that a passenger injured in an insured vehicle could not recover PIP benefits because he owned an uninsured vehicle. But the court allowed his spouse who was injured in the same car to recover. Either their policy did not define “named insured” to include a spouse, or the court chose to ignore such a definition.

139. The court also failed to see the implicit hostility to the married state contained therein. For a case in which the Florida Supreme Court urged the importance of marriage, see Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979).
The result in *Industrial Fire and Casualty Insurance Co. v. Jones*

140 is equally disturbing. Calvin Jones was injured while driving his mother's uninsured car. Jones resided with his mother and stepfather. He sought PIP benefits from Industrial, the insurer of his stepfather's car. Industrial denied payment based on language in its policy. The policy excluded coverage of any relative of the "named insured" while occupying a motor vehicle "of which the named insured is the owner and which is not an insured motor vehicle under this insurance."141 The court said Calvin's stepfather "owned" Calvin's mother's uninsured car, not in fact, but by operation of the definition of "named insured" in the policy.142 The court reached this conclusion despite the fact that the policy defined "named insured" more broadly than the Act defined "named insured."143 The court found its interpretation necessary to prevent "the ridiculous result of allowing the insurance of one automobile and the coverage on several unnamed automobiles."144 The

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140. 363 So. 2d 1168 (Fla. 3d Dist. Ct. App. 1978).
141. *Id.* at 1169.
142. *Id.* at 1170. Cf. *Lopez v. Fidelity & Cas. Co. of N.Y.*, 384 So. 2d 680, 681 (Fla. 3d Dist. Ct. App. 1980). Fidelity argued that coverage should be denied under the provision of the Act which authorizes the insurer to exclude benefits for injury sustained by a relative of the named insured, residing in the same household, while occupying another motor vehicle owned by the named insured but not insured under the policy. The court found the exclusion inapplicable because Rodriguez did not "own" the vehicle occupied by Lopez. Because Lopez was not Rodriguez's spouse (he was his son), he was not caught in the ensnaring definition of "owner" which caught the plaintiffs in *Jones* and *Fonseca*.
143. *Id.* The policy defined "named insured" to include the policy holder or the spouse of the policyholder. *Id.* Section 627.732 (1977) defined "named insured" as "a person, usually the owner of a vehicle, identified in a policy by name as the insured under the policy." *Id.* Cf. *Cavalier Ins. Corp. v. Myles*, 347 So. 2d 1060 (Fla. 1st Dist. Ct. App. 1977): It is axiomatic that the provisions of statutes relating to insurance become a part of any policy issued in the state, and that if the terms of a policy are susceptible of differing interpretations, the interpretation which sustains the claim for indemnity or which allows the greater indemnity will be adopted. *Id.* at 1062 citing *Dorfman v. Aetna Life Ins. Co.*, 342 So. 2d 91 (Fla. 3rd Dist. Ct. App. 1977).
144. 363 So. 2d at 1170. Here the court cited *Fidelity & Cas. Co. of N.Y. v. Fonseca*, 358 So. 2d 569 (Fla. 3d Dist. Ct. App. 1978) for authority.Ironically, Fonseca had paid for insurance on a "temporary substitute vehicle," but when injured in a
court also observed that “as a practical matter an insurance company may include as a named insured a policyholder’s ‘spouse’ [without actually naming the spouse on the policy] for the simple reason that a policyholder (especially in this day and age) is not apt to have the same spouse at any given point in time.”

The court appears to confuse matters of administrative convenience with matters of policy. The Jones court relied upon its former decision in Rojas, in which it opined that the inclusion of both spouses within the definition of “named insured” protects the insurer “from assuming risks for which premium payments were not elicited in situations where such risks were likely to eventuate.” But the court overlooked the fact that in Rojas the insured paid a premium for coverage in a temporary substitute vehicle and did not receive the expected coverage. While protection of the profits of the insurer is a worthy concern, in Jones that protection comes at the expense of an injured child, who had no control over whether or not his parents properly insured. As the Farley court recognized, “obvious practicalities” prevent a suit against the parent. The result in these cases encourages insurance companies to define terms in ways that the consumer would not expect, and in ways which offend the purposes of the Act. The policy exclusion at issue here presents a booby-trap for the unwary consumer.

Conclusion

Florida courts have extended the coverage of the No-Fault Act to those injured in vehicles which were not statutorily defined “motor vehicles.” This desirable result furthered the purposes of the Act. But the supreme court erred in Lumbermens. It should have extended coverage to one injured in an accident involving two commercial vehicles. In view of the subsequent amendment of the Act to expressly include com-

145. 363 So. 2d at 1170 n.1.
146. It also undermines the marital harmony for which the supreme court expressed great concern in Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979).
147. 358 So. 2d at 575.
148. See discussion of Rojas in text, supra.
149. 302 So. 2d at 179.
mercial vehicles, this injustice should not recur.

The courts have extended the coverage of the Act to children injured in or by insured vehicles despite the fact that their parents owned an uninsured car. This result is consistent with the purposes of the Act. The courts have denied the coverage of the Act to injured persons who actually own an uninsured car. The Act requires owners to purchase personal injury protection insurance, and it is reasonable to expect and require those who own cars to comply. But it is not reasonable to exclude from the Act's benefits those persons who do not own an auto, and thus have no opportunity to insure. If such a person is injured in an uninsured car, recovery of no-fault benefits from the insured driver, or from the insured owner of another car involved in the accident, should be permitted. This result would further the purposes of the Act without undermining the required insurance provision of the Act. The courts' failure to extend coverage on these facts is out of keeping with the purposes of the Act.

Finally, the imputation of constructive ownership of uninsured vehicles to spouses, thus denying the benefits of the Act to them, is a surprising and unfair result. This development is the most inimical to the purposes of the Act. It will eventually undermine the Act, for it invites drafting of insurance policies which avoid the Act's required benefits.
Alternatives to Public School: Florida's Compulsory Education Dilemma

A child is a person who is going to carry on what you have started. . . . He will assume control of your cities, states and nations. He is going to move in and take over your churches, schools, universities and corporations. All your books are going to be judged, praised or condemned by him. The fate of humanity is in his hands.¹

Introduction

The value of a quality education in our society is unquestioned. However, controversy exists concerning state efforts to insure education for its citizens. These efforts are reflected in compulsory education laws² which are sometimes challenged by citizens claiming compliance through an unorthodox method of schooling.³

To set the stage for an analysis of Florida's contemporary problems with compulsory school attendance laws, it is appropriate at the outset to briefly discuss some landmarks which have been significant in the origin and development of compulsory education in the United States. The focus of this note will then shift to State of Florida v. M.M.,⁴ a recent case involving education at home in the context of

¹. Abraham Lincoln. This quote was taken from H.S. Bhola, A Policy Analysis of Adult Literacy Versus Universal Primary Education, 55 VIEWPOINT TEACH AND LEARN 22, 24 (Fall 1979).
Florida's compulsory school attendance laws. The examination of *M.M.* will be highlighted by the court's struggle to define the word "school" and followed by an analysis of the potential ramifications of the court's decision. Although the court displayed wisdom in reaching its decision, there remains a legislative void in Florida which is susceptible to future challenge; some recommendations are suggested which can help to fill that gap and clarify Florida's ambiguous compulsory education laws.

**Historical Perspective of Compulsory Education**

In 1925 the United States Supreme Court in *Pierce v. Society of the Sisters*[^5] recognized the need to balance state power to insure the education of its populace with parental rights to direct their children's upbringing. *Pierce* involved a challenge to an Oregon enactment which required "every parent, guardian or other person having control . . . of a child between eight and sixteen years to send him to a public school."[^6] The Court considered the enactment "repugnant to the constitution" because the legitimate business and property interests of private schools were "threatened with destruction through the unwarranted compulsion which [the state exercised] over present and prospective patrons of their schools."[^7] *Pierce* is frequently cited for its dictum acknowledging the parental option to elect private school for their children. This option is a derivative of the parental right to be free from unreasonable governmental interference with respect to their children's upbringing.[^8] Although the parents' right to provide private education prevailed, along with the private schools' business and property interests, the Court cautioned

> [n]o question [was] raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of

[^5]: 268 U.S. 510.
[^6]: *Id.*, at 530 (emphasis added).
[^7]: *Id.* at 532, 535.
[^8]: *Id.* at 534-35 citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) which stated that legislation prohibiting the teaching of foreign languages to students prior to passing the eighth grade was an unreasonable interference with the right of parents to control the education of their children.
proportion age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.9

Thus, Pierce may be equally significant for its implicit recognition of the state's power to compel and regulate education of its citizens so long as the power is reasonably exercised.

The Supreme Court reaffirmed its position regarding state power to reasonably regulate education in Wisconsin v. Yoder,10 but the Court also recognized that notwithstanding the high priority on education, the state's interest "is by no means absolute to the exclusion or subordination of all other interests."11 In Yoder, Amish parents claimed that the compulsory education law in Wisconsin was inapplicable to them because it conflicted with their religious beliefs which are protected by the free exercise clause of the first amendment.12 The Wisconsin law, which required public or private school attendance between the ages of seven and sixteen, was contrary to the parents' religious practices prohibiting formal education beyond the eighth grade.13 This prohibition is rooted in the Amish doctrine which emphasizes that "salvation requires life in a church community separate and apart from the world and worldly influence."14 Apparently, the Amish community feared that formal education beyond the eighth grade "not only expose[d] themselves to... censure of the church community... but... also endanger[ed] their own salvation..." due to the intensity of peer pressures coercing conformity to non-Amish values.15 The Court, clearly influenced by the longstanding practice of the Amish religion

9. Id. at 534.
10. 406 U.S. at 213. The court was emphatic in their position by stating: "There is no doubt as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." Id. (emphasis added).
11. Id. at 215.
12. Id. at 208-09. The court quoted from the first amendment in footnote four of the opinion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Id. at 209 n.4.
13. Id. at 211.
14. Id. at 210.
15. Id. at 209-11.
coupled with the history of self-reliance demonstrated by its followers, agreed that enforcement of the Wisconsin compulsory education law would threaten the existence of the Amish religion.\textsuperscript{16} It is important to realize, however, that the \textit{Yoder} holding is narrow and the Amish parents may have been unsuccessful if their departure from the compulsory education laws had been more substantial\textsuperscript{17} or if their beliefs had not been grounded in a religious foundation.\textsuperscript{18}

Presently, compulsory education laws generally require children to attend school between the ages of six to sixteen.\textsuperscript{19} Although this age requirement varies only slightly from state to state, there is great disparity between state statutes regarding the means of achieving compulsory attendance.\textsuperscript{20} This lack of statutory uniformity, combined with conflicting judicial decisions, brings into focus the competing interests that often collide in compulsory attendance controversies. These interests are those of the state in mandating and regulating the education of its citizens, the parents in directing the upbringing of their children, and the child in being guaranteed educational opportunities.\textsuperscript{21} It is evident that these interests must be carefully weighed if a compulsory ed-

\textsuperscript{16} \textit{Id.} at 219, 224-25. While there was no evidence concerning the attrition rate in the Amish religion, the Court seemed confident that Amish defectors were not likely to become burdens on society. \textit{Id.} at 224-25.

\textsuperscript{17} \textit{Id.} at 238 (concurring opinion). Justice White explained why \textit{Yoder} should have limited application: “This would be a very different case for me if respondent’s claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the state.” \textit{Id.} The Court also seemed impressed with the quality of vocational training provided for the children in lieu of the brief additional period of formal education. \textit{Id.} at 224.

\textsuperscript{18} \textit{Id.} at 216. Chief Justice Burger who delivered the opinion of the court restricted \textit{Yoder} to claims based on religious beliefs. He hypothesized:

If the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his times and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau’s choice was philosophical and personal rather than religious and such belief does not rise to the demands of the religion clauses.

\textit{Id.} Compare F. & F., 273 So. 2d 15, discussed in the Ramifications section of this note.


\textsuperscript{20} \textit{Id.} at 379-81; \textit{See generally Annot.}, 65 A.L.R. 3d 1222 (1975).

\textsuperscript{21} 406 U.S. at 213-15. \textit{See also} 268 U.S. at 534-35.
ucation dispute is to reach a just resolution.

The state's interests in an educated citizenry was stressed early in our country's history by Thomas Jefferson who believed that education is a cornerstone of democracy and it is evident that the state is interested in preparing citizens to become “self-sufficient participants in society.” Parental interest in the nurture and education of their children is incontrovertible and to override the parent, a state interest of sufficient magnitude must exist. When the parental interest is religiously based, the state's concern must be compelling before the courts will allow intervention, as clearly demonstrated by the Yoder decision.

The interest of the child is obviously the heart of the controversy and should never be overlooked in the balancing process. Justice Douglas in his dissenting opinion in Yoder, wrote: “Children themselves have constitutionally protectible interests,” and he believed that the Yoder majority ignored the interests of the child in reaching its decision. Douglas eloquently stated: “The education of the child is a matter on which the child will often have decided views. . . he may want to be a pianist or an astronaut or an oceanographer . . . if his education is truncated, his entire life may be stunted and deformed.”

Today the controversies continue. In recent years parental dissatisfaction with public schools has manifested in an increased number of

22. 406 U.S. at 221, 225. See also Moberly, supra note 18 which quoted a forceful statement made by Thomas Jefferson in 1816: “If a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be . . . .” Id. at 196.

23. 406 U.S. at 221.

24. Id. at 214, 232. See also 391 F. Supp. at 460-61. In Scoma, the parents asserted fundamental constitutional rights to educate their children as they saw fit and the court held that those interests do not “rise above a personal or philosophical choice and cannot claim to be within the bounds of constitutional protection. Id. But see Ohio v. Whisner, 47 Ohio St. 2d 181 at . . ., 351 N.E.2d 750 at 771 (1976). Ohio’s minimum standards for private schools were so pervasive they nearly cloned the private schools in the public school image which consequently deprived the parents of their traditional interests in guiding their children’s upbringing. Id. at . . ., 351 N.E.2d at 768.

25. 406 U.S. at 214; 294 N.W.2d at 895; See also 47 Ohio St. 2d at . . ., 351 N.E.2d at 771; But cf. Prince v. Massachusetts, 321 U.S. 158 (1944) which explained that the power of the parent, even when related to a religious claim may be subject to limitations when it endangers the welfare of the child.

26. 406 U.S. at 242-44.

27. Id. at 244-46.
parents attempting to educate their children at home. There is evidence of this movement in Broward County, Florida, as demonstrated by the establishment of the United Citizens of Broward, a parent group bonded together by their interest in home schooling. "[A]lthough accurate figures are difficult to come by . . . John Holt . . . publisher of *Growing without Schooling*, a newsletter for home schoolers, estimates that upwards of 10,000 families" have established home schools nationwide.\(^{28}\)

Dissatisfaction with the public school system frequently stems from school boundary disputes and busing requirements. Certainly many parents are concerned for their children's welfare due to excessively long bus rides to school at unbelievably inconvenient hours,\(^{29}\) but it is significant to note the fact that many other parents are insidiously motivated by racial prejudice. Skepticism regarding the quality of education provided in the public schools also seems to be increasing in recent years, along with concerns about school violence and what some believe to be a "mean spirited, competitive, status oriented"\(^{30}\) atmosphere. As a former teacher, guidance counselor and coach in the Florida public school system\(^{31}\) I question whether these concerns are justified or exaggerated. Even if they are well founded, it can be argued that the school atmosphere is merely a reflection of the society in which children must learn to function.\(^{32}\) Certainly parents are entitled to be critical of the education afforded their children. However, regardless of parental motivations for withdrawing children from the public schools, parents should not be exempt from fulfilling *their* responsibility to comply in an acceptable manner with the state's compulsory education requirements.

Home instruction is recognized in many states as an alternative

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32. R.A. Bumstead, *supra* note 27.
means of compliance with compulsory education laws. In those states permitting education at home, it is not unusual for one or more of the following to be required: (a) certain courses to be included, (b) certified or qualified instructors, (c) instruction equivalent to that available in public schools or (d) instruction for a specified length of time.

Florida is among those states which statutorily provide for the home education alternative as a means of compliance with compulsory school attendance so long as the child is tutored by a certified instructor. Recently, however, a case of first impression arose in the Fourth District Court of Appeal of Florida which provided occasion to review a circuit court determination that parents who are not certified teachers may be permitted to educate their children at home.

State of Florida v. M.M.

When the 1981-82 Broward County School boundaries were re-established, Mr. and Mrs. Pohl objected to the continued busing of their two children to Ely High School in Pompano, Florida. After the Pohls were denied a transfer for their children by the Hardship Committee of the School Board, they decided to withdraw them from public school. The Pohls removed Scott and Michelle from Ely High School in February 1981 and commenced instruction in their own home which they designated as the Pohl Private School. The two children were the only pupils and neither of the parents were certified teachers nor was an older sister who also instructed the children on occasion.

33. See Note, supra note 1, at 379-81.
37. Fla. Stat. § § 228.041 (13) and (16) (Supp. 1980).
39. 407 So. 2d at 989-90.
40. In the Interests of Michelle Martin and Scott Evans, Nos. 81-2550 and 81-2552. (Fla. 17th Cir. Ct., ordered June 30, 1981). Heretinafter cited as Court Order.
41. Id.
42. Id., 407 So. 2d at 989.
43. 407 So. 2d at 990.
dent Welfare and Attendance Department of the School Board initiated an action for dependency in the Seventeenth Judicial Circuit alleging that the children had been truant from Ely High School in violation of the Florida Compulsory Education Law which mandates regular school attendance between the ages of six and sixteen. Compliance with Florida's compulsory education law can be accomplished in four alternative ways according to Florida Statute Section 232.02.

Regular school attendance is the actual attendance of the pupil during the school day as defined by law and regulations of the State Board. Regular attendance within the intent of 232.01 may be achieved by attendance at:

1. A public school supported by public funds;
2. A parochial or denominational school;
3. A private school supported in whole or in part by tuition charges or by endowments or gifts;
4. At home with a private tutor who meets all requirements prescribed by law and regulations of the State Board of Private Tutors.

Although the fourth alternative allows home instruction under the guidance of a private tutor, the Pohls did not claim compliance under that provision because a teaching certificate is a pre-requisite for private tutors. Asserting, instead, that their home was a private school, the Pohls claimed compliance with the third provision which does not explicitly mandate certification of instructors. The state argued that the Pohl teaching arrangement was similar to the private tutoring relationship contemplated in Section 232.01 (4) and, consequently, the instructors were required to be certified.

44. Id. and Fla. Stat. § 39.01(9)(d) (Supp. 1980).
48. Fla. State Bd. of Educ. Admin. Rule 6A-1.951 reads in part: "Private Tutors. Any person who tutors a child of compulsory attendance age, when such tutoring is in lieu of school attendance for the child, shall meet the following requirements: (1) He shall hold a valid Florida certificate to teach the subject or grades in which instruction is given."
49. Petitioners Brief at 1-2; Court Order at 1.
50. Petitioners Brief at 2.
held that the arrangement constituted a private school and therefore the teacher certification requirement did not apply because "[t]here are currently no rules or statutes regulating non-public schools in the areas of certification or education of teachers, curriculum, class loads, student assessment and many other areas." To comply with the private school provision, the Pohls were required merely to: (a) maintain enrollment and attendance records, (b) obtain certificates of immunization for their children, (c) instruct the children for the requisite number of hours per day and days per year and (d) file an annual data base survey with the Department of Education.

The court determined that the Pohls were not strictly in compliance with the Florida Statute because Scott and Michelle were instructed only four hours per day rather than the five hours mandated by law. Notwithstanding this deficiency, it was ordered that the children could attend the Pohl Private School and the matter was scheduled to be reviewed at a later date to allow the Pohls an opportunity to enlarge their instructional hours.

The state petitioned the Fourth District Court of Appeal and the oral argument focused on a frustrating effort to define "school." If the Pohl home instruction scheme had constituted a school, then it would have been difficult to deny compliance with the private school provision in the Florida statute. If the program had been merely a tutoring arrangement, then the private school provision could not have sheltered the Pohls from the teacher certification requirements applicable to private tutors under the home instruction provision.

Florida's statute provides virtually no aid in defining the word "school." The state relied on the definition of "school" provided in

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51. Court Order at 2. (emphasis added). Judge Vitale noted that "Florida Statute Chapter 247 which set minimum standards for private schools was repealed in 1969." Id. Interestingly, compliance with those standards was never mandatory.
56. Court Order at 2.
57. Id. at 4.
Florida Statute Section #228.041 (5): "A school is an organization of pupils for instructional purposes on an elementary, secondary or other public school level approved under regulations of the State Board." The problem with this definition, according to the Pohls, is that since it is found in Chapter 228 of the Florida Statutes entitled State Plan for Public Education it applies only to public education. The Pohls, therefore, asserted that the proper definition of school is derived from Florida Statute 229.808 (2) which "defines a non-public school as one which could be run by an individual" and "declares itself to be an educational center." The difficulty with this definition is that its application is expressly limited to organization of the data base survey, a report facilitating maintenance of state records of all private schools in Florida. This struggle to define the word "school" commanded the appellate court's attention and ultimately influenced the court to reverse "the final order under review in all respects save the adjudication that the minor appellees are dependent children within the jurisdiction of the family division of the circuit court."

Can A Home Be A School?

Several jurisdictions have struggled to define a "school" for purposes of determining compliance with compulsory education laws. Their experience provides a valuable context for analyzing the Fourth District Court of Appeal's rationale in M.M. Generally, two contrasting positions have emerged reflecting different viewpoints concerning the functions that schools should fulfill. The first position defines a school as an organization or institution in

61. Petitioners Brief at 3. The petitioners view was consistent with a 1972 Attorney General opinion which recommended use of this definition to determine whether attendance at a private school can satisfy the regular attendance requirement. 072-90 Op. Att'y Gen 154, 156 (1972).
63. Respondent's Brief at 3.
64. State of Fla. v. M.M.-oral argument tapes.
66. 407 So. 2d at 991.
68. Id. at 1232-34; Accord Note, supra note 2, at 364-65.
the *business* of education.\(^{69}\) Cases advocating this position often recognize the importance of group learning activities and school socialization functions.\(^{70}\) The second position considers an arrangement to be a school if *learning is imparted*, regardless of the number of students involved.\(^{71}\) This view focuses solely on academic functions and denies

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\(^{69}\) See State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929) where it was held that parents cannot "make use of units of education so small, or facilities of such doubtful quality, that supervision thereof would impose an unreasonable burden upon the state . . . ." *Id.* at 41, 146 A. at 171. *Accord* City of Akron v. Lane, 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979). State v. Counort, 69 Wash. 361, 124 P. 910 (1912) is often cited to support the proposition that home instruction by parents is not a private school. *See, e.g.*, Petitioner's Brief at 4. Judge Morris wrote a perplexing opinion in the *Counort* case. On one hand he stated that instruction by a parent to a child regardless of the parents' competency to teach is not attendance at a private school. 69 Wash. at _, 124 P. at 911. To constitute a private school "means the same character of school as the public school, a regular, organized and existing institution, making a business of instructing children . . . ." *Id.* at _, 124 P. at 911-12. On the other hand it seemed contradictory when he stated, "[u]ndoubtedly a private school may be maintained in a private home in which the children of the instructor may be pupils. This . . . is not to be determined by the place where the school is maintained, nor the individuality or number of the pupils who attend it. It is to be determined by the purpose, intent, and character of the endeavor." *Id.* at _, 124 P. at 912. The decision, denying private school status to the *Counort* arrangement seemed to turn on the state's evidence "that his two little girls could be seen playing about the house at all times during the ordinary school hours." *Id.*

\(^{70}\) 195 Cal. App. 2d at _, 16 Cal. Rptr. at 171; Knox v. O'Brien, 7 N.J. Super. 608, 72 A.2d 389 (Cape May County Ct. 1950). *Knox* was subsequently overruled by *Massa* which interpreted equivalent instruction merely to be academic equivalency and denied consideration of socialization factors. 95 N.J. Super. at _, 231 A.2d at 257.

\(^{71}\) 404 III. 574, 90 N.E.2d 213. The court, in *Levisen* agreed with the parents and held that "[a] school . . . is a place where instruction is imparted to the young . . . [and the] number of persons taught does not determine whether the place is a school." *Id.* at _, 90 N.E.2d at 215. The court reasoned that the end result is determinative rather than the manner in which the education is delivered. *Id.* See generally Comment, *Private Tutoring, Compulsory Education and the Illinois Supreme Court*, 18 U. CHI. L. REV. 105 (1950). *See also* State v. Peterman, 32 Ind. App. 665, 70 N.E. 550 (1904). In *Peterman*, the parent who hired a teacher to instruct his child at the teacher's home was in compliance with the law because "[i]his would be the school of the child . . . and would be as much a private school as if . . . conducted as such." *Id.* at _, 70 N.E. at 551. *Compare* 191 Kan. 701, 383 P.2d 962. The *Lowry* court held that the home instruction did not constitute a private school but also implied that the result may have been the opposite if the legislature's course of study requirements had been complied with by the parents. *Id.* at _, 383 P.2d at 965. *See* State v. Superior Ct.,
the importance of socialization at school. While both theories re-
represent accepted descriptions of schools, distinctive ramifications are
associated with each perspective. In terms of M. M., if the first theory
had been adopted by the appellate court, the Pohls would have had
difficulty demonstrating their instructional arrangement was an organi-
zation in the business of education. If the second theory had been
embraced, then the court may have considered the Pohls' arrangement
a private school because it imparted learning despite the apparent lack
of socialization.

In People v. Turner a California appellate court construed a
statute which, like Florida's, provided a home instruction exemption to
state compulsory education laws. The Turner court held that when
children were tutored at home, parents were not entitled to use the
private school provision. Reading the statute's sections in pari
materia the court concluded "the legislature intended to distinguish be-
tween private schools upon the one hand and home instruction by a
private tutor . . . on the other."

The Fourth District Court of Appeal in M. M. adopted the Turner
reasoning, concluding "[t]hat there is no statutory authority regulating
the establishment of private schools in Florida does not mean that Flor-
ida parents, unqualified to be private tutors, can proclaim their homes
to be private schools and withdraw their offspring from public
schools." The M. M. court applied the following canon of statutory
construction to section 232.02 in support of its conclusion:

55 Wash. 2d 177, 346 P.2d 999 (1959). The Washington Supreme Court established
"three essential elements of a school . . . (1) the teacher, (2) the pupil or pupils, and
(3) the place or institution." Id. at __, 346 P.2d at 1002. Washington law required all
teachers to be certified and teacher certification appeared to be the only ingredient
preventing the home instruction from being a school. Id.
72. 95 N.J. Super. at __, 231 A.2d at 257.
73. 69 Wash. at __, 124 P. at 911-12.
74. 404 Ill. at __, 90 N.E.2d at 215.
76. Id. at __, 263 P.2d at 688.
77. Id. Judge Patrosso stated, "[i]f a private school . . . necessarily comprehends
a parent or private tutor instructing at home, there was no necessity to make specific
provision exempting the latter." Id.
78. 407 So. 2d at 990.
In the interpretation of a statute, it will be presumed that the legislature intended every part thereof for a purpose, and that it had some purpose in introducing the particular language used in an enactment. The maxim "ut res magis valeat quam pereat" requires not merely that the statute should be given effect as a whole, but that effect should be given to each of its provisions. Significance and effect should be accorded every part of the statute, if this can be done without destroying or perverting the sense or effect of the law or the general policy that dictated its enactment. In general, therefore, that construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction that would leave without effect any part of the language used should be rejected if possible. 79

To allow the private school designation to be attached to the Pohl home tutoring arrangement would have ignored this rule of statutory construction and obviously rendered Florida's home instruction provision mere surplusage. 80

Ramifications

It is possible that the Pohls' home instruction would have furnished the children an adequate education; it is even conceivable that the children's education would be superior to that afforded by public schools. However, it is important to consider that the purpose of the compulsory education statute is to insure all children receive a satisfactory education. If parents are permitted to claim compliance with the private school provision while instructing children at home, then many children may be deprived of educational opportunities due to the idiosyncrasies of their parents. 81 For example, in F. & F. v. Duval

79. Id. (citations omitted) (emphasis added).
80. State of Fla. v. M.M.—oral argument tapes. To paraphrase one of the judges from the M.M. oral argument, if we were to adopt the position that home tutoring constitutes a private school then why wouldn't a private tutor simply declare the arrangement to be a school. (The judge was candidly suggesting that this would nullify the requirement in Florida that private tutors obtain teaching certificates.) Accord Petitioner's Brief at 5.
81. See 406 U.S. 205 (dissenting opinion); 391 F. Supp. 452; 404 Ill. 574, 90 N.E.2d 213 (dissenting opinion). In Leisen, Justice Simpson was concerned the law may "be thwarted by the whim and caprice of the many who . . . will take advantage
County parents instructing their children at home asserted that it was against their religious beliefs to send the children to school; they claimed compliance with the parochial school provision of Florida's statute. The father, a self-ordained minister of the so-called “Covenant Church of Jesus Christ,” believed that it was sinful to associate with Blacks and Orientals because they were the product of Eve’s copulation with Satan. The court found the parents not in compliance with the parochial school provision because the religion had not been recognized; this was supported by the fact that no church services were held for other people. This distinction is significant when comparing F. & F. to Yoder. Even though both cases ostensibly involve religious practice, only in Yoder was the claim legitimately grounded in the free exercise clause of the First Amendment. In cases not legitimately based on the free exercise clause, however, there is no guarantee that an exemption from state law will be granted.

There is an “ancient Rabbinic principle first laid down by the Babylonian Jewish Scholar Samuel, and known as dina de-malkhuta dina, . . . the law of the country is binding and in certain cases is to be preferred.” This principle describes the course taken by United States courts, which recognize one's right to hold any belief; but when those beliefs lead to practices interfering with the rights or welfare of others, the courts support the state's authority to intervene.

The F. & F. court found it unnecessary to consider whether the instructional arrangement could be a private school because the parents only claimed compliance with Florida's school attendance law as a home tutoring arrangement and a parochial school. This is important because a decision sanctioning the Pohl Private School in M.M. would have established a dangerous precedent enabling bizarre situations, as

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83. 273 So. 2d 15.
84. Id. at 17-18.
85. Id. at 18.
88. 197 Kan. 567 at —, 419 P.2d 896 at 901; 294 N.W.2d at 888.
89. 273 So. 2d at 17-18.
illustrated by F. & F., to achieve compliance with Florida’s private school provision. Moreover, judicial endorsement of such a policy would have undoubtedly resulted in a deluge of public school withdrawals. Many parents, like the Pohls, who are disgruntled with school busing could have used this precedent to thwart school board efforts to effectuate racial integration. Similarly, whenever school policy disputes arise, withdrawals would be encouraged without concomitant assurances that parent-furnished educational alternatives are adequate. In M.M. the court adopted a common sense approach recognizing that the Pohl Private School does not fit within the generally accepted meaning of “school.”

It is this author’s view that the M.M. court, by adhering to the teacher certification requirements of the home instruction provision in Florida’s statute, wisely avoided opening the proverbial floodgates. Unfortunately, the decision did not fill the void in Florida’s compulsory education statute by precisely prescribing the characteristics necessary for an instructional arrangement to be considered a school for purposes of the private school provision. This clearly would have usurped the legislature’s power; thus the court elected not to intrude into the legislature’s domain. The decision seems narrowly restricted to the facts of the case and it is unclear what result will follow when parents assert private school status by commencing instruction in a clubhouse, garage or storefront with an expanded number of pupils. The question is likely to be presented in the near future since “[s]chool officials [in Broward County] [estimate] that parents of about 30 to 40 students have been following the Pohls’ example of keeping their children home or in makeshift private schools to protest busing.”

What are the minimum characteristics necessary for an educational facility to be considered a private school? Consider the present arrangement of a Broward County storefront school, housed in Bay X of the North Lauderdale Square Shopping Center. It is called The North Lauderdale Academy and it may very well become the next battleground in the compulsory education arena. This arrangement was

90. Miami Herald, Dec. 17, 1981 § A at 1, col. 1. The “director of student welfare and attendance, said truant officers have found about 60 children this year who are being taught at home by parents.” Fort Lauderdale News, Dec. 17, 1981 § B at 1, col. 5.

born from the same busing controversy as the Pohl Private School and after an unsuccessful first attempt, the storefront school has been operating for several weeks.\footnote{Id. at 2B; Personal Interview with North Lauderdale Academy supervisor, Penny Kaufman.} The curriculum is provided by the University of Nebraska’s High School Independent Study Program.\footnote{University of Nebraska-Lincoln Division of Continuing Studies. Independent Study High School Bulletin Series 82, No. 10 (1981-82).} Although student enrollment has fluctuated, there are presently fifteen pupils attending the Academy with expectations of additional students in the future.\footnote{Miami News, Dec. 15, 1981 § B (Lifestyle), at 1-2, col. 2. Personal interview with North Lauderdale Academy supervisor Penny Kaufman.} The program’s supervisors are not certified teachers in the State of Florida although two of them have experience in education and one holds an out-of-state expired teaching certificate.\footnote{University of Nebraska-Lincoln Division of Continuing Studies, supra note 93, at 6.} Under the University of Nebraska’s independent study program, however, “[s]upervisors are not teachers of courses offered through the Independent Study High School, and to serve effectively, need not have the background to help students with the subject matter in the courses.”\footnote{Id. at 6-7.} The local supervisors are merely monitors or administrators and primary instruction is provided by correspondence with teachers at the University of Nebraska.\footnote{Miami News, Dec. 15, 1981 § B (Lifestyle), at 1-2, col. 2.}

Don Samuels, a member of the Broward County School Board, has argued that the North Lauderdale Academy “[i]n the long run, . . . will hurt the kids.”\footnote{Jim Augustyn, the interim Principal at the University of Nebraska’s Independent High School Program admits “they’ll have to pick up their socialization skills on the outside somewhere, and there won’t be the spontaneous give and take between teacher and pupil that you’d see in a normal school.” Id.} Development of social skills may be hampered if these children are deprived of the opportunity to interact and mature with their peer group.\footnote{Id.} Due partially to the school’s infancy and also to the nature of the endeavor, the facilities and equipment are below par. Yet, while social interaction and adequate facilities are desirable, they are presently of little consequence in determining compli-
ance with Florida's statute. Other questions are presented by the establishment of the North Lauderdale Academy. First, does this arrangement fall within the private school provision which does not mandate teaching credentials, or under the home education provision subject to teacher certification requirements? Second, are state certification requirements complied with when children are enrolled in correspondence courses similar to the University of Nebraska Independent Study Program? These questions have not yet been litigated in Florida and it is urgent for the legislature to address the issues during the present session.

Recommendations

M.M. has pointed out alarming shortcomings in Florida’s compulsory education statute. There are virtually no minimum standards assuring citizens of Florida that the quality of education at private schools will be acceptable. Furthermore, founders of new private schools appear uncertain of what minimum standards should be achieved to comply with Florida’s private school provisions. It is true that many private schools maintain high standards, but at the same time it is possible that some private schools are substandard and detrimental to student welfare. Understandably, regulations imposing all public school standards upon the private schools are unreasonable because the distinctiveness of private schools would become blurred. It is also recognized that any possibility of mass state indoctrination of our youth through the schools should be avoided. However, as stated earlier, the right of the state to reasonably regulate education is unquestioned and adoption of minimum standards would upgrade or

100. The Florida Statutes make no mention of social interaction or facilities with reference to private educational programs.
101. Court Order at 3.
102. Interview with North Lauderdale Academy supervisor Penny Kaufman.
103. 47 Ohio St. 2d at 49, 351 N.E.2d at 768. Accord 589 S.W.2d 877. “[T]o say one may not be compelled to send a child to a public school but the state may determine the basic texts to be used in the private . . . schools is but to require that the same hay be fed in the field as is fed in the barn.” Id. at 884.
104. 406 U.S. at 213; Accord Lemon v. Kurtzman, 403 U.S. 602 (1971). “A state always has a legitimate concern for maintaining standards in all schools it allows to operate.” Id. at 613. But cf. 589 S.W.2d at 883 n.9. “State controlled homogeneous
eliminate the substandard private schools without burdening those schools already maintaining acceptable standards.

Both the circuit court and the Pohls claimed the legislature intended not to regulate or control non-public schools. The legislature, however, did not intend to prohibit all regulations as illustrated by state requirements concerning the number of mandatory school days and hours for compliance with compulsory attendance laws. This is also substantiated by the standards established for non-public colleges and all independent post-secondary vocational, technical, trade and business schools. These standards exist to "protect" the student from deceptive, fraudulent or substandard education. They are not "intended to regulate the stated purpose of a nonpublic college [or post-secondary school] or to restrict any religious instruction or training in a nonpublic college [or post-secondary school]." It is difficult to understand why students in private elementary or secondary schools are not in need of the same protections provided students in private colleges or post-secondary schools.

It is time to establish minimum standards for all schools in Florida, and teacher certification should be one of the first requirements adopted. To this former teacher it is incredible that presently there is no certification requirement for those teaching in private schools. Although it has been argued that certification will not guarantee the competency of teachers, it will certainly provide one way to increase the likelihood that teachers are qualified to instruct our children.

To become a certified teacher in Florida, one must have earned a four-year college degree which includes an emphasis on professional preparation in teaching. In addition, the Department of Education

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schools have provided a fertile field for the growth of totalitarian governments." Id.


110. 294 N.W.2d at 894.


(2) Regular Certificate. The regular certificate shall be valid for 5 years and may be issued to an applicant who has met the following requirements:

(b) Holds an earned acceptable four-year bachelor's or higher
requires new teacher-applicants to demonstrate specific competencies by means of a written examination. The teacher must be competent to write in understandable style, interpret professional material, understand basic mathematics and comprehend patterns of child development. These qualifications are essential if Florida is to achieve a satisfactory standard of education. Finally, the state should also adopt minimum curriculum requirements insuring students in all schools that they will be instructed in those fundamental areas needed for functioning in society.

degree or a foreign degree that required twelve (12) years of pre-university education combined with four (4) years of higher education. . . .
(c) Has an acceptable major in a single certification subject . . . or has met the specialization and professional preparation requirements for that subject. . . .
(2) Examination required.
(a) Each applicant who applies for a full-time Florida teaching certificate and who does not currently hold a valid regular certificate in the State of Florida shall be required to present a passing score on each sub-test of the Florida Teaching Certificate Examination. . . .
(3) Description; competencies.
(c) The following competencies are to be demonstrated by means of the written examination:
1. The ability to write in a logical and understandable style with appropriate grammar and sentence structure.
2. The ability to read, comprehend, and interpret professional and other written material.
3. The ability to comprehend and work with fundamental mathematical concepts.
4. The ability to comprehend patterns or physical, social and academic development in students, and to counsel students concerning their needs in those areas.
113. Id.
114. State of Fla. v. M.M.-oral argument tapes. The necessity for minimum curriculum requirements was apparent from part of the dialogue which occurred at the M.M. oral argument.
Judge: “Supposing the Pohls are illiterate, does that make any difference? Attorney: “No Sir, not according to the law as we find it now.”
Judge: “If all they do for 5 hours a day is teach tennis, does that make any difference?”
Conclusion

M.M. has revealed serious defects in Florida’s compulsory education laws. If the Florida legislature “dropped the ball,” it is time to recover the fumble. Minimum standards for all Florida schools must be established to guarantee that no child is deprived the opportunity to obtain an adequate education.

Gary E. Sherman*

Attorney: “According to the minimum requirements which have been set up by the State Board of Education . . ., anyone attending a non-public school complies with compulsory attendance laws . . . by attending for 180 school days. They do not establish the curriculum or that the teachers have to be certified.”

Judge: “What does your position do with the supposed legislative intention that we shall have compulsory education in this state? Devastates it, does it not?”

Attorney: “Compulsory attendance may be achieved in one of four ways. Number 3 is private school.”

Judge: “You need not have a teacher and you need not educate!”

Attorney: “No Sir, it is the legislature that has dropped the ball if anybody, not this court or not the lower court. The lower court can only rule by what the law is as we find it.”


* I would like to express my appreciation to Special Assistant Attorney General Paul Zachs and attorney Ellis Rubin for their cooperation during my research. I would also like to express a special thank-you to Edna Sherman for her effort in typing this note.
Does the Constitution Guarantee Court-Appointed Counsel When the Plea is “Don’t take my Baby Away”? *Lassiter v. Department of Social Services*

An impoverished mother has no constitutional right to a lawyer’s help in resisting a state’s attempt to take her child away permanently. . . .

The preceding quote illustrates the press’ view of the Supreme Court’s decision in *Lassiter v. Department of Social Services*. In its five-four decision the majority held that court-appointed counsel is not a matter of right in state proceedings to permanently remove a child from his parent’s custody. This decision is Justice Potter Stewart’s legacy to the nation.

The Supreme Court has recognized a constitutional obligation to provide counsel in criminal cases but it has not yet extended that obligation to include non-juvenile civil proceedings. The constitutional source of the obligation is found in the fourteenth amendment which provides “no state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .” In criminal cases one’s life or liberty is in danger of deprivation. In civil cases one’s money or property is usually endangered. Between the extremes of loss of life or liberty and loss of money or property, lies the loss of one’s parental rights. The issue in *Lassiter*, which focused on this intermediate gray area, was whether due process is violated when the state attempts to judicially terminate parental rights without appointing counsel for the parent.

It is necessary to review the Court’s factual account given in

Lassiter and the historical development of the right to counsel as well as other due process considerations in civil contexts in order to understand not only the significance of Lassiter but also the opposing conclusions reached by the majority and dissenting justices. It appears, from the constitutional standards applied by the Lassiter Court that the majority considered loss of a child more nearly akin to loss of property than to loss of liberty. Therefore, the differing standards used by the justices in deciding the nature of the process due, will also be examined.

I. The Court’s Narration of the Facts

The facts of Lassiter are important because Ms. Lassiter was an atypical petitioner in this civil case. In addition, Justice Stewart, for the majority, and Justice Blackmun, for the minority, differed significantly in their interpretation of the relevant events.

In 1975, the District Court of Durham County, North Carolina, adjudicated petitioner’s infant son a neglected child. That court based its decision on evidence that Abby Gail Lassiter had not given her son proper medical care. As a result, the infant was transferred to the custody of the Durham County Department of Social Services. Later, in 1976, Ms. Lassiter was convicted of second degree murder, and sentenced to serve twenty-five to forty years in prison. Two years later, in 1978, the Department of Social Services petitioned the district court to terminate Ms. Lassiter’s parental rights, basing its petition on a department evaluation that she “ha[d] not had contact with the child since December of 1975.” In the majority’s opinion, this statement seemed to raise the inference that Ms. Lassiter chose not to see her son because of her disinterest in him. In contrast, the dissent pointed out

5. See pp. 299-305 infra, for discussion of due process standards applied in Lassiter.
6. 101 S. Ct. at 2156.
7. This conviction stemmed from stab wounds Ms. Lassiter inflicted upon an individual whom her mother was beating with a broom when Ms. Lassiter entered her mother’s apartment. Id. at 2156 n.1.
8. Id. at 2156.
9. Id. at 2156-57.
10. Id. at 2157 (emphasis supplied).
that Ms. Lassiter did not voluntarily neglect to contact her son, but was unable to do so because she was in prison."

According to Justice Stewart, who wrote the opinion for the majority, Ms. Lassiter was notified that the Department of Social Services had a hearing date to seek to terminate her parental rights. Although Ms. Lassiter's mother had retained counsel to assist in efforts to invalidate her murder conviction, Ms. Lassiter never mentioned the termination proceeding to him; she only mentioned it to "'someone'" at the prison. The majority implied this omission signified Lassiter was indifferent to her rights regarding her son. The dissent, however, related this incident in a different light. Justice Blackmun stated that when Lassiter was advised of the pending termination proceeding "[she] immediately expressed strong opposition to that plan and indicated a desire to place the child with his grandmother." Justice Blackmun also noted Lassiter was not informed she had a right to be represented by counsel at the termination hearing.

Ms. Lassiter was brought from prison to the hearing on Aug. 31, 1978. The Department of Social Services' sole witness was a social worker who detailed the medical neglect of the infant and stated the child should not be placed with his grandmother, who was caring for Ms. Lassiter's four other children. Following this testimony the court advised Ms. Lassiter to cross-examine the witness. Justice Stewart described this event:

Ms. Lassiter conducted a cross-examination of the social worker, who firmly reiterated her earlier testimony. The judge explained several times, with varying degrees of clarity, that Ms. Lassiter should only ask questions at this stage; many of her questions were disallowed because they were not really questions, but arguments.

11. Id. at 2173.
12. Id. at 2157.
13. Id.
14. Id. at 2173.
15. Id. at 2157.
16. It is interesting to note that in the majority opinion Lassiter's adversary is called "Department" while in the dissent it is called the "State." See, e.g., id. at 2157, 2168.
17. 101 S. Ct. at 2157 (emphasis added).
In contrast Justice Blackmun pointed out that the testimony of the Department's sole witness consisted of inadmissible hearsay evidence, to which Ms. Lassiter made no objection. Justice Blackmun aptly noted that while "[t]he court gave petitioner an opportunity to cross-examine the social worker, . . . she apparently did not understand that cross-examination required questioning rather than declarative statements."18

Ms. Lassiter testified she had properly cared for her son and expressed her desire that he live with his grandmother, brothers and sisters.19 On appeal from the termination of parental rights, Lassiter's only argument was that the trial court erred in failing to appoint counsel for her.20

The differing versions of the facts may perhaps be explained by the effect petitioner's character had upon the Court: She was not merely an ineffective parent, but a convicted murderess. The majority implied termination of parental rights was the only proper outcome in this particular case, and it is arguable that the Court's preoccupation with this result prompted a misapplication of logic and law. Throughout the majority opinion petitioner's character seemingly hangs like a shadow over the logic of the Court. A more "worthy" petitioner might have fared better.21

Given the facts in this case the Court's grant of certiorari was itself questionable. Justice Burger, concurring in the majority opinion, stated: "Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a 'candidate' for dismissal as improvidently granted."22 Neither Justice Burger nor the

18. Id. at 2173 (footnotes and citations omitted) (emphasis added). At this point the dissent includes testimony from the termination hearing which demonstrates that Ms. Lassiter had no notion as to the nature of cross-examination. The judge was impatient and discourteous to her, and all opportunity to present a meaningful defense was lost. Id. at 2173 n.22.
19. Id. at 2157-58.
20. Id. at 2158.
21. Perhaps a more "worthy" petitioner would not be a convicted murderess, have had a number of children out of wedlock, or be imprisoned for several decades and unable to personally care for her child. In Lassiter, all these factors combined to make the petitioner particularly unappealing.
22. 101 S. Ct. at 2163 (emphasis added).
other justices explain why certiorari was granted.

II. Historical Development of Right to Counsel

The Supreme Court had never before heard a case involving the right to counsel in the context of parental rights termination. Since the Court had not extended the right to court-appointed counsel to non-juvenile civil cases, it was necessary for the Lassiter Court to consider both the right to counsel in criminal cases and the due process given in civil cases.

The extension of fourteenth amendment due process guarantees to include the right to state appointed counsel is a recent development. In 1932 the Court, in Powell v. Alabama determined due process required courts to assign counsel for indigent defendants in capital cases. However, the Powell Court declined to determine whether that right extended to other criminal prosecutions.

Addressing the appointment of counsel in Lassiter the Court's analysis began with Betts v. Brady. In Betts, the Court refused to extend the automatic right to counsel for indigents charged with non-capital criminal offenses, deciding that state courts had the power to appoint counsel, or not, as they deemed proper. Betts held sway for over twenty years, until the case-by-case approach was overruled in the landmark decision Gideon v. Wainwright.

In Gideon the Court expanded the automatic right to counsel to include all non-capital felony cases. This shift from Betts demonstrated the Court's concern for fundamental fairness: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice,

23. The historical development of the right to counsel is also treated in Note, Constitutional Law - Due Process - Indigent Parents' Right to Counsel in Child Neglect Cases, 46 Tenn. L. Rev. 649 (1979).
25. See note 3 supra.
27. Id. at 71.
29. Id. at 473.
any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.\textsuperscript{31}

In the twenty years since \textit{Gideon}, the Court decided several cases specifically bearing on \textit{Lassiter}. The Court found the right to appointed counsel existed in juvenile proceedings where a child faced institutionalization in a juvenile detention facility.\textsuperscript{32} In addition the Court found the right to counsel exists in any prosecution threatening any length of imprisonment.\textsuperscript{33} Of the five justices reaching the merits in \textit{Vitek v. Jones},\textsuperscript{34} four concluded counsel must be appointed for a prisoner in a proceeding to transfer him from prison to a mental hospital.\textsuperscript{35}

Further expansion of the right to counsel was later inhibited by \textit{Morrisey v. Brewer} and \textit{Gagnon v. Scarpelli}.\textsuperscript{36} In \textit{Morrisey}, the Court held an informal pre-revocation hearing must precede parole revocation, but declined to decide whether the parolee was entitled to assistance of counsel, whether retained or appointed.\textsuperscript{37} In \textit{Gagnon}, the Court admitted that counsel might be necessary to assure due process in parole revocation proceedings, but decided a case-by-case approach was adequate to determine whether counsel should be appointed.\textsuperscript{38} The

\begin{itemize}
  \item \textsuperscript{31} \textit{Id.} at 344.
  \item \textsuperscript{32} In re Gault, 387 U.S. 1 (1967). Although a juvenile proceeding is not a criminal trial, the Court reasoned that the danger of incarceration in a juvenile detention institution was comparable to imprisonment. The penalty of incarceration, rather than the nature of the proceeding, made the presence of counsel requisite. \textit{Id.} at 12-31.
  \item \textsuperscript{33} \textit{Id}. at 344.\textsuperscript{40} The Court reasoned that the danger of incarceration in a juvenile detention institution was comparable to imprisonment. The penalty of incarceration, rather than the nature of the proceeding, made the presence of counsel requisite. \textit{Id.} at 12-31.
  \item \textsuperscript{34} \textit{Argersinger v. Hamlin}, 407 U.S. 25 (1972). The Court held that absent knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial. \textit{Id.} at 37. In any proceeding — no matter how minor — where incarceration might result, the right to counsel was definitively assured.
  \item \textsuperscript{35} \textit{Id.} at 344.\textsuperscript{41} The Court emphasized the importance of counsel in juvenile hearings, finding that the same rights afforded to adults in criminal proceedings should apply to juveniles. \textit{Id.} at 344.\textsuperscript{41} The Court emphasized the importance of counsel in juvenile hearings, finding that the same rights afforded to adults in criminal proceedings should apply to juveniles.
  \item \textsuperscript{36} \textit{Id.} at 344.
  \item \textsuperscript{38} \textit{Id.} at 497 (1980).
  \item \textsuperscript{39} \textit{Id.} at 790. The Court reasoned that revocation of parole or probation was not part of a criminal trial and therefore the full due process protections of criminal trials did not apply. \textit{Id.} at 781. It is interesting to note that in In re Gault, the nature of the punishment was the determining factor in requiring the appointment of counsel, even though the juvenile proceeding was not considered a criminal one. In
Lassiter Court relied on these cases to justify its affirmation of the case-by-case approach in deciding whether counsel need be appointed.

In the civil arena, the Supreme Court had not, before Lassiter, reached the merits of the right to counsel issue in termination of parental rights proceedings. The opportunity presented itself in 1971, when Kaufman v. Carter, a case remarkably similar to Lassiter, came before the Court. The Court denied certiorari, refusing to decide whether an indigent mother was entitled to court-appointed counsel in a state initiated civil suit seeking to declare her an unfit mother and obtain custody of five of her seven children. Justice Black, dissenting from the denial of certiorari, argued the Court should have heard the case and counsel should have been appointed:

The necessity of state-appointed counsel is particularly acute in cases like one of those before us, Kaufman v. Carter, where the state initiates a civil proceeding against an individual to deprive her of custody of her children. Here the state is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. The case by its very nature resembles a criminal prosecution. The defendant is charged with conduct—the failure to care properly for her children—which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society. And the cost of being unsuccessful is dearly high—loss of the companionship of one's children.

Davis v. Page, a fifth circuit case, also involved the right to court-appointed counsel in a parental rights proceeding. In Davis, the

Gagnon, on the other hand, the fact that the revocation of parole or probation was not part of a criminal proceeding seems to be the determining factor in not requiring appointment of counsel, even though the result, as in In re Gault, might be incarceration.

40. Id. at 964. Although Justice Black’s dissent to denial of certiorari in Kaufman seems directly related to the issues in Lassiter, the Court makes no mention of his opinion in Lassiter.
41. Id. at 959 (emphasis added).
hearing concerned removal of the child from the parent’s custody\textsuperscript{43} while in \textit{Lassiter} the hearing concerned the final termination of all parental rights.\textsuperscript{44} Unlike Ms. Lassiter, the parent in \textit{Davis} had no criminal record. The fifth circuit determined the parent was indeed entitled to a court appointed attorney to assure compliance with due process.\textsuperscript{45}

\textit{Lassiter} may have a negative effect on the decision in \textit{Davis}, since \textit{Davis} will probably be vacated and remanded for reconsideration in light of \textit{Lassiter}.\textsuperscript{46} It is interesting to speculate whether the Supreme Court would have overruled the fifth circuit decision in \textit{Davis}, had \textit{Davis} come before the Court prior to \textit{Lassiter}.

Since decisions specifically involving the right to appointed counsel have been mainly limited to criminal cases, the \textit{Lassiter} Court was compelled to analyze due process requirements in civil cases generally, rather than the right to counsel specifically. The right to counsel is one aspect of due process. In deciding what process was due in \textit{Lassiter}, the Court relied on its decision in \textit{Mathews v. Eldridge}.\textsuperscript{47}

Since 1976 when \textit{Eldridge} was decided, it has been the tool with which the Court decides due process issues.\textsuperscript{48} \textit{Eldridge} articulated a three-pronged test to be applied in due process determinations: “First, the \textit{private interest} that will be affected by the official action; second, \textit{the risk of erroneous deprivation} of such interests, through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally \textit{the Government’s interest}, . . .”\textsuperscript{49}

The guideposts of \textit{Eldridge} were generated by the Court’s earlier decisions in civil due process cases.\textsuperscript{50} In \textit{Cafeteria Workers v. McElroy

\textsuperscript{43} \textit{Id.} at 375.
\textsuperscript{44} 101 S. Ct. at 2156, 2157.
\textsuperscript{45} 640 F.2d at 604.
\textsuperscript{46} \textit{See} note 42 \textit{supra}. If \textit{Davis} should be remanded, the case-by-case approach mandated by \textit{Lassiter} would be applied. However, the lower court could still decide that in this particular case the parent is entitled to a court appointed attorney.
\textsuperscript{47} 101 S. Ct. at 2159 citing 424 U.S. 319 (1976).
\textsuperscript{48} \textit{See} Dixon v. Love, 431 U.S. 105 (1977); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Little v. Streater, --- U.S. ---, 101 S. Ct. 2202 (1981). In these cases the \textit{Eldridge} factors were applied to evaluate the procedural due process necessary when a drivers license was to be revoked, utilities were to be shut-off, and paternity to be adjudicated.
\textsuperscript{49} 424 U.S. at 335 (emphasis added).
\textsuperscript{50} \textit{See} Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (right to a hearing
the Court considered the litigant's private interests—loss of government employment.\textsuperscript{51} In \textit{Goldberg v. Kelly},\textsuperscript{52} the Court considered the importance of the private interest in determining the timing of a hearing for termination of welfare benefits,\textsuperscript{53} and found the private interest important enough to require a pre- rather than post-termination hearing be afforded.\textsuperscript{54} \textit{Goldberg} evaluated and weighed the government's interest in protecting the poor and avoiding increased fiscal burdens.\textsuperscript{55}

In both \textit{Richardson v. Perales}\textsuperscript{56} and \textit{Kelly} the Court considered the risk of erroneous deprivation as part of the due process issue. In \textit{Perales} physicians' reports were deemed sufficient evidence for finding nondisability in a claim for Social Security disability benefits.\textsuperscript{57} The procedure carried with it a low risk of erroneous deprivation, and it can be inferred from the Court's reasoning that the low risk was a factor in the decision.\textsuperscript{58} In \textit{Kelly} however, the evidence relied on in terminating welfare benefits was severely subject to "honest error or irritable misjudgment..."\textsuperscript{59} Since the risk of erroneous deprivation was great, the Court required a pre-termination hearing in this case.\textsuperscript{60}

In \textit{Eldridge} the Court adroitly interwove and balanced these considerations to formulate the factors necessary for fulfillment of due process requisites. As the culmination of a long line of due process deci-
sions, *Eldridge* provides a clear and useful tool for all due process determinations. Nevertheless, the application of *Eldridge* in *Lassiter* was not without conflict.

Due process considerations in civil cases have usually involved the right to a hearing, the timing of the hearing, or the nature of the hearing or procedure in question. In *Lassiter*, there was no question of entitlement to a hearing, nor was the timing of the hearing at issue. Rather, the nature of the hearing was the subject of evaluation, and the Court used the *Eldridge* guideposts to determine whether the hearing in *Lassiter* passed due process muster. The facts in *Lassiter* were an important ingredient under the *Eldridge* due process formula. The stakes were not mere property interests, but the benefits and rights of family life. The Court recognized the magnitude of the parent’s interest in the custody of his child.

Although the constitution does not specifically state that familial interests are constitutionally protected, a long line of cases have found such constitutional protection for rights existing within the realm of marriage, sexual matters, and child-rearing. In its treatment of due process issues in familial rights cases the Court has held a right to a hearing exists in a case involving a child custody decree obtained in an *ex parte* divorce action, as well as in a case involving child custody rights of unwed fathers. An Illinois statute was construed to mean an unwed father could be denied, without a hearing, custody of his children upon the death of the mother. The unwed father was presumed unfit. The Supreme Court held that a hearing was required before a father could be deprived of his chil-

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61. *See note 50 supra.*
62. 101 S. Ct. at 2160.
66. *Id.*
67. *Ill. Rev. Stat.* ch. 37, §§ 702-1, 702-4, 701-14. The pertinent language of the statute defines a parent as “the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child.” § 701-14. The definition of parent did not include the natural father of an illegitimate child.
dren. 68 The Court in *Lassiter* considered these cases to underscore the magnitude of parental interest in child custody. 69

Nevertheless, using the due process considerations enumerated in *Eldridge*, 70 and the historical fact that the right to appointed counsel exists mainly in criminal cases, the majority concluded that Ms. Lassiter did not have a right to appointed counsel.

III. The Majority Rationale

The majority's conclusion must be viewed in light of the facts it found persuasive: Ms. Lassiter repeatedly stabbed another human being, inflicting death; she was convicted for this murder; she was serving a twenty-five to forty year prison sentence; she was, therefore, an unfit mother. The majority implied that Ms. Lassiter could not, and should not have won custody of her son under the circumstances. To some critics the majority's treatment of the general issue of whether a parent was entitled to court-appointed counsel appears subordinate to its interest in a particular result for the particular petitioner.

Cases involving due process issues require a two tier inquiry. First, is the specific interest involved one entitled to fourteenth amendment due process protection? Second, if entitlement is demonstrated, what degree of due process protection is appropriate? 71

There is no doubt that a parent's interest in raising his child is entitled to some due process protection. In *Stanley*, the Court specifically stated “[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment.” 72 This point is so well settled that *Lassiter* only addressed the second question and decided the degree of procedural protection due.

Based on its historical analysis of the right to counsel, the majority found a presumption rooted in the criminal context, that “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” 73 The majority presumed no right

68. 405 U.S. at 658.
69. 101 S. Ct. at 2160.
70. *See* discussion at p. 296 *supra*.
72. 405 U.S. 645 at 651 (citations omitted).
73. 101 S. Ct. at 2159.
to counsel existed because no loss of physical liberty was at stake in *Lassiter*. This presumption was balanced against the three *Eldridge* elements\(^{74}\) to decide what process was due. The composite analytic picture was thus comprised of private interests, government interests, and risk of erroneous decisions on the one hand, and the presumption that appointed counsel is not constitutionally guaranteed where incarceration is not threatened, on the other.\(^{75}\)

Applying the *Eldridge* test, the *Lassiter* majority acknowledged a parent’s interest in the custody of his child is great\(^{76}\) and then rapidly proceeded to evaluation of the state’s interest. According to the majority the state’s interest is not only the child’s welfare,\(^{77}\) but also the desire to make judicial decisions in the most economical manner.\(^{78}\) The majority wanted to avoid imposing upon the states the expense of court-appointed counsel,\(^{79}\) as well as the added costs of the lengthened and more complex proceeding likely to result from the assignment of counsel.\(^{80}\)

While superficially enticing, the soundness of this reasoning seems debatable. In a case-by-case approach the lower court will have to determine whether counsel need be appointed in a particular case. *Cleaver v. Wilcox*\(^{81}\) suggested three factors to be considered when deciding whether to appoint counsel to fulfill due process requirements in

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\(^{74}\) The Court in *Lassiter* stated that *Eldridge* propounded three elements to be evaluated in deciding the requirements of due process and that the Court must balance these three elements. The majority gave no reason as to why it deemed the *Eldridge* elements proper for application to *Lassiter*, other than that the *Eldridge* elements concern due process. *Id.*

\(^{75}\) *Id.*

\(^{76}\) 101 S. Ct. at 2160.

\(^{77}\) *Id.*

\(^{78}\) *Id.*

\(^{79}\) *Id.* According to the majority in *Lassiter*, thirty-three states and the District of Columbia have statutes which already provide for the appointment of counsel in termination of parental rights and child dependency cases. *Id.* at 2163. It appears the majority declined to impose upon the states that which the majority of states have seen fit to impose upon themselves.

\(^{80}\) *Id.* at 2160.

\(^{81}\) 499 F.2d 940 (9th Cir. 1974). This was a class action seeking the right to appointment of counsel in child dependency proceedings. An amendment to the California Statutes — *CAL. STATS. WELF. & INST. CODE* § 600 (Deering) see also § 318.5, now provides for counsel as a matter of right in this type of proceeding.
a child dependency proceeding: (1) length of probable parent-child separation; (2) presence or absence of parental consent or disputed facts; (3) the parent’s ability to handle relevant documents and examination of witnesses at the proceeding. The preceding factors will necessarily vary and warrant individualized evaluation in each case, although each state may create its own guidelines. To use this method, the judge needs to investigate each case, familiarize himself with the abilities of the parents, and determine their capacity to proceed pro se. Is it more economical to allot a judge’s time to these inquiries, than to require automatic appointment of counsel upon determination of indigency? If judicial economy is a valid state interest it appears the Wilcox case-by-case approach defeats rather than serves this interest. The majority admitted, however, the state’s pecuniary interests in Lassiter were insufficient to overcome the parental interests represented in the case.

The third Eldridge factor concerns the possibility that erroneous decisions will result from the procedures currently used. This factor requires the court to consider whether the proposed procedure will significantly affect the outcome in a particular case. In Lassiter, the Court framed the inquiry as whether “a parent will be erroneously deprived of his or her child because the parent is not represented by counsel.” In answering the question the majority acknowledged in some cases parents might risk erroneous deprivation since, without counsel, they could not adequately represent their interests. However, this would not necessarily occur in every situation.

The majority stated that the weight of the Eldridge factors might rebut the presumption against appointed counsel in some cases but not in others. For example, in a particular case where state’s interests are strong, private interests weak, and risk of erroneous decision slight, the presumption against appointed counsel would not be rebutted. However, where the state’s interests are slight, private interests great, and risk of error high, the presumption might be rebutted. Since the

82. Id. at 945.
83. 101 S. Ct. at 2160.
84. Id.
85. Id. at 2161.
86. Id. at 2162.
87. Id.
88. Id.
weight of the *Eldridge* factors differ in each case, the majority adopted the case-by-case approach established in *Gagnon* as the proper method for deciding when counsel should be appointed.89

The application of this balancing test will be troublesome for lower courts. The majority did not explain the circumstances under which state interests could outweigh parental interest. Nor does the majority explain why courts should not defer to any risk of error where potential loss is great and the parent unrepresented.

Applying the case-by-case approach to *Lassiter* the majority concluded Ms. Lassiter had no right to counsel. In the majority's view the risk of error was slight because "the case presented no specially troublesome points of law, either procedural or substantive,"90 and "that counsel for Ms. Lassiter could not have made a determinative difference."91 Since the majority believed the presence of counsel could not have changed the outcome in *Lassiter*, it did not evaluate the need for counsel in termination proceedings generally.

IV. The Dissent's Counterpoint

Writing for the dissent, Justice Blackmun recognized his brethren's failure to look beyond petitioner's character in the *Lassiter* decision. "[T]he issue before the Court is not petitioner's character; it is whether she was given a meaningful opportunity to be heard. . . ."92

Justice Blackmun did not question the propriety of the application of *Eldridge* but applied them himself, to reach the opposite conclusion: due process required the appointment of counsel for an indigent parent threatened with judicial termination of parental rights.

Evaluating the *Eldridge* test, Justice Blackmun, like the majority, acknowledged the importance of the first factor—parental interest. He emphasized, however, the magnitude of this interest to a greater extent than the majority.98 Evaluating the second *Eldridge* factor—state interests—Justice Blackmun easily dismissed the state's financial interest

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 2175.
93. *Id.* at 2166.
as a limited one, while admitting the state's interest in the welfare of the child is a legitimate one. The Justice pointed out, however, that the child's protection is not occasioned by unnecessarily removing him from his biological parents. Therefore, it seems the state's interest would best be served by affording procedural protections in termination proceedings so as to assure against unnecessary or erroneous parent-child separations. It seems obvious appointment of counsel would be the very sort of procedural protection aiding the state in its goal of preventing unnecessary separations. Both the dissent and the majority agreed, however, that the state's interest in *Lassiter* was not the dispositive factor that tipped the scales against court-appointed counsel.

The final *Eldridge* factor—possibility of erroneous deprivation—was the factor that caused most divergence between majority and dissenting views. The majority believed in some cases risk of erroneous deprivation would not be "insupportably high." The dissent, on the contrary, stated that risk of error in this type of proceeding assumed "extraordinary proportion." According to Justice Blackmun, the risk of error was great because the legal issues were not simple. "The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and present sufficient supporting non-hearsay evidence, and conduct cross-examination of adverse witnesses." It would be a rare parent who could perform those adversarial functions successfully. Justice Blackmun called the majority's acknowledgment that these factors "may . . . overwhelm an uncounseled parent" a profound understatement.

Based on its evaluation of the *Eldridge* factors, the dissent found illogical the majority's conclusion that counsel need not be appointed in every case. But while the opinions' divergence in the factor analysis

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94. *Id.* at 2170.
95. *Id.*
96. *Id.*
97. *Id.* at 2170.
98. *Id.* at 2162.
99. *Id.* at 2170.
100. *Id.* at 2169.
101. *Id.*
102. *Id.*
103. *Id.* at 2171.
was not insignificant, the critical difference between majority and dissenting approaches focused on the manner in which *Eldridge* was applied. Justice Blackmun asserted that the case-by-case approach in this context reflected erroneous application of *Eldridge* because it necessitated judicial evaluation of litigants. Rather than evaluating different litigants within a given context, the correct inquiry concerns due process needs arising within different legal contexts. Justice Blackmun supported this reasoning: “But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not to rare exceptions.”

The majority’s decision in *Lassiter* is most vulnerable on this point. In *Eldridge*, the three-step test was applied to the proceeding involved in termination of disability benefits, rather than to the litigant, in order to determine constitutional sufficiency of the nature and timing of the procedure. It is clear from the *Eldridge* decision that the Court intended the test to be used in evaluating procedures rather than litigants; the decision turned not on the facts surrounding Mr. Eldridge’s loss of benefits but on the termination proceedings in general. Moreover, in the Court’s succeeding applications of *Eldridge* it has consistently applied the test to legal contexts rather than to litigants. It is amazing if not ironic that in *Little v. Streater*, decided the same day as *Lassiter*, the Court applied *Eldridge* in a manner con-
sistent with previous decisions. It used the three-pronged test to evaluate private interests, state interests, and risk of erroneous deprivation in paternity proceedings in general. The Court in *Little* did not consider Mr. Little's particular situation. Nevertheless, in *Lassiter* the Court specifically stated that each parent-litigant will be evaluated individually. This novel application of *Eldridge* is completely contrary its spirit and seems irreconcilable with the Court's traditional use of that test.

Justice Blackmun also disagreed with the majority's presumption that counsel should be appointed only when loss of physical liberty is threatened. The trend of prior Court decisions indicates there should be no such presumption, though most of those decisions dealt with criminal cases. Dissenting from denial of *certiorari* in *Kaufman*, Justice Black stated "the necessity of state-appointed counsel is particularly acute in [child dependency proceedings]." He found no presumption that court-appointed counsel was limited to cases involving deprivation of physical liberty.

The *Lassiter* dissent also pointed out that loss of liberty was not the only threat warranting court-appointed counsel. Justice Blackmun cited *Vitek*, in which a plurality required appointment of counsel even though transfer from prison to a mental hospital did not involve additional confinement. *Vitek* focused on the consideration that "[t]he stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that [require] procedural protections." The *Vitek* Court specifically stated the stigma which attaches to mental hospital confinement raised the need for procedural protections. It is arguable that just as great a stigma attaches to parents whose children are taken away by the state. The involuntary loss of parental rights is perhaps even more severe than

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111. *Id.* at 2208.
112. 101 S. Ct. at 2162.
113. *Id.* at 2166.
114. 402 U.S. at 959.
115. 101 S. Ct. at 2167.
117. *Id.*
involuntary subjection to treatment for mental illness. Hospitalization and treatment may be viewed as a helpful service, rather than a punishment, but loss of parental rights affords no such redemptive aspect for the petitioner. Nevertheless, the majority presumed away the parent’s right to an appointed attorney while the prisoner’s right was preserved.

The dissent rebutted the majority’s use of *Gagnon* in supporting its conclusion that a presumption exists against appointment of counsel.\(^1\) The Court in *Gagnon* held appointed counsel was not required, even though revocation of parole or probation results in loss of physical liberty. The dissent did not read *Gagnon* and *Vitek* as holding loss of physical liberty the only factor to consider when determining whether counsel should be appointed.\(^1\) Therefore, according to the dissent, the majority erroneously decided such a presumption exists.\(^2\)

Justice Blackmun offered another criterion for deciding whether counsel should be appointed: the nature of the proceeding itself.\(^3\) Compared with *Gagnon*, a termination of parental rights hearing is a formal proceeding. In *Gagnon* technical rules of procedure and evidence did not apply because of the informal nature of the parole revocation hearing,\(^4\) whereas in *Lassiter* the North Carolina statute provided for formal and adversarial procedures to extinguish parental rights.\(^5\) Justice Blackmun pointed this out: “Indeed, the State here has prescribed virtually all the attributes of a formal trial as befits the severity of the loss at stake in the termination decision—every attribute, that is, except counsel for the defendant parent.”\(^6\) A similar view was held in *Kaufman* by Justice Black, who compared dependency proceedings to criminal prosecutions.\(^7\)

\(^1\) 101 S. Ct. at 2166.
\(^2\) Id.
\(^3\) Id.
\(^4\) Id. at 2167.
\(^5\) 411 U.S. at 787. N.C. Gen. Stat. §§ 7a-289.23; 7a-289.25; 7a-289.27(1); 1a-1 Rule 1 (Supp. 1979); 101 S. Ct. at 2167.
\(^6\) Id. The government initiates the proceeding by filing a petition and serving a summons on the parent; a judge presides over the hearing and conducts the proceeding pursuant to the formal rules of evidence and procedure.
\(^7\) Id. at 2168.
\(^8\) 402 U.S. at 959.
Another troublesome element of the *Lassiter* majority’s reasoning was its application of *Eldridge* at all. Justice Blackmun did not take exception to the application of the *Eldridge* standards to *Lassiter*. However, in his own three-paragraph dissent, Justice Stevens recognized that by employing the *Eldridge* balancing test, the majority chose “an appropriate method of determining what process is due in *property* cases.” This, of course, is not necessarily an appropriate test where parental rights hang in the balance. Surely it seems logical that when the Court addressed what due process was requisite when a party stood to lose his Social Security disability payments—a case involving *monetary* losses—it did not calculate or intend that these same criteria be applied when loss of *parental rights* was contemplated.

The majority could have relied on other precedents demonstrating the loss of parental rights cannot be compared with loss of property; the former is a much greater loss. Justice Blackmun acknowledged these precedents, citing a series of cases that show loss of parental rights has been considered a more grievous deprivation than the loss of property. For example, in *May v. Anderson* the Court acknowledged that “[r]ights far more precious . . . than property rights will be cut-off if [a parent] is to be bound by the Wisconsin award of custody [to the other parent].” The high degree of protection given parental rights was also expressed in *Stanley v. Illinois*, when the Court stated: “It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this

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126. 101 S. Ct. at 2159.
127. 101 S. Ct. at 2176.
128. *Id.* (emphasis added).
129. 424 U.S. at 349.
131. 345 U.S. 528. The Supreme Court held that a child custody decree of another state need not be given full faith and credit when that decree was obtained in an ex parte divorce action. *Id.* at 534.
132. *Id.* at 533.
133. 405 U.S. 645.
Court with a momentum of respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

It seems the standard for what degree of process is due should be higher when the loss is parental rights rather than property rights. In Goldberg v. Kelly, the Court tied the applicable standard to the loss suffered: "The extent to which procedural process must be afforded the recipient is influenced by the extent to which he may 'be condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Using this test the majority necessarily would have concluded that loss of parental rights is one of the most grievous losses a human being can suffer: the highest standard of due process should have been applied in Lassiter.

Neither the majority nor dissent compared deprivation in Argersinger v. Hamlin to deprivation in Lassiter, yet the comparison is illuminating. In Argersinger, the defendant faced a $1,000 fine and/or six months in jail. He was actually sentenced to ninety days in jail. The mere possibility of that deprivation of liberty mandated appointment of counsel. If the Court had compared the loss in Lassiter to the loss in Argersinger using the "grievous loss" test, surely the permanent and absolute loss of parental rights would seem more severe than a short term in prison. On this basis, the due process mandated in Argersinger should have been extended to cases involving loss of parental rights.

The Lassiter Court could have stated simply and logically what universal rules of human experience teach: the loss of a child is among the most severe of all losses and requires the highest standard of procedural protection. As the circuit court noted in Davis v. Page: "To offer counsel when a single day in jail may be at stake, but to deny counsel to an indigent when the destruction of his or her family is threatened,

134. Id. at 651 (citations omitted).
135. 397 U.S. 254 (1970). The Court determined in Goldberg that a pre-termination hearing must be provided prior to termination of financial aid under federally assisted Aid to Families with Dependent Children program.
136. Id. at 2162-63. [citations omitted].
138. Id.
does not accord with our concept of due process." Further justification would hardly seem necessary, yet both the majority and dissent chose instead to weigh due process requisites in light of the *Eldridge* factors. Only Justice Stevens found no reason for weighing factors. He stated, instead, that due process should be applied here as in a criminal case. According to Justice Stevens "[t]he issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits." To this writer, Stevens' proposition seems self-evident.

Having come to the opposite conclusion with regard to due process right to counsel in termination proceedings in general, the dissent examined the implications of the majority's decision in view of *Lassiter's* facts. Justice Blackmun made it clear that Ms. Lassiter could not handle cross-examination. She did not present a defense; nor was she aided or advised by the judge as to what she could do. In fact, as apparent from the hearing transcript, the judge was quite rude to her.

The majority concluded that presence of counsel could not have made any difference in the outcome because the issues were not troublesome and because Ms. Lassiter had no arguments to present. This is conjecture. Counsel for Ms. Lassiter might have objected to the hearsay testimony offered by the department's only witness. This evidence comprised the major part of the state's case and was geared to convincing the court that Ms. Lassiter's mother was unable to care adequately for an additional child. Ms. Lassiter's mother denied this allegation and counsel might have stressed both the denial and Ms. Lassiter's interest in having her son returned to his brothers, sisters and grandmother. It is possible that expert witnesses provided by defense counsel might have testified that child rearing among family members was eminently preferable to rearing in foster homes. Ms. Lassiter had no real opportunity to present her case. Nevertheless the majority casu-

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139. 640 F.2d at 604.
140. 101 S. Ct. at 2176.
141. Id.
142. Id. at 2174.
143. Id. at 2174 nn.24 and 25.
144. Id. at 2162-63.
145. Id. at 2173. The social workers hearsay came from unidentified community members.
146. Id. at 2173.
ally observed that the outcome would not have been different if counsel had assisted.

Further, it is apparent the majority neglected the sage reasoning of *Armstrong v. Manzo,*\(^{147}\) where the Court stated due process required litigants have an opportunity to be heard “at a meaningful time and in a meaningful manner.”\(^{148}\) It is inconceivable that the majority actually perceived Ms. Lassiter's opportunity as meaningful.

The circuit court in *Davis* eloquently described the infirmities inherent in denying appointment of counsel in a case like *Lassiter:*

The State is represented by the State Attorney; it has access to public records concerning the family and to the service of social workers, psychiatrists, and psychologists. Those representing the state have experience in legal proceedings and the ability to examine witnesses, present evidence, and argue skillfully that the child should be adjudicated dependent. Unrepresented parents, in contrast, will normally not cross-examine witnesses, submit evidence, call witnesses, or present a defense. They do not understand the rules of procedure or substantive law. They do not object to improper questions or move to strike improper testimony. . . . [T]hey may not even understand the legal significance and effect of the proceedings.

Unless the indigent parent has the tools necessary to oppose the state's expert presentation, a finding of dependency could be based partially upon inadmissible hearsay, improper opinion evidence, or evidence irrelevant to the issue of dependency, a determination of dependency might be founded upon testimony that a skilled attorney would expose as biased or untrue. The parent may have a defense sufficient to prevent an adjudication of dependency, which he or she is unable adequately to present.\(^{149}\)

The circumstances which Judge Tuttle described in *Davis* were precisely what occurred in *Lassiter.* The basic truth of the fifth circuit's words in *Davis* were self-evident and seemingly unassailable, yet the

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147. 380 U.S. 545. The Court held in this case that failure to give notice to a divorced parent that an adoption was pending deprived him of his parental rights without due process.
148. *Id.* at 552.
149. 618 F.2d at 380-81.
majority in *Lassiter* chose to ignore the import of this argument.

Finally, Justice Blackmun referred to *Little v. Streater*, finding it ironic that the same day the Court decided a parent had no right to appointed counsel in *Lassiter*, it also found an indigent man had a right to state-paid blood-grouping tests taken in order to refute a charge of paternity. In *Little* too the Court applied the *Eldridge* test but came to a result opposite to *Lassiter*. The Court reasoned that absent the blood-grouping tests the petitioner might erroneously be adjudged a father:

Assessment of the *Mathews v. Eldridge* factors indicates that appellant did not receive the process he was constitutionally due. Without aid in obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, 'lacks a meaningful opportunity to be heard.'

Was Ms. Lassiter in less danger of an erroneous outcome than Mr. Little? Blood group tests are often inconclusive with regard to paternity. Whether or not the tests were performed Mr. Little might have remained in the same position. In *Lassiter* it is clear damaging hearsay evidence was admitted which may have prejudiced the outcome. The majority nonetheless ignored the import of the erroneous decision element and allowed greater procedural due process protection for Little than for Lassiter. If the holdings of *Little* and *Lassiter* are suggestive of the Court's hierarchy of values it may be argued the *Lassiter* majority believed a higher standard of due process should be afforded when parenthood is imputed than when it is terminated.

**Conclusion**

It is indeed unfortunate that an important issue—whether due process requires the appointment of counsel for indigents in termination of...
parental rights proceedings—was represented by a convicted murder-ess. It is fascinating to speculate whether the majority would have decided an obvious constitutional right to court-appointed counsel existed in termination proceedings had this question been presented by a non-felonious, hard-working, and exemplary petitoner. The Court should have recognized that any petitioner, no matter how unappealing, has the right to representation in this situation, in order to protect the right to a meaningful hearing. When parents’ rights to their children are threatened the highest standards of procedural protection should be afforded without question, because the loss of a child is one of the most tragic of all.

To those of us reaching adulthood in the post-Gideon generation, a criminal trial without representation seems the most flagrant violation of constitutional rights. The right to court-appointed counsel seems basic and its non-existence unimaginable; its hard-fought history is practically forgotten. The need for counsel in cases involving termination of parental rights seems no less compelling than the need for counsel in criminal cases. The Court’s five-four decision in Lassiter makes it clear that this compelling need, for the present, will remain unfulfilled.

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The Use Of Contempt Of Court To Enforce Florida Divorce Decrees

Florida’s courts often use contempt sanctions as a highly effective means of enforcing final divorce decrees.\(^1\) Accordingly, when a party fails to comply with a provision of the divorce order, the recalcitrant party may be threatened with imprisonment. This threat ensures rapid compliance with the duty the final decree imposes.\(^2\) The recent action of a Dade County circuit judge exemplifies the effectiveness of such a threat. Judge Rainwater cited 480 men in contempt of court over a four day period.\(^3\) Of the 480 men cited, 440 immediately paid the owed family support ordered by their respective divorce decrees.\(^4\)

The Florida Constitution, however, limits the courts’ extraordinary power to coerce: “No person shall be imprisoned for a debt, except in cases of fraud.”\(^5\) Therefore, it is imperative a court determine, prior to exercising its power, whether a debt is the underlying cause for the imposition of contempt and subsequent imprisonment. Courts have had particular difficulty making this determination regarding property settlements incorporated into final divorce decrees.\(^6\) Florida courts, in particular, have reached conflicting conclusions when determining whether these settlements are enforceable through contempt of court.\(^7\)

If a court considers property settlements as merely imposing a

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2. Id.
3. Id.
4. Id.
5. FLA. CONST. art. 1, § 11.
6. Compare Collins v. Collins, 179 So. 2d 231 (Fla. 2d Dist. Ct. App. 1965) and Firestone v. Ferguson, 372 So. 2d 490 (Fla. 3d Dist. Ct. App. 1979) holding the respective parties in contempt for failure to comply with a provision of a property settlement agreement incorporated into final divorce decrees with Howell v. Howell, 207 So. 2d 507 (Fla. 2d Dist. Ct. App. 1968) and Carlin v. Carlin, 310 So. 2d 403 (Fla. 4th Dist. Ct. App. 1975) holding contempt is not an available remedy to enforce property settlement agreements incorporated into final divorce decrees.
7. See note 6 supra.
debt, it should not punish the debtor by using its contempt power to enforce the decree. This note will attempt to set forth certain guidelines a Florida court might use in determining when a property settlement incorporated in a final divorce decree constitutes a debt. In such cases the decree is unenforceable through contempt because of Florida's constitutional guarantee.

Contempt

In order for any judicial system to function smoothly, its courts must have the ability to enforce their decrees. One such means of enforcement is the power of contempt. Florida defines contempt as "[a] refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any business of said court, after due notice thereof. . . ." 8

When the court seeks to punish a party for violating a judicial decree, it initiates criminal contempt proceedings. 9 When a private party initiates proceedings for the purpose of coercing another party into action or non-action, the proceedings are for civil contempt. 10 At times, the distinction between civil and criminal contempt is nebulous. The Florida Supreme Court discussed the differences and the difficulty of making the distinctions between the two in Pugliese v. Pugliese. 11

Tina and Rocco Pugliese were divorced in 1975. The final divorce decree ordered Rocco to vacate the marital dwelling. Subsequent to entry of final judgment, Rocco's attorney filed motions for a new trial, stay of execution of judgment and notice of hearing. The attorney advised Rocco the judgment requiring surrender of the premises was stayed pending final determination of the motions. Thus, Rocco refused to vacate the marital dwelling.

Upon Rocco's refusal to vacate, Tina Pugliese filed a motion for contempt and a notice of hearing. The judge held Rocco in contempt of

8. FLA. STAT. § 38.23 (1979); see also FLA. STAT. § 38.22 (1979) which states that "[e]very court may punish contempts against it whether such contempts be direct, indirect, or constructive, and in any such proceedings the court shall proceed to hear and determine all questions of law and fact."
10. Id.
11. 347 So. 2d 422 (Fla. 1977).
court for willfully refusing to vacate the premises as required by the divorce decree. Rocco was sentenced to thirteen days in county jail, but the order did not provide Rocco with an opportunity to purge his contempt by fulfilling the decree requirements which would terminate the sentence. Florida’s Second District Court of Appeal affirmed the decision without opinion. 12

To properly review the decision, the Florida Supreme Court had to determine whether the order was for civil or criminal contempt. 13 In doing so the court stated that “if the purpose of the proceedings is to coerce action or non-action by a party, the order of contempt is civil.” 14 In civil contempt, the party seeking to coerce the action or non-action initiates the proceedings. The judge then would hold the non-complying party in contempt for the “private benefit of the offended party.” 15

Criminal contempt, on the other hand, punishes rather than coerces. It is maintained solely and simply to “vindicate the authority of the court or to punish otherwise for conduct offensive to the public in violation of an order of the court.” 16 Criminal contempt can be either direct or indirect.

A direct criminal contempt is one committed in the “presence of the court.” 17 Oftentimes this type of conduct occurs during the course of a trial. For example, in Olds v. State, a judge held the public defender in direct contempt of court. 18 The holding stemmed from the judge’s displeasure with the public defender’s continued efforts to impeach an important state’s witness. The witness had been previously represented by the public defender’s office and the judge felt the continued effort to impeach the witness violated the attorney-client privilege. This violation prompted the judge to hold the attorney in direct criminal contempt.

Although the decision to hold someone in contempt is generally left to the trial court’s discretion, Florida’s Fourth District Court of

12. Id. at 424.
13. Id.
14. Id. (emphasis added).
15. Id.
16. Id. (emphasis added).
17. Demetree v. State, 89 So. 2d 498 (Fla. 1956).
18. 302 So. 2d 787 (Fla. 4th Dist. Ct. App. 1974).
Appeal reversed the *Olds* contempt order. The court concluded the trial judge erred in believing the information sought by the public defender was privileged: the subject matter of the attempted cross examination included statements by the state’s witness made in the presence of third parties and involved matters of public record. Based on these facts, the appellate court found the information was not privileged and the trial court’s order for direct criminal contempt could not stand.

In contrast to direct criminal contempt, an indirect criminal contempt is one committed “outside the presence of the court.” For example, in *Demetree v. State*, a judge held the defendant in contempt of court for violating an order enjoining him from operating a house of prostitution. The judge sentenced the defendant to six months in the Dade County Jail.

The Florida Supreme Court affirmed the *Demetree* order for indirect criminal contempt. It stated that typically, an indirect criminal contempt proceeding is brought on behalf of the public. Here, the injunction was obtained by the county solicitor in the name of the State of Florida. The alleged contemptuous conduct was not committed against the county solicitor as an individual, but was committed against the public at large. The trial court had sustained its burden of showing, beyond a reasonable doubt, the defendant was guilty of contemptuous conduct by continuing the operation of his brothel. Therefore, the order for indirect criminal contempt was valid.

Preliminarily, the court must decide who was offended by the contemptuous conduct since this determines whether direct or indirect criminal contempt was committed or whether civil contempt was committed. In *Pugliese*, the Florida Supreme Court found Rocco's conduct in failing to obey the court order to vacate could be subject either to indirect criminal contempt proceedings or civil contempt proceedings. The supreme court rejected Tina’s argument that by admitting in open

19. *Id.*
20. *Id.* at 790.
21. 89 So. 2d at 501.
22. *Id.* at 500.
23. *Id.* at 501.
24. *Id.* at 503.
25. *Id.* at 502.
26. 347 So. 2d at 424.
court, at the contempt hearing, he had defied the terms of the divorce order Rocco committed a direct criminal contempt. A judge must always hear testimony in his presence at a hearing for indirect criminal contempt. Declaring that this testimony constituted conduct equivalent to direct criminal contempt would obliterate the distinctions between direct and indirect criminal contempt. Thus, Rocco's conduct could not constitute a direct criminal contempt and the more stringent standards for an indirect criminal contempt proceeding applied.

To determine whether the proceeding was for criminal or civil contempt, the supreme court in *Pugliese* looked to the language of the order itself. Orders for civil contempt classically include a purging provision whereby the contemnor can terminate the sentence upon compliance with the court ordered action. Since the *Pugliese* order lacked this purging provision it was an atypical civil contempt order.

Turning to whether the order could be classified as one for indirect criminal contempt, the supreme court in *Pugliese* looked to the procedure followed by the lower court prior to adjudging Rocco in contempt. Florida Rule of Criminal Procedure 3.840 spells out the procedural requirements to initiate an indirect criminal contempt proceeding. Since

27. Id. at 426.
28. Id.
29. Id. at 424.
30. Id.
31. FLA. R. CRIM. P. 3.840. Indirect Criminal Contempt:
   (a) Indirect (Constructive) Criminal Contempt. A criminal contempt except as provided in the preceding subsection concerning direct contempts, shall be prosecuted in the following manner:
      (1) Order to Show Cause. The judge, of his own motion or upon affidavit of any person
      (2) Motions; Answer. The defendant, personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars or answer such order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. A defendant's omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.
      (3) Order of Arrest; Bail. The judge may issue an order of arrest of the defendant if the judge has reason to believe the defendant will not appear in response to the order to show cause. The defendant shall be admitted to bail in the manner provided by law in criminal cases.
      (4) Arraignment; Hearing. The defendant may be arraigned at the
these requirements were not met, Rocco was not given notice of the consequences that might follow the hearing. Thus, because the trial court’s order failed to adhere to procedural requirements for criminal contempt nor contained a purging clause, as required for civil contempt, the order for contempt could not stand whether classified as either criminal or civil. The supreme court reversed the Second District

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time of the hearing, or prior thereto upon his request. A hearing to determine the guilt or innocence of the defendant shall follow a plea of not guilty. The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. The defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and may testify in his own defense.

All issues of law and fact shall be heard and determined by the judge.

(5) Disqualification of Judge. If the contempt charged involves disrespect to or criticism of a judge he shall disqualify himself from presiding at the hearing. Another judge shall be designated by the chief justice of the Supreme Court.

(6) Verdict; Judgment. At the conclusion of the hearing the judge shall sign and enter or record a judgment of guilty or not guilty. There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty.

(7) The Sentence; Indirect Contempt. Prior to the pronouncement of sentence, the judge shall inform the defendant of the accusation and judgment against him and inquire as to whether he has any cause to show why sentence should not be pronounced. The defendant shall be afforded the opportunity to present evidence of mitigating circumstances. The sentence shall be pronounced in open court and in the presence of the defendant.

**FLA. R. CRIM. P. 3.830. Direct Criminal Contempt:**

A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts upon which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against him and inquire as to whether he has any cause to show why he should not be adjudged guilty of contempt by the Court and sentenced therefore. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

32. 347 So. 2d at 426.
Court of Appeal and remanded the case for proceedings consistent with its opinion.\textsuperscript{33}

The \textit{Pugliese} case illustrates that non-compliance with the provisions of a divorce decree may be subject to either civil or criminal contempt proceedings. Generally, non-compliance is characterized as a civil contempt because the purpose of the proceeding is to "preserve and enforce rights of private litigants to compel obedience to orders and decrees of the court made for the benefit of such parties."\textsuperscript{34} Usually the party who has not received family support payments (either permanent alimony or child support) initiates civil contempt proceedings to coerce the other party into making the delinquent payments.\textsuperscript{35} The sentence imposed as a result of a finding of civil contempt continues until the recalcitrant party fulfills his or her obligation.

When the purpose of the contempt proceeding is coercive, the trial judge is required to make an affirmative finding:

(1) The petitioner presently has the ability to comply with the or-

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\item \textsuperscript{33} \textit{Id.} at 427.
\item \textsuperscript{34} Deter v. Deter, 353 So. 2d 614, 617 (Fla. 4th Dist. Ct. App. 1977).
\item \textsuperscript{35} 180 So. 2d at 379.
\end{itemize}

Civil contempt proceedings should be instituted by the aggrieved party or those who succeed to their rights or someone who has an interest in the right to be protected. Due process of law requires that the party accused be advised of the charge and accorded opportunity to defend himself. In these proceedings there is no presumption of innocence and the burden of proof is upon the party bringing the charge to prove the facts charged by a preponderance of the evidence. Where a court order and its violation are established or admitted the burden is on the accused to show facts which would excuse his default. If the defense or excuse is that of inability to comply, the accused has the burden of proving by a preponderance of the evidence such inability. This is based upon the fact that the making of the order involved an implicit finding of ability to comply. Thus there must be an affirmative finding appearing on the commitment order that it is within the power of the accused to obey the order and, conversely, imprisonment is not available if the accused is unable to comply. It is for this reason often stated that the accused carries the keys of his prison in his pocket. In Florida it has been held that imprisonment for civil contempt must be for a fixed term and must include a specifically stated provision for purging. The fixed term requirement was imposed without stating whether the contempt was civil or criminal. As a general rule a fixed term is not required in punishment for civil contempt.
der and willfully refuses to do so, or (2) that the petitioner previously had the ability to comply but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order.  

The Florida Supreme Court spelled out this requirement in *Faircloth v. Faircloth*, where it remanded the case because the lower court had not made the required determination prior to exercising its contempt power.  

Apparently, the reason behind making this determination is to assure that the contemnor has the ability to comply with the order. Otherwise, the purpose of the proceeding would have to be something other than coercion. The trial court in *Faircloth* had held the former husband in contempt because his child support payments were in arrears and because he failed to comply with other provisions of the divorce decree. He was sentenced to the county detention center for five months and twenty-nine days or until he paid the money owed.  

### Duties Enforceable Through Contempt

Florida considers court ordered imposition of family support payments a legally imposed duty rather than a debt. The language used in the Florida statutes, allowing the court to impose family support obligations, reflects this conclusion: “The court may at any time order either or both parents a duty of support to the child.” The constitutional prohibition against imprisonment for a debt is circumvented by this analysis.

Although the Florida statute allowing the court to impose alimony does not expressly mention the word “duty,” it is referred to in a

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37. *Id.* at 651.
38. *Id.*
41. 43 Fla. at 465, 31 So. 2d at 252.
42. *FLA. STAT.* § 61.08 (1979).

1. In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of
related statute. Florida Statute § 61.12 sets forth the procedure necessary to garnish or attach amounts due for alimony and child support. Subsection (2) of the statute states, the court through issuance of a "writ may provide that the salary of any person having a duty of support pursuant to said order be garnished on a periodic and continuing basis for as long as the court may determine. . . ."43 The Florida Supreme Court has interpreted the obligation of family support (permanent alimony or child support) as a legally imposed duty. The supreme court reflected this view in McRae v. McRae: "The law imposes on [the] civilized [person] the duty to provide food, shelter and raiment for his [or her] own."44

Because courts consider imposition of family support imposition of a legal duty, they will enforce family support orders through contempt of court when policy considerations justify such action. As early as 1901, the Florida Supreme Court decided in Bronk v. State45 that contempt of court can be exercised to enforce the obligation of family support. The Bronk decision was based on the court’s belief that:

[a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded.

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

(a) The standard of living established during the marriage.
(b) The duration of the marriage.
(c) The age and the physical and emotional condition of both parties.
(d) The financial resources of each party.
(e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment.
(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education and career building of the other party.

The court may consider any other factor necessary to do equity and justice between the parties.

44. 52 So. 2d 908, 909 (Fla. 1951) citing Pollack v. Pollack, 159 Fla. 224, 225, 31 So. 2d 253, 254 (1947).
45. 43 Fla. 461, 31 So. 248 (1901).
Alimony or maintenance from the husband to the wife is not a debt, within the meaning of the constitutional inhibition against imprisonment for a debt. It is regarded more in light of a personal duty due not only from the husband to the wife, but from him to society, that courts of equity have the power to enforce by detention of the person of the husband in cases where he can discharge it but will not. 46

A policy consideration implicit in this argument is to make the husband pay support so that the wife and family do not become a burden on society.

Florida’s Third District Court of Appeal reiterated this view in Chapman v. Lamm: “Contempt for failure to pay court ordered alimony or child support is based upon the fact that such obligations arise out of the duty owed and that, in accordance with public necessity, dependents must be supported.” 47

It is interesting to note, however, in Chapman the appellate court reversed the trial court’s decision holding the former husband in contempt of court because part of the obligation of support had been converted into a debt to a third party. 48 Joe Chapman had been committed to the Dade County Jail for ninety days or until he paid the clerk of the court $8,170 in overdue child support payments. Part of this amount, $2,987.50, had been converted into a debt owed to the State of Florida, Department of Health and Rehabilitative Services. On appeal, Chapman argued the order was reversible because it purported to imprison him for a debt owed to a third party, the State of Florida. 49 Florida’s Third District Court of Appeal agreed and said the obligation “no longer carried the public necessity for enforcement by imprisonment.” 50 That part of the money owed to the State of Florida would not be used to support the children, and consequently public policy did not support the court’s exercise of its contempt power.

Courts will not imprison parties for failure to render payment of

46. Id. at 463, 31 So. at 252.
48. Id. at 1049.
49. Id.
50. Id.
family support unless policy reasons, such as continued maintenance and nourishment of the family, justify such action. 51 In other words, public necessity must justify court exercise of contempt power. Florida's First District Court of Appeal reflected this view when it stated in *Smith v. Morgan* that once public necessity no longer exists, "the purpose and justification for the extraordinary power of contempt expires." 52

In *Morgan*, the lower court found the former husband in contempt of court for failure to make child support payments in arrears. 53 The facts demonstrated upon dissolution of marriage in 1963, the husband was ordered to pay child support. In 1979, the circuit court entered an order abating the child support obligation because the 17 year old son was residing with the former husband and consequently was deriving support directly from the former husband. On the same day the court entered the abatement order the former husband was held in contempt. The judge sentenced him to five months and twenty-nine days in jail. 54 On appeal, the husband argued that the circuit court was without jurisdiction to punish, through contempt, the failure to pay child support arrearages once the obligation of support had been abated. 55 Florida’s First District Court of Appeal agreed and found the order for abatement “eliminated the public necessity for the extraordinary remedy of contempt since the father is now supporting the child directly.” 56

In *Morgan*, because the trial court was without jurisdiction to punish the appellant by contempt, the wife’s remedy for recovery of child support arrearages was limited to a judgment by “ordinary civil proceedings.” 57 The circuit court was without jurisdiction to use its power of contempt to enforce payment of child support in arrears once the child had reached the age of majority. 58 No sufficient policy reasons justify court exercise of contempt power to enforce child support pay-

52. *Id.* at 1053.
53. *Id.* at 1052.
54. *Id.*
55. *Id.* at 1053.
56. *Id.*
57. *Id.*
ment when the child is no longer a minor.\textsuperscript{59}

On the other hand, a policy consideration supporting the court's exercise of contempt power is that orders for family support are modifiable.\textsuperscript{60} Family support orders for alimony and child support generally

\textsuperscript{59} Id.

\textsuperscript{60} FLA. STAT. § 61.14 (1979).

Modification of alimony judgments, agreements, etc.—

(1) When the parties have entered into, or hereafter enter into, an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party has changed or the child or children who are beneficiaries of an agreement or court order as described herein have reached the age of 18 years since the execution of such agreement or the rendition of the order, either party may apply to the Circuit Court of the circuit in which the parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for a judgment decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties or the child or children, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order.

(2) When an order is modified pursuant to subsection (1), the party having an obligation to pay shall pay only the amount of support, maintenance, or alimony directed in the new order, and the agreement or earlier order is modified accordingly. No person shall commence, or cause to be commenced, as party or attorney or agent or otherwise, in behalf of either party in any court, an action or proceeding otherwise than as herein provided, nor shall any court have jurisdiction to entertain any action or proceeding otherwise than as herein provided to enforce the recovery of separate support, maintenance, or alimony otherwise than pursuant to the order.

(3) This section is declaratory of existing public policy and of laws of this state which are hereby confirmed in accordance with the provisions hereof. It is the duty of the Circuit Court to construe liberally the provisions hereof to effect the purposes hereof.

(4) If a party applies for a reduction of alimony or child support and the circumstances justify the reduction, the court may make the reduction of alimony or child support regardless of whether or not the party applying for it has fully paid the accrued obligations to the other party at the time.
continue over extended periods of time; often the circumstances sur-
rounding support payment change substantially. For instance, a former
spouse may remarry or the needs of a child might increase or decrease.
Thus, it is necessary that orders for family support be flexible to fit
changed circumstances. Upon sufficiently changed circumstances, ei-
ther party to the divorce may request the judge to modify a family
support order to reflect the changes that have occurred. Since these
orders are modifiable, thereby giving the recalcitrant party no excuse
for continued disobedience of the order, courts are more willing to exer-
cise their extraordinary contempt powers to enforce orders. The former
spouse could have had the order modified if he felt the order was exces-
sive and sufficiently changed circumstances justified modification of the
order.

In addition to necessary family support payments, court ordered
payment of attorney’s fees for services rendered during the divorce is
not considered a debt. The reason for placing legal fees in the same
category as family support obligations is unclear. Arguably, the policy
behind treating court ordered legal fees as a duty is to ensure that both
parties will retain competent legal counsel throughout divorce proceed-
ings. Because courts are willing to treat court ordered legal fees as
imposing a duty, they are able to use contempt powers to enforce such
orders avoiding constitutional stricture against debtor imprisonment.

Debts Not Enforceable Through Contempt

Property settlements incorporated into final divorce decrees have
given courts particular difficulty in deciding whether they should be
enforced through contempt proceedings or by ordinary civil proceedings
available to creditors against debtors. Two Florida district courts of ap-
peal have decided that property settlements incorporated into final di-

of the application or at the time of the order of modification.
61. Id. § 1.
63. Orr v. Orr, 141 Fla. 112, 192 So. 2d 466 (1939).
65. Harrison v. Harrison, 178 So. 2d 889 (Fla. 2d Dist. Ct. App. 1965); Law-
rence v. Lawrence, 384 So. 2d 279 (Fla. 4th Dist. Ct. App. 1980).
orce decrees may be enforced through contempt of court.66

Florida's Third District Court of Appeal upheld use of contempt to enforce a property settlement incorporated into a final divorce decree in Firestone v. Ferguson.67 The Firestones were divorced in 1974. The final divorce judgment included a property settlement with a provision that Myrna Firestone, the former wife, sell a farm in Kentucky and split the proceeds equally with her former husband, Russell. The agreement also provided Russell pay Myrna $5,000 per month in alimony.68

During a court hearing, Myrna indicated she would be willing to sell the property for $5,000 per acre.69 Thereafter, a Kentucky corporation offered her $4,700 per acre for the farm. Myrna refused to sign the sale papers and the offer expired. Russell moved to compel Myrna to comply with the settlement agreement. Judge Ferguson, a Dade County circuit court judge, held Myrna in contempt of court. He gave her ten days within which to execute the offer and agreement for sale. When she refused, the judge relieved Russell from paying further alimony.70

The appellate court affirmed the lower court's decision, but indicated the possibility of a different result had the property settlement called merely for the payment of money. This possibility was premised on the general rule that "the contempt process may not be utilized to enforce payments required under a property settlement agreement."71 However, the court found the general rule inapplicable to the facts of Firestone because the contempt proceedings were initiated to compel Myrna to execute a contract for the sale of property, not to make payments of money.72

Similarly, Florida's Second District Court of Appeal in Collins v. Collins held the trial court did not err by holding Marion Collins in contempt of court for failing to make mortgage payments pursuant to a

66. 179 So. 2d 231 (Fla. 2d Dist. Ct. App. 1965); 372 So. 2d 490 (Fla. 3d Dist. Ct. App. 1979).
67. 372 So. 2d 490.
68. Id. at 491.
69. Id.
70. Id.
71. Id. at 492.
72. Id.
property settlement.78 Marion and Nannie Lou Collins were divorced in 1963 and their final divorce decree incorporated a stipulation to the property settlement whereby Marion would make mortgage payments on certain properties. In 1964 the trial court adjudged Marion in contempt of court for failure to make the required payments. He was sentenced to sixty days in jail.74 The Collins decision seems to violate the general rule espoused in the Firestone's dicta which prohibits use of contempt proceedings to enforce a property settlement calling for payment of money.

Other cases strictly adhere to the general rule found in Firestone, which Collins seemingly did not follow.76 These cases hold that contempt of court is unavailable to enforce property settlements which merely impose a debt upon one of the former spouses.

For instance, in Howell v. Howell, Florida's Second District Court of Appeal followed the general rule.78 A property settlement agreement had been incorporated into the final divorce decree of William and Thelma Howell in 1959.77 In pertinent part, the agreement provided:

The husband in full and complete settlement and discharge of all obligations to the wife for alimony, support and maintenance, dower or claim of the wife against the husband or against his estate, agree[d] to pay to the wife the sum of $100.00 per week. . . . The husband agree[d] that there would be no abatement in the weekly payments hereinafter provided for any reason whatsoever except the remarriage of the wife. . . .78

In addition, the parties stipulated "[t]he settlement agreement . . . contained [a] full and complete payment and satisfaction of all alimony, maintenance, support, court costs . . . [and] neither party [would] ask for, nor be entitled to any other settlement. . . .79

Three years after the decree's execution, William unsuccessfully

73. 179 So. 2d 231.
74. Id.
76. 207 So. 2d 507.
77. Id. at 509.
78. Id.
79. Id.
petitioned the court to reduce the “alimony” payments. The judge held the agreement was a property settlement because the agreement was for the transfer of property rights and not for continued maintenance of the wife. The sum of money called alimony was actually the consideration paid to the wife for the transfer of her property rights. Because the agreement was actually a property settlement it was not modifiable. Property settlement agreements are contracts to distribute property upon dissolution of marriage and when fairly and voluntarily entered into, the courts will not disturb them. The former husband appealed and Florida’s Fourth District Court of Appeal affirmed.

In November of 1964, Thelma petitioned the court to hold William in contempt. For some sixty-nine weeks, William had only paid $50.00 per week instead of the $100.00 per week he was required to pay under the final divorce decree. William argued that when the Fourth District Court of Appeal affirmed the lower court’s dismissal of his petition for modification, it fixed the legal status of the original agreement as a property settlement rather than purely an agreement to pay alimony. Consequently, the payments to Thelma under the agreement constituted an ordinary contractual obligation enforceable only as between creditor and debtor. William urged contempt proceedings were improper since this was not a default of alimony payments but rather a failure to fulfill the contractual obligations of the property settlements. The appellate court noted that whether the contempt proceeding could be used to enforce these payments depended on whether the payments fulfilled an alimony or property settlement agreement.

The court in Howell found alimony to mean “nourishment” or

80. Id. at 510.
81. Id.
82. Id.
84. 207 So. 2d at 510.
85. Id.
86. Id.
87. Id.
88. Id.
"sustenance." That is, alimony continues to sustain a former spouse in a lifestyle to which he or she had become accustomed prior to the divorce, within the means of the other spouse. If, on the other hand, the periodic payments were made in consideration for relinquishment of property rights, they should be classified as payments pursuant to the executed property settlement. The court aptly summarized this method of classification: "It is the substance and not the form which is controlling." The use of the term "alimony" in the property settlement agreement is not conclusive.

On final analysis, the court agreed with William's argument that when the Fourth District Court of Appeal affirmed the dismissal of his previous petition for modification, it fixed the "law of the case" as to the legal classification of the payments. Thus, the appellate court was bound to characterize these payments as those pursuant to a property settlement, unenforceable through contempt. Thelma was limited to the usual remedies available to a creditor against her debtor. To allow otherwise, said the court, would result in imprisonment for a debt.

In Carlin v. Carlin, the Fourth District Court of Appeal broadened the general rule articulated in the Firestone dicta. The facts showed the husband voluntarily entered into a property settlement agreement which was incorporated into the final divorce decree. The former wife failed to comply with a provision of the agreement and was therefore adjudged in contempt of the final judgment for dissolution of marriage. The appellate court reversed the contempt order on the grounds that when the property settlement agreement is fairly and voluntarily entered into, its "violation . . . is not enforceable by contempt but only by the usual remedies available to a creditor against his debtor." This broadens the general rule in that it prohibits the use of contempt to enforce any property settlement agreement and not just

89. Id. at 511 citing Underwood v. Underwood, 64 So. 2d 281 (Fla. 1953).
90. 207 So. 2d at 512.
91. Id.
92. Id.
93. Id.
94. Id.
95. 310 So. 2d 403.
96. Id.
97. Id.
one requiring the payment of money.

Florida's Fourth District Court of Appeal later retreated somewhat from the rule in Carlin, in Burke v. Burke,98 where it held payments required under terms of a property settlement agreement could not be enforced by contempt proceedings.99 Prior to dissolution of their marriage, Joseph and Doris Burke entered into a property settlement agreement which was incorporated in the final divorce decree. The settlement agreement stipulated that Joseph was to pay Doris $1,956.26. In addition he was to execute and deliver to Doris the joint income tax return for 1974 together with a check in the amount of one-half the taxes due. Finally, Joseph was also to execute and deliver to Doris all documents necessary to release to her all his interests in a note and mortgage and transfer all of his interests in certain securities. Joseph failed to comply with any of these provisions which prompted Doris to file a motion to enforce the agreement through civil contempt.100

The trial court held the former husband in contempt of court. The appellate court affirmed in part and reversed in part.101 Regarding the money Joseph owed to Doris, the Fourth District Court of Appeal held it was clearly a payment required under the terms of a property settlement, unenforceable through contempt proceedings.102 The court, therefore, reversed that part of the trial court's order holding Joseph in contempt for failure to execute and deliver the joint tax return and a check for taxes due for the same reason.103

The court was faced with a different situation regarding the remaining portion of the lower court's order requiring Joseph to execute and deliver certain documents.104 These acts did not involve holding the former husband in contempt of court for failure to make an agreed payment pursuant to a property settlement agreement, but rather ordered he comply with the obligations assumed in the agreement.105 The effect of incorporating the agreement into the final divorce decree cou-

98. 336 So. 2d 1237 (Fla. 4th Dist. Ct. App. 1976).
99. Id. at 1238.
100. Id.
101. Id. at 1239.
102. Id. at 1238.
103. Id.
104. Id.
105. Id.
pled with the trial court’s order for compliance was a “mandatory order to specific performance of that act,” which the court found distinguishable from the payment of money.

The court in *Burke* indicated that because the trial court was in effect ordering Joseph to specifically perform the act, Florida Rule of Civil Procedure 1.570 applied. Florida’s procedural requirements provided, in part: “If any other judgment, injunction or mandatory order for the specific performance of any act or contract is not complied with, the court may hold the disobedient party for contempt. . . .”

The trial court ordered Joseph to specifically perform certain acts which did not involve payment of money. The former husband’s failure to comply was willful and deliberate, and not caused by inability to perform. Under these circumstances, the court held the trial court had the authority to enforce its order by holding the former husband in contempt.

Upon final analysis, it seems the rule regarding the enforcement of property settlement agreements incorporated into final divorce decrees swings from extreme to extreme. On one hand, as in *Collins*, contempt of court is available to coerce a former spouse to make required mortgage payments. On the other hand, as in *Carlin*, contempt of court is never an available remedy to enforce property settlement agreements incorporated into final divorce decrees. The more moderate approach was exhibited by *Benson v. Benson*, where Florida’s Fourth District Court of Appeal stated: “Failure to make payments pursuant to a pure property settlement is not the subject of contempt proceedings, . . .”

**Conclusion**

Florida courts have, on occasion, reached conflicting conclusions when addressing the issue of whether contempt is available as a remedy to enforce property settlement agreements incorporated into final divorce decrees. It seems clear that contempt is an available remedy to enforce family support obligations. Where, then, does confusion arise

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. 369 So. 2d 99, 100 (Fla. 4th Dist. Ct. App. 1979).
with regard to property settlement agreements?

One source giving rise to confusion is Florida's constitutional prohibition against imprisonment of debtors.111 Judicial construction of this provision does not prohibit court use of contempt as a means of enforcing family support obligations because these obligations are not classified as debts, but rather are viewed as legally imposed special duties. Therefore, when the court threatens a party with imprisonment for failure to comply with a family support provision, it is coercing that party's compliance with a legally imposed duty. The court is not threatening the party with imprisonment as a means of enforcing a debt, and consequently does not violate Florida's constitutional guarantee in this respect.

The situation is different when a property settlement agreement is involved. Property settlement agreements create no special duties upon the parties. They are merely contracts distributing property between husband and wife upon dissolution of marriage.112 When freely and voluntarily entered by the parties, these contracts are not disturbed and courts treat them like any other.113 Unlike family support orders, these settlement agreements are not modifiable.

Unpaid money obligations arising from settlement agreements are considered debts. Because courts must be careful not to violate the prohibition against imprisoning debtors, they follow the general rule that contempt of court is not an available remedy to enforce these payments.114 Therefore, the party seeking relief is limited to those proceedings any creditor would have against his debtor.115

Another source of confusion is, unlike cases presented by breached family support obligations, there really are no sufficient policy reasons justifying contempt for property settlement violations. Property settlement agreements are not intended to assure continued "sustenance" or "nourishment" to the family, and a party's failure to comply with a settlement provision does not necessarily mean a family will go without support. Why, then, should a court exercise its extraordinary power of contempt merely to enforce a contract to distribute property?

111. FLA. CONST. art. 1, § 11.
113. Underwood v. Underwood, 64 So. 2d 281 (Fla. 1953).
114. 207 So. 2d 507.
115. 310 So. 2d 403.
Certain guidelines might be useful to a court in determining whether a divorce order is enforceable through contempt. First the court should determine the source of the obligation for which enforcement is sought. If the court determines the source of obligation arises from a duty of family support then contempt may be an available remedy. The court must then determine whether policy considerations justify the exercise of its extraordinary power of contempt.118

If, on the other hand, the obligation arises from an agreement to distribute property, the court should be careful in exercising its power of contempt, lest a debtor be imprisoned. If courts treat these agreements like any other contract, the non-breaching party is afforded only those remedies sounding in contract. Perhaps, however, in cases of serious violation of a property settlement agreement, a court might impose punitive damages to deter future violations of serious magnitude.

The Burke decision laid down a particularly appealing approach where the court said it was enforcing the contract through its power of contempt because it had ordered the party to specifically perform the contract.117 The courts should be allowed to order a party to specifically perform a property settlement where the contract demands such action and there is no adequate remedy at law. Because specific performance, an equitable remedy, usually does not involve the payment of money, the court could circumvent the Florida proscription against im-

116. After this note was committed to print, the Florida Supreme Court reversed the Third District Court of Appeal in Chapman v. Lamm, 7 Fla. L. Weekly 124 (March 12, 1982). The supreme court recognized the general rule when a debt based upon an assignment of the right to receive child support payments is owed to a private third party (a bank for example), contempt of court is not an available means of enforcing that debt. See State ex rel. Cahn v. Mason, 148 Fla. 264, 2 So. 2d 255 (1941). However, when the state demonstrates sufficient public policy reasons, contempt of court is an available means of enforcing the child support payments owed to the state. Section 409.2561 of the Florida Statutes (1979) demonstrated the legislature’s intent, based on the “unique relationship” between the state and the family, to allow the state to use contempt of court as a means of securing repayment of public monies. The supreme court held that the acceptance of public assistance for the support of a dependent child vests in the department the authority to proceed with all remedies available to the child’s custodian. 7 Fla. L. Weekly at 126. Still the contempt order in Chapman was held to be improper because the former husband was not properly notified of the dissolution of marriage proceedings and the record did not support the determination that the husband had the ability to pay the child support. Id. at 124.

117. 336 So. 2d 1237.
prisoning for a debt. This type of approach would seemingly avoid much of the confusion surrounding the courts’ use of contempt to enforce property settlements incorporated into final divorce decrees.

Jeffrey F. Thomas
Constitutionality of Florida’s Statute Limiting Tort Recovery Against a Municipality: *Cauley v. City of Jacksonville*

In *Cauley v. City of Jacksonville*¹ the Supreme Court of Florida recently faced a constitutional challenge to monetary limitations placed on tort recovery against a municipality. In its July, 1981, decision the court held Florida Statute Section 768.28(5),² which imposed those limitations, constitutionally valid.

In order to appreciate the impact of the *Cauley* decision, it must be reviewed in historical perspective. This comment sets forth that perspective by considering the origin of “sovereign immunity” and furnishing an overview of the case-made tests used to determine when immunity attached to insulate municipalities from liability. Lastly, the statute’s provisions and *Commercial Carrier Corp. v. Indian River County*³ will be examined, providing a context in which *Cauley* can be evaluated.

**Sovereign Immunity**

Sovereign immunity was based on the premise that the king could do no wrong.⁴ Since the king was the supreme power, there could be neither jurisdiction over him nor redress against him. Rather than acknowledging a wrong without a remedy, the king was viewed as infallible and the doctrine of immunity was created.⁵ This legal fiction was

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1. 403 So. 2d 379 (Fla. 1981).
2. FLA. STAT. § 768.28(5) (1977) (this provision of the statute remains unchanged however the limits of recovery have been altered by ch. 81-317, 1981 Fla. Laws 1488).
3. 371 So. 2d 1010 (Fla. 1979).
5. Id.
later applied in the American states based on "the idea that whatever the state does must be lawful..." Thus, absent its consent, a state could not be sued in tort.

Municipalities, as subdivisions of the state, have also been afforded tort immunity for certain functions. Identifying those functions was often a difficult task. Over time different tests have been employed to help make the determination. However, courts have experienced considerable difficulty and confusion when applying these tests.

Case Development of Municipal Immunity

When the first test for municipal immunity was created, the major issue was the distinction between governmental and proprietary functions of a municipality. If the function was purely "governmental," immunity attached; a function that was "proprietary," "municipal" or "corporate" was not protected. The question then became, how to identify into which category a function fell.

In 1931, in Chardkoff Junk Co. v. City of Tampa the city was held liable for negligent operation of its incinerator. The Supreme Court of Florida discussed the distinction between governmental and proprietary functions. The court adopted the view that "[g]overnmental functions are those conferred on or imposed upon the municipality as the local agency of limited and prescribed jurisdiction, to be employed in administering the affairs of the state, and promoting the public welfare generally." The court used the term "municipal functions" in-

7. Id.
8. Id.
9. Id. at 977.
11. See Wood v. City of Palatka, 63 So. 2d 636 (1953); City of Tampa v. Easton, 145 Fla. 188, 198 So. 753 (1940); Chardkoff Junk Co. v. City of Tampa, 102 Fla. 501, 135 So. 457 (1931); Bryan v. City of West Palm Beach, 75 Fla. 19, 77 So. 627 (1918).
12. 102 Fla. 501, 135 So. 457 (1931).
13. Id. at 505, 135 So. at 459.
instead of "proprietary functions" or "corporate functions;" these terms were interchangeable.\textsuperscript{14} It defined municipal functions as those "which specifically and particularly promote the comfort, convenience, safety and happiness of the citizens of the municipality . . . . Under this class of functions are included, in most jurisdictions, the proper care of streets and alleys . . . and [other] improvements generally."\textsuperscript{15}

It appears the Florida Supreme Court has held consistently that street maintenance was a city duty, and has viewed it as a proprietary function.\textsuperscript{16} Therefore, the city traditionally lacked tort immunity in this area. However, the line between governmental and municipal functions was not always so easily drawn. In \textit{City of Tampa v. Easton},\textsuperscript{17} the court recognized that "[w]hat are governmental functions and what are corporate authority on duties of a municipality are not comprehensively defined in the law but are to be determined in each case upon a judicial interpretation and application of appropriate provisions or principles of law to the facts legally shown or omitted [sic] . . . ."\textsuperscript{18} The results which have followed were often inconsistent and confusing.\textsuperscript{19}

In 1957, after lower courts had wrestled with the "governmental-
proprietary” distinction, the Florida Supreme Court cast aside that theory and held municipalities could be liable for their employee’s torts under the doctrine of respondeat superior.\(^{20}\) Hargrove v. Town of Cocoa Beach\(^{21}\) represents the court’s attempt to clarify the confusion resulting from the earlier decisions. In Hargrove a municipal corporation was sued on the basis of a wrongful death claim. The plaintiff alleged the city was negligent because her husband, left unattended in a locked jail cell, died of smoke inhalation. The court ultimately found the city liable and recognized that up to this point the status of immunity was confusing to Florida courts because of “an effort to prune and pare the rule of immunity rather than to uproot it bodily and lay it aside . . . . This pruning approach ha[d] produced numerous strange and incongruous results.”\(^{22}\) Reasoning that the “modern city [is] in substantial measure a large business institution . . . [t]o continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism.”\(^{23}\)

The court in Hargrove expanded the municipality’s liability by holding it liable for the torts of its policemen under the doctrine of respondeat superior. “[W]hen an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done.”\(^{24}\) The court expressly receded from its prior decisions immunizing municipalities from liability for torts committed by police officers acting within the scope of their employment.\(^{25}\) However, immunity was expressly preserved for the municipality when acting in a legislative, judicial, quasi-legislative or quasi-judicial capacity.\(^{26}\)

Hargrove was restricted by Modlin v. City of Miami Beach,\(^{27}\) the next Florida Supreme Court decision to greatly impact on the munici-

20. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).
21. Id.
22. Id. at 132, 133.
23. Id. at 133.
24. Id. (footnote omitted).
25. Id.
26. Id.
27. 201 So. 2d 70 (Fla. 1967).
pal immunity issue. In *Modlin*, plaintiff's decedent was crushed to death when portions of a store mezzanine fell on her. Plaintiff brought a wrongful death action, alleging a city building code inspector negligently inspected the building during its construction. The court viewed the inspection as enforcement of the building code and, therefore, found it an “executive” function.

Since *Hargrove* had specifically reserved immunity only for judicial, legislative, quasi-judicial and quasi-legislative functions, the one remaining area of potential liability was for executive functions. Adhering to the dictates of *Hargrove*, the *Modlin* court reasoned “that if the respondent city [was] to escape liability, it [would] have [had] to [do so] other than by the path of municipal immunity.”

The *Modlin* court was creative in acknowledging an alternative route for evading liability. *Hargrove* had held only that a city was liable for the torts of its employees under the doctrine of *respondeat superior*, but did not furnish a dispositive guide to determining conditions under which possible tort liability became absolute. While recognizing that actionable negligence must present some breach of a duty owed, the *Modlin* court also found “a doctrine of respectable lineage and compelling logic that holds that this duty must be something more than the duty that a public officer owes to the public generally.” Armed with that principle, the court proceeded to restrict municipal liability for city employee negligence exclusively to those instances where a special duty was owed to the particular plaintiff. Since the building inspector's duty to Mrs. Modlin was no greater than that owed the general public, the court held the city was not liable.

In the wake of *Modlin*, it became apparent that municipal immu-

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28. *Id.* The court proceeded to define the distinction between legislative, executive and judicial functions. It stated that, “legislative action prescribes a general rule for future operation, whereas judicial and executive action is typically concerned with applying the general rule to specific situations or persons.” *Id.* A further distinction was made between executive and judicial or quasi-judicial functions. The court stated, “that a power authorized to be exercised on the personal judgment of the acting authority is purely executive, but that where notice and hearing are required and action is based upon the showing made at the hearing the action is judicial or quasi-judicial.” *Id.* at 74.

29. *Id.*

30. *Id.* (emphasis added).
Eight years after *Modlin*, Florida’s Fourth District Court of Appeal attempted to clarify the issue of municipal immunity in *Gordon v. City of West Palm Beach*. The court in *Gordon* summarized the status of municipal tort liability:

1) as to those municipal activities which fall in the category of proprietary functions a municipality has the same tort liability as a private corporation;

2) as to those activities which fall in the category of governmental functions “. . . a municipality is liable in tort, under the doctrine of respondent [sic] superior, only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation.” *City of Tampa v. Davis* . . .

3) as to those activities which fall in the category of judicial, quasi-judicial, legislative, and quasi-legislative functions, a municipality remains immune. *Hargrove v. Town of Cocoa Beach*, supra; *Modlin v. City of Miami Beach*, supra.

*Gordon* involved a wrongful death action brought by a father whose son was killed when his motorcycle hit an automobile at an intersection. The complaint alleged negligence by the city in the “design, construction and maintenance of the streets and for . . . failure to warn of a known hazardous condition.” Since the plaintiff claimed negligent maintenance of the streets, which historically had exposed a city to liability, this claim was actionable. However, the allegation of city negligence for failure to install and maintain traffic controls failed to present a viable cause of action because the court viewed these as

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31. *Gordon v. City of West Palm Beach*, 321 So. 2d 78, 79 (Fla. 4th Dist. Ct. App. 1975), *cert. dismissed*, 349 So. 2d 160 (Fla. 1977). The court in *Gordon* stated: “We are frank to admit that the current status of municipal tort liability is not at all clear since the advent of *Hargrove v. Town of Cocoa Beach; Modlin v. City of Miami Beach*, and subsequent cases attempting to interpret the breadth and scope of those two cases.” *Id.* (citations omitted).

32. *Id.*

33. *Id.* at 80 (emphasis in original) (citations omitted).

34. *Id.*

35. *Id.*
Statutory Waiver of Immunity and Judicial Determination of its Scope

The same year the Gordon case was decided, Florida Statute Section 768.28, waiving tort immunity for the state and all its subdivisions, became effective. The statute affects the state and its agencies or subdivisions, expressly including municipalities. Although the statute is a waiver of immunity, the legislature placed limitations on monetary recovery.

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private

36. Id. See also discussion in note 19 supra.
37. Ch. 73-313, § 1, 1973 Fla. Laws 711 which provided § 768.28 would be effective January 1, 1975; Ch. 74-235, § 3, 1974 Fla. Laws 664 amended the effective date of § 768.28 as applied only to the executive departments to be July 1, 1974. Gordon v. City of Miami Beach was decided October 10, 1975. FLA. STAT. § 768.28(1) (Supp. 1980) waives sovereign immunity for tort liability for the state, its agencies or subdivisions;

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Id.

38. FLA. STAT. § 768.28(2) (Supp. 1980).
(2) As used in this act, “State agencies or subdivisions” include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.
individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $50,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $100,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $50,000 or $100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974. 39

Because municipalities had not shared the same immunities as the state and its other subdivisions prior to the enactment of section 768.28, the statute’s applicability to municipalities was questioned. The Attorney General responded 40 by saying that “the state’s waiver of sovereign immunity contained in § 768.28 does not operate to limit in any substantive way the tort liability of municipalities under the doctrine of respondeat superior." 41 In 1977, 42 responding to the Attorney General’s opinion, the legislature added the last sentence of section 768.28(5) which is italicized above. 43 Thus the legislature mandated that municipalities were included not only in the waiver of immunity, 44

39. FLA. STAT. § 768.28(5) (Supp. 1980) (emphasis added). The amount recoverable has been increased to $100,000 for a single claimant and $200,000 per occurrence. Ch. 81-317, 1981 Fla. Laws 1488.
41. Id. at 71 (emphasis in original).
42. Ch. 77-86, § 1, 1977 Fla. Laws 162.
43. In the preamble of chapter 77-86 of the Florida Laws, the legislature stated that “the Attorney General, in his opinion number 076-41, dated February 23, 1976, failed to recognize the basis for the limitation of liability set forth in subsection (5) of section 768.28, Fla. Statutes. . . .” Ch. 77-86, 1977 Fla. Laws at 161. Recognizing the need for clarification, the legislature amended § 768.28(5).
44. Ch. 77-86, 1977 Fla. Laws 161-62.
but also in the limitation of liability, even though they had not enjoyed the same immunities as the state and other subdivisions prior to July 1, 1974.

Despite apparently broad statutory waiver of immunity in 1975 via Section 768.28, Florida’s courts were unsure of its scope. Faced with this uncertainty, the Florida Supreme Court in Commercial Carrier Corp. v. Indian River County, reconciled the statute with common law immunity. In this landmark decision the court articulated Florida’s present test which affords immunity for acts involving planning or policy decisions since these were found to be beyond statutory waiver. In contrast, under Commercial Carrier, operational or implementing activities were found to be within the statute and not immune from tort liability. Although the case involved actions brought against a county, rather than a municipality, Commercial Carrier clarified the status of immunity as it pertained to the state and all its subdivisions.

The case, accepted on certiorari, was a consolidation of two separate cases out of Florida’s Third District Court of Appeal: Commercial Carrier Corp. v. Indian River County, and Cheney v. Dade County. In Commercial Carrier the original plaintiff brought a wrongful death action based on a fatal collision at an unmarked intersection in Indian River County in which the Florida Department of Transportation (DOT) and Indian River County were named third party defendants. The complaint alleged the county was negligent for failing to maintain a stop sign and that DOT was negligent for failing to paint the word “STOP” at the intersection. At first blush it would appear that under the broad language of section 768.28 tort immunity had been waived. However, the trial court found failure to maintain a traffic signal not

45. Id.
47. 342 So. 2d 1047 (Fla. 3d Dist. Ct. App. 1977), rev’d and remanded, 371 So. 2d 1010 (Fla. 1979).
actionable and dismissed the third party complaint.\textsuperscript{49} The dismissal was upheld by the appellate court.

In \textit{Cheney} the petitioner alleged Dade County negligently maintained a traffic signal which directly caused the accident and injury to the plaintiff in the original action. The city moved to dismiss the complaint on grounds of sovereign immunity and the trial court granted the motion. The appellate court upheld the dismissal, finding that Florida's statutory waiver of immunity would not create liability in this case under \textit{Modlin} and that the duty owed Cheney was that owed to the public in general.\textsuperscript{50}

In the consolidated action the Florida Supreme Court invalidated the special duty-general duty test of \textit{Modlin},\textsuperscript{51} and then focused its attention on legislative intent for the scope of waiver under section 768.28. The court acknowledged the Federal Tort Claims Act\textsuperscript{52} as the basis for section 768.28 but noted Florida's statute, unlike the federal act, did not expressly exempt discretionary acts from liability. However, the court found, despite the absence of express statutory language, other jurisdictions had recognized a discretionary exception. After looking at other jurisdictions for guidance, the court recognized a discretionary exception in Florida. The more difficult second step was to determine how "discretionary functions" could be identified.

Since the term appeared elusive of any universal definition, other jurisdictions developed tests to help identify a discretionary function. The Washington Supreme Court, in \textit{Evangelical United Brethren Church v. State},\textsuperscript{53} developed a test consisting of four questions which \textit{Commercial Carrier} adopted as its guide.

\begin{quote}
(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision re-
\end{quote}

\textsuperscript{49} 371 So. 2d at 1013; 342 So. 2d at 1049.
\textsuperscript{50} 371 So. 2d at 1014; 353 So. 2d at 626.
\textsuperscript{51} 371 So. 2d at 1016.
\textsuperscript{52} 28 U.S.C. \textsection 2680(a) (1975).
\textsuperscript{53} 67 Wash. 2d 246, 407 P.2d 440 (1965).
quire the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? 54.

The Florida Supreme Court commended case-by-case utilization of this test in Florida 55 and adopted “the analysis of Johnson v. State . . . which distinguishes between the ‘planning’ and ‘operational’ levels of decision-making by governmental agencies.” 56 The discretionary

54. 371 So. 2d at 1019 citing 67 Wash. 2d at — , 407 P.2d at 445. Instructing the lower courts on application of this guide, the Washington Supreme Court said if all questions could be answered affirmatively, then the questioned act could reasonably be classified as discretionary. If one or more could be answered negatively, further inquiry would be necessary to determine whether the act was in fact discretionary.

55. Many courts have not used the test adopted in Commercial Carrier and a possible reason for this may have been articulated in Wallace v. Nationwide Mut. Fire Ins. Co., 376 So. 2d 39 (Fla. 4th Dist. Ct. App. 1979). That court found “the new test substituted in Commercial Carrier . . . to be a complex four point test, which might with some judicial straining, be construed either to exempt each and every governmental action, or alternatively, exclude none of them.” Id. at 40 (footnote omitted).

56. 371 So. 2d at 1022. The court was referring to Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). In Johnson, plaintiff's complaint alleged that plaintiff was requested by the state's employee Mr. Baer to provide a foster home for a particular youth. Further, defendant's employee negligently allowed a youth with homicidal tendencies and a history of violence and cruelty to be placed in plaintiff’s home without notice of these propensities. Plaintiff allegedly suffered injuries as a result of this negligence. The state moved for summary judgment on the ground of immunity. The trial judge granted the motion and plaintiff appealed. Id.

Looking to a statute which expressly immunizes public employees for discretionary acts, the Supreme Court of California was faced with a determination of whether immunity would attach under the facts of this case. Recognizing that some discretion would be involved in any official act, the court acknowledged that further analysis would be necessary. The court articulated a distinction between “planning” and “operational” functions. Under this distinction, those planning functions which involved policymaking would be immunized while the implementation of that policy would not be immunized. Id.

In applying that distinction to this case, the court found that the decision to parole a youth would be a policy consideration deserving immunity. However, once the decision to parole is made, any action to place the parolee with a family is merely a ministerial act and not deserving of immunity. Id.

The court cited numerous cases which immunized policy decisions but not the acts
function exception would apply only to planning level functions but not to operational level functions: "planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy." Thus, planning functions are generally equated with purely governmental functions, whereas operational functions are generally equated with proprietary or ministerial functions.

Having accepted these distinctions, the court found that maintenance of traffic signals and painting the word "STOP" were operational functions and consequently were not within the discretionary function exemption. Therefore, the county was not immunized from liability, and both Cheney and Commercial Carrier were remanded to the district court with instructions for remand to the respective trial courts for further proceedings.

Although Commercial Carrier provided guidelines for courts to identify discretionary functions, the guidelines appear susceptible to incongruous results. Illustrative of this incongruity is Ferla v. Metropolitan Dade County. Concerning an accident on Rickenbacker Causeway, plaintiffs alleged the county was negligent in four areas: (1) the design of the median strip, (2) the determination of the speed limit, (3) the width of the lanes and (4) the failure to erect a barrier. Using the "planning" level/"operational" level distinction, the court found item (1) was an "operational" level decision; items (2) and (3) involved "planning" level decisions and item (4) would have to be factually developed before a determination could be made. In reaching this decision, the court stated,

The distinction we feel compelled to draw between the median design and the lane width situations, the essential basis of which is difficult indeed to articulate, well illustrates the self-acknowledged "deficiencies" and "lack of certainty and predictability," Commercial Carrier Corp. v. Indian River County, ... involved in the analysis contained in Johnson v. State ... , which our court specif-

which carried out the decision and stated that most of the cases involved a "failure to warn of foreseeable, latent dangers flowing from the basic immune decision." Id. at _, 447 P.2d at 362, 73 Cal. Rptr. at 250 (footnote omitted).

57. 371 So. 2d at 1021 (footnote omitted).
58. 374 So. 2d 64 (Fla. 3d Dist. Ct. App. 1979).
ically adopted in the Commercial Carrier case.\textsuperscript{59}

Constitutionality of Recovery Limits as Applied to Municipalities

While \textit{Commercial Carrier} ostensibly clarified the status of immunity and recognized a discretionary function exception, questions remained regarding the constitutionality of statutory limitations placed on recoveries against municipalities. Two years after \textit{Commercial Carrier}, \textit{Cauley v. City of Jacksonville},\textsuperscript{60} held constitutional that portion of section 768.28(5) providing monetary limitations on tort recoveries. \textit{Cauley} concerned an area in which municipalities had never been afforded immunity, the negligent maintenance of streets.\textsuperscript{61} The facts of the case were undisputed. Mrs. Cauley alleged the existence of a dangerous condition in the road for a period of time and the city's negligence in not repairing the condition or giving adequate warning of it. Mrs. Cauley further alleged that she was injured as a result of the city's failure to repair or warn of the condition. The jury awarded her $400,000 in damages, and her husband $200,000 for loss of consortium. Because Mrs. Cauley was found seventy-five percent responsible for her injury, the judgment was accordingly reduced to a total of $150,000. The city motioned for reduction of the judgment to $100,000 as limited by section 768.28(5).\textsuperscript{62} The trial court granted the motion and expressly held section 768.28(5) constitutional.

In \textit{Cauley}, appellants challenged the constitutionality of section 768.28(5) which limited their recovery on a judgment against the City of Jacksonville. Prior to enactment of the state's waiver of immunity, together with its limitations on recovery, the Cauleys would have been entitled to an unlimited recovery. Florida's Supreme Court stated the issue in \textit{Cauley} "concern[ed] the validity of that portion of Sec.

\textsuperscript{59}\textsuperscript{59} \textit{Id.} at 68 n.1 (citations omitted).
\textsuperscript{60} 403 So. 2d 379 (Fla. 1981).
\textsuperscript{61} Since the maintenance of streets has been consistently held to be a duty of the city, the city traditionally did not have immunity for this proprietary function. \textit{See} note 16 \textit{supra}.
\textsuperscript{62} The limitations have since been increased to $100,000 for a single claimant and $200,000 per occurrence. \textit{See} note 39 \textit{supra}.
768.28(5) which limits compensatory damages against municipalities for negligent performance of operational-level or proprietary functions.\textsuperscript{63} Admittedly the court narrowed the issue to deal exclusively with municipalities because it stated (without demonstrating) that \textit{Commercial Carrier} found section 768.28(5) constitutional, as it related to the limitation on recoveries against the state and its counties.\textsuperscript{64}

The majority in \textit{Cauley} ultimately held the cap on recovery against municipalities as constitutional. The appellants had alleged several grounds of constitutional error: due process and equal protection rights had been violated; denial of access to the courts and jury trial; the statute violated the separation of powers; and circuit court deprivation of power to issue necessary writs. The majority considered these allegations of constitutional error and summarily stated, "[w]e reject all these contentions."\textsuperscript{65}

Striking appellants' constitutional arguments, the \textit{Cauley} majority relied on \textit{Duke Power Co. v. Carolina Environmental Study Group, Inc.}\textsuperscript{66} to justify legislative imposition of recovery limits. But the majority failed to explain why it relied on \textit{Duke Power Co.}, a factually distinguishable North Carolina case holding constitutional a federal statute limiting recovery on nuclear reactor accidents. In addition, the

\footnotesize{63. 403 So. 2d at 381. The court had jurisdiction to hear the issue under article V, § 3(b)(1) of the Florida Constitution which provides the supreme court "[s]hall hear appeals . . . from orders of trial courts . . . initially and directly passing on the validity of a state statute . . . ." Fla. Const. art. V, § 3(b)(1) (1972).

64. Chief Justice Sundberg, who wrote the majority opinion in \textit{Commercial Carrier}, states in the dissent in \textit{Cauley} that \textit{Commercial Carrier} decided only the scope of the waiver under § 768.28. Therefore, it would appear to this writer that if \textit{Commercial Carrier} held § 768.28(5) to be constitutional, it was by implication only. The court merely reversed the dismissals of Commercial Carrier's and Cheney's third party complaints. The respective trial courts had found immunity attached when a county failed to maintain traffic controls, but the supreme court found to the contrary. It determined the granting of immunity for decisions regarding traffic control maintenance in the past was no longer valid under the dictates of § 768.28, since immunity was found to exist only for discretionary functions at the planning level and not for operational or maintenance functions. By so doing, the court determined only the scope of the waiver under § 768.28 and not the constitutionality of any monetary limitations on recovery as provided in § 768.28(5).

65. \textit{Id.} at 384.

66. 438 U.S. 59 (1978). The dissent questioned the application of this case. \textit{See} notes 82 and 83 and accompanying text \textit{infra}.}
The majority stated that it previously found legislation restricting recovery in the workmen’s compensation and no-fault automobile insurance areas constitutional. The arguments rejected in these earlier cases were “[s]ubstantially the same” as the attacks rejected in Cauley.

The majority opinion considered and rejected appellants’ argument that Kluger v. White disposed of the case sub judice. In Kluger, Florida Statute Section 627.738 was held unconstitutional when challenged on the ground that it did not comply with the Florida Constitution, article I, section 21. Florida’s Constitution provides “[t]he Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” The issue in Kluger was whether this constitutional guarantee “bar[red] the statutory abolition of an existing remedy without providing an alternative protection to the injured party.” The Kluger court held that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

68. 403 So. 2d at 384.
69. 281 So. 2d 1 (Fla. 1973).
70. The statute provided that an action for recovery of property damage resulting from an automobile collision could only be maintained if two conditions occurred: first, if the owner had chosen not to buy insurance protection against property damage and second, if the damage exceeded five hundred and fifty dollars. The imposed minimum dollar amount of the statute precluded the appellant from maintaining an action because the value of her car was only two hundred and fifty dollars.
72. 281 So. 2d at 3.
73. Id. at 4.
The *Cauley* majority, however, rejected *Kluger* as inapposite. The court’s rejection was based on the belief that no statutory right to recovery against a municipality for its negligence existed prior to Florida’s adoption of the constitutional declaration of rights. In addition the court found no common law right pursuant to Florida Statute Section 2.01.

The majority viewed section 768.28 as a way of bringing “fairness, equality and consistency to an area of the law which . . . has been beset with contradiction, inconsistency and confusion.” The court recognized that treating municipalities in parity with state and counties provided a benefit not outweighed by possible harm to individual plaintiffs who would no longer be entitled to unlimited recoveries. Municipalities, which had become more like other subdivisions of the state, and are governmental entities, should not be treated as “partial outcasts.” Further, treating municipalities equally eliminates the need to determine which rules apply when actions against city and county are consolidated as in *Cauley*. However, even-handed application of section 768.28(5) to all the state’s subdivisions actually results in a modified immunity for municipalities. In areas where a municipality did not receive immunity prior to enactment of section 768.28, they will now be protected by monetary limitations on recovery. It is this capping of a previously unlimited recovery, without providing what is viewed as a reasonable alternative, which formed the basis of *Cauley*’s dissent.

Chief Justice Sundberg, writing for the dissent, stated that “the majority has misconstrued case law and blurred traditional distinctions between immunity for state, county and municipal governments.” He found the first such misapplication in the majority’s reliance on *Commercial Carrier* which Sundberg, its author, viewed as having decided only the *scope* of section 768.28 waiver for the state and counties.

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74. 403 So. 2d at 385.
75. *Id.* However, the dissent strenuously opposed this interpretation of *Kluger*. For a discussion of the basis for this opposition, see note 89 and accompanying text *infra*.
76. *Id*.
77. *Id.* at 386.
78. *Id.* at 387.
79. *Id*.
80. *Id.*
The Chief Justice asserted *Commercial Carrier* recognized municipal rules for determining immunity were not to be applied to the state and counties and that *Commercial Carrier* did not expressly discard the rules governing municipal liability. The dissent viewed the imposition of a cap on recovery as an unjustified protection for municipalities in an area where protection had previously not been enjoyed, specifically, in disputes arising from allegations of negligent performance of proprietary or operational functions.

Sundberg buttressed his dissent by criticizing as well majority reliance on *Duke Power Co.*, a case dealing with a federal act providing no-fault recovery for injuries resulting from a nuclear accident. A compelling interest in *Duke* necessitated change in traditional tort recoveries. Moreover, *Duke* was a federal decision and there is no analogical counterpart in the Florida constitutional provision for access to the courts. Lastly, Chief Justice Sundberg found the majority misplaced reliance on *Halligan* and *Lasky*, which were distinguishable from *Cauley* since these cases dealt with providing a remedy without requiring proof of fault.

Chief Justice Sundberg believed *Kluger* applicable and controlling of *Cauley*. He asserted that common law action against a municipality existed prior to adoption of Florida’s Constitution and that Florida embraced this cause of action via Florida Statute Section

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81. *Id.*
82. *Id.* at 388-89.
83. 403 So. 2d at 388-89.
84. 344 So. 2d 239 (Fla. 1977).
85. 296 So. 2d 9 (Fla. 1974).
86. 403 So. 2d at 388.
87. *Id.* at 387.
88. *Id.*
89. Chief Justice Sundberg found the common law cause of action espoused in a legal maxim which propounds that the law gives a remedy with full and just compensation for the negligent injuries caused by another. *Id.* at 388.
2.01. Therefore, applying the strictures of Kluger, one of two conditions must be present for valid abolition of a cause of action: either the legislature must 1) provide a reasonable alternative for recompense or 2) show an overpowering public necessity and no other method of meeting the public need. The dissent found neither condition present and viewed "[the effect of Section 768.28(5) as] . . . forc[ing] a plaintiff to give up a common law right and receive nothing in return." Although the plaintiff is entitled to some monetary recovery under the statute, Chief Justice Sundberg evidently did not view this as a reasonable alternative within the purview of Kluger. Therefore, applying the holding of Kluger to the facts of Cauley, the dissent advised that the portion of section 768.28(5) limiting recoveries be held "unconstitutional as applied to municipalities."

Conclusion

Municipalities may breathe easier knowing their financial exposure is limited. However, the court has explained little of the reasoning it used in determining that the ceiling on municipal tort recoveries was constitutional. The majority silenced the arguments presented under the access to courts mandate of article I, section 21 of the Florida Constitution by declaring Kluger inapplicable. Consequently, the majority deftly avoided having to determine whether section 768.28(5) provided the alternative right to recompense necessary for the valid abolition of an existing remedy.

By its action, the Florida Supreme Court has made it clear that a plaintiff suing a municipality must look to the legislature for any amount awarded exceeding the statutory limitations. It may be a hollow victory, for the plaintiff who is awarded a large verdict must

90. Id.
91. Id.
92. Id.
93. Ch. 73-317, § 1, 1973 Fla. Laws 711, as originally enacted, provided that insurance coverage above the statutory limitations of § 768.28(5) served to expand recovery to the extent of coverage. Id. at 712. See § 768.28(10). However, that provision was repealed by ch. 77-86, 1977 Fla. Laws 161. Thus at present, a plaintiff may only recover more than the limitations of § 768.28(5) through further act of the legislature.
then expend more time and energy trying to convince the legislature it is deserved. The Florida Supreme Court may one day be forced to address a separation of powers issue because the legislature has, in essence, set itself up as the last judge and jury.

Mary Ava Bobko

94. While claims bills have been very successful, there are a series of procedures which must be followed before the plaintiff may be able to recover the full amount of their judgment. First, the claims bill must be prepared and submitted. Next, a hearing is conducted by a Special Master, who in turn prepares a final report and recommendation for the Committee on Judiciary. If the claim is reported favorably by the committee, it must then pass in the House, the Senate, and finally reach the Governor. See M. Robinson, Introduction of Claims Bills, Policies, Procedures and Information (January 1982) (Prepared for Representative Hamilton Upchurch, Chairman, Committee on Judiciary).
Harmless or Reversible Error? Florida’s Rule 3.390(a)

Introduction

The Florida Constitution 1 confers a quasi-legislative role upon the Supreme Court of Florida authorizing it to adopt uniform practice and procedural rules applicable to the state’s courts. Pursuant to this power the Florida Rules of Criminal Procedure were adopted in 1967 in order “to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure and fairness in administration.” 2 However, in some instances the rules have failed to promote the requisite simplicity: Rule 3.390(a) 3 is an example of a judicial rule which does not effectuate such simplicity. This tenet’s application, both in its original and amended version, has caused confusion as is made apparent by judicial misinterpretations in the lower courts.

In essence, Rule 3.390(a) established the right of either party to have the jury instructed on the maximum and minimum sentence which could be imposed with an adjudication of guilt. Controversy arose concerning the semantic interpretation given the language of the rule. Was the requirement that the judge on request instruct the jury directory or mandatory? Further, if instruction giving is mandatory, does its omission constitute reversible or harmless error? This note addresses these questions. First the rule’s history and purpose will be examined. Later, developing caselaw and legal analysis will be described to illustrate its application in Florida’s courts.

1. Article V, section 3 of the Florida Constitution was adopted November 6, 1956 in a general election. It states, “[t]he practice and procedure in all courts shall be governed by rules adopted by the Supreme Court.” Fla. Const. art. V, § 3.
2. FLA. R. CRIM. P. 3.020.
3. The original and amended versions will be given in their chronological development later in the text.
Historical Perspective

In order to fully comprehend both the scope and implications of the minimum-maximum sentencing rule, a historical viewpoint illustrating the development of the rule is imperative. Prior to granting the Florida Supreme Court authority to codify rules of procedure, the legislature enacted statutes specifying such procedural guidelines. Many of these statutes, including Rule 3.390(a) evolved into specific Florida Rules of Criminal Procedure.4 When the Florida State Legislature enacted The Criminal Procedure Act,5 in 1939, Statute 918.10 (entitled “Charge to Jury”) Section (1) provided, “[t]he presiding judge shall charge the jury only upon the law of the case at the conclusion of the argument of counsel.”7 The statute was amended in 1945, adding, “and must include in said charge the penalties fixed by law for the offenses for which the accused is then on trial.”8

The Supreme Court of Florida first interpreted the statute in Simmons v. State.9 The basis for the appeal was the judge’s failure to charge the jury as required by Florida Statute 918.10. The court recognized uncertainty in the statutory language: it was unclear whether the charge was mandatory or directory. In deciding the issue, the court relied strongly on the general premise that the jury’s sole function is to determine issues of fact and apply the appropriate law in rendering its decision. Contrarily, the court’s function is to instruct the jury on the law pertinent to the factual situation. “[I]f the court is required to depart from this course and discuss matters having no bearing on the true function of the jury, the trial necessarily is disconcerted and impeded.”10

4. In fact, as Albert Datz noted in 1968, “most of the rules are patterned after statutes which were in existence at the time the rules were adopted; and in many instances the statutes were lifted verbatim and placed into rules.” Datz, Rules of Criminal Procedure, 42 Fla. B.J. 285 (1968).
5. The Criminal Procedure Act became effective October 19, 1939. The criminal courts were then governed with a uniform procedural act until the adoption of the Florida Rules of Criminal Procedure.
6. 1940 Fla. Laws 239 (1940).
7. Id.
9. 160 Fla. 626, 36 So. 2d 207 (1948).
10. Id. at __, 36 So. 2d at 208.
The supreme court also scrutinized the constitutionality of the statute, focusing on the separation of powers doctrine. In the court’s view the enactment attempted to mandate a new procedural role for the courts by altering their discretionary authority to instruct the jury. The court conceded that while the legislature has the power to establish guidelines in procedural areas, primary judicial power and discretion cannot be hindered by legislative regulation.

The Simmons opinion seemed to suggest the rule was unconstitutional, yet the court avoided direct pronouncement on this question. Taking a different route, the court construed the rule in a light designed to prevent constitutionally fatal ambiguity and applied a saving judicial gloss:

It will be observed that statute 918.10, in directing the court to charge upon the penalty, uses the word “must”, rather than “may”. If the statute be interpreted as an unqualified mandate that the court in every criminal case include in the charge the penalty which might be imposed, rather than a mere grant of the privilege to so charge, it becomes an unreasonable infringement of the inherent power of the court to perform the judicial function because it burdens the court with doing an empty and meaningless act. 11

The court reasoned that the legislature is presumed to intend constitutional enactments. Thus the legislature must have intended the trial judge to retain discretion in using the additional charge. To this end, the court further concluded that “shall” in legislative enactments usually connotes a “grant of authority” which is subject to limitations of power. Through the interpretation of the words “must” and “shall” 12

11. Id.
to mean "may," the court determined that the statute should be applied in a discretionary, not mandatory, manner.

Adoption of the Florida Rule of Criminal Procedure 3.390(a)

When the Supreme Court of Florida adopted the Florida Rules of Criminal Procedure in 1967, Section 918.10(1) of the Florida Statutes became Rule 3.390(a). Since the wording of this statute did not clearly indicate whether the rule was mandatory or directory the Simmons rationale appeared dispositive. Nevertheless, the point became multilitigious.

In 1974, the Supreme Court of Florida interpreted the new rule in Johnson v. State. The defendant had been convicted of second degree murder. The defense counsel requested in writing that the judge instruct the jury on the maximum penalties, which the judge refused. The Second District Court of Appeal affirmed the lower court denial by relying upon the Simmons rationale that the rule was directory rather than mandatory. The supreme court explained the distinction stating, "[i]f the requirements of the rule are mandatory, it must be complied with by the trial judge; if, however, such language is directory only, the granting or denying of a request for such instruction would rest within the sound discretion of the trial judge." In its affirmance the court relied primarily on the argument that because sentencing was not a

‘Must’ also has been construed as mandatory. State v. Reese, 365 Mo. 1221; 274 S.W.2d 304, 308 (1954). However, the majority of the courts have interpreted in context. In Re Atkins Estate, 121 Cal. App. 251, 8 P.2d 1052, 1054 (1932); Robinson v. City of Saginaw, 267 Mich. 557, 255 N.W. 296 (1934).

13. The court's interpretation of "shall" as "may" is a direct contradiction to the 1977 amendment interpretation. See note 27.
14. Section 918.10 had been slightly reworded to state that "[a]t the conclusion of argument of counsel the court shall charge the jury. The charge shall be only on the law of the case and must include the penalty for the offense for which the accused is being charged." Fla. Stat. § 918.10(1) (1967). Interestingly, the legislature did not repeal this statute when the Florida Rules of Criminal Procedure were adopted.
15. Fla. R. CRIM. P. Jury Instructions 3.390(a) provides: "The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel, and must include in said charge the penalty fixed by law for the offense for which the accused is then on trial."
16. 308 So. 2d 38 (Fla. 1974).
17. Id. at 39.
jury function it was not the trial court's function to give instructions on penalties to be imposed. Bolstering its rationale, the court pointed to the consistency of their Simmons and Johnson decisions with Florida's Standard Jury Instruction:

[T]he language of Standard Jury Instructions in Criminal Cases 2.14 (as validated by Rule 3.985 of the Florida Rules of Criminal Procedure) which instructs the jury that it is not to be concerned with the imposition of any penalty if it reaches a verdict of guilty, except as it may be connected with a recommendation of mercy.18

However, in using the Simmons decision as a precedent, the Johnson court in essence contradicted itself. In Simmons, interpretation of the statute was overshadowed by the possible violation of the separation of powers doctrine. Avoiding the constitutional issue, that court interpreted the statute broadly in order to alleviate its potential interference with judicial responsibilities. But in 1967, when the supreme court adopted the identical language of the statute into Rule 3.390(a), it obviated any claim of legislative interference. Therefore, "the decision amounted to a de facto amendment of the rule by substituting 'may' for 'must'."19 The courts continued to follow this interpretation until the 1977 amendment.

1977 Amendment to Rule 3.390(a)

In 1977, Rule 3.390(a) was amended20 as follows:

The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel and upon request of either the State or the defendant the judge shall include in said charge maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial.21

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18. Id. at 40.
21. Id.
Due to the altered language of the 1977 amendment lower courts were uncertain of its interpretation. Since the previous rule had not been construed by its plain meaning it was unclear which direction the supreme court would pursue. In other words, what did "shall" mean?

The district courts' interpretations of the new rule followed contradictory patterns of logic as illustrated in two leading cases, *Tascano v. State* and *Murray v. State*. The First District Court of Appeal, in *Tascano*, stated "in light of the previous judicial decisions construing the term 'must' as 'may', we are hesitant to conclude that the rule, by use of the term 'shall', means what it says and is accordingly mandatory." The court then held that the rule was discretionary and not mandatory even though "shall" is mandatory language. In 1980, the Fifth District Court of Appeal decided *Murray*, which differed from the semantic interpretation given "shall" in *Tascano*. The *Murray* court felt that a change in the language signalled that the interpretation had been altered, and therefore concluded that "shall" was meant to be mandatory, as indicated in Webster's New Collegiate Dictionary. Although this interpretation was at variance with *Tascano*, it did little to alter the outcome. The court invalidated the mandatory language utilizing instead the *Johnson* rationale that the Florida Standard Jury Instruction 2.15 required the jury to disregard penalty in determining guilt or innocence. Thus, the court concluded, a judge's

22. "Shall" has been interpreted by Florida courts to have a mandatory meaning. Holloway v. State, 342 So. 2d 966 (Fla. 1977); Neal v. Bryant, 149 So. 2d 529 (Fla. 1962); J.W.H. v. State, 345 So. 2d 871 (Fla. 1st Dist. Ct. App. 1977).


24. 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980).

25. Id. at 407.

26. Id. at 112.

27. Fla. Std. Jury Instr. (Crim.) 210(a) provides:

(A) You are to disregard the consequences of your verdict. You are impaneled and sworn only to find a verdict based upon the law and the evidence. You are to consider only the testimony which you have heard (along with other evidence which has been received) and the law as given to you by the court.

You are to lay aside any personal feeling you may have in favor of, or against, the state and in favor of, or against, the defendant. It is only human to have personal feeling or sympathy in matters of this kind, but any such personal feeling or sympathy has no place in the consideration of your verdict. When you have determined the guilt, or innocence, of the
failure to adhere to the literal language of Rule 3.390(a) cannot be reversible error, for it is illogical to reverse a conviction "upon the basis that the jury was not afforded information which it was then obligated to disregard." If courts were required to follow such contradictory principles it would be "suggestive of a Lewis Carroll fantasy flight back and forth through the legal looking glass." Therefore, even if the statute is mandatory, it loses much of its strength since failure to comply does not warrant reversal.

Subsequently, the Supreme Court of Florida reviewed *Tascano*. The court decided that if the amendment was to have the prior directory meaning, the 1977 alteration would have been "meaningless and accomplished nothing." Thus, the court concluded that it is mandatory, upon the request of either counsel, to instruct on maximum and minimum sentences which may be imposed. Justice Alderman, in his dissent, agreed with the district court in *Murray* that Rule 3.390(a) was inconsistent with the Florida Standard Jury Instructions. Consistent with the *Murray* rationale he sought to invoke the harmless error doctrine because the instruction required the jury to disregard the mandatory penalty instruction; failure to give this instruction would have no bearing on the determination of guilt. Additionally, Justice Alderman noted that in amending this tenet, no commentary indicated an intent to overrule the *Johnson* decision. The dissent's disdain for the confusion created by the amendment is obvious:

If a majority of this court intends that, when requested, an instruction on penalties is mandatory, then the court should promulgate a new rule that clearly and directly tells judges and lawyers of this state that the rule is mandatory and not directory.

In deciding *Tascano*, the court declared the decision prospective.

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28. 378 So. 2d at 112.
29. *Id.*
30. 393 So. 2d 540 (Fla. 1980).
31. *Id.* at 541.
32. *Id.* at 542.
33. *Id.*
34. The court could have made the decision retroactive but decided to make it
and reversed for a new trial. The various state's attorneys disagreed with the decision that the conviction was reversible. In future cases, it was contended, failure to adhere to Rule 3.390(a) would be a harmless error.\textsuperscript{35} The various district courts were confronted with the dilemma of whether they should proceed upon the precedent established in \textit{Tascano}\textsuperscript{36} or follow the narrow, mandatory interpretation by relying on the rationale in \textit{Murray}.\textsuperscript{37} The supreme court ended the dilemma by reviewing the district court's decision in \textit{Murray}. Recognizing the obvious conflict with \textit{Tascano}, the court quashed the \textit{Murray} decision to facilitate consistency. The harmless error doctrine was found inapplicable because, "this mandatory duty could be circumvented on the basis of the harmless error rule, [and] the effects of the mandatory provision in the rule would be negated."\textsuperscript{38} To be consistent the court reviewed \textit{Knight v. State}\textsuperscript{39} and \textit{Allen v. State}, both of which relied on the appellate decision in \textit{Murray}. The court clarified its position on pending cases when it reaffirmed that "the defendant, as well as all others who have preserved this point on appeal, received the benefit of this interpretation of the rule."\textsuperscript{40}

As broad as the rule appears, it is narrowed by the fact that defense counsel must make formal objection in order to preserve the point for appeal.\textsuperscript{42} In \textit{Welty v. State}\textsuperscript{43} the supreme court continued to con-

\begin{itemize}
\item 35. \textit{FLA. STAT.} § 59.041 (1979) states that:
\begin{itemize}
    \item No judgement shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.
\end{itemize}
\item 37. 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980).
\item 38. 403 So. 2d 417 (Fla. 1981).
\item 39. 394 So. 2d 997 (Fla. 1981).
\item 40. \textit{Id}.
\item 41. \textit{Id}.
\item 42. \textit{FLA. R. CRIM. P. Jury Instruction} Rule 3.390(a) states:
\begin{itemize}
    \item No party may assign as error grounds of appeal the giving or the failure to
\end{itemize}
\end{itemize}
strict the rule. The defendant argued for reversal since the judge failed to adhere to *Tascano*. The district court refused to reverse:

> On several occasions during the trial the jury was advised that the maximum penalty for murder in the first degree was death and the minimum penalty was life imprisonment. The trial court failure to again advise the jury on what it had already been told was not a reversible error. 44

The *Welty* decision revealed the court’s flexibility in applying Rule 3.390(a). Since the possible penalties were presented to the jury, although not specifically in the instructions, the court refused to reverse a conviction on a technical procedural error.

**Perspective**

The developing interpretation of Rule 3.390(a) illustrates the court’s authoritative power in its quasi-legislative role. Because the court has rejected application of the harmless error doctrine when instruction has been incorrectly withheld, the state has been compelled to retry a convicted defendant in an overworked criminal justice system. Judges and district attorneys are frustrated. As Marc Gorden, an Assistant State Attorney, stated, “[t]here are at least 20 cases in all and at least half a dozen major cases that we’ve had to rehandle because of a technical error . . . . It’s created a substantial problem for us.” 45 He also said that the cost to the criminal justice system is hard to determine. In Florida today, with the increasing crime rate, both the cost of criminal justice and popular indignation over protecting a criminal with procedural technicalities, is mounting.

When the court adopted the rule, no commentary rationalized the

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43. 402 So. 2d 1159 (Fla. 1981).
44. *Id.* at 1160.
stringent guidelines. This could be explained by the increasingly difficult task faced by jurors who weigh the factual evidence and apply the complex laws given in jury instructions. Considering the degree of responsibility given jurors, is it not imperative that they understand the gravity of their decision and know that the death sentence, life imprisonment or probation is possible? The gravity of the situation should inspire greater consciousness in jury deliberations.

Alderman, in his dissent in *Tascano*, recognized that the court could have prevented confusion by clearly and explicitly stating the intention of the amendment. He noted that the court failed to adhere to precedent in its interpretation of "must" and "shall." The court's indecision has resulted in a number of cases requiring reversal based on the rule. Alderman's position is supported by the Conference of Circuit Courts which asked the supreme court to reverse the decisions based on the rule. Judge Futch, of Broward County, observing the contradiction in the rule said, "[h]ow can a jury disregard the consequences of a verdict when you tell them the penalties? It's asking too much of the jury to disregard it. They're human too."

Opposition has been unsuccessful in changing the supreme court's costly interpretation of this rule. The tenet has been clearly defined as its guidelines have been explicitly stated for the lower courts. With precedent established, the court in *Welty* indicated that less than strict adherence would suffice. The court will not reverse a lower court's decision on a purely procedural mistake if the lower court complies with the essence of the rule. The outer limits of the court's flexibility remain untested; presently it is clear only that the jury must be fully aware of the possible penalties or the decision will be reversed. It seems ironic that judges, by failing to give requested, written instructions, will generate an otherwise avoidable source of judicial waste.

* Roberta Stanley Kaib

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46. 393 So. 2d at 541, 542.
Nurse Practitioners: Here Today . . . Gone Tomorrow?

Today's nurse practitioners are fair game for malpractice lawsuits. These specialized nurses provide primary care services such as diagnosis, prescription and treatment for lower fees than physicians.¹ During the past decade, the dramatic increase in the number of nurse practitioners has been accompanied by a growing recognition of the legal ramifications of their practice. The number of nurse practitioners is certain to increase dramatically in the next few years.⁵

In 1965, training programs were initiated for nurse practitioners.⁸ Later, governmental interest focused on this new health care provider as a promising answer to the shortage of physicians providing primary care to rural or poor urban areas. Federal action included the Nurse Training Act of 1971⁴ and the Comprehensive Health Manpower Act of 1971,⁵ which directed funds toward training nurse practitioners.⁶ The Nurse Training Act of 1975⁷ continued federal support for training. In 1978, although the nurse training amendments failed, funding for nurse practitioner training programs was extended another year.


² Scheffler, Yoder, Weisfeld & Ruby, Physicians and New Health Practitioners: Issues for the 1980s, 16 INQUIRY 195, 218 (Fall 1979).

³ The first educational program for nurse practitioners was started in 1965 at the University of Colorado Medical Center by Loretta Ford and Dr. Henry Silver to train pediatric nurse practitioners. Feinstein, Physician Extenders in Florida, 68 J. FLA. MED. A. 371 (May 1981).


under a continuing appropriations resolution. Even after the Nurse Training Amendments of 1979 also met with failure, the nurse practitioner movement continued to gain strength.

State legislatures responded by enacting laws that recognized nurse practitioners and permitted their practice. At present nurse practitioners are practicing in roughly 35 states.

A flurry of legislative activity has evolved over the last few years as state legislatures, aware of the exigency for clarification of the role of nurse practitioners, have revised or developed their nurse practice acts to provide both a legal basis for the nurse practitioners' functions and a definitive framework for regulating the scope of their practice. Although the ostensible and intended purpose of these statutes is to promote expanded delegation of powers to nurse practitioners, as applied most statutes tend to unduly restrict, or to leave unresolved, the scope of authorized delegations.

In 1979 Florida's Legislature added a new section to the Nurse Practice Act. This statute recognized such categories of advanced

11. FLA. STAT. § 464.012 (1979): Certification of advanced registered nurse practitioners; fees.—

(1) Any nurse desiring to be certified as an advanced registered nurse practitioner shall apply to the department and submit proof that he holds a current license to practice professional nursing and that he meets one or more of the following requirements as determined by the board:

(a) Satisfactory completion of a formal postbasic educational program of at least 1 academic year, the primary purpose of which is to prepare nurses for advanced or specialized practice.
(b) Certification by an appropriate specialty board.
(c) Graduation from a program leading to a master's degree in a nursing clinical specialty area with preparation in specialized practitioner skills.

(2) The board shall provide by rule the appropriate requirements for the following categories:

(a) Nurse anesthetist.
(b) Nurse midwife.
(c) Family nurse practitioner.
registered nurse practitioners as anesthetist, midwife, family, family

(d) Family planning nurse practitioner.
(e) Geriatric nurse practitioner.
(f) Pediatric nurse practitioner.
(g) Adult primary care nurse practitioner.
(h) Clinical specialist in psychiatric mental health nursing.
(i) Other categories as may be determined by rule of the board.

(3) An advanced registered nurse practitioner shall perform those functions authorized in this section within the framework of an established protocol. A practitioner currently licensed under chapter 458, chapter 459, or chapter 466 shall maintain supervision for directing the specific course of medical treatment. Within the established framework, an advanced registered nurse practitioner may:

(a) Monitor and alter drug therapies.
(b) Initiate appropriate therapies for certain conditions.
(c) Perform additional functions as may be determined by rule in accordance with s. 464.003(3)(c).

(4) In addition to the general functions specified in subsection (3), an advanced registered nurse practitioner may perform the following acts within his specialty:

(a) The nurse anesthetist may, to the extent authorized by established protocol approved by the medical staff of the facility in which the anesthetic service is performed, perform any or all of the following:
1. Determine the health status of the patient as it relates to the risk factors and to the anesthetic management of the patient through the performance of the general functions.
2. Based on history, physical assessment, and supplemental laboratory results, determine, with the consent of the responsible physician, the appropriate type of anesthesia within the framework of the protocol.
3. Order under the protocol preanesthetic medication.
4. Perform under the protocol procedures commonly used to render the patient insensible to pain during the performance of surgical, obstetrical, therapeutic, or diagnostic clinical procedures. This shall include ordering and administering regional, spinal, and general anesthesia; inhalation agents and techniques; intravenous agents and techniques; and techniques of hypnosis.
5. Order or perform monitoring procedures indicated as pertinent to the anesthetic health care management of the patient.
6. Support life functions during anesthesia health care, including induction and intubation procedures, the use of appropriate mechanical supportive devices, and the management of fluid, electrolyte, and blood component balances.
7. Recognize and take appropriate corrective action for abnormal pa-
planning, geriatric, pediatric, adult primary care, clinical specialist in patient responses to anesthesia, adjunctive medication, or other forms of therapy.

8. Recognize and treat a cardiac arrhythmia while the patient is under anesthetic care.

9. Participate in management of the patient while in the postanesthesia recovery area, including ordering the administration of fluids and drugs.

10. Place special peripheral and central venous and arterial lines for blood sampling and monitoring as appropriate.

(b) The nurse midwife may, to the extent authorized by established protocol approved by the medical staff of the health care facility in which midwifery services are performed, perform any or all of the following:

1. Perform superficial minor surgical procedures.
2. Manage patient during labor and delivery to include amniotomy, episiotomy, and repair.
3. Order, initiate, and perform appropriate anesthetic procedures.
4. Perform postpartum examination.
5. Order appropriate medications.
6. Provide family-planning services.
7. Manage the medical care of the normal obstetrical patient.

(c) The family nurse practitioner may perform any or all of the following acts:

1. Manage selected medical problems.
2. Order physical therapy.

(d) The family-planning nurse practitioner may provide family-planning services.

(e) The geriatric nurse practitioner may perform any or all of the following:

1. Manage selected medical problems.
2. Order physical therapy.

(f) The pediatric nurse practitioner may perform any or all of the following:

1. Initiate, monitor, or alter therapies for certain uncomplicated, acute illnesses within the framework of the standing protocol.
2. Initiate childhood immunizations.

(g) The adult primary care nurse practitioner may perform any or all of the following:

1. Initiate appropriate medications by defined protocol.
2. Initiate immunizations.
3. Monitor and manage patients with stable chronic diseases.
4. Initiate treatments and medications and alter dosage within the established protocol.
psychiatric mental health and others. The statute allows registered nurses with additional education, training and special licenses to perform expanded duties as authorized by professional licensing boards.

These so-called "physician extenders" or "representatives of expanded nursing" have consistently sought more independence in function and decision-making. Although Florida Statute Section 464.012 opened the way for expanded delegation of medical functions, it leaves uncertainty as to the permissible limits of delegation. There has been

(h) The clinical nurse specialist in psychiatric mental health nursing may perform the following:

1. Establish behavioral problems diagnosis and make treatment recommendations.

2. Monitor and adjust dosages of prescribed psychotropic medications as indicated within the framework of the established protocol.

(5) The board shall certify, and the department shall issue a certificate to any nurse meeting the qualifications in this section. The board shall establish an application fee not to exceed $100 and a biennial renewal fee not to exceed $50. The board is authorized to adopt such other rules as may be necessary to implement the provisions of this section.

12. See also, State of Fla. Dep't of Prof. Reg., Bd. of Nursing, ch. 210-11, Administrative Policies Pertaining to Certification of Advanced Registered Nurse Practitioners.

210-11.21 (1) In addition to these categories of Advanced Registered Nurse Practitioners specified in Sec. 464.012 (2), F.S., the following categories are created by the Board: Emergency Nurse Practitioner, OB/GYN Nurse Practitioner, Maternal Child Health/FP Nurse Practitioner, College Health Nurse Practitioner, and Diabetic Nurse Practitioner.

210-11.20 (9) Established Protocol: Written guidelines or documentation outlining the therapeutic approach which should be considered. Such protocol shall be mutually agreed upon by the ARNP and the practitioner.

210-11.20 (16) Supervision: General supervision whereby a practitioner authorizes procedures being carried out but need not be present when such procedures are performed. The ARNP must be able to contact the practitioner when needed for consultation and advice either in person or by communication devices.

13. Nurse practitioner education programs in Florida are approximately one academic year in length and include:
a) University of Miami: midwifery, adult primary care, geriatrics and family practice;
b) University of South Florida: adult primary care;
c) University of Florida: adult health, child health, family health, pediatrics, and obstetrics-gynecology;
d) Shands Hospital (Gainesville): nurse anesthetist; and
e) Bay Memorial Medical Center (Panama City): nurse anesthetist.
no case construing this statute, indeed, no case in any state in which a nurse practitioner has been independently sued for malpractice. In light of the fierce legislative activity in the states during the past few months, this article evaluates the statutory controls over this emerging practice and suggests methods to impede a nurse practitioner malpractice suit. The Florida statute will be the focus of the discussion.

Nurse Practitioners In Florida

The role of the nurse practitioner embraces many functions not within the traditional scope of nursing practice such as testing, diagnosis, prescription and treatment. The last three are traditionally medical functions, and are the center of the controversy. These functions were the exclusive domain of the physician and, therefore, beyond the periphery of lawful practice for a nurse. Now a nationwide movement has emerged to establish legal authority for nurse practitioners to perform such "medical" functions free from repercussion.

Florida statutes allow registered nurses who meet the requirements for a nurse practitioner category to perform expanded duties as authorized by professional licensing boards; i.e., in accordance with rules and regulations issued by an administrative agency such as the board of nursing and/or medicine. The statute is, therefore, an administrative-type statute,14 as compared to other regulatory15 and traditional stat-


https://nsuworks.nova.edu/nlr/vol6/iss2/1
utes. Florida’s statute, compared to other nurse practitioner statutes, appears to be one of the most comprehensive and detailed, enumerating the permissible duties for each of the eight types of nurse practitioners. However, the statute employs vague terminology which has the ultimate effect of restricting rather than expanding nurse duties.

Florida Statute Section 464.003(3)(c) defines “advanced or specialized nursing practice.” The advanced registered nurse practitioner may perform:

... acts of medical diagnosis and treatment, prescription, and operation which are identified and approved by a joint committee ... such acts shall be performed under the general supervision of a practitioner ... within the framework of standing protocols which identify the medical acts to be performed and the conditions for their performance.

This restrictive phraseology inhibits and even prohibits independent


17. See note 11 supra.
judgment and decision-making by nurse practitioners. Florida thus ensures the dependency of nurse practitioners upon physicians.

This same statute, incorporating “nursing diagnosis and nursing treatment” within the scope of advanced or specialized nursing practice, defines the terms:

d) “Nursing diagnosis” means the observation and evaluation of physical or mental conditions, behaviors, signs, and symptoms of illness, and reactions to treatment and the determination as to whether such conditions, signs, symptoms, and reactions represent a deviation from normal.

e) “Nursing treatment” means the establishment and implementation of a nursing regimen for the care and comfort of individuals, the prevention of illness, and the education, restoration, and maintenance of health.  

The obvious purpose of the statute is to distinguish “nursing” diagnosis and treatment from “medical” diagnosis and treatment. Articulating satisfactory criteria to accommodate the conflicting factions is a recurrent challenge.

Legislation and regulations vary among the states, but almost all states require physicians to supervise, become involved with and be legally responsible for the activities of nurse practitioners. Only two states provide independent prescriptive authority for nurse practitioners. It appears that the majority of nurse practitioner statutes intend to permit prescription or treatment only in a subordinate capacity. The physician's control is manifested in: (1) the determination and promulgation of rules and regulations by joint boards of medicine and nursing; (2) the requirement that certain practices be performed within the scope of protocols, policies and procedures, standing orders and standardized procedures written in accord with the supervisory physician,

and (3) the necessity of a written agreement between the physician(s) and the nurse, submitted to the Board of Nursing, regarding the details of the supervision of the nurse.21 Whereas Florida requires that the acts be performed “under the general supervision” of a physician and “within the framework of standing protocols,” several states22 permit nurse practitioners to work “in collaboration” with physicians. These states have effected a valiant attempt to situate nurse practitioners in parity with physicians.23

Legislative Unrest: New Controls Proposed

Presently, individual physicians establish standing orders or protocols with their respective nurse practitioners. This is a joint effort by two professionals, allowing each to contribute accordingly. Nurse practitioners perform the initial assessment, diagnosis and treatment of patients with uncomplicated illnesses; i.e., those necessary techniques with the least risk of malpractice.24 Physicians perform the diagnosis and treatment of complicated illnesses or give further treatments to patients initially examined and treated by the nurse practitioner who have not responded to treatment or who have developed complications beyond the area of nurse practitioner expertise. This sequence frees the overworked physician from routine procedures, permitting him to concentrate on more complicated cases and to attend to a greater number of patients.25

In Florida, this cooperative ideal is colored by the physicians’ and nurse practitioners’ battle for economic supremacy. This legislative battle bears the semblance of protecting the public from nurses who would practice medicine without a physician’s supervision and assistance; but it is also an economic war as to who will reap the rewards of patient

25. See Kissam, supra note 1, at 7-9; Scheffler et al., supra note 2, at 198.
health care. Senate Bill 889 and House Bill 903 were drafted and introduced by the Florida Medical Association at the 1981 Florida Legislative Session. Although debated, both bills were defeated in committee hearings in late May of 1981. These bills would have instituted the following control measures for physicians working with nurse practitioners:

1) A physician could not enter into a supervisory agreement with a nurse practitioner until the Board of Medical Examiners approved each of the medical acts the nurse would perform and how closely each would be monitored.

2) A nurse practitioner would have to practice in the same community as the supervisory doctor.

3) A doctor could supervise no more than two nurse practitioners.

These bills were reintroduced at the 1982 legislative session as House Bill 239 and Senate Bill 500. The 1982 proposals would not apply to nurse midwives or nurse anesthetists. If passed, the first requirement may result in delay, chaos and possible abuse of discretion. Since there has been no documentation to date of any major problems with the protocol system as it presently exists, such a provision cannot be justified.

The second requirement, that nurse practitioners practice in the same community as the physicians with whom they work, may also reduce the level of service. Presently, the majority of nurse practitioners

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26. See note 25 supra; Kissam, supra note 1, at 17, 51.
27. Fla. S.B. 889 (1981) and its companion, Fla. H.B. 903 (1981), died in committee without being heard. The bills were drafted by the medical association and proposed in the Senate by Senator Mattox Hair and in the House by Representatives Thomas Danson and James Ward.
28. See note 24 supra.
practice in physical proximity or in the same community as their respective participating physicians. Those nurse practitioners serving the health needs of patients in rural or poor urban areas have established telephone communications with their physicians; the absence of physicians in these areas leaves no other alternative. Florida's physicians could justify this new proposal since it would prevent nurse practitioners from capitalizing on the physician's absence by performing medical acts outside their permissible scope of practice. However, such abuse is rare, and has been successfully dealt with under existing statutes. In Hernicz v. State of Florida, Department of Professional Regulation, an appellate court affirmed the nursing board's decision to suspend a nurse practitioner's license for treatment of two patients without specific authorization for the treatment from a licensed physician.

A third requirement of these bills limits a physician to supervising a maximum of two nurse practitioners. This provision would appear to enable physicians to more closely supervise the acts of nurse practitioners, thus protecting the patient from any abuse of practice. Three factors dispel the need for this legislation. First, other controls have proved successful, as noted above. Second, there are approximately 1,437 nurse practitioners in Florida and approximately 18,500 physicians; overstaffing is unlikely to be a real threat. Third, no literature exists which describes this problem, even though these programs have existed for several years.

Other states in which physicians have launched legislative attacks against nurse practitioners include Oregon and Arkansas. Oregon, one of the forerunners of the nurse practitioner movement, gives nurse practitioners the most independence, permitting them to practice in "collaboration with" rather than "under the direct supervision of" physi-

Huard, The Nurse Practitioner as a Physician Substitute in a Remote Rural Community-A Case Study, 94 PUB. HEALTH REP. 571 (Nov./Dec. 1979); Kissam, supra note 1, at 64.


32. See note 24 supra. See also Leggett v. Tennessee Bd. of Nursing, 612 S.W.2d 476 (Tenn. 1981).

33. 390 So. 2d 194 (Fla. 1st Dist. Ct. App. 1980).
In addition, Oregon allows nurse practitioners to individually prescribe many medications without any specific protocols with physicians. However, the Oregon Medical Association is presently sponsoring a bill that would limit these privileges, narrowing the scope of practice for nurse practitioners on the ground that “it is not in the public interest for nurse practitioners to work independently of a physician.”

The Oregon bill is analogous to the Florida bill in that the state medical board would have the ultimate authority to define the nurse practitioners’ relationship with physicians and to determine the protocol for practice. The Oregon bill, however, is even more restrictive, giving the state medical board the ultimate authority to establish the formulary from which practitioners prescribe, to set all the educational requirements for prescription-writing privileges and to control directly the screening and approval of applicants.

In Arkansas, the State Nurses Association recently instituted suit against the State Medical Board and the Arkansas Medical Society alleging that both boards had violated antitrust laws and pursued a conspiracy to restrain trade in the provision of health care services and to fix, control and raise the price of such services. This litigation resulted from the passage of regulations limiting a physician to supervising or employing no more than two nurse practitioners at any one time. This provision is analogous to the proposed Florida bills. Like the Florida bills, the Arkansas regulations require the physician to explain to the medical board how the nurse practitioner will be utilized and to describe her credentials.

35. Id. §§ 678.375, -385, -390.
37. Id.
38. Id.
39. 81 Am. J. of Nursing 934 (May 1981). In addition to the above allegations, the Arkansas State Nurses Association alleged that the actions of the medical boards violate constitutional and contractual rights “by restricting the nurse practitioners’ liberty and property rights, their right to practice their chosen profession [and their] right to be free from interference with their contractual relationships.” Id.
40. See text accompanying note 29 supra.
Obstacles to Independence

Although their training, experience and licensure prepares them for primary care techniques, nurse practitioners are confronted with several major obstacles: physician reluctance, inadequate malpractice insurance coverage, physician's assistant competition, and potential malpractice litigation. These obstacles must be overcome or nurse practitioners, recently considered "here today," will be "gone tomorrow." Therefore, an analysis of each of these obstacles is requisite.

Physicians fear that in employing and supervising nurse practitioners, they risk increased exposure to lawsuits. Their fear may be well-founded. The physician's liability increases with his level of control over the nurse or nurse practitioner. If "a nurse's services are simply ministerial in character, she is not regarded as the doctor's borrowed servant, but rather as the servant of the hospital, so that the latter may be vicariously liable," with the appearance of nurse anesthetists, who had special training and greater responsibility, the issue of control in the hospital setting became less clear. One view is that a nurse anesthetist who obeyed a doctor's order by following a standard hospital procedure was still not a borrowed servant. Since the doctor "did not actually supervise or control the acts of" the nurse anesthetist, he was not responsible for the outcome. Another approach is the "right of control" theory, illustrated in a case where the doctor was held responsible for the act of an anesthetist over whom "he had the authority to cancel

43. See Kissam, supra note 1 at 57.
44. See id. at 45.
47. Id. at 450.
and thereby control procedures at any time." Several states require nurse anesthetists to work only in the physical presence of their supervising physician. Florida restricts the nurse anesthetist to performing only "to the extent authorized by established protocol."

Control is important in the hospital setting where the doctor may have relatively close actual control and yet may escape liability because the nurse anesthetist is the servant of the hospital. The work of the nurse practitioner in the community or office removes this safety net of hospital responsibility. This creates a dilemma for the physician. If he exerts more control over the nurse practitioner, his liability is more firmly fixed. If he promotes independent action for the nurse practitioner, his state-imposed responsibility may still make him liable for acts he does not actually control. The problem requires an analysis of the true increase in risk to the physician and the alternate methods of compensation.

The "nurse practitioner as a malpractice-aggravator" concept may be outweighed by a "nurse practitioner as a malpractice-alleviator" concept. Medical studies show that nurse practitioners tend to provide more personal attention to patients than do physicians in comparable situations, fostering improved patient/primary care provider relationships and fewer malpractice suits. One leading reason for the malpractice crisis is the short time physicians spend with patients, which promotes strained feelings in the patients and results in their increased propensity to consider litigation. The nurse practitioner as a malpractice alleviator would probably be a welcome relief to the burdensome workload of the physicians, and improve the level of patient care.

Another obstacle to the nurse practitioner movement for indepen-

51. Robyn & Hadley, supra note 41, at 447; Kissam, supra note 1, at 18. The high cost of physician's services relative to the cost of nonphysician's services suggests that much-expanded delegation may be economically feasible. Recent economic evaluations of nurse practitioners indicate that gains in physician productivity from effective use of full-time nurse practitioners are likely to be far in excess of thirty-three percent. Id. at 7. See also A. Holder, Medical Malpractice Law 401 (2d ed. 1978).
52. See Scheffler, supra note 2, at 219. See also A. Holder, supra note 51.
idence from physician supervision revolves around the inadequacy of malpractice insurance coverage. We enter this line of analysis with the assumption that there will be patients injured by nurse practitioners just as by any health care providers, and that these negligently injured patients deserve compensation. Physicians usually have professional liability insurance and nurses are generally insured through the hospital's malpractice insurance policy as long as they are acting within the scope of their employment. However, nurse practitioners, whose independent medical judgment and functions may result in legal claims similar to those against physicians, may not have adequate means of compensating an injured patient. Currently, there are only a limited number of policies made available to nurse practitioners. Even these policies are ambiguous regarding the extent of coverage and tend to leave nurse practitioners in a legal limbo. One inherent weakness of these policies is that they are traditional nursing policies that only cover the nurse practitioner for "nursing" acts of negligence, not for "medical" acts.

But, as nurse practitioners are, in essence, performing "medical" acts of primary care, their policies ought to explicitly cover "medical" acts of negligence as well.

Only recently has there been a breakthrough in third party reimbursement to nurse practitioners by insurers. Florida has joined this movement by establishing some reimbursement under the Medicaid program. Previously, physicians reimbursed nurse practitioners for their services from the fees and insurance reimbursements they personally received. Independent payment may be regarded as a step to independent practice.

Physicians have been reluctant to relinquish their traditional diagnostic, treatment and prescriptive authority. This reluctance is manifested by the restrictive regulations established by medical boards. In Florida, the Department of Health was given the power to "make such rules and regulations as it may deem necessary for regulating the prac-

53. Robyn & Hadley, supra note 41, at 452.
54. Id. See also Trandel-Korenchuk, supra note 42.
55. Robyn & Hadley, supra note 41, at 452.
56. 81 AM. J. OF NURSING 653 (Apr. 1981); Scheffler, supra note 2, at 222-23.
58. See note 41 supra.
tice of midwifery.” It drafted an application for licensure form which required more detailed information about past nursing practice than was required by the statute. The court found that if the information did not bear a direct relationship to the “skill, competence and fitness of an applicant” the specific requirements of the statute limited the inquiry. Interprofessional role conflicts, as between medical boards and practitioners, appear to be increasing. Professional opposition may be the inevitable reaction to the fear of competition from the nurse practitioner movement.

Gender discrimination is another obstacle which nurse practitioners will have to surmount. Some physicians may view the present women’s liberation movement as a threat to their status quo. The past, however, does evince a gradual adaptation to the changing role of women. Therefore, time may conquer this handicap.

Withstanding competition from physicians’ assistants is another obstacle. Physicians’ assistants are another type of physician extender, analogous to nurse practitioners in development and responsibilities. Their function is to assist physicians. The first program for physicians’ assistants began in 1965. However, this category of health care worker was and is predominantly male, made up primarily of medical corpsmen returned to civilian life. In Florida, only one educational training program exists. Physicians are required to supervise physicians’ assistants and are generally held legally responsible for physicians’ assistants’ acts pursuant to the Medical Practice Act. Physicians’ assistants may neither sign prescriptions nor utilize prescriptions presigned by a physician. Yet no restrictive measures similar to the

61. See Johnson, I Don’t Want to Be a Test Case, 5 NURSE PRACTITIONER 7 (May/June 1980).
62. See Edmunds, Gender and the Nurse Practitioner Role, 5 NURSE PRACTITIONER 42 (Nov./Dec. 1980).
63. Nurse practitioners question why recent proposed restrictions have not been aimed at physicians’ assistants. See also Feinstein, supra note 3.
64. See id.; Scheffler, supra note 2, at 216.
65. Scheffler, supra note 2, at 216.
66. Id.
68. Id. See also Kissam, supra note 1, at 18, 21, 50; Scheffler, supra note 2, at...
proposed regulations for nurse practitioners have been proposed for physicians' assistants. 69 As the two physician extenders are similar in many ways, 70 it appears that Florida physicians seek to eliminate nurse practitioners, while retaining physicians' assistants.

One final obstacle to nurse practitioners' independence is medical malpractice litigation. Case law concerning nurse practitioners other than nurse anesthetists 71 is scant. The problem in suits against nurse practitioners is determining the standard of care for a newly created profession. While the general standard of care for professionals in Florida is "... that level of care, skill and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances;" 72 the actual standard for nurse practitioners is difficult to define given the diversity of practice and the small number of practitioners. In the case of nurse anesthetists it has been defined in terms of their greater training and responsibility. "They have expertise in an area which is akin to the practice of medicine." 73 But comparison with the practice of medicine is also incorrect. Speaking of the California nurse practitioner statute and its consequences in tort suits against these professionals, the court said "In amending this section ... the Legislature recognizes that nursing is a dynamic field, the practice of which is continually evolving to include more sophisticated patient care activities. ... . It is the legislative intent also to recognize the existence of overlapping functions between physicians and registered nurses. ... ." The Legislature, however, did not expand the role to include the practice of medicine or surgery." 74 Thus the jury instruction that the standard of care for a nurse practitioner is that of a physician was improper.

216.

70. See Scheffler, supra note 2, at 218.
Solution: Minimize the Risks

Nurse practitioners have so far successfully eluded the malpractice specter. The present legal climate is favorable, but certainly subject to change.

One method to minimize the dangers of malpractice claims is to promote an increase in the number of nurse practitioners in order to provide proper insurance coverage for “nursing” and “medical” acts at reasonable rates.75

Another means of minimizing the risks is to provide for well-established and documented protocols outlining the therapeutic approach to be considered. These should be clearly written and mutually agreed upon by the nurse practitioner and the physician. A parallel approach would include instituting well-defined and documented job descriptions for all nurse practitioners at the inception of each particular position.76 These protocols and job descriptions would attempt to eliminate any subsequent questions about the scope of practice of nurse practitioners and would promote the proper degree of independent practice. But since the physician would have to authorize the established protocols and job descriptions, he may expose himself to potential liability. This would tend to make his protocols conservative, which would protect the nurse practitioner, but would be self-defeating of the long range goal. A balance must be worked out.

Conclusion

The concept of nurse practitioners is relatively new, and has been recognized only recently in statutes. The medical-legal community and state legislatures are faced with an enormous task, one that involves the hurdling of traditional concepts and views of nursing which have weathered decades of litigation. All states will soon be charged with a duty to appraise or reappraise their nurse practitioner acts, since the

75. F. Keeton, INSURANCE LAW § 2.8(a) (1971). “In the marketing of any product or service, economy can be achieved through high-volume dealings. . . . By adjusting premiums to the average level of risk among the large number of participants, the insurer can maintain a financially sound plan.” Id.
76. See also M. Edmunds, The Position Description, 4 Nurse Practitioner 45 (July/Aug. 1979).
general welfare is not served by relegating these health care providers to an inferior status. Legislators should look behind the proffered rationales for proposed amendments and examine the underlying motivations. Broad restrictions should not be enacted where unnecessary.

Indeed, expansion of the powers of nurse practitioners may be the better course of action. Under a cooperative effort between doctors and nurse practitioners, the field could flourish. With increased numbers the nurse practitioners could provide needed services protected by reasonably priced insurance geared to the scope of the practice. This would benefit the patients, the practitioners and the physicians.77

Sheryl Havens

77. During publication of this note, House Bill 239 was passed, approved by the Senate, and signed by the governor. The bill becomes effective July 1, 1982.