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For The Sake Of Our Children: Selected Legislative Needs Of Florida’s Children

Ellen Irene Hoffenberg*

I. Introduction

The realization that children are a group of special people—individual constituents deserving special recognition, protection and attention—is a new concept for American jurisprudence and for state legislators. This article reviews Florida child welfare law, focusing on selected issues identified by numerous professionals and groups during recent years. It specifically addresses concerns which require resolution through the passage of substantive legislation.¹ This article examines first the need for uniformity and clarity in laws pertaining to children. It then discusses specific reforms for child abuse and neglect proceedings. Special protections needed for child victims and witnesses in sexual and other abuse-related prosecutions are highlighted. The author recommends several specific methods of improving professional and volunteer services for children and concludes with comments on the current state of the needs of Florida’s children and prospects for the future.

II. The Need for Uniformity and Clarity in Legislation for Children

Laws seeking to protect the maltreated child must be especially clear and uniform because the persons principally responsible for enforcing and responding to them are non-lawyers. For example, social workers investigate and, if necessary, initiate prosecution of cases, develop written contracts, and prepare evidence; all usually without the assistance of legal counsel. The parties to a juvenile court proceeding

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¹ Issues requiring appropriations actions are not included in the scope of this article.

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are generally not represented by counsel; parents are afforded the right
to counsel only in limited situations; and the child welfare agency often
appears unrepresented. Additionally, Florida has chosen a lay citizen
model for its guardian ad litem representation of children.

Most states have provided three separate focuses in child protec-
tive statutes since the passage of the federal Child Abuse Prevention
and Treatment Act in 1974. The first is the criminal focus, defining
and prohibiting those child abuse and neglect acts which are criminally
punishable. The acts of the parent or other person are the focal point of
the proceedings and are measured by the degree of harm. The second
area of focus of child welfare legislation is the juvenile court. Certain
child abuse and neglect acts authorize the juvenile court to intervene in
the parent-child relationship by ordering specific services or by separat-
ing the child from the family. In this area the concern is for the partic-
ular harm to the child and the need to protect him. The third area of
emphasis is reporting. Child abuse or neglect is defined for the purpose
of requiring the reporting of such incidents to child protective agencies.
These statutory definitions of abuse and neglect also allow investigation
of the home and its danger to the child and authorize intervention on
minimal grounds for belief that the child has been abused.

Florida’s child protective laws follow this tripartite model to some
extent. Criminal statutes are contained in Chapter 827, Abuse of Chil-
dren or Disabled or Aged Persons, and in numerous other statutes not
necessarily directed toward the protection of children, but containing
elements relevant to crimes of child abuse and neglect. Chapter 415

4. See FLA. STAT. §§ 827.01-05; 827.071 (1983) for definitions and descriptions
of the following: aggravated child abuse; child abuse; negligent treatment of children;
persistent nonsupport; sexual performance by a child; respectively.
5. Assault, Battery, Culpable Negligence; ch. 784; Kidnapping, False Imprison-
ment, Custody Offenses, ch. 787; Sexual Battery, ch. 794; Prostitution, ch. 796; Crime
Against Nature, Indecent Exposure, ch. 800; Bigamy, Incest, ch. 826, Obscene Litera-
ture, Profanity, ch. 847.
abuse or neglect” is defined as “harm or threatened harm to a child’s physical or
mental health or welfare by the acts or omissions of the parent or other person respon-
sible for the child’s welfare. See id. § 415.503(3). “Harm” includes physical or mental
injury, id. § 415.503(5); abuse, id. § 415.503(5)(a),(b); pornography and prostitution,
id. § 415.503(5)(c); acts of abandonment and neglect, id. § 415.503(5)(d)-(f).
provides for child abuse reporting,\textsuperscript{7} investigations of reports,\textsuperscript{8} coordination of agencies,\textsuperscript{9} evidentiary considerations at trial,\textsuperscript{10} protective custody,\textsuperscript{11} the use of expert diagnoses and evaluation,\textsuperscript{12} education and training,\textsuperscript{13} and representation of children.\textsuperscript{14} The jurisdiction and responsibilities of the juvenile court regarding dependent children are contained primarily in Chapter 39, Proceedings Relating to Juveniles.\textsuperscript{15} However, court jurisdiction to protect dependent children is also granted in the “reporting” statutes,\textsuperscript{16} the chapter devoted to agency mandates for protection of children,\textsuperscript{17} and in proceedings for dissolution of marriage.\textsuperscript{18} Additionally, although guardianship is an important tool

\begin{itemize}
\item \textsuperscript{7} Id. 415.504, .505, .51, .513 (1983); formerly § 827.07(3),(4),(9),(15) (1981).
\item \textsuperscript{8} Id. 415.505 (1983); formerly 827.07 (4),(10)(1981).
\item \textsuperscript{9} Id. 415.504 (1983); formerly 827.07(4) (1981). Medical examiner must report findings of child abuse to local law enforcement agency. The law enforcement agency or Department of Health and Rehabilitative Services (HRS) is authorized to take the child into protective custody, \textit{Id.} § 415.506. HRS may create multi-disciplinary teams. \textit{Id.} § 415.505(2). HRS can notify the state attorney or law enforcement agency to conduct a criminal investigation. \textit{Id.} § 415.505(1)(g). Responsibilities of public agencies, including the court, are given regarding education and training. \textit{Id.} § 415.509.
\item \textsuperscript{10} Id. § 415.512 (Abrogation of privileged communications).
\item \textsuperscript{11} Id. § 415.506.
\item \textsuperscript{12} \textit{Id.} § 415.505(2). “The department may develop and coordinate one or more multidisciplinary child protection teams in each of the department’s service districts. The department may convene such teams when necessary to assist in its diagnostic assessment, service, and coordination responsibilities. Members of the team may include representatives of appropriate health, mental health, social service,, legal service, and law enforcement agencies.” \textit{Id.}
\item \textsuperscript{13} \textit{Id.} § 415.509(2).
\item \textsuperscript{14} \textit{Id.} § 415.508; formerly 827.07(16). “A guardian ad litem shall be appointed by the court to represent the child in any child abuse or neglect judicial proceeding.” \textit{Id.}
\item \textsuperscript{15} \textit{FLA. STAT.} §§ 39.001-39.516 (1981). Ch. 39 contains four separate sections: Part I includes legislative intent and definitions; Part II includes proceedings for delinquency cases; Part III includes dependency cases and Part IV includes proceedings for interstate placement of juveniles. It should be noted that interstate placement of dependent children is contained in \textit{FLA. STAT.} § 409.401 (1981). \textit{See also} \textit{FLA. STAT.} § 409.168 (1981) regarding children in foster care; department report and court review status.
\item \textsuperscript{16} \textit{FLA. STAT.} §§ 415.503(5)(f)(3); 415.506(2) (1983).
\item \textsuperscript{17} \textit{FLA. STAT.} §§ 409.168, 409.401 (1981).
\item \textsuperscript{18} \textit{FLA. STAT.} § 61.13(3) (1981) contains the only full definition of the best interests of the child in the Florida Statutes, a concept which is the central theme of agency and court intervention on behalf of dependent children. This section is cross-referenced in \textit{FLA. STAT.} § 39.408(2) (1981) requiring HRS to conduct a pre-disposition study, prior to disposition of dependency cases, which covers all factors defined in
\end{itemize}
to assure permanency planning for children, guardianship proceedings are the subject of a separate division of the circuit court.

Laypersons and practitioners alike become confused when attempting to reconcile these various laws. For instance, a “child” is defined by Chapter 415 as “any person under the age of 18 years.” Therefore, a report of abuse or neglect concerning a married child under the age of 18 will trigger an investigation by the Department of Health and Rehabilitative Services (HRS). However, HRS can not seek juvenile court protection for the same child because the court’s authority extends only to unmarried persons under eighteen. Therefore, if the investigation leads to a determination that the child is in danger and should be removed from the home, the court is powerless to order the removal.

Chapters 39 and 415 are irreconcilable as well on the issue of defined acts of child abuse and neglect. The protection afforded to the child under the “reporting” statute is broader because investigation is less intrusive to family life than formal court intervention. However, the definitions of harm and injury which constitute abuse and neglect do not correlate well with the court’s protective powers. HRS may investigate a report of child neglect where the parents do not have sufficient financial resources to care for the child and the court may order medical services for such a child. However, if the parent resists inter-

§ 61.13(3).
19. See, Hardin, Legal Placement Options to Achieve Permanence for Children in Foster Care in FOSTER CHILDREN IN THE COURTS 150 (M. Hardin ed. 1983). The court is allowed to place the child with relatives and others on a temporary basis. However, only temporary legal custody is provided. FLA. STAT. § 39.41(1)(b) (1981).

20. See FLA. STAT. §§ 744.101-744.531 (1981) regarding guardianship. Hardin distinguishes between those states which grant guardianship within juvenile proceedings and those which require petitioning a different division of the court. The latter is a more difficult and multi-staged process. Hardin, supra note 19, at 150.

21. FLA. STAT. § 415.503(2)(1983); See also FLA. STAT. 827.01(1) (1981).
25. FLA. STAT. §§ 39.01(1),(2),(26)(1983). Rather than limiting court jurisdiction by strict definitions of child abuse or neglect, it is recommended that court review of prevention and reunification services prior to authorizing removal of the child be used as the mechanism of assuring that agency and court intervention is limited to the most serious of cases. See infra notes 52-71 and accompanying text. Florida’s law presently places an arbitrary distinction between children protected by reporting laws, and those able to seek court protection.

26. FLA. STAT. § 415.503(5)(f) (1983). Financial inability does not eliminate the
vention, the court does not have authority to declare the child dependent, since according to the definitions in Chapter 39\textsuperscript{27} a child cannot be considered neglected if the sole basis for neglect is his parents' financial inability to care for him. A similar disparity between statutes occurs in the definition of abandonment. The "reporting" statute defines abandonment in simple terms as the time when a parent "abandons" the child.\textsuperscript{28} This definition permits agency intervention when it determines from the circumstances that a child's caretakers exhibit an intent to withdraw protection or support. However, the juvenile court is not immediately able to take the child into its care because abandonment for its jurisdiction carries a requirement that the lack of support or communication with the child continues for a period of six months or longer.\textsuperscript{29} Similarly, although the court may not find the child legally abandoned if the abandonment arises from a parent's lack of ability or capacity to care for him,\textsuperscript{30} Chapter 415 makes no distinction between voluntary or involuntary acts of abandonment. Further, the respective laws do not share a consistent definition of the caretaker, be it parent, guardian, or custodian, whose alleged acts of abuse or neglect warrant scrutiny.\textsuperscript{31} The acts also fail to provide clear direction on those circumstances when caretakers should be offered an opportunity to voluntarily accept services, rather than be forced by the court to do so.\textsuperscript{32}

\textsuperscript{27} FLA. STAT. § 39.01(26) (1983) states in part that "'Neglect' occurs when the parent or other legal custodian, \textit{though financially able}, deprives a child of...food, clothing, shelter, or medical treatment..." \textit{Id.} (emphasis added).

\textsuperscript{28} FLA. STAT. § 415.503(5)(d) (1983).

\textsuperscript{29} FLA. STAT. § 39.01(1) (1983). Abandoned means a situation in which a parent, who, while being able, makes no provision for the child's support and makes no effort to communicate with the child for a period of 6 months or longer. \textit{Id. See infra notes} 75-100 and accompanying text.


\textsuperscript{31} FLA. STAT. § 415.503(3), (5) (1983) provides for the protection of children who are abused or neglected by a parent "or other person responsible for the child's welfare." \textit{Id.} This includes the child's legal guardian, custodian, foster parent, and employee of a day care center, residential home or institution; or other person legally responsible for the child's welfare in a residential setting. \textit{Id. § 415.503(9)}.

\textit{FLA. STAT. § 39.01(9) (1981)} defines acts of dependency as applying to parents or other custodians. Legal custody is defined in § 39.01(21), but the term custodian is not. The language contained in chapter 415 is recommended as more appropriate.

\textsuperscript{32} FLA. STAT. § 415.505(1)(e) (1983) provides that if the Department determines that a child requires immediate or long-term protection through (1) medical or
Child abuse and neglect laws must function within a scheme that allows both intervention and the eventual withdrawal of agencies and the court so that the child can be restored to a family which is able to care for him without state interference. Laws contained in separate chapters must, therefore, clearly relate to one another, and facilitate protective intervention in a consistent manner. Inconsistencies must be resolved in favor of the maximum protection of the child, not the adult. The child's well-being must be deferred to in any balancing test.

III. Specific Reforms For Child Abuse and Neglect Proceedings

A. Voluntary Agreements for Services

Once it is determined that a child has been abused or neglected, and that services or placement outside the home will be necessary to protect the child, Florida law encourages offering such services on a voluntary, rather than court-ordered, basis. Typically in such a case the parents will agree in writing to pursue a course of services in exchange for HRS not filing formal dependency proceedings. This course is consistent with legislative intent to preserve family life with minimal state intervention. The offer of voluntary services is, however, tempered by HRS responsibility to protect the child, if it later proves necessary, by initiating court proceedings. The specific circumstances under which other health care, (2) homemaker care, day care, protective supervision, or other services to stabilize the home environment, or (3) foster care, shelter care, or other substitute care to remove the child from his parents' custody, such services shall first be offered for the voluntary acceptance of the parents or other person responsible for the child's welfare, who shall be informed of the right to refuse services as well as the Department's responsibility to protect the child regardless of the acceptance or refusal of services. If the services are refused or the Department deems that the child's need for protection so requires, the Department shall take the child into protective custody or petition the court as provided in chapter 39. The statute does not define which cases are serious enough to warrant court intervention. Chapter 415 fails to require consent of the child prior to entry into voluntary agreements. FLA. STAT. § 39.403(2)(b) requires consent of the child. Neither statute sets forth criteria for reviewing consent of the child or parent.

33. See supra note 32.
35. FLA. STAT. § 415.505(1)(e) (1983) states in part: "If the services are refused or the department deems that the child's need for protection so requires, the depart-
a child is considered to be in danger are not clear, and practitioners are left unguided as to whether the consent of the child is necessary to an effective voluntary service agreement.\textsuperscript{36} 

Agreements, in general, between agencies and parents have been the subject of considerable criticism on the grounds that a child cannot be made the subject of a contract with the same force and effect as if he were a mere chattel.\textsuperscript{37} Voluntary agreements are useful to circumvent the formal legal process or to avoid the bitterly contested hearings which may hinder later treatment and increase parents' antagonism to agency services.\textsuperscript{38} However, such agreements may be perceived by parents as unwarranted pressure to admit the need for help or wrongdoing, and are often based on the interest of the parents and agency without full consideration of the child's interests.\textsuperscript{39} Similar concerns are raised when the court is requested to amend a petition alleging abuse or neglect in order to make the allegations more acceptable to the parties, or to use pre-adjudicatory hearing plans which defer actions on filed petitions.\textsuperscript{40} In these cases, the child is not represented, and is therefore not afforded an effective voice in the decisionmaking.\textsuperscript{41} 

Voluntary agreements may be the best choice where the parents are amenable to help and the child is believed to be free from danger. However, they should not be used where there is prior evidence of abuse, neglect, or resistance by the parents to offered services. The ad-

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36. FLA. STAT. \S 39.403 (2)(b) (1981) states: "If the intake officer determines that the report or complaint [of child abuse] is complete, but that in his judgment the interest of the child and the public will be best served by providing the child care or other treatment voluntarily accepted by the child and his parents or legal custodians, the intake officer may refer the child for such care or other treatment." \textit{Id.} (emphasis added). FLA. STAT. \S 415.505(1)(e) (1983) refers only to acceptance by the parent.


38. \textit{Id.} at 3.

39. \textit{Id} at 1.

40. \textit{See e.g.,} Fla. R. Juv. P. 8.130 (West 1983). The new rule proposed by the Juvenile Rules Committee requires the consent of the child and the guardian ad litem where appointed. Such plans rarely contain stipulations to facts of abuse or neglect. If violated, there is no provision for recording the child's statement, or preservation of other important evidence.

41. The practice of appointing an advocate to represent the child in agency proceedings to pursue voluntary agreements prior to court intervention should be encouraged.
vantages of informal disposition are outweighed by the need to estab-
lish a court record.\textsuperscript{42}

Court proceedings create a record of the facts surrounding the
placement. Complete transcripts, detailed petitions, orders, and
findings of fact can create complete information for later court pro-
ceedings if efforts to work with the natural parent prove unsuccess-
ful. The attorney should be aware that the facts surrounding the
original placement will be an important part of a termination pro-
ceeding, should that later become necessary.\textsuperscript{43}

The problems involved with voluntary agreements made outside of
court proceedings cannot be cured by court review, since the judge will
probably do little more than ask the parent whether the consent to the
agreement is voluntary, and whether the allegations of abuse or neglect
are true.\textsuperscript{44}

In recent years, there have been efforts to categorically define the
types of cases serious enough to receive judicial review on a non-discre-
tionary basis. Alternative legislative drafts have proposed that indepen-
dent multidisciplinary child protection teams review agency recommen-
dations to divert cases from judicial review where the child has been
sexually abused, there is evidence of failure to thrive, or there is visible
injury to a child under the age of five. These types of cases have been
identified as the least likely to be resolved by voluntary rehabilitation,
and include children at the highest risk for additional injury or death.
It is believed that this type of legislation has been repeatedly rejected
because of antipathy to greater court intervention in family life and the
expense involved. Ensuing child protection team review of all cases in
the most serious category would require significant funding increases.
Court review of such cases would also involve greater financial costs
since at present less than five percent of the reported cases of child
abuse and neglect in Florida receive judicial attention.\textsuperscript{45}

Florida Statutes section 409.168, popularly known as the Skinner
Bill, attempts to provide timely court review of voluntary placements in
foster care if the child remains in placement longer than thirty days or

\textsuperscript{42} Hardin, \textit{Setting Limits on Voluntary Foster Care}, in \textit{Foster Children in
the Courts} 72 (M. Hardin ed. 1983).

\textsuperscript{43} Id. at 73.

\textsuperscript{44} Id. at 78.

\textsuperscript{45} FLA. HRS, 1982 \textit{Report}.
is placed in foster care twice within one year. HRS is required to draft a written performance agreement, with the participation of the parents, outlining the actions that the parents will take to resume custody of the child. The performance agreement must then be submitted to the court to assure court review within six months of the date that the court is notified of the placement in foster care. However, courts have consistently not reviewed such voluntary placements because they lack dependency jurisdiction. The court has not conducted a hearing on allegations of abuse and neglect properly brought upon a petition or found the child to be dependent and in need of out-of-home placement, and, therefore, the court has no jurisdictional basis for exercising its power over the child. Proposed legislation would ameliorate this problem by: 1) amending the definition of dependency to include a child who has been voluntarily placed in care as set forth in section 409.168, Florida Statutes, where the parents have failed to substantially comply with the terms of a written performance agreement, and 2) amending section 409.168, Florida Statutes, to clearly state that upon submission to the court of a performance agreement, the court shall review the agreement to determine if it complies with law. This provision is necessary since submission to the court for approval of the agreement under section 409.168 does not assure timely review by the court, nor specify that the court has the power to accept or reject the

48. Fla. Stat. § 409.168(3)(f)(2) (1981). Section 409.168(3)(f) mandates court review of children placed voluntarily in foster care after six months from court notification of voluntary placement. Although the agency is required to draft and submit a performance agreement for these children, the agreement would not constitute a petition for initiation under chapter 39. Section 39.404(1) requires the filing of a petition alleging the child to be dependent pursuant to § 39.01(9). Therefore, the court must first find the child to be dependent and thereafter review placement of the child.

49. Health & Rehabilitative Services Committee, Fla. House Bill 399 (1984). See also Senate Bill 273. The proposed legislation has been the subject of committee review since 1981, and represents important and major changes to chapter 39 and chapter 409. The proposed changes will hereinafter be referenced to present law.

50. Proposed amendments to § 39.01(9)(8) (through an additional category of dependency: “Child found to be dependent includes a child who has been voluntarily placed with a licensed child caring agency or the Department, whereupon, pursuant to 409.108 a performance agreement has expired and the parent has failed to substantially comply with the requirements. . . .”).
proposed agreement.51

B. Tightening Guidelines for Removing Abused or Neglected Children from Their Homes

When a report of abuse or neglect is investigated and it appears that the child is in imminent danger,52 he may be taken into protective custody.53 If the child is held in protective custody for longer than twenty-four hours, a petition must be filed requesting the court to authorize his continued detention.54 Chapter 39, Florida Statutes, provides broad guidelines for taking a child into custody. There must be:

reasonable grounds to believe that the child has been abandoned, abused, or neglected, is suffering from illness or injury, or is in immediate danger from his surroundings and that his removal is necessary to protect the child or if the custodian of a child under protective supervision has violated in a material way a condition of the placement imposed by the court.55

The lack of more specific guidelines has been the subject of continuing debate.56 It is argued that the broad terms used in most statutes

51. Id. Proposed amendments to § 409.168(3) add a section, entitled “Review by the court” to present section regarding performance agreements, which reads in part: “[u]pon submission of a performance agreement to the court, the court shall review the agreement to determine if the agreement is consistent with previous orders of the court placing the child in care and with the requirements for the content of a performance agreement as provided in paragraph (3)(c). The court may set a hearing with notice to all parties on the agreement and any provisions thereof.” Id.

52. FLA. STAT. § 415.506 (1983) states in part that if the condition of the child is such, that continuing the child in the child's place of residence or in the care or custody of the parents... presents an imminent danger to the child's life or physical or mental health.” Id. (emphasis added.). See supra notes 33-51 and accompanying text which notes the lack of guidelines for the types of cases considered dangerous.

53. FLA. STAT. § 827.07(6) (1981) allows law enforcement, HRS, hospital personnel, or a doctor to take the child into protective custody.


56. See A. FREUD, T. GOLSTEIN & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979) [hereinafter cited as A. FREUD], wherein the authors argue that agencies and courts are unable to adequately deal with the most serious cases of abuse and neglect, and should not attempt to broaden the net of protection to include all suspected cases of abuse and neglect.
allow unnecessary removal of children from their parents by not carefully defining the specific types of harm which warrant removal.57 The Institute for Judicial Administration-American Bar Association (IJA-ABA) Joint Standards Relating to Abuse and Neglect58 propose that state legislatures limit court intervention to those cases where the child is endangered and likely to suffer additional harm.59 This would require a showing of serious physical injury such as disfigurement or impairment of a bodily function, broken bones or severe bruising.60 Those opposing stricter guidelines argue that in attempting to accommodate the conflict between parental autonomy and state intervention, the proponents of such standards fail to appreciate and distinguish the ranges of intervention. They assume, often erroneously, that court-ordered services have a negative impact on the child and family. Moreover, a child who does not display specific physical injury can still suffer the physical pain and emotional trauma occasioned by parental abuse. Under the IJA-ABA guidelines that child is denied access to court-imposed services.61 Initial agency intervention on a minimal basis must be justified by the same showing of serious danger that is required to remove a child from his home. It is likely under these proposed standards that the child without visible injuries will “fall through the cracks,” only to come to the court’s attention later with much more serious or fatal injuries.

In addition to stricter definitions of the types of trauma that warrant intervention, attempts have been made to ensure that an agency provides sufficient services to the family to avoid long-term removal. The court is required to review the agency’s documented efforts before it can authorize the continued detention of the child.62 Overreaction to

58. These standards are committee proposals and have not been approved by the IJA-ABA as an organization. See generally M. Hardin & P. Tazzara, Termination of Parental Rights: A Summary and Comparison of Grounds from Nine Model Acts 34 (1981) (for a discussion of ABA standards for court intervention).
59. Id., Standard 8.2 at 34. See also id., Standard 6.4 at 35.
alleged abuse or neglect and the immediate removal of the child from the parents' custody has often resulted in unnecessary placement of minors outside of the home and sometimes into extended foster care. Federal law requires that prior to the placement of a child, efforts must be made to prevent or eliminate the need for removal by the social service agency. The court must find that continuation in the home would be contrary to the child's best interests and that the agency's efforts to re-unite the family have been reasonable. Since states vary in terminology, it is often difficult to determine at what point the court is required to make this determination. It is important that judicial review occur as closely in time as possible to the actual removal. However, review should not occur prior to the parties having had an opportunity to fully explore efforts to prevent removal.

Proposed Florida legislation clarifies existing uncertainties by requiring court review throughout the various stages—at detention or shelter hearings, arraignment hearings, subsequent detention review hearings, adjudicatory hearings, and disposition hearings. Thus, at the initial hearing the court would be required to determine that there is probable cause to believe that the child is dependent and that the “department has made reasonable efforts to prevent or eliminate the need or removal of the child from his home.” In order to allow HRS, guardians ad litem, prosecutors, and child protection teams sufficient time to make and document reasonable preventive efforts, the proposed legislation extends the time for which shelter care can be authorized from fourteen to twenty-one days. Additionally, the proposed legislation encourages the use of an arraignment hearing to assure that parents are represented by counsel and to help determine whether a con-

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63. Wienerman, Improving Practice to Avoid Unnecessary Placements, in Foster Children in the Courts 12 (M. Hardin ed. 1983).
65. Id.
66. Id.
67. See supra note 49. A proposed amendment to Fla. Stat. § 39.402 (1981) states that “[n]o child shall be removed from home or continued out of home pending disposition where, with the provision of appropriate and available services, including services provided in the family home, the child could safely remain at home.” Id.
69. See supra note 49.
70. Id.
C. Definitions of Abuse, Abandonment and Neglect for Dependency and Termination of Parental Rights

The present definitions of an abused, abandoned or neglected child have given rise to considerable debate in Florida. The incident giving rise to initial removal or adjudication of a child as dependent, may later become the basis for proceedings to terminate the parents’ rights. Definitions of abuse, abandonment and neglect for short-term court intervention should be distinct from definitions applying to the drastic step of terminating parental rights. The criteria used in termination proceedings should place more emphasis on the particular aspects of parental conduct, for example, their willingness to seek counseling and follow through with offered services, or their failure to accept treatment for mental or emotional illness, or drug or alcohol addiction. The parent-child relationship should be closely examined, with emphasis on the nature of the bond between parent and child, the child’s wishes, and the ability or willingness of foster caretakers to adopt the child. The initial abusive or neglectful conduct of the parent which precipitated agency intervention should be considered only as one of several factors in terminating parental rights and should receive particular emphasis only when the conduct is so serious as to have caused significant injury to the child or a sibling, or is followed by recurrent incidents of abuse despite intervention efforts.

Grounds for termination of parental rights differ dramatically throughout the United States, and many states have chosen to separate the definitions for termination from those involving initial intervention. Termination statutes should focus on the condition of the parent which causes him or her to be unable to consistently care for the child for extended periods of time. Some model acts provide for termination if “emotional illness, mental illness or mental deficiency render the

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71. *Id.* The proposed amendment to § 39.402 adds the provision for an arraignment hearing to be conducted after the filing of a petition and prior to the adjudicatory hearing.

72. *Fla. Stat.* § 39.01(9) (1981). *See* § 39.01, the definitional section of the statute, for definitions of the following: abandonment § 39.01(1); abuse § 39.01(2); neglect § 39.01(26). The aforementioned are used for proof of grounds for permanent commitment under *Fla. Stat.* § 39.41(1)(f)(1)(a).

73. *See* M. HARDIN & P. TAZZARA, *supra* note 58, at 34.

74. *Id.*
parent consistently unable to care for the . . . child for extended periods." In Colorado, for example, the parent-child relationship can be terminated upon a showing that the conduct or condition of the parent is unlikely to change within a reasonable period of time. Emotional or mental illness or deficiency, excessive use of drugs or alcohol, long-term confinement and unsuccessful efforts by child caring agencies are factors to be taken into consideration in determining parental unfitness.

Recommended model acts also discuss termination of parental rights when the child has been previously removed from the home because of abuse or neglect. However, they also urge that termination of parental rights should occur only after examination of the ties that the child has retained with the parent and the relationships that the child has developed with foster parents or other caretakers. Several experts encourage the use of the term "psychological parent" to assist the court in determining whether the child has established a significant relationship with the person who fulfills the child's psychological and

75. Id. at 33 (discussing Katz Model Act for Permanent Commitment). See also Health and Human Services Model State Adoption Act cited therein at 9, 33.
76. Colo. Rev. Stat. § 19-11-105 (1981). See also Or. Rev. Stat. § 419.523 (1981) where termination can occur if the parent is found unfit by reason of conduct or condition seriously detrimental to the child and integration of the child into the home is improbable in the foreseeable future due to the unlikelihood of the conduct or condition changing. Regional Research Institute Guidelines developed by Hardin, as cited in his work, supra note 58, at 33, require that the parent's condition be diagnosable and cause the parent to be unlikely to assume minimally acceptable care of the child.
78. See M. Hardin & P. Tazzara, supra note 58, at 34 (discussing Standards Relating to Abuse and Neglect); at 33 (discussing Katz Model Act for Permanent Commitment requiring showing of a previous adjudication and continuing or serious acts and the Regional Research Institute Guidelines which require a showing that the parental conduct caused serious harm or danger to the child or siblings which makes return of the child an unacceptable risk when considering the frequency and duration of the conduct, severity of harm, and continuation of conduct despite diligent agency efforts to assist parents).
79. See M. Hardin & P. Tazzara, supra note 58, at 29 (citing the National Council of Juvenile and Family Court Judges Termination of Parental Rights Statute, which urges that where the child is in foster care, the court shall consider whether the child has become integrated into the foster family, and whether the family is willing to permanently integrate the child. The factors to be taken into consideration are identical in all important respects to Florida's present definition of the best interest of the child. Fla. Stat. § 61.13(3) (1981). Florida's permanent commitment statute presently requires a showing of manifest best interest of the child to permit termination. Fla. Stat. § 39.41(1)(f)(1) (1981)).
80. See generally A. Freud, supra note 56.
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physical needs on a day-to-day basis. Termination is not encouraged where it would be detrimental to the child's bond with the parent or where the present placement of the child makes adoption impractical.

Passage by the Florida legislature of proposed legislation to revise the definition of abandonment by removing the requirement that a child be abandoned six months or longer would distinguish initial intervention from the definition of dependency used as the statutory criteria for authorizing permanent commitment. However, this legislation does little to reconcile the need to protect children whose parents have abandoned them or lack capacity to care for the child through mental illness, severe physical incapacity or drug addiction. Proposed amendments to the neglect definitions, removing the need to show financial ability, are appropriate but fail to protect the child whose parents cannot be provided services because of lack of funding. This is so because amendments to section 39.01(26) would not allow a finding of neglect to be entered if the neglect was "caused primarily by financial inability unless services for relief have been offered and rejected." A proposal to allow a finding of neglect where services were unavailable was rejected during subcommittee hearings. Therefore, before a child could be considered neglected, the agency must show 1) that grounds for neglect are not primarily because of financial inability; 2) if primarily caused by financial inability, that services are available; and 3) that services have been rejected by the parent. This would prevent the court from adjudicating a child dependent upon the consent of a parent or relative in order to gain funding for social service programs that would not be

81. See M. Hardin & P. Tazzara, supra note 58, at 29.
82. Id. at 28.
83. Id. (Where child is placed with relatives that do not wish to adopt, or child is placed in a residential treatment facility or other placement which could not be considered a "family" environment, or where the foster family is unwilling or unable to adopt the child). See also Hardin, Legal Placement Options Achieve Permanence for Children in Foster Care, supra note 19, at 128.
84. The six-month abandonment requirement presently contained in Chapter 39.001(1) would be removed by H.B. 399 and S.B. 273 to Fla. Stat. § 39.41(1)(f)(1)(a) and replaced with "...sufficient to evince a wilful rejection of parental obligations." See supra note 49 and 72. Regarding parental incapacity, compare M.T.S. v. State, 408 So. 2d 662 (Fla. Dist. Ct. App. 1980) with In the Interest of J.L.P., 416 So. 2d 1250 (Fla. Dist. Ct. App. 1982). This amendment would do little to reconcile what has been termed in M.T.S. as a tragic oversight in failing to protect the child whose parent is suffering from mental illness. This statutory problem has been the subject of numerous resolutions of the conference of Circuit Judges of the State of Florida, Juvenile Section.

https://nsuworks.nova.edu/nlr/vols/iss2/13
available without court order.

D. Permanency Planning for Children

With the passage of the Skinner Bill in 1980, Florida introduced a requirement that the juvenile court consider parental efforts to secure return of their child by improving the home conditions which caused his removal. However, Florida must presently comply with the intent of federal legislation which requires 1) examination of the removal of a child to determine whether preventive and reunification efforts have been made to keep the child in the home, 2) the drafting of a case plan for each child placed voluntarily or involuntarily, designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parent's home, 3) judicial or court approved administrative hearings within eighteen months of placement of the child to determine the future permanent placement of the child. Failure to comply with federal legislation can technically result in the loss of millions of dollars to Florida's foster care program.

Proposed legislation seeks to bring Florida law into further compliance with federal law by closely examining initial removal as a mechanism to force an agency to use preventive services. Proposed legislation would accomplish the following: 1) assure court review of voluntary placements in foster care by specifically providing court jurisdiction for dependent children placed in such care; 2) clarify that permanent placement plans can be substituted for performance agreements when the parent is unwilling or unable to enter into a written agreement with the agency; 3) define the court's role in assuring that the performance agreement complies with law and previous court orders; and 4) define substantial compliance so that a child cannot be returned home unless

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85. Fla. Stat. § 409.168 (1981). See also Fla. Stat. § 39.41(1)(f)(d) (1981) which provides that the child may be permanently committed if the parent has failed to substantially comply with the performance agreement. Fla. Stat. § 409.168(1) (1981), the Skinner Bill, was enacted because of the legislative finding that 7 out of 10 children placed in foster care did not return to their biological parents after the first year, and that the children placed in foster care should either be returned to their natural parents or placed in adoptive homes after one year. To assure permanency planning, the legislature required the drafting of performance agreements for each child placed in care, and mandated a series of court reviews. Id.

the child’s well being and safety are assured. 89

The Florida statute known as the Skinner Bill presently recognizes either return of the child to the parent or adoption as Florida’s permanency planning goals. Proposed legislation would sanction other options. In many cases, for example, it may be more appropriate for the sixteen or seventeen year old adolescent in agency care to prepare for independent living 90 rather than be adopted or left in foster care indefinitely. For other children, long-term foster care would be recognized as a permanency planning option. A substantial number of children remain in foster care after it is apparent that return to the natural parents is impossible. This may be the result of poor planning for the child or the result of a conscious choice by the agency or the biological or foster parents. 91 If long-term foster care is selected, it should be accompanied by clarification of whether the agency or the foster parent will make important decisions regarding the child 92 and whether the foster parent has standing to protest a subsequent agency decision to remove the child. 93 Although adoption may be desired by some foster parents, they may be unable to do so because they would lose the financial assistance provided to them as foster parents. 94 Federal law includes a legal guardian within the definition of a parent 95 and the foster parent who pursues guardianship may be prevented from receiving financial assistance. Florida’s guardianship proceedings 96 are not presently viewed as a mechanism for establishing permanency. Florida foster parents would lose state payments by becoming guardians and guardianship proceedings themselves are costly and difficult for foster parents, relatives or others to pursue since they take place in a separate court division. 97

Legislation proposed for the 1984 Florida legislative session fur-
thers permanency planning in two other ways. First, it formally recognizes the important role of the child's representative by mandating the appointment of a guardian ad litem.\textsuperscript{98} Second, it specifies the role of the court at judicial review hearings.\textsuperscript{99} An area which remains undressed by Florida law is permanency planning for children placed with relatives. Presently, the court may place a child with a relative following an adjudication of dependency.\textsuperscript{100} The child does not receive the benefits of legally mandated written agreements and judicial reviews as is the case with children placed with HRS or other licensed child-caring agencies. Agency supervision may be terminated after the child is no longer in danger. Placement with relatives can be as disruptive to the relationship between parent and child as placement with strangers since the relative's authority and control over the child is just as likely to conflict with that of the parent. Permanency planning proceedings should apply to these children as well.

IV. Special Protections for Child Victims and Witnesses in Child Abuse Cases

A. Florida Law and Proposed Recommendations

Florida law presently allows for the prosecution of abuse-related offenses under numerous criminal statutes.\textsuperscript{101} The punishment for these offenses ranges from capital punishment, for the sexual battery of a child eleven years old or younger, to various degrees of felony and misdemeanor offenses. Age, consent requirements and penalties bear little

\begin{itemize}
  \item \textsuperscript{98} See supra note 49. Amendments to FLA. STAT. § 409.168 (1981) would include recognition of the role of the guardian ad litem by reviewing the guardian ad litem report at judicial reviews, and by assuring that the child is represented by a guardian ad litem throughout § 409.168 proceedings.
  \item \textsuperscript{99} See supra note 49. The proposed legislation would amend § 409.168 to require the court to inquire whether the child is represented by counsel; whether the parties have complied with the services, visitation, financial obligations of the agreement; review whether the reasons for entry into a plan are still relevant; whether the child's placement is appropriate; and the projected date for the child's return to the home.
  \item \textsuperscript{100} FLA. STAT. § 39.41(1)(a)(b) (1981) permits the court to place the child with a relative or other adult person, with or without agency supervision, recognizing that family or community placement is preferred to more institutionalized shelter placements.
  \item \textsuperscript{101} See supra note 5.
\end{itemize}
Selected Legislative Needs

relation to the behavioral and psychological information available about child and sexual abuse victims. The American Bar Association National Legal Resource Center for Child Advocacy and Protection has recommended a scheme of sexual abuse definitions and acts which encompasses any form of intentional and explicit sexual behavior with a child or committed in a child’s presence.\textsuperscript{102} The recommendations encourage defining "sexual abuse" in criminal statutes by the same terms used in reporting laws.\textsuperscript{103} The recommendations further encourage criminal statutes to include a provision specifically prohibiting intrafamily sexual abuse\textsuperscript{104} in order to give legislative recognition to the serious problem of sexual abuse of children by parents or parental

\textsuperscript{102} J. Buckley, Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases (Oct. 1982) (pamphlet issued by National Legal Resource Center for Child Advocacy and Protection).

\textsuperscript{103} Id. at 14. The recommendations are: Specific Statutory Definitions. Criminal statutes should specifically define sexual abuse of a child. Juvenile court statutes and child abuse and neglect reporting statutes should include and specifically define sexual abuse of a child, or define such abuse by reference to the definition in the criminal statute. The following acts should constitute sexual abuse of a child: (1) any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is an emission of semen; (2) any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person; (3) any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose (except acts intended for valid medical purposes); (4) the intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of either the child or the perpetrator (except acts reasonably construed as normal caretaker responsibilities or affection and those for valid medical purposes); (5) the intentional masturbation of the perpetrator's genitals in the presence of the child; (6) the intentional exposure of the perpetrator's genitals in the presence of the child, or any other sexual act, intentionally perpetrated in the presence of a child, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose; (7) sexual exploitation, which includes allowing, encouraging or forcing a child to solicit for or engage in prostitution or engage in the filming, photographing, videotaping, posing, modeling, or performing before a live audience, where such acts involve exhibition of the child's genitals or any sexual act with the child as defined in (1)-(6) of these recommendations. \textit{Id.} at 13. \textit{See also} proposed House of Representatives Bill 873 (1984), where sexual abuse is defined, similar to the aforementioned requirement, as an amendment to § 415.503 (1983). This bill, introduced by the Speaker of the House, received impetus from finding of the House of Representatives Ad Hoc Committee on Children and Youth.

\textsuperscript{104} Id. at 22, Recommendation 3.1 defines intrafamily sexual abuse as that committed by a parent, caretaker, or adult household member in a position of authority or control over the child.
figures. Criminal statutes should establish degrees in the sexual abuse of a child, and attendant punishment, based upon whether the acts constitute intrafamily sexual abuse. Factors such as the nature and duration of the abuse, the age of the child and perpetrator, the use of force, threats or other forms of coercion, and the existence of prior sexual offense convictions or juvenile court adjudications for sexual abuse should be considered. Higher penalties should be reserved for those cases considered more aggravated. Colorado has amended several of its criminal law provisions to include sexual assault by a person in a position of trust to the child and has adopted penalties that reflect more closely the relationship of the child to the perpetrator.

The model recommendations also encourage legislative guidelines for prosecution and sentencing in intrafamily child sexual abuse cases. Innovations like these in other states have proven successful in protecting the child, punishing the offender, protecting the rights of the child and offender, and encouraging a greater number of prosecutions of sexual abuse cases with minimal disruption to the child and the family's life. Where the court has guidelines which permit it to order treatment as a condition of probation or a suspended sentence, an offender may be helped while avoiding a criminal trial. Colorado, for example, has recently passed legislation allowing suspension of sentences for perpetrators who are not habitual offenders, and permitting the imposition of a treatment program as part of a probationary

105. Id.
106. Id. at 23, Recommendation 3.2, Statutory Degrees of Offenses Based Upon Certain Factors (the relationship of the perpetrator to the child should be a factor).
107. Id.
108. Id.
109. A person in a position of trust is defined in COLO. REV. STAT. § 18-3-401 (1983) as a person who is a parent or acting in the place of a parent and charged with any of a parent’s rights, duties, or responsibilities concerning a child, or a person who is charged with any duty or responsibility for the health, education, welfare or supervision of a child, including foster care, child care or family care, either independently or through another, no matter how brief, at the time of an unlawful act.
110. COLO. REV. STAT. § 18-3-405 (1983).
111. See supra note 102, at 24, Recommendation 3.3.
112. Id. at 25. See also INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES (J. Buckley ed. 1981).
113. J. Buckley, supra note 102, at 26. Pre-trial diversion programs in criminal prosecutions suffer from the same dangers as described in part III of this article if there is no judicial finding that the abuse has occurred.
The recommendations encourage states to mandate use of protective orders in sexual abuse cases. Orders of this nature may require the perpetrator to do or refrain from doing certain specified acts such as vacate the home where the child resides; limit contact with the victim, other children in the home or any child; refrain from further abuse; participate in counseling or treatment; stay away from the neighborhood or school of the child; cooperate with limited or supervised visitation; and pay support for the child or family. The nonparticipating parent may even be included in such orders. Protective orders entered in both criminal and civil proceedings will ensure maximum protection and sensitivity to the child's needs, while expediting the prosecution process. Typically the responsibility for seeking and enforcing such protective orders is legislatively placed with law enforcement agencies.

B. Videotaping and Other Protective Measures for Child Victims and Witnesses

Prosecution of child abuse cases is difficult because often the child's testimony is supported by little physical corroboration to overcome the factfinders' natural skepticism that the crime occurred. Those experienced in dealing with the child sexual abuse victim know that bolstering the credibility of the child and educating the criminal justice system to exercise sensitivity during proceedings are almost insurmountable problems. An abused child is often threatened by parents regarding the child's intent to testify. The child finds it difficult, in an open courtroom, to accuse the parent whom he still loves.

115. In Florida, as well as other states, the child is normally removed from the home rather than the abuser being ordered to reside elsewhere. The child is thus further traumatized by being isolated from family members who may be supportive of the child. Prolonged resolution of the case often results in the child not receiving needed treatment and the child's recanting of sexual abuse accusations.
116. Buckley, supra note 102, at 20, Recommendation 2.2. See also House Bill 873, supra note 103, which adds § 39.4055, entitled Injunction Pending Disposition of Petition for Detention or Dependency, but is not confined to sexual abuse.
117. Id. at 21.
A courtroom physically accommodates adults, but is quite threatening to the younger child. Child advocates have attempted to reduce the trauma of courtroom testifying in a variety of ways. Prosecutors, guardians ad litem and victim advocates may explain court proceedings to the child prior to the actual trial, and provide emotional support throughout the case. In some Florida courts, a guardian ad litem will be appointed to represent the child in the criminal prosecutions of his abuser. However, the legislatively mandated appointment of a victim—witness advocate to assist the child would best ensure that the child is protected. Experts encourage such appointments, acknowledging that criminal cases differ from juvenile cases because the child is a witness, rather than a party, to the proceedings and the purpose of criminal prosecutions is primarily to punish the offender rather than protect the best interests of the child. A victim-witness advocate in criminal court, however, can help to minimize the trauma of the legal process by “for example, accompanying the child during interviews and court proceedings, arranging transportation, explaining the process, preventing, where possible, harassment or other intimidating investigative or court room procedures, and in essence, being a “friend of the court” or support person who shepherds the child through the process.”

The commentary to the recommendation urges the guardian ad litem appointed in the juvenile court proceeding as the person most appropriate to provide assistance during the criminal trial phase. This practice, when used in Florida, has helped to achieve better communication between the juvenile, the criminal court, and professionals, while providing the child with a continuous support figure throughout the various proceedings.

Florida law currently recognizes the need to reduce trauma to the child victim by allowing a parent to be present during any questioning, and requiring interviews to be conducted in the least harmful environment. In 1982, a bill was proposed to further protect children during

120. Pursuant to Fla. Stat. § 415.508 (1983) representation of the child is by a guardian ad litem in all child abuse and neglect proceedings. The definition of child abuse and neglect contained in § 415.503(5) would include not only those acts contained in §§ 827.03-.06 but other criminal offenses. H.B. 873 clarifies that a guardian ad Litem must be appointed in civil and criminal cases. See supra note 5. Special thanks to P. Miles, Circuit Coordinator of the Sixth Judicial Circuit Guardian Ad Litem Program for her research contributions to this section of the article.

121. J. Buckley, supra note 102, at 9, Recommendation 1.4.1.

122. Id. at 10.

depositions, discovery and other actions involved in child abuse prosecutions. In its amended form the bill, which was not passed by the Florida legislature, required the appointment of a guardian ad litem to represent victims under the age of eighteen who are compelled to testify in a criminal child abuse case.¹²⁴

A separate problem was addressed in *State v. Dolen* where a Florida court acknowledged the need to exclude the defendant from a deposition because of emotional trauma to his child victim.¹²⁵ In several foreign countries, questioning of children is conducted outside the presence of the defendant by specially trained professionals.¹²⁶ Although requests to exclude an abuser from dependency proceedings in juvenile court are usually granted, questioning a child outside the presence of the defendant during a criminal trial conflicts with the defendant’s constitutional right to confront his accuser.¹²⁷ As a result, special videotap-

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¹²⁴. The guardian ad litem would have been authorized to request protective orders on behalf of the child, attend depositions and request court protection. One form of the bill would have required the presence of a judicial officer. H.R. 5 Fla. Leg. Sess. (1983), creating FLA. STAT. § 914.16 (1983) (depositions of juvenile victims in criminal proceedings). The bill would have created FLA. STAT. § 914.10 (1983) and repealed FLA. STAT. § 827.07(16) (1981) in favor of broader appointment authorities including any victim of child abuse or neglect. The bills did not pass during the session. Arguably, there was insufficient information about the Guardian Ad Litem Program, then in a pilot stage, to assure sufficient resources for representing the victims that needed protection under the bill. Additionally, confusion existed regarding the role of the guardian ad litem in criminal prosecutions since the state attorney is charged with protection of the child. See J. Buckley, *supra* note 102, at 9 (the idea that the state’s function to assure punishment of the offender may cause treatment of the child in a manner inconsistent with the child’s best interests.)

¹²⁵. 390 So. 2d 407 (Fla. 5th Dist. Ct. App. 1980). *Dolen* recites that the court has discretion to exclude the defendant from depositions pursuant to FLA. R. CRIM. P. 3.220 without interfering with the defendant’s right to confrontation, and where the witness will be available for trial.

¹²⁶. See Lloyd, *supra* note 119, at 185, which recited the practice in Israel and Scandinavian countries of using professional workers with extensive backgrounds in human behavior to interview children.

¹²⁷. See U.S. v. Benfield, 593 F.2d 815 (8th Cir. 1978). This would include blocking the defendant’s view of the child, Herbert v. Superior Court, 712 Cal. Rptr. 850 (1981); *See also* In the Matter of S. Children, 424 N.Y.S.2d 1004 (Kings County Fam. Ct. 1980). A creative approach is recommended by Libai, as outlined in Lloyd, *supra* note 134. The use of an informal child-proof courtroom is recommended, which has one way mirror behind which the defendant and the public would sit. Counsel for the defendant would be in the courtroom and communicate electronically with the defendant. However, the practice is noted as not only raising constitutional issues, but containing prohibitive construction costs.
ing statutes have been introduced in Florida and other states to provide protection to the child while safeguarding the rights of the defendant. In order to be effective several additional provisions should be incorporated into Florida's present videotaping law. 128

First, Florida presently allows videotaping if the child victim is eleven years of age or younger. 129 Other states extend protection to young adolescents who face many of the same traumas as children under eleven. In addition, many victims who qualify under Florida's statute at the time of the abuse are older than eleven when they are required to testify. Arizona law presently allows videotaping of a minor under the age of fifteen, 130 while New Mexico's statute includes children who are sixteen years or younger. 131 The Florida proposed amendments would raise the protection to children under age sixteen. Second, Florida presently permits only the state to apply for videotaping. This procedure fails to recognize that a parent or the child's representative may also wish to invoke this protection based on facts and circumstances of which the state is unaware, or is unwilling to support based upon the relative need for conviction in the case. Florida law does not permit the child, parent, child representative or defendant to have standing to request that the court allow the child to be videotaped. Other states, however, allow such requests. 132 It may be argued that the state has the right to conduct the case as it sees fit. But recognition that counsel or the representative of the child, as well as the defendant, may apply for an order to videotape would simply permit the victim or witness to be heard regarding the "severe mental or emotional trauma" that might occur if the child were required to give live testimony. The present Florida statute provides for a hearing where the court may consider the state's arguments in opposition to videotaping, as well as those of other parties, and the relative merits on behalf of the child. 133 This practice is continued in proposed amendments. Third, Florida presently

128. Fla. Stat. § 918.17 (1983). Bills passing both House and Senate committees during 1984 have been refiled this year and are identical in all substantive aspects. See Committee Substitute for House Bill 56 and Senate Bills 140 and 237.
allows the videotaping of a victim's testimony only in prosecutions for sexual battery and child abuse, even though the victim of another offense might suffer equal or more serious trauma. New Mexico provides for taping in prosecutions involving sexual penetration or sexual contact. Arizona permits it in all civil or criminal offenses involving an alleged sexual offense. Fourth, Florida presently requires that the court find "a substantial likelihood that the child will suffer severe emotional strain if required to testify in open court" as a prerequisite to granting a request for taping. This requirement must be met by evidence from parents, caretakers, psychologists or other mental health professionals. Colorado law requires a preliminary finding which can be based upon "recommendations from the child's therapist, or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child." Fifth, Florida presently allows for taping only after the trial has actually commenced. One of the major obstacles toward successful prosecution of child sexual abuse cases is assuring that the trial occurs as soon as possible after the incident has been reported or has occurred. Child victims are vulnerable to the pressures of prolonged prosecutions because they do not have the coping mechanisms of adults to deal with such stress. The child is likely to recant prior statements in order to end prolonged proceedings and the harsh effects of being removed from family and friends. In addition, a child is especially susceptible to forgetting important facts.

It is essential for children to receive treatment for the trauma of sexual abuse, and begin the healing process, as soon as possible. Prolonged prosecution detrimentally affects this process. Colorado has formally recognized that cases involving the commission of unlawful sex-

134. Id. See COLO. REV. STAT. § 18-3-412(1) (183) which allows for taping in various sexual offense cases.

135. See supra note 131.

136. See supra note 130. The proposed Florida legislation would relate to sexual or child abuse cases, whether civil or criminal. Both victims and witnesses would be permitted to invoke the protection of the law.

137. FLA. STAT. § 918.17 (1983). The proposed legislation retains this requirement, substituting the word "trauma" for strain.


139. FLA. STAT. § 918.17 (1983). The proposed amendment would permit taping at any time. At the hearing on the videotaping motion the court could ascertain if the defendant has completed discovery. The prosecutor must assure expeditious handling of these cases to assure maximum benefits of early videotaping.
ual acts against minors must take precedence before the court. Neither Colorado, Arizona, Montana, or New Mexico require that the trial be commenced before the videotaping can take place. Proposed legislation would eliminate this requirement by allowing an application for videotaping to be made at any time prior to the trial of the case. Finally, Florida presently requires that the court preside at the videotaping. Either the court or a person who is specifically interested in the well-being of the child should be present during taping to assure that questioning is conducted in a sensitive manner, and to counter the effect of confrontation with the defendant.

C. Innovations in Evidentiary Principles

The prosecution of child and sexual abuse cases can be greatly aided by expert testimony on the dynamics of intrafamily child sexual abuse and principles of child development. Using an expert to present evidence of the sexually abused child syndrome, which includes dynamics of sexual abuse, similar to expert evidence on the battered child syndrome, is recommended when pertinent. The sexual abuse syndrome involves such elements as progressive sexual behavior over a prolonged period of time, the lack of force or physical injury, the late disclosure of the incident, the passive role of the nonparticipating parent, retraction or inconsistency in statements by the victim, and certain special behavioral characteristics of the victim and the offender.

141. See supra note 39.
143. The proposed legislation would delete the requirement that the court be present if the court finds that the child will be protected and that a guardian ad litem represents the child. Montana provides for the court and “such persons as deemed necessary by the court” to be present, Mont. Code Ann. § 46.15-401 (1981). See supra notes 130-32 and accompanying text. The proposed legislation would also permit the appointment of a special master. The parties, including the child’s representative must stipulate that the presence of the court is not necessary.
144. See Buckley, supra note 102, at 37.
145. Id. at 40.
146. Id. See also, Berliner, Canfield, Blick & Buckley, Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development, in Child Sexual Abuse and the Law 166, 171-173 (J. Buckley ed. 1983), (the behavior includes physical symptoms with no physiological basis, clinical depression, isolation from peers, runaway, truancy, involvement with drugs or alcohol, drop in academic performance, pseudo-mature seductive behavior, fear of men, heavy family re-
Such testimony is crucial where a jury might find it difficult to believe that the child is the victim of a violent crime. Additionally, evidence in a sexual abuse prosecution may include statements which are inadmissible hearsay according to evidence law. Where there is corroborating evidence of the abuse, however, Florida courts should be willing to accept the testimony under the general exception to the hearsay rule.\(^{147}\)

The court should be permitted to consider "the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness, in deciding whether to admit the statement."\(^{148}\) Such an exception would comport with the belief that children are not adept at the reasoned reflection necessary to support false allegations.\(^{149}\) A special hearsay rule exception added to Florida’s code of evidence would eliminate the need for courts to allow the statements of a child through "tortured interpretation" of the existing hearsay exceptions. Colorado has legislated exactly such an exception, with the requirement that the adverse party be given ample notice.\(^{150}\)

V. Proposals For the Improvement of Professional and Volunteer Services For Children

A. Establishment of Minimum Standards

In any given community, there are certain persons who are most likely to come into contact with abused children, such as teachers, doctors and social workers. By law these professionals are mandated to report abuse or neglect; they may also be responsible for diagnosing development characteristics include shyness, embarrassment, difficulty in understanding abstract concepts, and short attention span.\(^{151}\)

147. See Buckley, \textit{supra} note 102, at 34. Proposed H.B. 873 recommends that Florida adopt this position by adding § (23) to § 90.803.

148. \textit{Id.} at 34, Recommendation 4.3.

149. \textit{Id.} at 35. See also Buckley, \textit{Evidentiary Theories for Admitting a Child’s Out-of Court Statement of Sexual Abuse at Trial}, \textit{supra} note 119, at 153.


151. \textit{Fla. Stat.} § 827.07(3) (1981) requires reports by day care center workers, teachers, public health practitioners, social service and mental health workers, and doctors. Those likely to contribute to diagnosis are nurses, social workers, teachers police officers. Florida law also mandates responsibilities for law enforcement, state attorney, judges, H.R.S. guardians ad litem and child protection teams in the handling of abuse
or providing intervention or treatment services to the abused child. The state's child abuse prevention plan mandated under Florida Statutes section 415.501, popularly known as the Mills Bill, recommends that the legislature statutorily require the development of minimum standards for education and training of professionals charged with responsibilities in child abuse cases. The Mills Bill provided the major impetus in the training of school and law enforcement personnel. Legislation can provide direction and impetus to persons and agencies by requiring minimum training and formulation of standards for professionals and volunteers who are responsible for the detection, diagnosis, treatment, and representation of abused children. These standards can be implemented by: requiring certification of those professionals licensed or regulated by the state in the relevant responsibilities of dealing with children; providing funding incentives for training activities; and requiring that any contract entered into by HRS with private agencies for services targeted for abused and neglected children specify that agency staffs have minimal qualifications and training in the relevant area of practice.

cases under FLA. STAT. § 827.07(1) (1981). See also notes 2-35 and accompanying text.

152. FLA. STAT. § 415.501 (1983); formerly 827.075 (1982), (also known as the Child Abuse Prevention Act. The Law called for the appointment of state and district task forces to identify the child abuse prevention needs of the state.

153. Fla. Dept. of HRS, State Plan: A Comprehensive Approach for the Prevention of Child Abuse and Neglect 23 (Dec. 1982) which recommended funding for and statutory mandates requiring minimum education and training standard for professions in child abuse cases, e.g. law enforcement, state attorneys, public defenders and judges. District II and VII identified these items specifically. See id. at 76. Each institution of higher learning should mandate courses if future professional practice involves working with children. Id.

154. Id. at 30 (target dates for training elementary, middle and high school personnel). Id. at 28. (law enforcement agencies have included mastery of information on child abuse as part of basic recruit curriculum in forty-one certified training centers. Id. at 30. FLA. STAT. § 402.305(1) (1981) requires minimal standards of training for day child care personnel.

155. See J. Buckley, supra note 102, at 13, which recommends special training for professionals who deal with intrafamily child sexual abuse in psychological, social and legal issues, basic principles of child protection and development and interviewing techniques. Id. at 13.
B. The Coordination of Agencies

The Mills Bill provided an opportunity for Florida communities to identify problems in coordinating child abuse efforts. Although further legislation may not be needed to enhance communication and cooperation between agencies, certain refinements are necessary. One commentator recommends that agencies establish an interdisciplinary approach for handling sexual abuse cases in order to provide greater efficiency, expertise and information sharing. Presently in Florida, for example, a law enforcement agency may not be notified about a reported child abuse because HRS is only mandated to report serious cases to the state attorney. The prosecution of cases in separate criminal and juvenile court forums may also contribute to poor communication and inefficiency. This perception has led to recommendations that a single prosecutor be assigned to handle all stages of a case, and that procedures to coordinate child protective, criminal and other judicial proceedings involving intrafamily sexual abuse be devised.

C. Independent Representation of Children

The need for providing independent representation for children is well recognized in Florida. Legislative funding of the State of Florida Guardian Ad Litem Program has provided legitimacy and stability

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157. See Buckley, supra note 102, at 7. Buckley recommends including procedures to prevent duplicated interviews through the use of joint interviews by various individuals needing information, or the use of one well trained investigator who can address the nature and goals of interviews required by different agencies. Id. at 10. See also recovery H.B. 873 language amending FLA. STAT. 415.505 (1983).
158. Id. at 8.
159. FLA. STAT. § 415.505(1)(8) (1983); formerly 827.07(10)(g) (1982), provides that HRS may notify law enforcement agencies. It is recognized that law enforcement must immediately secure evidence in order to assure the possibility of criminal prosecution to protect the long-term interests of the child. Sensitivity to the needs of the child can be accomplished through training of law enforcement, as with other agencies. See H.B. 873, supra note 116, which would require coordination between the state attorney, HRS, and law enforcement and create liaisons with schools and hospitals.
160. See Buckley, supra note 102, at 11.
161. Id. at 8.
162. FLA. STAT. § 415.508 (1983); formerly 827.07(16) (1981) has required the appointment of a guardian ad litem in child abuse and neglect judicial proceedings since 1978. See also proposed amendments in H.B. 873, supra note 116.
to the concept of representing abused and neglected children.\textsuperscript{163} The statewide use of volunteer lay citizens has placed Florida in the vanguard of guaranteeing abused children an effective voice.\textsuperscript{164} Expanding since 1980 to fifteen of Florida’s twenty judicial circuits, the Guardian Ad Litem Program has recruited and trained over fifteen hundred volunteer lay citizens and attorneys who have provided invaluable service to over eight thousand victims of child abuse. Independent evaluations have consistently recommended statewide implementation\textsuperscript{165} of the program and the legislature is urged to fund expansion in 1984 to the remaining areas of the state. Some of the many important roles that guardians ad litem perform on behalf of children are: 1) \textit{Investigator}—the guardian ad litem independently conducts an investigation on behalf of the child, including interviews with the child, child’s counselor, medical and mental health specialists, the parents, teachers, and persons in the community. He also collects relevant records and consults with experts; 2) \textit{Monitor}—the guardian ad litem serves as a monitor of the agencies and persons who provide services to the child, he assures that orders of the court are followed and that families and children receive needed services; 3) \textit{Protector}—the guardian ad litem protects the child during questioning and helps support the child emotionally to minimize the often harmful effects of being embroiled in the adversary process; 4) \textit{Spokesperson}—the guardian ad litem assures that the child’s wishes are heard, and that the best interest of the child is presented to the court and to agencies dealing with the child; and 5) \textit{Reporter}—the guardian ad litem presents information to the court, recommending to the court what is in the child’s best interest, and prepares a written report which becomes a permanent part of the child’s record.\textsuperscript{166}

\textsuperscript{163} The program is part of the administrative structure of the circuit courts of the state. It is funded through the Office of the State Courts Administrator of the Supreme Court of Florida.


\textsuperscript{165} These recommendations are based upon quality representation as compared with other models, and cost effectiveness. An Evaluation of Florida’s Guardian Ad Litem Program by M.G.T., Inc. (1982, 1983) An independent private contractor hired by the State of Florida.

\textsuperscript{166} FLA. R. JUV. P. 8.300 (West 1983). See E. Hoffenberg, Role of Guardian
VI. Conclusion

The increased support and protection of child abuse victims in Florida in recent years has provided the state with thousands of community and state advocates who are becoming more aware of the legislative needs of Florida’s children. As professionalism increases, practitioners will continue to question irreconciliable conflicts in child welfare laws. The growing respect for children’s legal representatives will assure continued input to state legislators. Florida’s child victims of abuse are beginning to command the attention of lawmakers. Comprehensive reforms in the areas of permanency planning, effective prosecution of cases and sensitivity to the special needs of children in the criminal justice system are needed. Highly specialized training and maximum efforts for coordination and communication among agencies are the least that our most precious resource—our children—deserve. For the sake of these children, the legislative challenges that await our lawmakers and citizenry at this time must be met with the same enthusiasm and creativity that has accompanied previous efforts. Innumerable generations of children who are yet to be born will reap the rewards of these efforts.

Juvenile Justice in Florida: Bringing Rehabilitation Back Into Style

Jack Levine*

I. Introduction

As is the case nationwide, Florida is experiencing a philosophical and fiscal tug-of-war over the issue of juvenile justice. The continuous struggle between rehabilitation and punishment has resulted in major statutory revisions in four of the past five years. In budgetary terms, the state is attempting to pay for both treatment and punishment and this dual emphasis hampers the potential for rehabilitative success. This article is written with a dual purpose: to dispel several juvenile justice myths and to present a factual account of Florida's juvenile justice program as it currently exists. It is hoped that this information will give elected officials and their concerned constituents the impetus to improve the ways we handle young persons who get into trouble. During the decade of the 1970s Florida played a leadership role in national juvenile justice reform, but our status as the model state is slipping. Only if certain statutory and budgetary changes are made can Florida reclaim its position as the exemplary provider of justice to children and their families.

II. Juvenile Crime in Florida: Myths and Facts

In 1982, approximately 76,000 youths aged seventeen and under were arrested in Florida—a decrease of twenty-one percent over the past five years. Less than seven percent of all arrests of juveniles are for crimes of violence. Despite these facts, a mythology has developed

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1. FLA. DEP'T OF LAW ENFORCEMENT, CRIME IN FLORIDA 88 (1982) [hereinafter cited as CRIME 1982].
2. FLA. DEP'T OF LAW ENFORCEMENT, CRIME IN FLORIDA 104 (1978) [hereinafter cited as CRIME 1978].
3. CRIME 1982, supra note 1, at 88.
which tells tales of “the rising tide” of youth crime. A perception that our state and nation are in the midst of a juvenile crime wave is fueled by shocking reports of isolated serious crimes perpetrated by young persons. The justification for this perception is due in part to an actual and significant rise in the crime rate of the eighteen to twenty-five year old age group. The resultant outcry to “get tough on kids” has been scattershot, however, and these calls for “toughness” have been misdirected at a younger class of juveniles. It is helpful to look at the following popular myths and the true facts concerning those issues:

Myth 1. The number of juvenile arrests is increasing and represents a juvenile crime epidemic.

Fact: The number of juvenile arrests in Florida has declined twenty one percent over the past five years, from 97,433 in 1978 to 76,381 in 1982.

Myth 2. Florida’s juvenile arrests account for a large and growing proportion of total arrests.

Fact: Juvenile arrests account for a decreasing proportion of total arrests. In 1978, juvenile arrests represented 25.8% of total arrests. In 1982, juvenile arrests accounted for 14.6% of total arrests.

Myth 3. The number of juvenile arrests in Florida for violent crimes is dramatically increasing.

Fact: The number of juvenile arrests for the four most serious violent crimes (homicide, rape, armed robbery and aggravated assault) has decreased approximately eighteen percent since 1979. These crimes account for less than six percent of all juvenile arrests.

Myth 4. Juvenile crime is increasing most significantly in Florida’s major metropolitan areas.

Fact: From the period of 1976 through 1982, juvenile arrests have decreased in each of the fifteen largest metropolitan counties of

4. Id. at 89.
5. CRIME 1978, supra note 2, at 105.
7. CRIME 1978, supra note 2, at 104.
8. CRIME 1982, supra note 1, at 88.
10. CRIME 1982, supra note 1, at 88.
The explanation for the significant decrease in delinquency referrals over the past five years cannot be based on a demographic shift in Florida’s population. In fact, the number of juveniles aged four to seventeen has not appreciably changed over this period. Amendments to Florida’s delinquency laws cannot be used as an explanation for the decrease in crime since the decline in juvenile arrests has been steady all through the years of numerous statutory changes. The 1981 legislative changes which increased the use of secure detention and escalated the adult court transfer rate were preceded by a year of markedly declining juvenile arrest rates. In actuality, the decrease of juvenile arrests is a national trend. There has been a steady decrease in juvenile arrests since 1974, attributable, in part, to a concomittant decline in the national youth population.

Demographics aside, the year 1974 saw a significant effort at the federal level, through the Juvenile Justice and Delinquency Prevention Act, to decriminalize status offenses and place restrictions upon certain harsh treatments of minor juvenile offenders; for example, jailing juveniles with adults. It may be argued that the improved juvenile crime statistics are a result of a more enlightened approach to the handling of less serious offenders. Growing emphasis on the prevention and treatment of child abuse, and a recognition that status offenders are not offenders but victims, may be the most significant explanations for the declining juvenile crime rates nationwide.

III. Policy Directions in Juvenile Justice

It is the responsibility of elected officials in the executive, legislative and judicial branches of government to guarantee to the public that policy and budgetary decisions in the realm of juvenile justice are based upon fact, not myth. Florida’s delinquency statute and the range

11. Id. at 106.
of juvenile justice programming should reflect a clear view of the youth crime issue, and project a clear vision of how to improve the system. In October 1983, the Governor's Office of Planning and Budgeting released a report which documents the strengths of Florida's juvenile justice system, and points to those areas which require reform.\(^{16}\) It emphasizes the relative cost-effectiveness of current delinquency services. If heeded, the report can serve as an outstanding planning document for all branches of government. What follows is a summary of Florida's juvenile justice program with accompanying recommendations for improvement.

A. Diversion Programs

In 1978, the Juvenile Alternative Services Project (JASP) was piloted in three districts of the Department of Health and Rehabilitative Services (HRS). The Juvenile Alternative Services Project is a court diversion program which provides services and sanctions such as arbitration, restitution, family counseling and community work service to non-serious juvenile offenders. After initial evaluations reported less than twenty percent recidivism,\(^{17}\) JASP has been expanded to serve all eleven HRS districts. In 1982-83 16,000 clients were served, more than 300,000 hours of community work were performed, and restitution payments totaled over $228,000.\(^{18}\) The cost for providing JASP services averages $170.00 per client,\(^{19}\) whereas traditional judicial handling costs average $1,000.00 per case.\(^{20}\)

Notable criticisms of service-oriented diversion programs focus on their "net-widening" aspect.\(^{21}\) It has been asserted that the volume of offenders served by JASP-like programs does not represent true diver-
ortion because these individuals would not routinely receive court attention due to the minor nature of their alleged offenses. Basic to this criticism is the argument that ninety-five percent of all adolescents commit delinquent acts but are not apprehended, receive no sanctions, and eventually mature out of their misbehavior. Opponents of diversion services argue that this method widens the net of arrests, brings unnecessary formality to the diversion process, and may actually serve to label the child as a delinquent without court adjudication.

Despite the proliferation of JASP, the judicial handling of juveniles has steadily increased in Florida. From 1976, when approximately one-third of all juvenile delinquency referrals were brought to court for adjudication, the rate increased to fifty-four percent in 1982. The phenomenon, brought about by increased filings by the state attorneys, reflects a public perception that “nothing happens” to youths who are arrested. Court processing is viewed as concrete evidence that “something happens.”

In order to establish the cost-effectiveness of Florida’s diversion programs, evaluative studies must be undertaken to determine if JASP clients are truly being diverted and whether these youths would be subjected to court processing if the diversion service did not exist. Judicial handling should be reserved only for violent or chronically delinquent youth. Because so few juveniles who come to court are such serious offenders, it is more appropriate to substitute the dollars which now go into the bulk of court processing with diagnostic services, special remedial education, and employment training. By reducing the judicial handling rate from fifty-four percent to thirty percent, the state could realize a savings in excess of fifteen million dollars annually. This amount could then be directed to a range of appropriate family support and skills training services.

B. Detention Programs

Florida has the highest pre-adjudicatory juvenile detention rate in the nation. During fiscal year 1982-83, 25,089 youths were admitted to secure detention—over one-third of all delinquency referrals during that period. The total average daily population in Florida’s twenty

23. Id.
regional detention centers was 1,016 in 1982-83, with an average length of stay per child of 12.7 days.\textsuperscript{26} During that same time, over 400,000 child days were spent in secure detention.\textsuperscript{26} Funding for secure detention represents one-quarter of the state's total budget for delinquency services.\textsuperscript{27} Due to the detainees' pre-adjudicatory status, the detention program is not intended to offer any treatment services, just custodial care. The cost of this care totals $1,200 per child per month.\textsuperscript{28}

In 1981, the Florida Legislature amended section 39.032, Florida Statutes, which governs the detention decisionmaking process. Under current law, the criteria for admitting a child to detention excludes only the first-time accused misdemeanant, and even that child may be admitted if there are reasonable grounds to believe that he will fail to appear at any hearing.\textsuperscript{29} In addition, the role of law enforcement and the state attorney in making the detention decision was significantly broadened by the 1981 statutory change.\textsuperscript{30} This legislation was passed in direct reaction to a change enacted in 1980 which had restricted the use of detention. The 1980 criteria created a storm of protest from the law enforcement community. Specific cases of juveniles who were arrested for certain crimes but could not be detained caused enormous frustration. The perspective that "these youths must learn a lesson by being locked up" was heard statewide. The fact that detention is not to be used as punishment, that due process prohibits the arresting officers from assuming the role of judge, and that the "lesson" learned in detention may not be corrective but, on the contrary, destructive were not considered. The 1980 change was depicted to the 1981 legislature as promoting criminal behavior yet the facts did not justify this depiction.

During the 1980-81 year, detention populations were reduced by twenty percent without any significant negative effect.\textsuperscript{31} During that period, the number of arrested juveniles who were released pending adjudication increased less than one half of one percent, rates of appearance at scheduled hearings were equal to previous years, and total ar-

25. \textit{Id.}
26. \textit{Id.}
27. FLA. DEP'T HEALTH \& REHAB. SERV., PUBLIC HEARINGS MANUAL 79 (1983) [hereinafter cited as \textit{HEARINGS MANUAL}].
28. \textit{Id.}
29. FLA. STAT. \S\ 39.032 (1981).
30. \textit{Id.}
31. POLICY ANALYSIS, \textit{supra} note 16.
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rests of juveniles dropped by ten thousand. According to the 1983 Governor’s Office policy report:

[T]he 1980 detention criteria, which were designed primarily to reduce the detention rate for juveniles charged with victimless offenses and minor property offenses, achieved their intended purpose and should be considered a successful experiment in the effort to increase the cost effectiveness (reduce the number detained without increasing the juvenile crime rate) of detention practices.

After the criteria were expanded in 1981, the detention rate increased forty percent. As a result, the need to expand existing centers and to build new facilities has become a major fixed capital and operating budget issue. The 1981-82 state budget contained $8,000,000 of fixed capital for secure detention centers, and a biennial operating cost of nearly $35,000,000. The 1983-84 operating budget for detention services is $20,400,000 and an additional $2,500,000 for fiscal year 1984-85 is being requested by HRS. Detention has become one of Florida’s major child-intensive growth industries.

Contrary to the intent of the federal Juvenile Justice Act of 1974, the clientele of Florida’s secure detention centers now includes a population of status offenders—youth who are held in contempt of court for violating dependency orders. These orders stem from truancy, runaway, or similar non-criminal behavior. Surveys of Florida’s secure detention centers during the past two years have revealed as many as ten percent of those detained were status offenders serving specified sentences by order of the court. These youths remain in detention twice as long (24.8 days average) as the youths held pending delinquency hearings. Secure detention certainly curtails status offense behavior during the term of incarceration. The child cannot run through the concrete block walls or steel doors, there are no parents to disobey, and attendance at the detention school is mandatory. Such confine-

32. Id. at 10.
33. Id. at 10-11.
34. Id. at 11.
35. FLA. DEP’T HEALTH & REHAB. SERV., SUPPLEMENTAL BUDGET REQUEST 4 (fiscal year 1984-5).
37. POPULATION ANALYSIS, supra note 24.
38. COMMITTEE ON HEALTH AND REHABILITATIVE SERVICES, FLA. HOUSE OF REP., BILL ANALYSIS PCB 3 (relating to status offenders, 1983) [hereinafter BILL ANALYSIS PCB 3].
ment, however, operates to inflict harm by aggravating the complex problems which gave rise to the original status offense behavior. Due to family, school and court frustration, and the dearth of appropriate treatment resources, incarceration has become the expedient option. But detention of behaviorally dependent children is an expensive mistake, one which reduces the chances of resolving those children's real problems.

An alternative to secure detention, the non-secure detention program, has been established in each of the regions now served by a detention center. Non-secure detention provides intensive supervision to those youths who are in pre-hearing status at one-third the cost of secure detention placement. These youths remain with their families, are required to maintain regular school attendance, and adhere to defined activity limitations. During 1982-83, 5,873 youths were placed in non-secure detention status, averaging 364 youths on a daily basis. The success of this alternative to secure confinement is well documented. Most youths appear at their hearings and are not accused of additional offenses in the interim. Due to budget constraints and a longer length of stay required in non-secure status, 21.4 days versus 12.6 for secure, the program continually operates at capacity.

With minimal modification, the state should re-adopt the set of detention criteria passed by the 1980 Florida Legislature which restricted the use of secure incarceration while not presenting any significant threat to the integrity of the court process. Currently the non-secure detention program serves one-quarter of the total average daily population of youth in detention status. The program should be expanded to serve one-half of all detained youths as a cost effective alternative to secure confinement. This shift of resources would effect an operating savings of some $5,000,000 in addition to removing the necessity for capital construction for expanded and new detention facilities. The practice of utilizing secure detention as punishment for repeated status offense behavior should be curtailed. The fiscal cost of this practice is overshadowed only by the human cost to the child. Expansion of well-staffed non-secure shelters at which behaviorally dependent youth receive diagnostic and therapeutic services is the most cost-

39. CHILDREN, FAMILIES & YOUTH PROGRAM OFFICE, HRS, KEY INDICATORS REPORT (1982-83) [hereinafter cited as KEY INDICATORS REPORT].
40. Id.
41. POPULATION ANALYSIS, supra note 24.
effective alternative to detention incarceration.

C. Community Control

Community control is a court-ordered non-residential supervision program. A youth is required to perform specified tasks such as community work service or payment of restitution and adhere to certain behavior limitations such as observing curfews and attending school or a job training program for a period of time designated by the court. Failure to obey the community control order results in the commitment of the child to HRS. Each year less than ten percent of the clients supervised on community control have failed the program and received commitment status. During 1982-83, 22,320 youths received community control sanctions at a per client cost of approximately $350.

Since 1980 the community work service and restitution components of the program have been expanded. During 1982-83, more than 150,000 hours of community work service, and $500,000 of victim restitution payments were generated by community control clients. The program operates at a per client cost which averages one-tenth of the costs of the residential program, a clearly cost effective alternative.

The community control program's direction toward expansion of work service and restitution should be continued. The caseworker's role in this regard should involve creative involvement with the private business sector in each community. Employment skills training, job development and placement services should become primary functions of the community control program so that clients can achieve economic and personal success when their supervision is completed.

D. Commitment

The percentage of juveniles who are committed by the court to HRS for treatment services is eight percent of all youths who are referred to HRS for alleged delinquency. This is double the commitment percentage of five years ago. Since the early 1970s the array of

43. Policy Analysis, supra note 16 at 12.
44. Id.
45. Telephone interview with Mr. Dix Darnell, Department of Health and Rehabilitative Services, Children, Youth and Families Program Office (Nov. 1983).
46. Id.
47. Policy Analysis, supra note 16 at 15.
programs available as commitment options has expanded to a remarkable degree. Fifteen years ago all youths committed for treatment in Florida were sent to training schools. In 1982, training schools admitted approximately thirty-two percent of all committed youth. The remaining two-thirds were served by numerous alternative programs ranging from non-residential special intensive groups and marine science institutes to residential wilderness programs, halfway houses, group treatment homes, and START centers. During 1982-83, approximately 3,200 youths were committed to community alternative delinquency programs. These youths were served at less cost and with a higher degree of success than those committed to training schools.

Florida operates three training schools: the A.G. Dozier School in Marianna, the A.D. McPherson School in Ocala, and the Florida School for Boys in Okeechobee. The latter institution is operated by the Jack and Ruth Eckerd Foundation under contract with the state. During 1982-83, the training schools housed a total average daily population of 1,016 youths. The average population over the third quarter of 1983 has been reduced to approximately 850 per day. The cost per client of an average six-month stay in training school is $6,280. Although training schools are perceived to be the "deep end" of the juvenile justice system, housing only serious offenders who have been through numerous other programs without success, statistics point to a different reality.

Over the past three years, as many as forty-five percent of training school admittees were youths who had never received treatment in an alternative program. Currently, one-third of training school clients are first commitments. Fewer than fifteen percent of the juveniles in training schools have been committed for violent offenses. Three-fourths of them are not significantly different in terms of commitment

49. CHILDREN, FAMILIES & YOUTH PROGRAM OFFICE, HRS, COMMITMENT PROGRAM DATA ANALYSIS (1982).
50. HRS, CHILDREN, YOUTH AND FAMILIES, STATISTICAL PACKAGE (1982).
51. Id.
52. Id.
53. KEY INDICATORS REPORT, supra note 39.
54. Id.
55. Id.
56. CHILDREN, FAMILIES & YOUTH PROGRAM OFFICE, HRS, COMMITMENT PROGRAM DATA ANALYSIS (1982).
57. POLICY ANALYSIS, supra note 16, at 24.
58. Id. at 16.
offenses and offense histories from those juveniles who are placed in community programs. Although state policy prohibits the placement of misdemeanants in a training school, waiver of this policy occurred over a hundred times during 1981-82. This evidence points to the randomness of placement practices which are more dependent on space availability than on an individual client’s history or specialized need.

The 1983-84 training school operating budget is $12,800,000. Unfortunately, little of this expenditure relates to appropriate mental health services or even basic supervision. Psychologists’ caseloads are at a 1:200 ratio and general supervision is the responsibility of cottage parents who earn less than $9,000 annually. Additionally, the history of treatment in the training schools has not been the provision of care “which will best serve the moral, emotional, mental and physical welfare of the child.” Corporal punishment was a prevalent practice until its use was discontinued in the mid 1970s. Physical beating to discipline children who have often been victims of child abuse over much of their lives serves neither the client nor the program. To create a system of violent punishment is tantamount to ignoring all but the toughest clients. The dilemma of training schools is whether rehabilitation will ever be feasible in an environment that houses four hundred youths in a rural setting which completely cuts off the realities of home and community. Nearly half of training school clients are age fifteen or younger. Housing several hundred young adolescents in a closed environment serves only to exacerbate emotional disturbance and to promote violent behavior.

Clear distinctions must be made between the treatment needs of serious violent youth offenders and less-serious committed youth. Departmental screening procedures should be developed which diagnose those youths with special needs such as emotional disturbances and developmental disability. Appropriate treatment resources should exist for these individuals. Violent and repeat offenders, who represent less than fifteen percent of all youths committed by the court, should receive in-
tensive therapeutic treatment in relatively small, secure programs of twenty-five to thirty beds. If proper client evaluation and specialized treatment services were available, large training schools would become an unnecessary component of the delinquency program.

E. Adult Correctional Admissions

Since 1978, the number of juveniles admitted to adult prisons has tripled from 257 in 1977-78 to 771 in 1981-82. Of the 771 juvenile admissions in 1981-82, forty percent were aged sixteen or younger. Statutory changes enacted in 1981 permit the transfer of sixteen and seventeen year-olds for criminal prosecution as adults at the discretion of the state attorney. The sole criterion for this transfer is a felony charge; no prior record needs to be in evidence. Although it is assumed that adult court transfer should be limited only to those juveniles who are accused of violent crimes or have proven themselves not amenable to juvenile court handling, the statutes do not set such limitations on prosecutorial discretion. Under current law, a sixteen year-old accused of grand larceny (theft of property valued at $100 or more) may be tried as an adult, subjected to six months in jail pending trial, and be incarcerated in the adult prison system if found guilty.

Of the juveniles sentenced to the Florida Department of Corrections in 1981-82, twenty-five percent had no prior arrests on record. The median sentence for these juveniles was three years with a majority of them having been found guilty of non-violent property offenses. Burglary accounted for forty-four percent of these commitments. By placing a sixteen year-old burglar in prison for three years, the state pays an initial $30,000 installment on a long-term debt. According to the Youthful Offender Program Evaluation, these inmates are frequently the target of severe exploitation and abuse by older, stronger inmates. Prison, especially for the young, is a violent environment in which the powerful prey upon the weak. A victimized offender cannot

65. Id.
66. POLICY ANALYSIS, supra note 16, at 25.
68. Id.
69. Id.
70. POLICY ANALYSIS, supra note 16, at 25.
71. Id.
be rehabilitated, and our prisons are producing hundreds of youthful victims each year who will return to their communities worse off than they were before being sent away.

The authority to transfer a juvenile to criminal court should be a judge's decision, after the facts have been presented in a waiver hearing. The waiver process should only be utilized for those juveniles who commit serious crimes or whose records indicate that previous attempts at juvenile court sanctions have failed. The Department of Corrections should develop specialized programs which emphasize vocational training for juvenile inmates ages seventeen and under. No inmate who is diagnosed as developmentally disabled or mentally ill should be incarcerated in mainstream prison environments.

IV. Juvenile Justice and the Educational System

In examining the problems of youth who enter the juvenile justice system, the role of the school cannot be ignored. Sporadic attendance, misbehavior and educational failure are all characteristics of young people who get into trouble with the law. Although schools are responsible for the enforcement of compulsory attendance laws, few school districts in Florida have effective programs to respond to the complex reasons for a student's non-attendance or misbehavior. The misbehaving child is viewed by school administrators as a discipline problem who requires punishment. In the 1981-82 school year, over 180,000 public school students in Florida received corporal punishment on single or numerous occasions. Actual incidents of corporal punishment may number a half million or million annually. In the 1981-82 school year, over 83,000 Florida students were suspended from public school. In the 1980-81 school year, over 40,000 students dropped out of Florida's public schools, and another 112,000 were not promoted to the next highest grade. Each year, for every two graduates of Florida's schools, a third child is a dropout.

The discipline statistics are especially severe for black students. In the 1980-81 school year, black students comprised twenty-three percent of the Florida public school population but represented thirty-three percent of the non-promoted students, thirty-seven percent of the corpo-

73. Fla. Dep't of Educ., Students in Florida Public Schools 29 (1981-2).
74. Fla. Dep't of Educ., Students in Florida Public Schools 28 (1981-2).
75. Id. at 23.
76. Id. at 24.
rally punished students, thirty-eight percent of the suspended students and forty-three percent of the expelled students. In 1979, the federal Office of Civil Rights released a study which ranked the nation’s one hundred worst school districts for overrepresentation of black students among those who were corporally punished, suspended or expelled. Ten Florida school districts were among those one hundred. These districts are ten of the twelve largest Florida school districts, encompassing nearly sixty percent of the state’s public school population.

The Florida Alternative Education Act was established in 1978 to promote educational services which are “positive not punitive” and are directed to provide special help to the disruptive and unsuccessful student. A majority of Florida’s school districts have implemented alternative education programs. An evaluation of these programs by the Governor’s Office of Planning and Budgeting in 1981 revealed that most district programs offered little in the way of specialized instruction or support services. The majority of districts operated in-school suspension and detention programs, without any cooperative planning within districts, across districts, or with the Department of Education. Without the proper implementation of the Alternative Education Act, the punitive and exclusionary practices of Florida’s public schools have continued to generate drop-out rates and a population of under-educated, unskilled, frustrated and desperate young people. Additionally, the 1983 Florida Legislature’s initiative in passing the RAISE Bill, aimed at making graduation requirements more stringent, may result in even higher drop-out rates. RAISE ignores the special needs of a large population of students who are failing under current educational standards.

After five years, the Alternative Education Act should begin to show a positive impact on exclusionary discipline practices. To that end, clear performance measures for district alternative education programs should be developed by the Department of Education and utilized for evaluation purposes. The practices of corporal punishment and suspension should be limited by statutory amendment. It is not in the

77. Id.
81. Id.
best interest of either the child, the school, or the state to continue to over-utilize these ineffective punishment methods. The emphasis of the RAISE improvements should be expanded to include increased counseling and guidance services and expanded remedial education components. Unamended, the RAISE initiative will result in higher drop-out rates than presently exist. An enhanced career education program should be developed utilizing the technical expertise of private business and community agencies to promote improved job training and employment opportunities for Florida’s student population.

V. Conclusion

The purpose of Florida’s juvenile justice system is appropriately stated in section 39.001, Florida Statutes, as the intent “to protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation. . . which are consistent with the seriousness of the offense. . . .” 82 This state has established, through statutes and programs, a proper framework for the achievement of that rehabilitative purpose. Certain needed adjustments, such as those suggested in this article, would bring our system more expeditiously toward this rehabilitative goal.

82. FLA. STAT. § 39.001 (1979).
Dealing with Child Abuse and Neglect: A Prosecutor's Viewpoint

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I. Introduction

Child abuse and neglect are among the most critical problems social service and law enforcement agencies face in Florida. Abuse and neglect take many different forms and arise from a wide range of causes. The problem is one of the most complex issues faced by law enforcement agencies because conflicting medical, social and legal considerations make it very difficult to formulate any set policy in determining what is necessary to protect the child and the public. For example, the development of the facts in child abuse cases requires a comprehensive child protection team effort. The Florida Legislature has made some significant advances in this area, but it is imperative that well-funded child protection teams composed of well trained counselors, investigators and medical experts be available on a twenty-four hour basis to respond to this critical community problem.

It is just as important to have the proper resources to treat children who are victims of abuse and neglect. Convenient psychiatric, psychological and medical assistance should be immediately available to all children. Long term care and treatment should be provided when needed to deal with the horrible scars left by abuse and neglect. Long term follow-up should take place to make sure the child is protected against future abuse and neglect. Too often a child does not receive adequate follow-up treatment for abuse and neglect because he cannot afford it. Florida must take steps to see that this care and treatment is available for every child who is the victim of abuse and neglect. The state must also provide programs to correct the behavior of those guilty of abuse or neglect. Many offenders and their families need assistance to correct behavior that has caused the abuse. We must provide family support programs throughout the state to provide the medical, psychological and social support and treatment necessary to rebuild the family.
This article concentrates on the legal aspects of abuse and neglect from a prosecutor’s viewpoint. It discusses such topics as the problems involved in the detection and reporting of child abuse and neglect; the crucial need for thorough investigation of these cases; the emergency protective powers available; juvenile dependency proceedings; and the various powers of disposition available. The article suggests various reforms that are urgently needed and calls for the provision of financial resources to investigate and treat problems of abuse and neglect in children. But all the laws in the world will mean nothing unless we provide the financial resources to investigate and treat abuse and neglect.

II. Conflicting Types and Sources of Child Abuse and Neglect

The following hypothetical fact patterns demonstrate the conflicting forms and sources of child abuse and neglect. They demonstrate the need for flexibility and sensitivity in determining the appropriate disposition of each case.

A. Physical Abuse

A father is a stern taskmaster who loves his daughter. He paddles her for poor marks in school and becomes obsessed with her making “straight A’s.” As a consequence he beats the child and inflicts serious physical injury requiring medical treatment.

A stepmother, frustrated at her husband’s obvious preference for his own children over her own, tortures her stepchildren by burning them with lighted cigarettes and beating them with a belt when they do the slightest thing wrong.

A father physically abuses his entire family when he drinks. When he is not drinking, he is a gentle, loving father.

A mother’s live-in boyfriend has a long criminal record of violent crime and domestic violence. He beats, kicks, and strikes her children, whose bruises are reported by a teacher.

A young, single mother lives with her three children in poverty. She has few employable skills. She is without family in the area. Her boyfriend has left her. The six year-old has a fever; the three year-old is throwing up; the one year-old will not stop screaming. She
slaps the baby in the head as hard as she can in frustrated despair and anger. He falls unconscious and is taken to the emergency room suffering serious injury.

Each case is an example of child abuse, but each case must be looked at individually, based on the people involved, to determine what combination of treatment and punishment will work to protect the child and to make sure the offender never does this again to anyone.

B. Neglect

A mother of four whose husband makes enough to support the family totally neglects her children. She watches television all day and lets the children fend for themselves. The baby lies in her crib in her own waste. Neighbors complain and counselors respond to find the baby dying and all the children suffering from malnutrition. The mother is determined to be of average intelligence and mentally competent.

A young, single mother works and goes to school at night in order to obtain a better job. The children are left by themselves. Sometimes she remembers to leave food. One child is found wandering in the neighborhood with a high fever. All the children are found to be ill with a virus they have had for two weeks. They have not been treated, nor have they seen a doctor.

The wealthy parents supply their child's every material need and make sure he has "round the clock supervision." Yet the parents spend little time with the child; they show him no affection, and are uninterested in his activities. The child becomes withdrawn and morose. He does poorly in school. His peers tease him as being different.

Each case is an example of neglect but different sanctions and treatment would be appropriate in each case and the last case could never be proven in a court of law. This case raises the question as to when or at what point government should intervene.

C. Sexual Abuse

A father is a successful mid-management professional. Business pressures and subsequent financial reverses cause him to start drinking to excess. During these drinking episodes, he has sexual relations with his six year-old daughter. She tells her mother who consults the
family physician. The child loves her father. The mother does not want the family destroyed. She wants treatment for the father and for her daughter in order to help her cope with what has happened to her.

A sixty year-old activities director at a camp fondles a nine year old girl who is a student at the camp and inserts his finger into her vagina. The child's family is outraged and demands the maximum prison sentence. The offender has no prior record and is considered an excellent counselor by teachers and parents. Every psychologist and psychiatrist who examines him says he is a mentally disordered sex offender who would benefit from extended outpatient treatment.

A boyfriend beats and rapes the twelve year old daughter of the woman he lives with.

Each of these cases is an example of sexual abuse against a child, where different sanctions and treatment would be appropriate. All of these hypothetical situations demonstrate the need to look at each case on its own merits. One case may require vigorous criminal prosecution of the offender and a request for a lengthy prison sentence. Another case may require sensitive treatment of an entire family by a juvenile judge in a dependency proceeding. Other cases will require both remedies. Every case of child abuse and neglect requires a sensitive, thoughtful analysis by all concerned of what is best for the child and what will protect others from such conduct in the future. The answer may often be based more on the intuition of those skilled in the handling of child abuse cases than on any doctrinaire legal position or philosophy. Yet, the law will inevitably play a role, especially in attempting to ensure due process for those suspected of child abuse. The key to each case of child abuse is to learn the facts about the abuse, its causes and the family's social and medical history. Problems of proof may prevent a criminal prosecution otherwise warranted. Lack of a full social history may cause the court to award custody to an inappropriate family member. The full development of the facts is as important as the legal issues involved.

III. Detection and Reporting of Child Abuse and Neglect

An effective detection and reporting system must be developed in order to adequately address the problem of child abuse. The one year-old who is beaten by a parent cannot report it and cannot dispute the
parent's claim that he fell out of the crib. Florida has taken significant steps to develop an effective reporting mechanism which must be publicized and perfected. Florida's child abuse reporting mechanism is spelled out in its statutes.\(^1\) Anyone having knowledge or a reasonable suspicion that a child is abused or neglected in Florida must report such knowledge or suspicion to the Florida Department of Health and Rehabilitative Services (HRS).\(^2\) Knowing and willful failure by anyone required to report known or suspected child abuse or neglect or the knowing and willful prevention of another from making such a report is a second degree misdemeanor.\(^3\) The report is made to the statewide Child Abuse Registry on a toll free telephone or to the local office of HRS. Immunity from liability is provided for anyone making a report in good faith, and the reporter's confidentiality is respected.\(^4\) Relatives are usually the first to detect abuse and neglect. These relatives often have conflicting motivations because while wanting to protect the child they may want to see the offender helped rather than punished and are afraid the state will only take punitive action. Moreover, they may be fearful of retribution if they report the abuse. One goal of any system

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2. *Id.* § 415.504.
3. *Id.* § 415.513.
4. *Id.* § 415.511. In addition to immunity, the statutory scheme contains many other provisions designed to encourage reporting and facilitate the enforcement process. For example, the name of any person reporting child abuse or neglect may not be released except to certain authorized persons, absent the written consent of the reporter. *Id.* § 415.51(5). A reporter, however, may be called as a witness by HRS or the State Attorney, in a proceeding involving the child who is the subject of a report. The fact that such person made the report may not be disclosed. *Id.* § 415.51(5). Anyone releasing the name of a reporter, except as authorized, is guilty of a second degree misdemeanor. *Id.* § 415.513(3).

No communications except communication between an attorney and his client shall be privileged in any case of child abuse or neglect and no privilege except the attorney/client privilege shall constitute grounds for failure to report abuse and neglect, failure to cooperate with the investigation or failure to give evidence in a judicial proceeding relating to abuse or neglect. *Id.* § 415.512.

The statute presents a problem which must be sensitively handled by prosecutors and police. If a reporter expects confidentiality, he will be upset if he is subpoenaed and made to testify. Thus, on first contact with a reporter, the investigator should stress the fact that the witness was the reporter will not be revealed. However, the reporter should be made to understand that in cases in which it is imperative for the State to proceed in order to protect the child or the public, he may be called as a witness. Clear communication at the outset of cases can avoid many problems with a witness in subsequent proceedings.
must be to develop public confidence that, when reported, the case will be handled sensitively and fairly and the reporter will be shielded from retribution and harassment. As confidence is developed, the public must also be advised through public service announcements, neighborhood and Parent-Teacher Association meetings, churches and schools, of the need to report abuse and neglect.

After family members, teachers and doctors are the second most likely group to detect child abuse and neglect. However, teachers are often fearful they will be sued or called on the carpet by an angry parent in the principal’s office. Each school system should make sure all personnel are advised of the critical need for reporting and the immunity provided by the reporting statute. Emergency room doctors and pediatricians are also key observers. Specialists can often tell that the seemingly innocent broken leg of a three year-old, reported as suffered in a fall, was in fact caused by a severe blow. It is important that the medical profession train physicians to identify child abuse and that all child protection teams are staffed with doctors specially trained in such detection. The diagnosis of a sexually transmitted disease in children is a significant indicator of possible sexual abuse. Early detection followed by immediate investigation is often the key to successful disposition of the case.

IV. The Need for Thorough Investigation

Successful efforts against child abuse will succeed only if there is a thorough investigation by competent law enforcement agencies along with skilled counselors and physicians functioning, whenever possible, as a team. Law enforcement officers and counselors should be trained to develop legally sufficient proof of the abuse or neglect. Counselors should develop a thorough and fair social history of the child, the offender and the family to determine the appropriate disposition of the case. If initial investigation indicates child abuse or neglect, the investigators should be able to consult with prosecutors skilled in dependency matters and criminal prosecution to obtain advice on any legal problems which may arise during the investigation.

Investigators should have access to experts skilled in pediatric trauma and rape treatment. Laboratory tests revealing a sexually transmitted disease in a child is important, although not conclusive, evidence of sexual abuse. Child abuse is one of the worst ills of any community and sufficient medical and laboratory resources should be committed to assure a full investigation. When a child is the suspected
To be completed
Dependency proceedings or through criminal prosecutions. Florida Statutes Chapter 827 categorizes criminal child abuse as Aggravated Child Abuse, Child Abuse and Negligent Treatment of Children. Of course, criminal statutes defining homicide, kidnapping, sexual battery and incest apply as well.

Dependency proceedings are governed primarily by Florida Statutes Chapter 39, "Proceedings Relating to Juveniles," Parts I and III. If a child is adjudicated dependent, the court may place him under protective supervision or commit him to the temporary or permanent custody of others. A child who is found by the court to be abused or neglected is designated a dependent child. If a parent who is capable of providing support fails to provide that support and either makes no effort or a marginal effort to communicate with the child for six months, the child is "abandoned." A child is "abused" by "any willful act that results in a physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired." A parent "neglects" a child by depriving or allowing the child to be deprived of any basic necessity, or by permitting the child to live in an environment where his health, physical or otherwise, is in danger of significant harm. The definitions used in the


7. See infra, notes 46 through 84 and accompanying text.


9. Id. § 39.01(1)

“Abandoned” means a situation in which a parent who, while being able, makes no provision for the child’s support and makes no effort to communicate with a child for a period of six months or longer. If a parent’s effort to support and communicate with a child during such a six month period are, in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned.

Id.

10. Id. § 39.01(2).

11. Id. § 39.01(26).

“Neglect” occurs when a parent or other legal custodian, though financially able, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment or permits a child to
juvenile statutes are fairly straightforward except for the confusion generated by the term “financially able” in the definition of “neglect.” 12 The financial ability requirement was added by the Florida legislature in 1978 to prevent a child from being taken from his parents simply because they are poor. 13 This requirement may, however, preclude the protection of a child whose parent is poor but who has some condition other than poverty that prevents him or her from being a proper parent.

The Florida Third District Court of Appeal addressed this issue in State v. M.T.S. 14 The state petitioned the court to declare dependent a two week-old baby displaying symptoms of drug withdrawal and brain damage. 15 The mother was hospitalized for a mental condition, had cut her wrists, suffered from a hereditary mental illness, had another child in foster care, and her sole means of support was $220.00 per month from social security. 16 The court found the child was not abandoned for a period of six months or longer as required by statute 17 It held the child was not neglected because the mother was not financially able to care for the child and affirmed the trial court’s order denying the petition for dependency. 18 The appellate court rejected the contention that the trial court had inherent jurisdiction to protect the child and held that “Chapter 39, supra, constitutes the sole and exclusive means by which the circuit court can declare a child to be dependent.” 19 According to the court, the legislature had supplanted and limited the old common law doctrine of parens patriae and any remedy for parental maltreatment of children was strictly determined by statutory definition. 20 Calling it a “tragic oversight,” the court said “[o]bviously, there is a hiatus in Chapter 39, whereby, a child of a parent who is impover-

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12. Id.
14. 408 So. 2d 662 (Fla. 3d Dist. Ct. App. 1981), petition for review denied, 419 So. 2d 1200 (Fla. 1982).
15. Id.
16. Id.
17. Id.
18. Id. at 662-63.
19. Id. at 663.
20. Id.
ished and suffering from mental illness, drug abuse or alcoholism will not be protected for six months after the onset of the parent's illness." 21 Following the Third District Court of Appeal's rationale, children whose parents are poor cannot be declared "neglected" because their parents are financially unable to provide for them. An abandonment theory gives no protection for a period of six months. 22 It appears, by statutory definition, that the children of poor parents are not entitled to the same quality of protection as children of more affluent parents. The Florida Fourth District Court of Appeal in *Wright v. State* avoided this problem by considering "neglect" as composed of two different categories: 1) deprivational neglect and 2) environmental neglect. 23 The court held that the term "financially able" applied only to the parent who deprived the child of necessary food, clothing, etc., under the first prong of the "neglect" definition and not to the parent who permitted a child to live in an environment which impaired his health under the second prong. 24 The court then stated:

That is not to say, however, that poverty could never constitute a defense to a charge of neglect bottomed upon an allegation of harm resulting from an unhealthy environment. We hold only that the burden is on the parent or other legal custodian to come forward with evidence that the condition was unavoidable because of poverty, under such circumstances. 25

The Fourth District Court of Appeal has indicated financial inability may not even be a bar to a finding of dependency in a case of deprivational neglect. In the case *In Interest of J.L.P.*, 26 that court rejected the mother's contention that since she had never had custody of the child she could not legally neglect him. The court held that both neglect and abuse could be established prospectively by evidence, based on the mother's current condition, that neglect and abuse would occur if the child were placed in her care. 27 The court did not directly address

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21. *Id.*
23. 409 So. 2d 1183 (Fla. 4th Dist. Ct. App. 1982).
24. *Id.* at 1184-85.
25. *Id.* at 1186.
26. 416 So. 2d 1250 (Fla. 4th Dist. Ct. App. 1982).
27. *Id.* at 1252. The court further stated: "Under the statutes, we hold that in order to sustain a final order of permanent commitment because of neglect or abuse, there must be clear and convincing evidence that the child has been or will be neglected or abused." *Id.* (emphasis added, footnotes omitted).
Child Abuse and Neglect

the financial ability issue but simply quoted Wright, saying:

We are not insensitive to appellant's plight, which is woeful, and her circumstances are a stark reminder that life can be wretched in this country at this time for the poverty stricken. Furthermore, as this court said in Wright v. State, 409 So. 2d 1183, 1184 (Fla. 4th DCA 1982),

The purpose of the phrase "financially able" in subsection (27) is to ensure that financially disadvantaged parents may not be divested of their children simply because they are poor. It does not, however, constitute a license for child abuse for either rich or poor. We need not draw that fine line which the circumstances of some future case will require of a court confronted with a deprivation of necessary food, clothing, shelter or medical treatment. The term "financially able" rather clearly applies in that situation and poverty, under appropriate circumstances, may be found to constitute a bar to a finding of dependency. 28

The court in J.L.P. could have based its decision on a finding of abuse alone, thus making financial ability irrelevant. Nonetheless, these cases indicate the Fourth District, in attempting to protect the child, will limit the impact of the financial ability requirement as much as possible. 29

An epilogue to the M.T.S. case is that during the period in which the state appealed the trial court decision, the child's mother died. After the Third District Court of Appeal ruled, the state filed a dependency petition alleging neglect on the part of the child's father who was unknown even to the child's mother. Based upon the neglect allegation against the father and following a diligent search for him, the child was adjudicated dependent and placed in the temporary custody of the state.

An attempt was made in the 1983 Florida legislative session to amend the neglect definition but the legislature did not act on the proposal. One other aspect of the definition of abuse and neglect deserves mention. A parent legitimately practicing his religious beliefs, who as a result of those beliefs fails to provide needed medical treatment for his child, shall not be considered abusive or neglectful for that reason

28. Id.
alone. However, the court may order that the child receive medical services if his physical condition requires it.

In cases of child abuse and neglect, prosecutors have the following options: 1) prosecute criminally for child abuse and seek sanctions against and treatment of the offender; 2) file a petition for dependency seeking treatment, supervision and protection of the child; or 3) do both. In making a decision about how to proceed the following considerations are important:

A. Burden of proof

In criminal prosecutions the state must prove its case beyond and to the exclusion of every reasonable doubt. In dependency proceedings, the state has a much lesser burden of proof since it is required to establish a state of dependency by a preponderance of the evidence. In many cases, the child may be too young to testify and there may be no independent witnesses, no confessions and insufficient evidence to make a circumstantial case against the parent criminally. The dependency route may be the only alternative.

B. Effect of prosecution on the child

In some cases the experience of reliving the abuse or neglect as he testifies in the formal setting of a courtroom before a judge and jury may be too traumatic for the child. Florida law allows the videotaping of victims under the age of twelve in sexual battery and criminal child abuse cases. This provision, while still requiring that a judge preside, helps to alleviate the formal setting of a normal court proceeding. After balancing the interests, however, all involved may conclude that the dependency route is preferable in order to minimize the emotional strain on the child. In dependency proceedings, the child will appear before a judge of the juvenile division of the circuit court in a more informal, less threatening setting.

31. See Ivey, 319 So. 2d at 59.
33. Id. § 918.17 (1983). See also articles by Haas and Hoffenberg in this issue.
C. Culpability of the offender

Oftentimes the parent is a well-meaning, loving parent who went too far or did not know how to cope. In such cases, criminal prosecution would not be appropriate.

D. Punishment of the offender and the need for leverage for treatment

Although removal of a child may be a severe punishment to a parent, in other cases it will be inadequate. The only means of securing punishment for malicious offenders is through criminal prosecution. Punishment, including probation if appropriate, may also provide an effective leverage for treatment of an offender who needs to be pushed to treatment.

E. Deterrence

A prosecutor must constantly consider a sentence which deters others from committing such offenses in the future. Child abuse and neglect is a serious community problem and criminal prosecution is the only route to full exposure and deterrence of the defendant’s actions.34

VI. Emergency Protective Powers

A child may be taken into custody by a law enforcement officer or representative of HRS prior to the initiation of court proceedings if the officer or agent has reasonable grounds to believe that the child

34. The following statutory goals should govern the decision as to how to proceed in all cases of child abuse and neglect:
   1. “To assure . . . (the child). . . the care, guidance and control, preferably in (his) own home, which will best serve the moral, emotional, mental and physical welfare of the child and the best interests of the state.” FLA. STAT. § 39.001(2)(b) (1983).
   2. “To preserve and strengthen the child’s family ties whenever possible. . . .” Id. § 39.001(2)(e).
   3. To deter the offender and others from committing similar acts in the future. Id.
   4. To make sure the applicable laws “are executed and enforced as will assure the parties fair hearings at which their rights as citizens are recognized and protected.” Id. § 39.001(2)(d).
has been abandoned, abused, or neglected, is suffering from illness or injury, or is in immediate danger from his surroundings and that his removal is necessary to protect the child.\(^\text{35}\)

Once taken into custody, the child should be released to a parent, guardian, a responsible adult relative, or responsible adult approved by HRS who can properly care for the child.\(^\text{36}\) The child should not be placed in a shelter prior to a court hearing unless shelter is required to protect the child, or he has no parent, legal custodian, or responsible adult relative to provide supervision and care for him.\(^\text{37}\) A "shelter" is the statutory term for a residential facility designed to provide temporary custodial care for dependency children.\(^\text{38}\) In abuse cases, when counselors and medical experts agree that the home is otherwise appropriate and safe, efforts should be made to keep the child in the home with a responsible adult and to remove the offender from the home.

The Florida Rules of Juvenile Procedure require that a detention hearing be held within twenty-four hours after a child has been taken into custody, excluding Sundays and legal holidays.\(^\text{39}\) At the detention hearing the court must determine whether the placement of the child in a shelter is necessary to protect him, or is necessary because there is no one to whom the child can be released; whether placement in a shelter is in the best interest of the child; and whether probable cause exists to believe that a child is dependent.\(^\text{40}\) In determining probable cause at a detention hearing, the court must use the standard of proof necessary for an arrest warrant and may base its findings upon a sworn statement or sworn testimony.\(^\text{41}\) The detention hearing is not adversarial in nature, and hearsay evidence is permissible.\(^\text{42}\)

No child shall be held in a shelter longer than fourteen days with-

\(^{35}\) Id. § 39.401(1)(b) (1983).

\(^{36}\) Id.

\(^{37}\) Id. § 39.402(1)(a)-(b) (1983).

\(^{38}\) Id. § 39.01(31) (1983).


\(^{41}\) Fla. R. Juv. P. 8.040.

\(^{42}\) Id. See Moss v. Weaver, 525 F. 2d 1258, 1260 (5th Cir. 1976). State v. I.B., 366 So. 2d 186 (Fla. 1st Dist. Ct. App. 1979). See Moss v. Weaver, 525 F. 2d 1258, 1261 (5th Cir. 1976); Moss and I.B. are delinquency cases, but the sections of the Florida Rules of Juvenile Procedure which govern detention apply to both dependency and delinquency.
out an adjudication of dependency nor longer than thirty days following an adjudication without the entry of an order of disposition. The statute provides for the extension of the twenty-four hour and fourteen day time periods described above, but the language providing for such extensions is confusing and needs to be revised by the legislature. Greater time is often needed to prepare for trial. Allowing a pre-adjudication shelter period of twenty-one days, which is the period for delinquency detentions, is preferable. The statutory standard for extending the shelter periods should be the same as the delinquency standard which is "good cause."

In any case of child abuse or neglect, it is imperative that immediate steps be taken to provide medical treatment and counseling for the child. Often, the mental and emotional trauma suffered by the child is as great as the physical injury. In cases of sexual abuse there may be no physical injury but the emotional trauma may be severe. Every effort must be made to secure appropriate counseling for the child when it is necessary, particularly in cases in which the parent or custodian cannot afford to pay for such treatment. Generally, the parents and the child must consent to examination and treatment, but Florida law provides for emergency treatment in certain situations.

VII. Juvenile Dependency Proceedings

Dependency proceedings are initiated by a petition for dependency "filed by the State Attorney, authorized agent of the department, or any person who has knowledge of the facts alleged or is informed of them and believes that they are true." The proceeding is governed by the Florida Rules of Juvenile Procedure. The essential parties in a dependency proceeding are the petitioner, the child and any person required by law to be summoned. Parents and legal custodians, actual custodians, and guardians ad litem are among those required to be summoned. Foster parents can have standing in dependency proceedings as the actual, if not legal custodians, of a child; their special status is recognized by Florida law. It appears it is more important to be, or

44. Id. § 39.402(9)(a); FLA. STAT. § 39.03(7) (1977).
47. FLA. R. JUV. P. 8.340.
to have been, an actual custodian of a child than to be a relative in gaining standing in a dependency proceeding.\textsuperscript{50} Previously, Chapter 39, Florida Statutes, contained a provision requiring placement of a dependent child with able relatives, if possible, rather than in foster care.\textsuperscript{51} Thus a relative had standing to intervene in a dependency proceeding. However, this provision has been repealed. Now, the law only provides for notice and although relatives are to be notified in the case of a permanent commitment where parents are dead or unknown, the court now may exercise discretion as to whether to permit a relative to intervene.\textsuperscript{52}

Insolvent parents or custodians have a right under the Rules of Juvenile Procedure to court-appointed counsel in cases involving permanent commitment and where criminal child abuse charges might result.\textsuperscript{53} This gives a parent a greater right to appointed counsel than that spelled out recently by the United States Supreme Court in \textit{Lassiter v. Department of Social Services}.\textsuperscript{54} In that case, the Supreme Court held that parents had a right to appointed counsel only in those cases involving allegations which could result in criminal prosecution.\textsuperscript{55} However, it recognized that the states could provide and require counsel for parents in other cases as well.\textsuperscript{56} It is advisable in more complicated cases involving very unsophisticated parents, or in cases involving mentally ill or retarded parents, that counsel be appointed if the parents are indigent.

Any child who is the subject of a judicial proceeding has the statutory right to be represented by a guardian ad litem,\textsuperscript{57} but there is no constitutional right to counsel for a child in a dependency proceeding.\textsuperscript{58}

\textsuperscript{50} In the Interest of J.R.T., 427 So. 2d 251 (Fla. 5th Dist. Ct. App. 1983); In the Interest of J.S., 404 So. 2d 1144 (Fla. 5th Dist. Ct. App. 1981); In the Interest of K.S.K., 294 So. 2d 50 (Fla. 1st Dist. Ct. App. 1981).

\textsuperscript{51} \textsc{Fla. Stat.} § 39.10(6) (1977); In Re R.J.C., 300 So. 2d 54 (Fla. Ist Dist Ct. App. 1974).

\textsuperscript{52} \textsc{Fla. Stat.} § 39.41(3)(a)4 (1983); In the Interest of J.S., 404 So. 2d 1144, 1146 (Fla. 5th Dist Ct. App. 1981).

\textsuperscript{53} \textsc{Fla. R. Juv. P.} 8.290(c)(2). This procedural rule is consistent with the Florida Supreme Court's holding in In the Interest of D.B., 385 So. 2d 83 (Fla. 1980).

\textsuperscript{54} 452 U.S. 18 (1981).

\textsuperscript{55} \textit{Id.} at 31-2.

\textsuperscript{56} \textit{Id.} at 33-4.

\textsuperscript{57} \textsc{Fla. Stat.} § 415.508 (1983). \textsc{Fla. R. Juv. P.} 8.300 reflects the statutory provision and further details the duties of a guardian ad litem.

\textsuperscript{58} In the Interest of D.B., 385 So. 2d 83, 91 (Fla. 1980).
The appointment of a guardian ad litem to represent a child in dependency proceedings involving abuse or neglect is mandatory by statute. Any responsible adult can be a guardian ad litem. Parents must pay for the services of the guardian ad litem, but if they do not or are unable to pay, HRS is responsible for these fees.

The ninety-day speedy trial rule applies to dependency proceedings. It begins to run from the date the child is taken into custody or the date the dependency petition is filed whichever occurs first. If the adjudicatory hearing has not begun within ninety days, or an extension is granted, the dependency petition is dismissed with prejudice. Thus, in determining whether to take a child into custody or file a petition, investigators must act promptly to protect the child from abuse or neglect while at the same time assuring themselves they have enough evidence to proceed to trial within ninety days. Once the dependency petition has been filed, the court has the authority to order the child to be examined by a physician or psychologist. The court can also order, as part of non-testimonial discovery, that the child provide samples of his blood, hair, or other bodily materials or to submit to a reasonable, physical or mental inspection of his body. There is no statutory provision that the parents, custodians, or guardians of dependent children can be compelled to submit to mental or physical examinations or evaluations.

The Florida Rules of Civil Procedure and Chapter 39 Florida Statutes provide a way to circumvent this problem. Section 39.408(1)(b) provides that rules of evidence in civil cases apply to dependency and adjudicatory hearings. Thus, when the juvenile rules are silent on an issue, civil rules may be referred to for guidance. Rule 1.360(a), Florida Rules of Civil Procedure, allows for physical or

59. FLA. R. JUV. P. 8.300(b).
60. The duties of guardians ad litem together with a description of the State of Florida Guardian Ad Litem Program are outlined in article by Hoffenberg/Scheibler in this issue.
63. FLA. R. JUV. P. 8.180(a).
64. FLA. R. JUV. P. 8.180(b).
66. FLA. R. JUV. P. 8.070(h)(i).
67. In the Interest of D.A.W., 178 So. 2d 745 (Fla. 2d Dist Ct. App. 1965).
69. In the Interest of D.B., 383 So. 2d 278 (Fla. 5th Dist Ct. App. 1980).
mental examination of a person when the physical or mental condition of the person is in controversy and there is good cause shown for the examination. This rule has been held to apply in dependency cases because the juvenile rules are silent on this issue and also because this is a rule for obtaining evidence in civil cases. A mental examination of a parent or custodian of a child may be ordered only when the mental condition of the party is directly involved in some material element of the parent or custodian's abuse or neglect and when the mental condition cannot be adequately evidenced without the assistance of expert medical testimony. Florida should adopt a statute providing for compulsory examination of parents, as well as children, in applicable abuse and neglect cases.

The court, as a condition of disposition, can order the parents or guardians of a dependent child to receive family or professional counseling to rehabilitate the child. Furthermore, nothing appears to prevent the court from requiring psychological or psychiatric examinations or evaluations of parents or custodians as a condition of a plan or performance agreement. In less serious cases of abuse and neglect where there is a high degree of cooperation on the part of the parents and the likelihood of a successful resolution is great, the parties may agree to a plan of treatment, training or conduct as provided for in Rule 8.130, Florida Rules of Juvenile Procedure. Such a plan places the dependency petition in abeyance and usually requires counseling and supervision for the family of an abused or neglected child who most often remains at home. The speedy trial requirement must be waived so that the petition may be acted on, if the court finds a violation of the plan after the ninety days have expired. The court has the power to accept or reject the plan. The plan is not an admission of the allegations of the dependency petition and successful completion of the plan can result in the ultimate dismissal of the dependency petition.

In the Interest of J.R.M., the court held that the state attorney is not a party to a plan in a delinquendy case and has no right to veto

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71. Id. at 584.
75. Id. 8.130(a)(3)(iii).
it, although he can object to its acceptance.\textsuperscript{77} The rule has now been changed, in delinquency cases, to require the state attorney's consent to defer prosecution.\textsuperscript{78} However, the court's ruling in \textit{JRM} appears to continue to apply to dependency cases and the state attorney does not have veto power over a plan developed by the parties, HRS, and the court in a dependency action.

The adjudicatory hearing is the trial at which the court initially determines whether a child is dependent. The state attorney represents the state and the hearing is held before a judge without a jury.\textsuperscript{79} Rules of evidence are the same as those for civil cases and a preponderance of the evidence is required to establish dependency.\textsuperscript{80} The parents or custodians who are charged with abuse and neglect may testify on their own behalf but must be warned of the danger of self-incrimination or the prosecutor must be willing to grant them use immunity. They may be cross-examined like any other witness. The adjudicatory hearing is open to the public except in cases involving unwed mothers, custody, sexual abuse, or permanent placement. However, the court has discretion to close any hearing to the public.\textsuperscript{81} The hearing is also open to the electronic media but, again, at the court's discretion.\textsuperscript{82}

Dependency proceedings, including the adjudicatory hearing, must be conducted pursuant to statute, and with regard for procedural and substantive due process.\textsuperscript{83} Dependency proceedings fall under the Uniform Child Custody Jurisdiction Act and that statute must be given proper regard in a dependency proceeding.\textsuperscript{84} If, at the adjudicatory hearing, the court finds the child dependent but finds that only home supervision is required, it may withhold adjudication and place the child's home under the supervision of HRS. However, in most cases, the court conducts a separate dispositional hearing after the initial dependency hearing.

\textsuperscript{77} Id. at 938-39.
\textsuperscript{78} FLA. R. JUV. P. 8.130(a)(3)(ii).
\textsuperscript{79} FLA. STAT. § 39.408(1)(b) (1983); FLA. R. JUV. P. 8.190 (c).
\textsuperscript{81} FLA. STAT. § 39.408(1)(c) (1983); \textit{See also} FLA. STAT. § 918.16 (1983).
\textsuperscript{82} \textit{See} \textit{In re Petition of Post-Newsweek Stations, Florida}, 370 So. 2d 764, 779 (Fla. 1979).
\textsuperscript{83} A.Z. v. State, 383 So. 2d 934 (Fla. 5th Dist. Ct. App. 1980).
\textsuperscript{84} FLA. STAT. §§ 61.1302-.1348 (1983); \textit{In the Interest of T.L.}, 392 So. 2d 288 (Fla. 5th Dist. Ct. App. 1980).
VIII. The Powers of Disposition

A. The Disposition Hearing

The disposition hearing is the equivalent of the sentencing in criminal cases. At this hearing the court determines what to do with a child who has been found dependent, either after the plea of the parent or an adjudicatory hearing. Although adjudicatory and dispositional hearings may be combined, usually they are separate proceedings. Although the court can proceed without a written report, at a typical hearing it receives a written predisposition report from HRS, any relevant reports such as psychological or psychiatric evaluations, and other relevant evidence. Parents or custodians, the child, and the guardian ad litem are entitled to disclosure of any information in HRS's predispositional report. The only rule of evidence in a dispositional hearing is relevancy and materiality. Written or oral information can be received into evidence for its probative value, even though the information would not be admissible at trial. Procedurally, the burden of proof shifts to the parent at a dispositional hearing.

The courts have broad powers of disposition. Among these is the power to grant HRS or another child caring agency permanent commitment of a child for subsequent adoption. Permanent commitment terminates both the rights of the parents and the jurisdiction of the court over the child. Since it is such a significant action this power is usually not exercised at an initial disposition hearing but usually occurs in subsequent proceedings.

As a less drastic alternative, the court may place a child with a parent, relative, or third person, under the supervision of HRS, with court-ordered conditions. It may commit the child to a childcaring agency, or to the temporary custody of HRS. Additionally, the court may also order that reasonable support be paid by a natural or adoptive parent for a child in the custody of an institution or person other than

85. FLA. STAT. § 39.408(2) (1983); FLA. R. JUV. P. 8.200(b).
86. FLA. R. JUV. P. 8.200(a).
90. Id. § 39.41(1)(f).
91. Id. § 39.41(4).
92. See infra text accompanying notes 103 to 126.
the natural parent.\textsuperscript{94} It may further order that the parents or legal guardian of a dependent child receive counseling.\textsuperscript{95} The court may change the supervision or custody status of a child at a subsequent proceeding without a new adjudicatory hearing.\textsuperscript{96} However, if the parents or custodians object to this modification, the court must hear all parties before any change may be ordered.\textsuperscript{97} As a matter of practice, any contested change in supervision or placement of a dependent child usually results in a full hearing. The court has the power to enforce all of its disposition orders through contempt proceedings.\textsuperscript{98}

B. Foster Care

Florida Statutes, section 409.168, a relatively new statute, mandates that certain steps be taken to ensure that children who are placed in temporary state or private agency custody do not languish in foster care.\textsuperscript{99} It specifically states that "[i]t is the intent of the Legislature that permanent placements with their biological or adoptive families be achieved as soon as possible for every child in foster care and that no child remain in foster care longer than one year."\textsuperscript{100} It provides for a performance agreement and spells out detailed procedures and time limits for the court to review the parties' performance and determine whether the child should be returned to his natural parents, remain in a foster home, or be permanently committed. It creates a right of judicial review in all cases in which children have been adjudicated dependent and have remained in continuous foster care for six months.\textsuperscript{101}

In some cases, the statute may result in the court's returning children to their home or placing them into permanent commitment for adoption prematurely. In those cases where a child's chances of adoption are virtually nonexistent, permanent commitment cuts him off for-

\textsuperscript{94} FLA. STAT. § 39.401(1)(g) (1983); Saulpaw v. Singer, 423 So. 2d 943 (Fla. 3d Dist. Ct. App. 1983).
\textsuperscript{95} FLA. STAT. § 39.41(5) (1983).
\textsuperscript{96} Id. § 39.41(1)(e).
\textsuperscript{97} Id.
\textsuperscript{98} Id. § 39.412; FLA. R. JUV. P. 8.270, 8.280; R.M.P. v. Jones, 419 So. 2d 618 (Fla. 1982).
\textsuperscript{99} FLA. STAT. § 409.168 (1983). Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st Dist Ct. App. 1981). In this case, HRS was enjoined to initiate the required judicial review. Id. at 162.
\textsuperscript{100} FLA. STAT. § 409.168(1) (1983).
\textsuperscript{101} Id. FLA. STAT. § 409.168(3)(g)(2).
ever from his natural family. Great care should be taken to avoid such situations and the legislature should consider amending the statute to permit a child to remain under foster care in extraordinary situations.

C. Permanent Commitment

Permanent commitment is the ultimate and most extreme action which can be taken by the court in dependency cases involving abuse and neglect. Permanent commitment terminates the parent’s rights over the child. The permanent loss of custody of a child is a far more severe remedy than any other available in dependency proceedings and, indeed, it is one of the most severe decisions courts can make. Since it is such an extreme remedy, courts will usually first attempt other remedies including treatment, counseling, protective supervision and foster care. They will use performance agreements to attempt to push the parents or custodian into providing a proper setting for the child. When all else fails, and the prospect for abuse and neglect continues, the court must consider permanent commitment proceedings. These will usually occur as a separate proceeding after other alternatives have been tried. There are procedural and evidentiary requirements for permanent commitment which do not exist in the usual dependency proceeding because of the significant impact on parent and child.

The United States Supreme Court has held that an indigent parent in a proceeding involving termination of parental rights is not entitled to appointive counsel as a matter of right because the parent’s interest in the custody of his child is not the same as a criminal defendant’s interest in keeping his liberty when faced with incarceration. However, Florida has held that an indigent parent is entitled to court-appointed counsel in permanent commitment proceedings. A request for permanent commitment in Florida must be initiated by a formal pleading entitled “Petition For Permanent Commitment” containing the allegations of facts necessary for such commitment. An action to have a child declared dependent and a permanent commit-

102. Id. § 39.41(4).
103. Id.
105. In the Interest of D.B., 385 So. 2d 83 (Fla. 1980); Fla. R. Juv. P. 8.260(a).
ment action may be combined. A circuit judge on his own motion may initiate permanent commitment proceedings in a dependency proceeding even if HRS does not concur in the need for permanent commitment.

A court must strictly adhere to statutory standards for a permanent commitment and make findings of facts showing why the child should be permanently committed. A court may permanently commit a child if the court finds this to be in the manifest best interest of the child and the parents have abused, abandoned or neglected the child. Courts have held that a child can be permanently committed for prospective abuse or neglect. Care must also be taken in permanent commitment cases not to overlook the due process rights of fathers who have shown an interest in their children, even though the children were conceived out of wedlock. Notice requirements to all parties are spelled out in detail by statute and rule.

The grounds for termination of parental rights or permanent commitment must be proved by "clear and convincing evidence." The Florida Supreme Court first enunciated the standard of clear and convincing proof in an adoption case which resulted from an initial dependency action. However, the language used by the court can be applied to any proceeding involving termination of parental rights. All Florida district courts of appeal have adopted the clear and convincing

107. Id. 8.260(a); Noeling v. State, 87 So. 2d 593 (Fla. 1956).
109. FLA. R. JUV. P. 8.260(f); Noeling v. State, 87 So. 2d 593 (Fla. 1956); G.S. v. State, 190 So. 2d 603 (Fla. 2d Dist. Ct. App. 1966).
115. Torres v. Van Eepoel, 98 So. 2d 735, 735 (Fla. 1957).
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standard of proof. However, the First District Court of Appeal has held that a permanent commitment proceeding is a type of dispositional hearing and that the court can accept as res judicata a prior finding that a child had been abandoned, neglected, or abused and the state need only prove, by clear and convincing evidence, that it is in the best interest of the child to be permanently committed. Requiring a petitioner to prove by clear and convincing evidence only the best interests of the child and not the child's best interest and that the child has been abandoned, neglected or abused is contrary to other Florida cases. These cases plainly hold that both of the two-prong requirements for permanent commitment must be proven by clear and convincing evidence.

In applying the clear and convincing standard the courts will go to great lengths and give parents considerable latitude in correcting the conditions generating abuse and neglect before requiring a child's permanent commitment. In one case, by the time the mother was nineteen, she had almost killed a girl in a fight, had run away from home, lived with the Hell's Angels, and attempted suicide. She tried to give her baby away at a shopping center. She refused mental treatment, vocational rehabilitation and counseling and voluntarily placed the baby in foster care. Warned by HRS that permanent commitment proceedings would be initiated if she did not assume responsibility for the child, she refused rehabilitation and gave birth to another child. When the second baby was left unattended by a babysitter, HRS picked up the baby. The mother broke most appointments to visit the sec-

116. In the Interest of T.C., 417 So. 2d 775 (Fla. 3rd Dist. Ct. App. 1982); In the Interest of J.L.P., 416 So. 2d 1250 (Fla. 4th Dist. Ct. App. 1982); In the Interest of C.M.H., 413 So. 2d 418 (Fla. 1st Dist. Ct. App. 1982); In the Interest of D.A.H., 390 So. 2d 379 (Fla. 5th Dist. Ct. App. 1980); In the Interest of J.F., 384 So. 2d 713 (Fla. 3rd Dist. Ct. App. 1980); Carlson v. State, 378 So. 2d 868 (Fla. 2d Dist. Ct. App. 1979); In the Interest of C.K.G., 365 So. 2d 424 (Fla. 2d Dist. Ct. App. 1978).


118. See In the Interest of T.C., 417 So. 2d 775 (Fla. 3d Dist. Ct. App. 1982); In the Interest of J.L.P., 416 So. 2d 1250 (Fla. 4th Dist. Ct. App. 1982); In the Interest of D.A.H., 390 So. 2d 379 (Fla. 5th Dist. Ct. App. 1980); In the Interest of J.F., 384 So. 2d 713 (Fla. 3rd Dist. Ct. App. 1980); Carlson v. State, 378 So. 2d 868 (Fla. 2d Dist. Ct. App. 1979).


120. Id. at 382.

121. Id.
ond baby despite the fact that an HRS caseworker went to her house to pick her up.\textsuperscript{122} Yet, the Fifth District Court of Appeal held that these facts fell short of the required clear and convincing proof.\textsuperscript{123}

In another case,\textsuperscript{124} the child was permanently committed at the age of three and-a-half years only after a history of abuses by the mother beginning when the child was only four weeks old. On six different occasions the child had been temporarily committed to the state as a result of parental abuse and neglect prior to the time the court permanently committed the child.\textsuperscript{125} Even though permanent commitment is a drastic measure, courts should draw the line and permanently commit a child if the evidence of abuse and neglect or prospects for it are clear and convincing, and the parents have been given numerous legitimate opportunities to rehabilitate themselves.\textsuperscript{126}

**IX. Conclusion**

Protection of a child is one of society’s most important goals. Everyone seems to agree that the family, in the long run, is the best place to provide that protection. At some point, however, the state must step in if the family fails in its obligation to the child. In Florida, the state attorneys’ offices and social service agencies can and do work together to prevent and correct child abuse and neglect. But these efforts are in vain unless the Florida legislature provides adequate resources for diagnosis, treatment, and correction of the often tragic circumstances that generate abuse and neglect. Additionally, more legislation is needed which shows a greater awareness of the magnitude and complexity of the problems which many of Florida’s children encounter. The following contains a few suggestions to help improve the current situation:

1) Child protection teams should include among their members a skilled counselor-investigator and police-investigator whose salaries make them competitive with the best in their field. These teams should be responsible for an optimum population at risk. Staff should not be assigned based on some historical caseload figure. These teams should have sufficient personnel to enable them to immediately respond to all

\textsuperscript{122.} \textit{Id.} at 382-83 (Cobb, J., dissenting).
\textsuperscript{123.} \textit{Id.}
\textsuperscript{124.} \textit{In the Interest of Contrino}, 338 So. 2d 246 (Fla. 3d Dist. Ct. App. 1976).
\textsuperscript{125.} \textit{Id.} at 247.
complaints of abuse or neglect around the clock. The staff should be trained to deal sensitively with children and families in crisis and should consider racial, ethnic and cultural differences.

2) Medical schools working with existing specialists in the diagnosis of child abuse should specially train physicians in this area and every child protection team should have immediate access to such physicians and to rape treatment centers trained in identifying sexual abuse of children. These physicians should be trained in courtroom work and should testify in dependency proceedings and prosecutions for child abuse.

3) Emergency medical, psychiatric and psychological care should be immediately available for all abused and neglected children. Follow-up care should be provided as long as the child needs it, regardless of the parent’s ability to pay.

4) Counselor-investigators should make regular follow-up visits to make sure that incidents of abuse or neglect are not recurring and that the child is receiving the support and treatment needed.

5) Convenient transportation should be provided for children to go to treatment facilities when their family or foster parent cannot afford to take them. Tragically, treatment has often been discontinued because of failure to follow-up and lack of transportation.

6) Prosecutors trained in working with children should handle abuse and neglect cases and the same prosecutor should handle a case from beginning to end. Every child protection team should have access to a lawyer skilled in dependency proceedings who will work with them.

7) A pleasant and sensitive environment should be created for children’s interviews and depositions.

8) Adequate counselors and foster care facilities should be provided. Again, these resources should be provided based on the population at risk and not some arbitrary formula unrelated to the children to be served.

9) The salaries of child care workers in all categories should be thoroughly competitive to attract and retain competitive and sensitive counselors.

10) Treatment programs should be provided for all offenders serving
short term prison sentences for abuse or neglect.

11) Appropriate programs for mentally disordered sex offenders should be readily available.

12) Support and professional assistance should be provided for all parents who neglect their children through ignorance or inability to cope.

13) Psychological and psychiatric assistance should be made available in appropriate residential and non-residential settings to identify and correct the causes of child abuse and neglect.

Child abuse and neglect are truly a tragedy for all of us. The victims cannot help themselves. The community, legislators and constituents alike, must all work together to help alleviate this tragic problem.
Florida’s Dependent Child: The Continuing Search for Realistic Standards

Christina A. Zawisza* and Mary K. Williams**

I. Introduction

The Florida Legislature in 1984 will once again revisit the state's juvenile dependency laws in their entirety. These are the laws which deal in the civil context with abused, neglected, abandoned, truant, runaway and ungovernable children and are contained in Chapter 39 and section 409.168, Florida Statutes. The Health and Rehabilitative Services (HRS) Subcommittee on Health, Economic and Social Services of the Florida House of Representatives has drafted and passed Proposed Committee Bill 2 which extensively revises the present dependency provisions of these two statutes.

Such major effort gives pause to look back at Florida’s previous efforts to forge realistic dependency standards, to look at the previous efforts of other states and Congress, and to look forward to the informed legislative decisionmaking Florida must now make. Observers and participators in Florida’s dependency process approach the search for standards from different perspectives: children's rights; parents' rights; state interests; fiscal constraints; religious implications; and political considerations. When issues concern children, particularly children at risk, the debate is often filled with emotion and fraught with legal and social dilemmas. This article discusses the state of Florida’s role in the lives of dependent children from the perspective of family autonomy, preservation and reunification. It looks first at previous quests for realistic standards in dependency law by summarizing the

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2. The Subcommittee passed this on October 31, 1983. The bill has been filed as H.B. 399. Its Senate companion bill is S.B. 273.
work of certain legal and social work commentators and analyzing the constitutional basis for family preservation standards. Part III examines both Congressional efforts to develop federal family preservation standards and Florida's previous reform efforts. The article concludes with a discussion of those crucial family preservation issues which Florida currently faces and how these can be resolved.

II. The Past Search for Realistic Standards

The origin of the present dependency system which mandates state intervention in family life whenever a child is abused, neglected, abandoned, or in need of supervision lies in the state's historical role of *parens patriae*, and in its police powers. This intervention system historically was managed through juvenile courts and public social welfare agencies. The original statutory dependency framework was established to provide work or training for poor children and to minimize welfare costs and fraud. Much later, the development of Aid to Dependent Children and new awareness of the special needs of children resulted in a statutory dependency process that became much less a financial assistance program and much more a system in which the state served as the arbiter of acceptable parental behavior. The patchwork nature of old dependency laws and their intent to serve these divergent purposes led to increasing concern in the mid-1970s, a concern which continues to the present. The dilemma centers around the limits of state intervention in family life and the search for realistic standards that provide certainty to decision-makers, and at the same time produce more good than harm to children and families.

A. Legal and Social Work Commentary

The leading proponent of the need for workable standards in the dependency process is Michael Wald, an attorney, who in a pair of articles written in the 1970s set forth both his proposed standards and


5. Areen, *supra* note 4, at 917.
his rationale for their viability. 8 Wald articulated the need for the narrowing of child neglect laws, arguing that in a society which values individual and family autonomy and privacy, it is preferable to solve family problems through noncoercive intervention. The remedy of coercive intervention, Wald emphasized, will do more harm than good to children and families. 7 In a second article, Wald developed a model rule-oriented dependency law and argued that specific value judgments about family intervention should be made at the legislative level, rather than in the courts. 8 The key problems Wald saw in the dependency process in 1976 were: 1) lack of adequate funding for noncoercive intervention services and reunification services; and 2) laws and administrative processes that did not reflect and facilitate a set of consistent goals for intervention. 9 The result, Wald felt, was an existing statutory system that focused on parental behaviors rather than harm to the children. 10

In elaborating on the weaknesses of the child welfare system, Wald pointed to substantial evidence that state intervention is harmful, not beneficial, to children and parents. 11 Most children are strongly attached to their parents whether “fit” or “unfit.” Another problem discussed by Wald was the application of neglect standards in an arbitrary, discriminatory way, with neglect standards being applied more stringently to poor families than to middle class families. Wald feared the massive reallocation of children to new parents under the 1970s standards. 12 As a more realistic approach, Wald suggested an intervention system in which standards for final termination of parental rights are related to standards for initial removal of children from their homes and to standards for return of children to their homes. He summarized his proposals as follows:

7. Wald I, supra note 6, at 987-1005.
8. Wald II, supra note 6, at 649-52.
9. Id. at 627-28.
10. Id. at 629.
11. Id. at 644-45.
12. Id. at 651.
I propose that neglect statutes be revised to allow intervention only when a child has suffered or is likely to suffer certain serious harms. When intervention is needed to protect a child, the child should be left in her home unless she cannot be protected from the specific harm justifying intervention without removal. If a child must be removed, intensive services should be provided to reunite the family and the child should be returned when she will no longer be endangered in her home, not when it is in her 'best interest' to return. However, to prevent children from remaining in impermanent foster care, parental rights should be terminated and a permanent placement provided for most children under age three at the time of removal after six months of placement if the child cannot be returned home at that time. For children over three termination would occur if they cannot be returned home after one year in placement.13

A formulation similar to the Wald proposals was offered even earlier by commentator Robert Mnookin.14 He maintains that three principles should govern state intervention in family life and the removal of children from their homes: 1) removal should be a last resort, used only when the child cannot be protected within the home; 2) the decision to require foster care placement should be based on legal standards that can be applied in a consistent and even-handed way, and not be profoundly influenced by the values of the particular deciding judge; 3) if removal is necessary, the state should actively seek, when possible, to help the child's parents overcome the problems that led to removal so that the child can be returned home as soon as possible. In cases where the child cannot be returned home in a reasonable time, despite efforts by the state, the state should find a stable alternative arrangement such as adoption for the child. A child should not be left in foster care for an indefinite period of time.15 Mnookin was troubled by the use of only the vague best interests standard when making decisions as to state intervention in family life. Society's knowledge of human behavior provides no reliable predictors of future abuse and neglect, and thus courts lack substantial predictive information. Our pluralistic society, Mnookin argues, lacks consensus about child-rearing strategies and values, and

13. Id. at 637-38. These proposals are explained in detail, id. at 700-06.
15. Id. at 602.
thus courts are left to rely on personal values. The lack of consistent standards makes it too easy to ignore detriments to removing children and children separated from natural parents suffer "separation trauma}. Finally the best interests standard ignores parental interests.

Judith Areen has proposed several principles which balance the interests of child, parent, and state: 1) standards for court intervention in a family should focus on the emotional and physical needs of the children rather than on parental fault; 2) decisions on whether and how to intervene in a family situation should serve to enhance the social and emotional bonds of that family, 3) courts should require a permanent placement for any child who has been removed from his family and who cannot be returned safely within a period of time that is reasonable in view of the age and needs of the child. The reasons for the Areen principles are similar to those of Wald and Mnookin: history has indicated that the enhancement of family ties is normally the best way to protect the best interests of children; separation of children and parents can be harmful to a child's emotional development whatever the fault of the parent; and the most prevalent characteristic of families charged with neglect is poverty.

The need for narrower and more specific statutory standards in the dependency process has been urged from a social worker viewpoint as well as the legal viewpoint. Douglas Besharov very recently referred to the problem of increasing liability, both civil and criminal, because of the failure of social workers to properly investigate and treat child abuse and neglect cases. Inadequate funding of social services has meant that the number of child welfare staff required to serve abused

16. Id. at 615-22.
17. Id. at 623.
18. Id. at 614-15.
19. Areen, supra note 4, at 918.
20. Id.
21. Id. at 919.
22. Id.
and neglected children has not kept pace with the reports of suspected incidences of dependency. Besharov maintains that existing dependency laws are too broad to set the ground rules for appropriate decisionmaking by social service agencies charged with the duties of investigation and treatment. Existing laws place too much responsibility for decisionmaking on social workers, charging them with the burden of making sophisticated predictions of parental failure, when the predictive capacity of the social sciences makes it impossible to show with any degree of certainty whether a particular parent will abuse or neglect a child. Besharov suggests that existing laws be redrafted to deal only with past abusive and neglectful behavior with only very narrow exceptions. He recommends that dependency laws legislate on serious harm to children, but avoid dealing with minor assaults or marginally inadequate care.

Anne Selinske, a social worker, agrees that the increased demand for services has overloaded the child welfare system and the increase has not been matched with additional resources. Her solution to this critical problem is the passage of legislation delineating the children who need help the most and determining how services are to be provided to them. Existing dependency laws, Selinske maintains, have not sufficiently limited the situations justifying intervention.

The basic weaknesses in state care of children was even recognized by the United States Supreme Court in 1977 in Smith v. Organization of Foster Families (OFFER). The Court found a disproportionate resort to foster care by the poor and victims of discrimination, due partly to the disruptive effect of poverty on family stability but partly to the fact that middle and upper income families purchase private care for their children. "The poor have little choice but to submit to state-supervised care when family crises strike." The Court also noted the "hostility of agencies to the efforts of natural parents to obtain the re-

25. Besharov, supra note 24, at 4031.
26. Id. at 4032 (citing the U.S. National Center on Child Abuse and Neglect, Review of Child Abuse Research: 1979-81).
27. Id. at 4034.
29. Id. at 32-3.
31. Id. at 834.
32. Id.
turn of their children” and gave various explanations for this hostility. Studies show that social workers of middle class backgrounds tend to favor placement with generally higher status families, thus reflecting a bias that treats the natural parents’ poverty and lifestyle as prejudicial to the best interests of the child. Other problems discussed by the Court include lack of staff to provide social work services to enable natural parents to resolve their problems and prepare for return of the child, and agency policies which discourage involvement of the natural parent in the care of the child.

All these comments have in common the recognition of the fallibility of human services, the limitations of funding, the lack of predictive capacity, and the disruptive effect of poverty. They give cause for caution in the drafting of dependency statutes, and urge the need for clarity, specificity and narrowness.

B. The Constitutional Basis for Family Preservation Standards

Not only have legal and social work commentators and the United States Supreme Court in Smith v. OFFER recognized the importance of family autonomy and preservation as a paramount value in American society, but the principle has also been firmly established as a mandate of constitutional law. The Supreme Court’s decisions in the field of family law show three distinct lines of analysis that are relevant to proposed legislation on dependency: 1) family autonomy 2) family privacy and 3) the requirements of family preservation. While these lines overlap, a separate discussion of each will assist in the later analysis of the Proposed Committee Bill 2.

1. Family Autonomy.

The state’s interest in promoting family autonomy derives from its parens patriae objective of ensuring the welfare of children and its police power goal of promoting the strength and stability of society. There are, however, definite constitutional limits on the state’s power to control the substantive values and beliefs of its citizens. The United States Constitution strictly limits the state’s power to impose on its citizens...

33. Id.
34. Id.
35. Id. n.35.
zens any particular moral, religious, or ethical values although any individual is free to hold such views. In that sense, families are constitutionally autonomous. Thus in *Pierce v. Society of Sisters* the Supreme Court held that the state may not standardize its children by forcing them to accept instruction from public school teachers only. The Court pointed out that “[t]he child is not the mere creature of the state; those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” In *Meyers v. Nebraska*, the Court held that the state may not foster a homogeneous people with American ideals by forbidding the teaching of foreign languages to young children. *Wisconsin v. Yoder*, stands out as a particularly poignant reminder of the weight of family autonomy. In this case the Court acknowledged that the interest of the state in providing a system of compulsory public education is a “paramount” concern. It might even be said that the best interests of Amish children required their participation in the American educational mainstream. But the Court firmly emphasized that the state interest in protecting children must still be balanced against the fundamental rights of parents, and thus the Court refused to enforce the law requiring compulsory school attendance until the age of sixteen.

A compelling recent decision is *Bellotti v. Baird*, in which the Supreme Court discussed parental ability to regulate a child’s abortion. The Court stated that “affirmative sponsorship of particular ethical, religious or political beliefs is something we expect the State not to attempt in a society constitutionally committed to individual liberty and freedom of choice.” In short, the limits placed on the state’s police power by the Constitution and the mandates of family autonomy prevent the state from imposing social norms and moral values on families and accord parents the dominant role in childrearing and childbearing decisions. Any standards of parental fitness, therefore, must remain

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37. 268 U.S. 510 (1925).
38. *Id.* at 535.
41. *Id.* at 213.
42. *Id.* at 229.
43. *Id.* at 213.
44. 443 U.S. 622 (1979).
45. *Id.* at 638.

https://nsuworks.nova.edu/nlr/vol8/iss2/13
sensitive to the principle of family autonomy.

2. **Family Privacy**

A second line of constitutional cases deals with the right to family privacy concerning intimate family activities. *Prince v. Massachusetts* mentioned a private realm of family life which the state connot enter.\(^{47}\) *Skinner v. Oklahoma* invalidated a state statute providing for mandatory sterilization of persons convicted of three or more selected felonies.\(^{48}\) *Griswold v. Connecticut* struck down a state statute forbidding the use of contraceptives.\(^{49}\) *Roe v. Wade* overturned a state statute prohibiting non-therapeutic abortions.\(^{50}\) *Eisenstadt v. Baird*\(^{51}\) struck down a state statute prohibiting the sale of contraceptives to unmarried persons. In *Eisenstadt*, the Court said: “if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.”\(^{52}\)

The right of privacy has been expanded to the right of extended families to live together. In *Moore v. City of East Cleveland*\(^{53}\) the Supreme Court invalidated a local ordinance which defined “family”, so as to exclude Moore’s grandchildren from living with her in subsidized housing. The Court explained, “[b]ut when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”\(^{54}\) Thus the Supreme Court has clearly established that individuals have a group of rights related to intimate family decisions. The state can not advance a countervailing interest that is compelling enough to interfere with these rights.

3. **State Intervention and Family Preservation**

The final area of constitutional concern deals with the state’s ability to intervene in family life to affect a decision about the person with

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47. 321 U.S. 158, 166 (1944).
49. 381 U.S. 479 (1965).
52. *Id.* at 453.
54. *Id.* at 499.
whom a child shall live. This line of cases has occasionally dealt with private party custody disputes but has more often focused on disputes between the state and private parties. Because of the fundamental right to family integrity and family privacy, the Supreme Court has recognized that the right to care, custody and control by a parent is a reciprocal right of the parent and the child. The Court stated, in Stanley v. Illinois,\(^5\) that the issues of competency and care are important issues for both parent and child,\(^6\) and, in Ford v. Ford,\(^7\) that the question of with whom the child resides is "vital to a child's happiness and well-being."\(^8\)

The Supreme Court has recognized the differing constitutional rights of parents who reside with their children and those who do not. Parental rights are at their pinnacle when parent and child live together in an intact domestic unit. Thus in Stanley v. Illinois,\(^9\) the Court held that a single, widowed father who lives with his children has a due process right to a hearing before a child can be removed from the home.\(^5\) In contrast, the Court held in Quilloin v. Walcott\(^1\) that an unwed father who did not reside with his children did not have a constitutional right to withhold consent to their adoption by the stepfather with whom they lived.\(^2\)

In Smith v. OFFER\(^3\) the Supreme Court faced for the first time the issue of the right of natural parents to family integrity, contrasted with the interests of the foster parents in continued custody of the foster children and the state's interest in protecting the child. Even after the family has been separated, the liberty interest of natural parents in family privacy rests on a higher plane than the rights of any other individual, because:

its contours are ordinarily to be sought, not in state law, but in intrinsic human rights. Any emotional ties that may develop between a foster parent and a child—or arguably between a legal custodian and a child—are of less constitutional significance than

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55. 405 U.S. 645 (1972).
56. Id. at 657.
58. Id. at 193.
59. 405 U.S. 645 (1972).
60. 405 U.S. at 658.
62. 434 U.S. at 256.
the ties between natural parents and children because the former are relationships created by the State and in which the State has been a partner from the outset.64

The *Smith* decision recognizes for the first time the inchoate substantive due process rights to future custody of natural parents whose children have been removed from their homes.65 It also reinforces the constitutional distinction between family rights when the state is an intervenor as opposed to family rights when only private parties are involved.

Although a parent may lose temporary custody of a child, the parent does not lose the right to family integrity. The Supreme Court noted in *Santosky v. Kramer*66 that "[t]he fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."67 While parents retain their fundamental family rights even after removal of the child, the state's interest is distinct.68 When the state has reason to believe that a positive nurturing parent-child relationship still exists the state has an interest in preservation of the family unit.69 But when it is clear that the natural parent cannot or will not provide a normal family home then the state's interest is in finding the child an alternative permanent home.70 The limitations on state intervention through its *parens patriae* powers lie in the lack of constitutional permission to separate children from fit parents and in the recognition that even parents who are separated from their children have a right to future custody. Because these are fundamental rights, the state may pursue its protective powers only when a compelling state interest has been demonstrated and only when the least drastic alternatives are used.71

64. 431 U.S. at 845.
67. 455 U.S. at 753.
68. 455 U.S. at 766, 102 S. Ct. at 1401.
69. *Id.*
70. *Id.*
III. Statutory Responses to the Search for Realistic Standards

Progress has been made to ameliorate the patchwork nature of this country’s dependency system and to implement constitutional law. These efforts have come from both federal legislation and through reform efforts in the Florida legislature.


In the late 1970s Congress studied problems related to foster care, and the public welfare systems which served children. Child welfare advocates articulated many of the weaknesses identified by Wald, Mnookin, Areen, which were discussed in Part II of this article. Until 1980, federal government participation in public child welfare systems serving dependent children was largely limited to funding provided through the Aid to Families with Dependent Children (AFDC) foster care program under Title IV-A of the Social Security Act. This program provided federal funds to reimburse some of the costs of foster care for “eligible” children, primarily those from poor families. This form of federal financial assistance encouraged court-ordered placement in foster care, even though other federal monies were available for foster care related services and general child welfare services. However, no uniform federal standard existed to encourage states to provide services to prevent removal of children and to aid in reunifying families with their children placed in foster care. In response, the Adoption Assistance and Child Welfare Act of 1980 (hereinafter referred to as the Adoption Assistance Act) was enacted by Congress on June 17, 1980. This is the first major federal effort to reform the foster care system and to provide fiscal incentives to states to emphasize the goals of prevention and reunification. This law imposes numerous legal requirements on states to ensure that preventive efforts are made to avoid separation of dependent children from their families, that states are accountable for the status of children in foster care, and that stays in foster care are as short as possible.

The Act has several components. It creates a new Title IV-E\textsuperscript{75} governing foster care maintenance payments and adoption assistance payments. It amends the child welfare services program under Title IV-B.\textsuperscript{76} Title IV-E (Federal Payments for Foster Care and Adoption Assistance) requires each state participating in the AFDC program to develop a plan for meeting the new requirements of the Act as a condition for federal foster care funding.\textsuperscript{77} Each state’s plan must include the following components: 1) a judicial determination that continuation in the home would be “contrary to the welfare of the child” prior to placement in foster care;\textsuperscript{78} 2) effective October 1, 1983, a judicial determination that “reasonable efforts” have been made to prevent or eliminate the need for removal of the child from the home, prior to placement in foster care;\textsuperscript{79} 3) case plans for each child discussing the appropriateness of the particular placement, the services which will be provided to facilitate the child’s return home or other permanent placement, and the services which will be provided to the child;\textsuperscript{80} 4) a case review system to assure that the status of each child is reviewed at least every six months “to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned home or placed for adoption. . . .”;\textsuperscript{81} 5) a dispositional hearing within eighteen months of placement in foster care to determine the future status of the child,\textsuperscript{82} 6) procedural safeguards as to parental rights pertaining to removal of the child from the home, changes in placements, and decisions affecting visitation rights;\textsuperscript{83} 7) for voluntary placements in foster care, a voluntary placement agreement which provides for return of the child to the parents upon request, and limits the duration of voluntary placements to six months, absent a judicial determination that the child should not be returned home;\textsuperscript{84} 8) a fair hearing procedure before the

\textsuperscript{79} Id.
\textsuperscript{83} Id.
\textsuperscript{84} 42 U.S.C. §672(g) (Supp. V 1981).
state agency, for anyone denied benefits under the Act.85

The requirement that reasonable efforts be made to prevent the need for placement in foster care is a requirement which must be met, not only by the state plan, but also in each individual case in which federal funding is sought. This provision furthers the goal of preventing removal from the home and gives the state a fiscal incentive to provide preventive services. The requirements for case plans and case reviews emphasize the goal of family reunification. By focusing on “alleviation or mitigation” of the problems causing the placement in foster care, the Act departs from the more subjective standard of “the best interests of the child”, and adds certainty and enforceability to legal standards for returning the child home.

The amendments to Title IV-B (Child Welfare Services) contained in the Act also further the goals of removal prevention, accountability for children in the state foster care system, and reunification of natural families. Before its enactment, actual appropriations for child welfare services never exceeded $56.5 million.86 Although a broad array of services were authorized under the program, services to prevent removal and reunify families were not required. In fact, foster care was defined as a service under Title IV-B and many states used the bulk of their IV-B funds to subsidize foster care maintenance payments. The Adoption Assistance Act made a number of important changes in this Title IV-B program. First, states are precluded from increasing the amount of their child welfare services grant expended for foster care maintenance above 1979 levels.87 Thus, additional appropriations (which as of 1982 have reached $163 million)88 must be used for other service programs. The specific guidelines for the use of additional funds consist of a two-step process. The first set of requirements comes into play when appropriations under Title IV-B exceed $141 million.89 For any year in which appropriations are at least that high, a state can only receive its share of amounts over $141 million by meeting the following guidelines: 1) conducting an inventory of all children who have been in foster care for over six months to determine whether the child needs to

86. A. ENGLISH, supra note 74, at 38.
88. Interview with Abigail English, author of FOSTER CARE REFORM, in Orlando, Fla. (April 28, 1983).
remain in care and what services are needed to allow the child to go home or to be adopted,\textsuperscript{90}2) implementing a statewide information system documenting demographic data, location, and goals for each child in foster care or who has been in care within the past 12 months,\textsuperscript{91}3) implementing the case review system required by Title IV-E, for all children in state-supervised care,\textsuperscript{92} and 4) establishing a program to provide services designed to reunite children in foster care with their natural families if possible, or to facilitate placement for adoption.\textsuperscript{93}

The second stage of the Title IV-B requirements becomes operative when appropriations for the program reach the level of $266 million for two consecutive years. At that point, in addition to meeting all of the first stage requirements, states must have a preplacement preventive service program in place geared toward preventing placements in foster care and preserving the natural family unit. Any state not meeting these requirements will only be eligible to receive its share of $56 million, the 1979 child welfare program appropriation.\textsuperscript{94}

While the Act clearly imposes affirmative duties upon states to implement the law's protections as a condition for receipt of federal funds and to oversee compliance, it is still too early to determine the extent to which courts will allow individuals to enforce the requirements through litigation. Questions such as whether the law creates a private right of action, whether the law creates substantive rights, whether individuals may assert those rights, and whether an administrative, state, or federal judicial forum is appropriate for asserting them have yet to be resolved.\textsuperscript{95}

The first judicial decision interpreting the requirements of the Adoption Assistance Act came in the case of \textit{Lynch v. King},\textsuperscript{96} in which a federal district court issued a preliminary injunction directed to the Massachusetts Department of Social Services. The case involved alleged violations of the federal constitutional and statutory rights of children who were subject to the agency's protective intervention.\textsuperscript{97} Specific allegations included the failure to investigate suspected abuse

\begin{itemize}
\item \textsuperscript{94} 42 U.S.C. § 627(b) (Supp. V 1981).
\item \textsuperscript{95} English, \textit{Litigating Under the Adoption Assistance and Child Welfare Act} in \textit{Foster Children in the Courts} (M. Hardin ed. 1983).
\item \textsuperscript{96} 550 F. Supp. 325 (D. Mass. 1982).
\item \textsuperscript{97} 550 F. Supp. at 329.
\end{itemize}
and neglect, the failure to provide appropriate services to prevent the need for foster care placement or to reunify foster children with their natural families, and the failure to establish and review case plans for children and their families. Although *Lynch v. King* was filed before the requirements of the Adoption Assistance Act became effective, and although the injunction was entered based on violations of the old law, the court based its prospective injunctive relief upon the new Act's conditions for continued federal funds, and required the Massachusetts agency to implement the case plan and case review system contained in Title IV-E. The court also placed limitations on social worker caseloads, and required, as of October 1, 1983, that reunification services be provided. Although the defendants have appealed the decision, it stands as authority for the existence of a cause of action to enforce both Title IV-B and Title IV-E of the Adoption Assistance Act.

B. Florida's Response: Reform Efforts

At the same time that Wald, Mnookin and Areen were requesting more realistic dependency laws and Congress was studying foster care reform, various state efforts were also underway to deal with the placement of children in foster care and the regular review of their status. In the 1970s and 1980s, before the case review requirements of the Adoption Assistance Act were enacted, foster care review statutes had already been legislated in many states because of the belief that regular judicial review of children in foster care would address some systemic weaknesses and facilitate more rapid return of children to their own homes. One of the first states to pass such legislation was New York. A research project which investigated the effects of New York foster care review hearings on the rate of return home confirmed that such reviews had accomplished the desired result. The study found a positive correlation between agency caseworker services provided to the natural family and the child's eventual return home.

Through section 409.168, Florida Statutes, Florida enacted its first judicial review statute in 1977, requiring regular judicial review hear-

98. 550 F. Supp. at 331-36.
100. *Id.*
ings, reports to the court and mandatory dispositional alternatives. This initial statute was passed because:

The Legislature finds that 7 out of 10 children placed in foster care do not return to their biological families after the first year and that permanent homes could be found for many of these children if their status were reviewed periodically and they were found eligible for adoption. It is the intent of the Legislature, therefore, to help ensure a permanent home for children in foster care by requiring a periodic review and report on their status.103

In 1980, a legislative study by the House Health and Rehabilitative Services Committee of children in foster care found that, despite this noble intent, Florida still had 7,800 children who would remain in foster care over thirty months, an increase of two months over the 1979 figures.104 The same study found that adequate foster care case plans were essential to the judicial review process. The study commented, “[T]he need for foster care case plans within a tight time frame is necessary if foster care is, in fact, ever to become truly a ‘temporary’ placement for children. The utilization of a contract approach to foster care has proven to be very workable in some states.”105

The legislature subsequently revised section 409.168, Florida Statutes, and added section 39.41(6)(b) in 1980. Section 409.168 requires written performance agreements as well as judicial reviews. A performance agreement is a court-ordered document that is prepared by the social service agency in conference with the natural parents. The agreement delineates what is expected of all parties and what must be accomplished before a child can be returned to the parent. Performance agreements are required for all children who remain in foster care longer than thirty days. Section 39.41(6)(b) provides that substantial compliance with the terms of a performance agreement must result in the return of a child to the custody of the natural parent. The hoped for effect of this new legislation, according to the Committee Report, was the following:

105. Id. at 22.
The proposed changes in both the permanent commitment section of Chapter 39 and the report and judicial review section of Chapter 409 attempt to bring greater focus on the timeliness of preparing performance agreements to plan for the child entering foster care and the need to have the agency, the natural parents, and other involved parties to work together to help the family reunite if at all possible or to move toward terminating parental rights if feasible and moving toward placement of the child in a permanent, stable family setting.

The changes also attempted to stress the importance of the judicial review proceedings to the courts by removing the ability to waive the hearing and by also requiring the agreements to be submitted to the court. 106 Florida's Juvenile Justice Act, Chapter 39, Florida Statutes (1980), provides the statutory authority for the state to initially intervene in family relationships and to place dependent children in the homes of relatives or in foster care. In enacting this legislation, the legislature expressly stated the purpose of the Chapter, indicating a clear preference for maintaining and restoring the natural family. 107 In addition to Florida's Juvenile Justice Act, the legislature has mandated that the Department of Health and Rehabilitative Services (HRS) administer a program for dependent children and their families. The legislature set forth the goals toward which the program was to be directed and once again clearly indicated its preference for reunification of the natural family. 108 For some time, therefore, it has been the legislative policy in Florida to recognize the importance of family reunification and preservation as a goal. The concomitant search for realistic standards has long been a legislative priority.

The issues raised by the foster care review legislation are beginning to be addressed by Florida courts as the family reunification tools begin to be enforced. Quaintance v. Pingree 109 establishes the importance of having regular judicial reviews on a timely basis and interprets the provisions of section 409.168 as mandatory. In re V.M.C., 110 holding that an out-of-state placement of a Florida foster child is not authorized by statute, also establishes the principle that the dispositional alternatives contained in section 409.168 are mandatory and exclusive.

106. Id. at 2.

https://nsuworks.nova.edu/nlr/vols/iss2/13
The first case to trace at length the legislative history of section 409.168 and the policy implications of the foster care scheme chosen by Florida is *In re A.B.*. This decision makes clear that the Florida legislature in enacting Chapter 39 and section 409.168 replaced any common law best interests of the child standard with a specific set of statutory requirements designed for reconciliation of children with their natural parents whenever possible and their permanent placement in adoptive homes when that is not possible. The decision emphasizes that the legislative goal for Florida's foster children is permanence. This goal can only be achieved if HRS has fulfilled its affirmative obligation to design and carry out a meaningful performance agreement.

IV. Family Preservation Issues and Proposed Legislation For Florida

Although much has been accomplished through federal and state laws to improve the dependency process, a great deal remains to be done. During its 1983 session, Florida's legislature addressed many of these open issues and will address these problems again in the 1984 session. This section identifies the crucial family preservation issues currently at stake in Florida, and suggests some ways these issues can be resolved.

A. Compliance with the Adoption Assistance and Child Welfare Act

In order for Florida to continue to receive federal foster care and child welfare funds, Florida must meet the requirements of the federal Adoption Assistance and Child Welfare Act. While not all of the Act's requirements require legislative changes, Florida's dependency statute must be examined in light of the federal requirements to determine where changes are needed. The Proposed Committee Bill 2 addresses many of these issues in a positive manner. Florida law presently requires proof of abandonment, abuse, or neglect. Neglect, as defined, precludes an adjudication of dependency if the reason for the child's deprivation is poverty or "financial inability." An amendment

112. See supra note 74 and accompanying text.
contained in the proposed bill would modify the financial inability language by permitting an adjudication of neglect in cases of financial inability if "services were offered and rejected". This proposed change is consistent with the goal of prevention and the requirements of the Adoption Assistance Act that "reasonable efforts" be made to avoid the need for placement in foster care.\textsuperscript{115} In any event, a program of preventive services may soon be required as a condition for receiving additional funds under Title IV-B for the state of Florida. Earlier drafts of Proposed Committee Bill 2 would have permitted an adjudication if services were offered and rejected and in the additional situation when services for relief were merely unavailable. The unavailability language, which is inconsistent with the goal of the federal law, has been deleted from the proposed bill.

Federal law prohibits federal funding for a foster care placement, absent a judicial finding as to "reasonable efforts" to prevent the placement.\textsuperscript{116} To bring Florida law into compliance, the Proposed Committee Bill 2 contains amendments which would insert the "reasonable efforts" determination into the Florida statute, not only at the disposition hearing when the placement is ordered, but also at earlier stages in the proceeding. Thus, the judicial inquiry into preventive efforts would begin at the detention stage, and if efforts have not been reasonable, the court can order that services be provided to maintain the child in the home. By inserting these requirements into the early stages of the proceedings, the proposed amendments adhere to the preventive goals of the Adoption Assistance Act and are consistent with the constitutional prohibition on separating children from fit parents.

The Title IV-E requirements for case plans and a case review system are largely met by the judicial review and performance agreement provisions of section 409.168, Florida Statutes. The performance agreement should contain most of the substantive elements of a case plan. Under current Florida law, the decision to return a foster child to his home turns on improving the conditions which caused removal, as set forth in the performance agreement.\textsuperscript{117} The language in the Proposed Committee Bill 2 uses the word "remediate" in establishing a standard. This is consistent with the language of the federal statute which focuses on "alleviating or mitigating" the problems causing foster care place-
ment at the review hearing.\textsuperscript{118} Any legislative changes which would amend Florida's standard by shifting the focus away from the correction of the problems which caused the placement and toward a "best interests" standard, could jeopardize Florida's receipt of federal funds. Another amendment contained in the proposed bill requires an eighteen month judicial review hearing. This would satisfy the Adoption Assistance Act's requirement for a "disposition hearing" within eighteen months.\textsuperscript{119} Current Florida law provides for an equivalent of the federal disposition hearing only after twenty four months in foster care.\textsuperscript{120}

These and other proposed legislative changes address most of the requirements of the Adoption Assistance and Child Welfare Act which necessitate statutory change. Other requirements of the Act, while capable of being met by HRS, should be considered for future legislative action. For example, the statewide information system and the reunification and prevention services programs funded under Title IV-B could be the subject of specific legislation. Not only would such legislation assure Florida's compliance with the Act but it would also strengthen Florida's response to the challenge of designing a realistic and consistent system for dependent children.

B. The Criteria for Removal and Return

Legal and social work commentators and the United States Supreme Court have in their separate approaches identified the need to connect the statutory criteria for removal of children from their homes and placement in substitute care with the criteria for their return home or for their permanent placement if they cannot go home. Prior to 1980 this problem represented a glaring flaw in Florida law because the criteria for disposition of dependent children were unclear. The Florida Supreme Court in 1958 broadly interpreted Florida's juvenile dependency law in \textit{Pendarvis v. State}.\textsuperscript{121} The court stated that once a child has lawfully been declared a dependent child, he becomes a ward of the state and broad discretion is vested in the juvenile court to do whatever it believes is in the best interests of the child.\textsuperscript{122} The problems with this interpretation from a practical point of view have been described by

\begin{footnotesize}
\begin{enumerate}
\item[118.] 42 U.S.C. § 675(5)(b) (1980).
\item[119.] 42 U.S.C. § 675(5)(c) (1980).
\item[120.] FLA. STAT. § 409.168(3)(b) (1980).
\item[121.] 104 So. 2d 651 (Fla. 1958).
\item[122.] 104 So. 2d at 652.
\end{enumerate}
\end{footnotesize}

In 1980 the Florida legislature attempted to make the connection between standards for removal and standards for reunification of families by designing the performance agreement. The legislature provided for the return of children if parents substantially complied with the performance agreement and for permanent commitment if parents did not. The performance agreement must contain a description of the reasons for the placement of the child in foster care, the problems or conditions of the natural home that necessitated removal and the remediation which will determine the return of the child to the home. It also must contain a statement of the specific actions to be taken by the parents to eliminate or correct the identified problems or conditions.

While the statutory language appears clear on its face, there have been serious problems in the implementation of this law. The lines have been drawn between those forces committed to the concepts of family reunification and permanence for children and those forces determined to retreat to the vague best interest standard that allows a court to find “better parents” for dependent children, the 1970s debate staged anew. The Florida First District Court of Appeal in its comprehensive decision *In re A.B.*, has clarified the applicability of the simple best interests test in state intervention cases. This decision establishes that the goal of Florida’s foster care system is not to search for a fuller life with more desirable parents for a child. A passive system of relying upon a judge’s perception of the “best interest of the child” demands “more wisdom than Solomon’s and its discriminatory ramifications, penalizing the poor by reparenting their children to more affluent candidates, are

123. See Mnookin, *supra* note 14 and accompanying text.
124. 268 U.S. 510 (1925). See *supra* note 37 and accompanying text.
125. 443 U.S. 622 (1979). See *supra* note 44 and accompanying text.
129. FLA. STAT. § 409.168(3)(a)6 (1980).
130. Id.
132. Id. at 44.
distressingly evident.” Some of the debate and confusion, therefore, has been laid to rest.

The Florida House of Representatives HRS Subcommittee on Health, Economic and Social Services, furthermore, has addressed this debate in Proposed Committee Bill 2 by defining more specifically the concept of substantial compliance with the terms of a performance agreement. The bill provides “‘substantial compliance’ means that the circumstances which caused the placement in foster care have been remediated to the extent that the well being and safety of the child will not be endangered upon the child being returned to the parent or guardian.” The strength of this definition lies in the extent to which it corrects the problems identified earlier in Parts II and III. It gives certainty to social workers, courts, parents, and children. It deals with serious harm to children and their endangerment. It adheres to constitutional principles of family preservation and limitations on state intervention in family life. It, finally, assures Florida’s compliance with the Adoption Assistance and Child Welfare Act for the purpose of receiving federal funds.

C. Poverty as a Standard for Dependency

The legal and social work commentators and the United States Supreme Court have been sensitive about the extent to which the burden of state intervention in family life falls disproportionately upon the poor and victims of discrimination. In 1978 the Florida legislature ameliorated this problem by defining “neglect” as requiring financial ability and defining abandonment as also requiring ability to support and communicate with a child. Difficult economic times and cutbacks in federal funds have spurred the poverty debate again in Florida. There is no financial assistance available in Florida for two-parent families who have exhausted their financial resources. Yet some trial courts persist in claiming the need to protect the children of the unemployed and allege that children are better off in foster care than in these homes without means.

133. Id.
137. Id.
The Subcommittee on Health, Economic and Social Services has resolved this debate in Proposed Committee Bill 2 by broadening the definition of neglect and abandonment and by modifying the requirements of financial ability and the ability to support and communicate. The bill conditions an adjudication of neglect in cases of parental poverty upon the offer and rejection of services to assist the family. The more troublesome language of earlier drafts which refers only to the offer of "available" services has been removed. This language evolved after substantial debate and discussion. Lines were drawn between those forces clearly committed to adjudications of dependency solely for poverty reasons and those forces opposed to any such change in the existing laws. Any effort to further weaken the statutory protection for parents without financial ability would be subject to legal challenges. In addition, such results would strike at the essence of a fundamentally fair societal value system. Statutory provisions that make poverty a basis for state intervention between parent and child could violate the equal protection and due process rights of the United States Constitution in their abrogation of the rights of family autonomy, family privacy, and family preservation. Such definitions would establish a cultural value choice that poverty is per se unwholesome for children and would establish the solution as removal of children from their homes rather than providing financial subsistence for the families. The effects on parents and children of "separation trauma" would be ignored and social workers and resources are diverted from cases where children are in grave danger. Cases of poverty are better solved elsewhere than in the juvenile courts because there is no certain body of research that children are fatally and inexorably harmed by growing up poor and the proposed bill preserves this solution.

D. Right to Counsel for Parents in the Dependency Process

Perhaps the most pressing family preservation issue currently at stake in Florida is that of the absolute right to counsel on an appointed basis for indigent parents at every stage in the dependency process. Currently each interest is represented in Florida dependency proceedings except the accused parent. Florida courts now use complex evidence presented by child protection teams at adjudication. It is not unusual to see at least six professionals, including lawyers, HRS

138. Areen, supra note 4, at 930-32.
counselors, and psychologists marshalled against an unrepresented parent standing alone. It should be recognized that the present proposed revisions to Chapter 39 would make it easier to adjudicate neglect and abandonment in the first instance because these definitions are expanded. Thus an even greater death blow is dealt to the natural parent’s rights. At the very least, Proposed Committee Bill 2 makes the dependency process even more complicated for the unsophisticated parent to understand.

The Subcommittee on Health, Economic and Social Services has recognized the importance of the right to counsel and has included provisions for appointed counsel in its proposals. The reasons for supporting this provision are compelling. For example, on September 15, 1983, the United States Fifth Circuit Court of Appeals issued an en banc decision in *Davis v. Page*\(^{140}\) which has generated great confusion. Twenty-four judges participated in the decision which concerned indigent parents’ due process rights to appointed counsel in state dependency proceedings.\(^{141}\) Five judges held that the decision of the United States Supreme Court in *Lassiter v. Department of Social Services*\(^{142}\) requires that the right to counsel in Florida dependency proceedings be determined on a case-by-case basis. These five judges required the court to apply the *Matthews v. Eldridge*\(^{143}\) three-pronged due process test and determine in each case: 1) the parental issue at stake, including the possibility of the child remaining in his home or with relatives as opposed to removal from the home and placement in foster care, 2) the state’s interest in an accurate and just decision, and 3) the risk that a parent will be erroneously deprived of custody because the parent is not represented by counsel.\(^{144}\)

One Fifth Circuit judge concurred with the above five but stated that “due process will require counsel in most cases of this kind (unless saved by a determination that the evidence was sufficiently great “that the absence of counsel’s guidance did not render the proceedings fundamentally unfair”).”\(^{145}\) Eight judges ordered the entry of judgment for the defendant judges, stating that the pleadings did not present a case or controversy. No comment on the merits of right to counsel was made.

140. 714 F.2d 512 (5th Cir. 1983).
141. 714 F.2d at 513.
144. 714 F.2d at 516-17.
145. *Id.* at 522.
by these judges. ¹⁴⁶ Eleven judges joined in dissenting from the order of judgment for the defendants. ¹⁴⁷ In addition to finding a case or controversy these judges would require an absolute right to counsel. The reasons given for this right included: 1) adjudications of dependency are different in nature from permanent commitment hearings; 2) initial separation of parent and child involves an intact family unit with constitutional rights to family integrity that are of greater constitutional significance than those of families whose bonds have been severed; 3) adjudications of dependency in Florida deal a "death blow" to parental rights and have a lasting chill on the exercise of these rights; 4) certain legal rights are lost if not asserted at the adjudicatory stage in dependency proceedings; 5) initial adjudications stigmatize or sever the presumption that a parent is fit, a showing that can never fully be regained by subsequent evidence produced at later stages; 6) the state's parens patriae interest in child protection favors preservation not severance of natural family bonds; 7) Florida's dependency proceedings are formal accusatory proceedings where: the state is always represented, the formal rules of evidence are employed, a guardian ad litem represents the child, and every interest but the parent's is represented by counsel. Psychological, medical and sociological evidence is used; 8) issues adjudicated in Florida's dependencies are speculative and far-reaching; 9) unrepresented parents lose custody of their children more often than parents who are represented; and 10) proceedings entailing substantive adjudications of fundamental liberty interests require counsel absolutely, while proceedings involving placement on the basis of previous substantive adjudications require counsel on a case by case basis. ¹⁴⁸ The mandate of the Fifth Circuit in Davis had been stayed pending a petition for review by writ of certiorari to the United States Supreme Court. This petition was denied January 10, 1984. ¹⁴⁹

In examining other right to counsel cases in Florida, a similar confusing array of decisions is evident. In In re D.B. and D.S., ¹⁵⁰ the Florida Supreme Court required trial judges to appoint counsel for parents whenever permanent termination of parental rights might result or when the proceedings, by their nature, might lead to criminal child

¹⁴⁶ Ḯd. at 518-22.
¹⁴⁷ Ḯd. at 524.
¹⁴⁸ Ḯd. at 525-32.
¹⁵⁰ 385 So. 2d 83 (Fla. 1980).
abuse charges.151 This result is compelled by the federal Constitution.152 In all other cases, trial judges are required to use all available legal aid services and when these services are unavailable, to request private counsel to provide the necessary services.153

A case closely analogous to In re D.B. and D.S., is In re Hutchins.154 The Florida Supreme Court in Hutchins considered the previous “ungovernability” classification contained in Florida law. That statute provided that a child who committed a second act of ungovernability could be adjudicated delinquent.155 In re Gault156 had long ago established the child’s right to counsel in a delinquency proceeding. The Florida Supreme Court explained that the right to counsel was not mandatory at the first hearing on ungovernability, because that first hearing was not necessarily the first step in an adjudication of delinquency, depending upon the conduct of the child.157 But the court concluded that it was impermissible to base an adjudication of ungovernability for the second time on a previously conducted hearing in which the child was not represented by counsel.158 It stated that the first adjudicatory hearing is a “critical first step” in the delinquency proceeding and the accused is entitled to all due process rights at each step in the procedure.159 De novo review at a subsequent hearing in which all the facts of the first ungovernability hearing were reheard does not provide adequate constitutional safeguards since the first adjudication remains an essential element of delinquency.160

The Florida dependency scheme is similar to the former ungovernability scheme in that there are a series of “critical first steps,” beginning with detention and ending with permanent commitment.161

151. Id. at 90.
152. Id.
153. Id. at 92. The Florida Attorney General has argued that because all adjudications of dependency threaten a parent with permanent termination of parental rights and the possibility of criminal charges, State law already sweeps more broadly than Lassiter (Brief in opposition to Petition for Certiorari, Davis v. Gladstone, 52 U.S.L.W. 3503 (Jan. 10, 1984).
154. 345 So. 2d 703 (Fla. 1977).
155. Id. at 706.
156. 387 U.S. 1 (1967).
157. 345 So. 2d at 706.
158. Id. at 707.
159. Id.
160. Id.
The seriousness of this issue is illustrated by *In re C.M.H.*\(^{162}\) In this case the Florida First District Court of Appeal held that the original adjudication of abuse, neglect and abandonment was sufficient to form the basis for subsequent permanent commitment without further proof.\(^{163}\) While this decision may be constitutionally invalid under *Santosky v. Kramer*,\(^ {164}\) and has been somewhat clarified by *In re A.B.*,\(^ {165}\) the original adjudication of dependency is still a critical stage in any subsequent proceedings to terminate parental rights.

In *Hutchins* terms, initial dependency proceedings are "critical first steps" because they may result in permanent commitment at a subsequent hearing. The issue of parental unfitness is substantively adjudicated in the initial adjudicatory hearing. As Judge Vance pointed out in *Davis*, due process absolutely requires counsel in proceedings entailing substantive adjudications of fundamental liberty interests.\(^ {166}\) Lower court decisions on the right to counsel in Florida include *Alton v. Conklin*, which holds that parents have a right to counsel whenever their child may be committed to an institution;\(^ {167}\) *In re R.W.*, which holds that parents have a right to counsel at the time of a stipulation as to an adjudication of dependency;\(^ {168}\) and *A.T.P. v. State*, which holds that parent and child have a right to counsel at detention hearings that are akin to summary adjudications.\(^ {169}\) A permanent commitment order was overturned in *In re R.W.H.* when the record did not reveal the mother's intelligent waiver of counsel.\(^ {170}\)

After considering these decisions, it appears that Florida trial courts must pursue the following analysis at a minimum: 1) the parental interest at stake; 2) the state interest at stake; 3) the risk of an erroneous decision; 4) the formality and complexity of the proceeding; 5) the likelihood of use of medical, psychological or sociological evidence; 6) the likelihood that a child will remain at home or with relatives as opposed to removal from the home; 7) the possibility of criminal child abuse charges; 8) the possibility of a subsequent permanent commitment; 9) the presence of a stipulation; and 10) the possibility

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162. 413 So. 2d 418 (Fla. 1st Dist. Ct. App. 1982).
163. Id. at 427.
166. 714 F.2d at 533.
167. 421 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1982).
168. 429 So. 2d 711 (Fla. 5th Dist. Ct. App. 1983).
that the child may be committed to an institution.

The complexity of this formula leads to the conclusion that the absolute right to counsel conferred by statute would avoid the expense of judicial decision making on a case-by-case basis and its endless appellate litigation. The two state statutes reviewed by the United States Supreme Court in Lassiter 171 and Santosky172 require court appointed counsel at adjudication. In enacting right to counsel legislation, Florida would join a host of sister states, such as New York and North Carolina. The Supreme Court in Lassiter reminds us that wise public policy and informed opinion holds that appointed counsel is necessary not only in permanent commitment proceedings but in neglect and dependency proceedings as well.173 The proposed amendment will simplify judicial decision making and will bring Florida in line with the national trend towards an absolute right to counsel.

E. The Standard of Proof for Permanent Commitment

The final family preservation issue currently facing Florida is the standard of proof required at permanent commitment hearings. Florida’s statute has never specified a standard. Until recently, appellate courts had consistently ruled that clear and convincing proof of 1) parental unfitness and 2) the manifest best interests of the child were required at permanent commitment hearings.174 Last year, however, the First District Court of Appeal interpreted the existing Florida statute in In re C.M.H., holding that only the manifest best interests of the child need to be demonstrated by clear and convincing evidence in order to terminate parental rights.175 The initial adjudication of dependency (by a lower standard of proof than clear and convincing), the court decided, made the issue of parental unfitness res judicata in a subsequent proceeding to terminate parental rights.176 Because the appellate court’s ruling in C.M.H. does not meet the standards of constitutional due process, set forth by the Supreme Court in

173. Id.
175. 413 So. 2d 418, 425 (Fla. 1st Dist. Ct. App. 1982).
176. 413 So.2d at 425.
Santosky, and because the current statute is silent as to this important issue, this topic is currently ripe for legislative action.

Parental rights can be terminated upon a showing that the parent has abandoned, abused, or neglected the child or has failed to substantially comply with a performance agreement, and that permanent commitment is manifestly in the best interests of the child. Dispositional hearings are more relaxed than adjudicatory hearings. The present statute is silent as to whether the formal rules of evidence are applied at a permanent commitment hearing. Florida courts had repeatedly held that a finding of permanent commitment must be based on clear and convincing evidence both as to present parental unfitness and as to the best interests of the child until In re C.M.H. was decided.

"Clear and convincing" is a higher legal standard than the more-likely-than-not standard of a "preponderance of the evidence" which applies at dependency adjudications and in most civil actions. Clear and convincing, however, is not as high a legal standard as the "beyond a reasonable doubt" applicable in criminal proceedings. The United States Supreme Court in Santosky ruled that proof of parental unfitness by a mere preponderance of the evidence is unconstitutional. The Court stated that applying a standard of proof "no greater than that necessary to award money damages in an ordinary civil action" failed to meet the requirements of due process and to adequately protect the parent's fundamental constitutional interest in the future of his family unit. In analyzing New York's termination statute, the Supreme Court said that the findings of permanent neglect may be made only upon a showing of clear and convincing evidence. At that stage of the proceedings, the natural parents are pitted against the state and the only issue is the unfitness of the parents. Because the consequences of permanent commitment are so severe, and because, at this fact-finding stage both parent and child share interest in avoiding the erroneous termination of parental rights, only a clear and convincing evidence standard can adequately allocate the risk between the family's interests and the state's interests. The Supreme Court emphasized that at this

178. FLA. STAT. § 39.41(b) (1979).
180. 455 U.S. at 749, 102 S. Ct. at 1402.
181. 455 U.S. at 752, 759.
182. 455 U.S. at 748-49.
183. Id.
stage the question of whether it would be in the best interests of the child to return home is not at issue. The Court noted that even if permanent commitment is denied, the child’s placement in foster care can still be maintained.

Santosky is not cited in the opinion of In re C.M.H., nor is the constitutional due process issue analyzed. To date, no Florida court has clearly addressed the requirements of Santosky, but it is evident that the statutory interpretation arrived at in C.M.H. cannot withstand judicial scrutiny in light of Santosky. In the process of substantially revising Florida’s dependency statute, provisions relating to permanent commitment should be amended to comply with the Supreme Court’s decision in Santosky v. Kramer. Revising the statute will ensure that future permanent commitment proceedings will not be subject to a reversal on constitutional grounds, and will provide finality to the permanent commitment process.

V. Conclusion

The current efforts of the Florida legislature to revise the state’s dependency laws offer tremendous opportunities for progress. Looking back at previous efforts to forge realistic standards helps identify the problems and pitfalls in the child welfare system and these laws’ constitutional foundations. Previous Florida efforts have provided an opportunity to test and retest solutions. The federal Adoption Assistance and Child Welfare Act offers new solutions along with financial aid to the state. In its effort to reform, Florida should, in caution, remember the cherished American values of family autonomy and privacy and the limitations of state intervention in family life. In the search for realistic and consistent standards in the emotion-laden area of dependency law, the only standard which has endured the test of time, social change, and varying economic conditions is the standard of family preservation.

184. 455 U.S. at 754-56.
185. Id.
Funding the Most Costly Alternative: A Legislative Paradox

Wesley W. Jenkins*

I. Introduction

This article discusses the perhaps rather startling fact that legislators traditionally tend to allocate funds for more costly social services rather than for the less expensive ones. Unfortunately, the more a service costs, the fewer people it serves per dollar spent and the less remedial impact it has. A reversal of this tendency is slowly evolving and this article discusses some recent legislative changes showing this new trend. Further, this article proposes that the legislature should provide companion funding for preventive programs along with those funds budgeted to alleviate the results of the social problem itself.

II. A Tradition of Legislative Neglect

It is virtually axiomatic in the broad field of social services that the more costly a service, the more likely it is to receive funding. It is equally axiomatic that the more costly a service the fewer people it will serve for the dollars spent and the less overall remedial impact it will have. This paradox occurs because legislators tend to wait until social problems are very severe before providing funds to address them. By this juncture "pathology" has become deeply entrenched requiring far more expensive methods of treatment. The severity of the problem militates against substantial remediation and limits the "treatment" to relatively few individuals. This traditional legislative neglect dates from the early days of our Republic. It can be traced historically to even earlier times in foreign countries.¹

In the late 1700s a group of industrialists in Beverly, Massachusetts who supported the construction of a cotton mill argued that it "would afford employment to a great number of women and children, many of whom will be otherwise useless, if not burdensome to soci-

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¹. H. JAMES, THE LITTLE VICTIMS, 10 (1975).
ety.” In 1790 when the first American cotton mill opened in Rhode Island, nine children from seven to twelve years of age were employed. During the nineteenth century children also worked in coal mines, lumber mills, shoe and glass factories and other forms of manufacturing. Children as young as five and six worked twelve hours a day. Plant owners starved them, whipped them, dunked them in tubs of cold water when they dozed off and stunted their growth through overwork and malnutrition. The census of 1900 shows 1,750,178 children between the ages of two and fifteen at work in American industry. By 1910 the number had climbed another 200,000.

At the same time so-called “baby farms” were often paid lump sums to house unwanted illegitimate children. Consequently the shorter a child’s life span the greater the profit margin for the “baby farm” operators. Mill hands and factory workers frequently placed infants into day care. These children received insufficient food along with opiates and other drugs in an atmosphere of crowded rooms, bad air, uncleanliness and willful neglect. It is a grim commentary that there were laws on the statute books in this country to prevent cruelty to animals long before there were similar laws to prevent cruelty to children. The Society for the Prevention of Cruelty to Animals similarly antedates the Society for the Prevention of Cruelty to Children.

This persistent failure to address social problems at their origins has resulted in the dilemma of having to provide for increasingly severe problems at higher and higher cost. Institutional care is always more expensive per person served than the same general level of care given on an outpatient or non-institutional basis. In spite of this obvious fact, huge institutions to house the mentally retarded have existed for many years. Even more expensive hospitals for the mentally ill have warehoused thousands of patients under a single roof. Only in recent years have concerted efforts been made to secure the release of these institutionalized individuals to less costly community care. These community based programs are far less expensive than the hospital care they have replaced. They also have a better record for preventing the “revolving door” phenomenon than their institutional counterparts.

Boley Manor in St. Petersburg, Florida, a halfway house for patients released from state mental hospitals, is one example of such a case.

2. Id. at 12.
3. Id.
4. Id.
5. Id. at 12-13.
community based program. This organization provided care for its clients at an average cost of $16,414 per year in 1982-83. Care in the state mental hospitals varies from one institution to another but for all state mental hospitals combined the cost was $28,590 per patient during the same period. At the same time the recidivism rate for Boley Manor was thirty-one percent while recidivism for state hospital discharges into the community was over fifty-four percent. Arguably, a hospital houses and treats the most seriously ill mental patients while a halfway house receives only those who have improved because of costly hospital treatment. This may not always be true, but even if it is, this does not invalidate the basic premise that more costly services tend to receive priority funding since the usual treatment cycle is from home to hospital to halfway house. Assuming patients have all received maximum hospital benefits at discharge the recidivism rate should be comparable. Provision for a reverse cycle from home to halfway house to hospital is a relatively new, emerging treatment modality. There is no way to know if halfway houses can effectively prevent the progression of symptoms obviating the need for hospitalization in the first place but is a fitting topic for controlled research and there is considerable enthusiasm about its efficacy.

Foster care programs for children provide an additional example of the concept of high cost and limited effectiveness. There is general agreement among child welfare experts that the American system of foster care has not met the needs of the vast majority of children entering the system. The government agencies responsible for administering the majority of these foster care programs have typically done so with insufficient staffs, largely untrained in child welfare practice. Programs have been characterized by a very high rate of staff turnover. Foster families, to their credit, have usually responded generously to the children. They have done so with little pre-service or in-service training. Their homes have frequently become overcrowded with foster children because of the scarcity of homes available for these children. They have always been sorely underpaid. As a result of all the above factors, children have remained in foster care for inordinately long periods of time.

6. Telephone interview with Marilyn Dimas, Executive Director of Boley Manor, in St. Petersburg, Fla. (Nov. 30, 1983).
7. Id.
8. Id.
While it is very difficult to secure accurate estimates of the number of children in foster care, a national study estimates that 502,000 children were in foster care in 1978. Nearly twenty-five percent of the children in foster care had been there over six years and 2.5 years was the median length of time in care.

This study reveals the injurious effects of a costly service that leads to even greater future problems and expenses. It states that “[t]wenty-two percent of the children in foster care have been with at least three foster care families.” Since each child begins life in at least the titular care of a biological parent, these children have had at least four parent figures in their brief lives. The consequences of constant disruptions of the child’s family ties are lamented by commentators Kline and Overstreet who state, “should it be necessary to change a child’s foster placement there are disadvantages to the child, lesser but serious disadvantages to the parent and erosion of resources.” These thoughts are echoed by other authorities who indicate that every child requires continuity of care, and an unbroken relationship with at least one adult who is and wants to be directly responsible for his daily needs. They stress the importance of the psychological ties that develop over time between a child and the adults who continually provide for his day-to-day care.

Unfortunately our nation’s foster children have not benefitted from this needed continuity of care. They have been moved from home to home, often precipitously, many times with no long-term plan for their future. They have experienced “foster care drift.” Not surprisingly, these children feel rootless and angry. Many have great difficulty forming meaningful or close relationships with other children or adults.

11. Id.
12. Id.
15. Id.
16. Jones, Stopping Foster Care Drift: A Review of Legislation and Special Programs, LVII CHILD WELFARE 571 (1978) ("foster care drift" describes the frequently experienced situation in which a child is placed in the foster care program, no specific plan is devised and he spends his entire childhood moving from one foster home to another).
Many of them are considered "hard to place" for adoption because they are older, emotionally or physically handicapped, or constitute a family group of several siblings.

There is ample documentation that a relatively small expenditure of funds can effectively move many such children from foster care back to biological family units or into adoption or other permanent placements.\(^\text{17}\) As early as 1972, Cumberland County, Pennsylvania, demonstrated that a county welfare department with no outside grant money or legislative support could, within five years, reduce the number of children in foster care by one-half through an aggressive adoption program.\(^\text{18}\) Other aspects of the five-year project are equally impressive. It is estimated it cost less than $95,000 and saved $668,000 in foster care costs exclusive of medical and dental care or administrative costs. With the redistribution of caseloads, the agency was able to develop day care and other services to children in their own homes. There was a reduction of turnover rates of foster care caseworkers and fewer foster case placements per child.\(^\text{19}\)

A different approach predating the Cumberland County effort has had results which are equally significant. In 1971, the Juvenile Welfare Board of Pinellas County, Florida entered into an agreement with Family Service Centers of Pinellas County (then named Family and Children's Service) to provide funds for that agency to intensify its efforts to find adoptive homes for children who were considered hard to place. The arrangement provided financial support for personnel and for recruitment of homes. It also authorized limited financial subsidies in special cases for low income families who would otherwise not have been able to adopt children with special medical problems or who were members of family groups. This program has continued with modifications to the present time. Several years after the initial funding the Juvenile Welfare Board provided staff to the local district of the Department of Health and Rehabilitative Services (HRS) to assist the Department in securing the legal release of children in foster care, permitting them to be placed for adoption. This coalition proved to be particularly effective. More than four hundred children with special needs have been placed as a direct result of this funding.\(^\text{20}\) While there have

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19. *Id.*
been subsequent changes in the adoption services delivered by HRS as well as the Family Service Centers, the initial project provided the first impetus for the concentration of adoptive efforts on these special children. No estimate of cost savings has been made but it is obvious that the adoptive placement of more than four hundred children has had considerable fiscal impact on foster care expenditures. The more subtle but perhaps more beneficial effect has been to give these children the positive experience of permanence in their adoptive families and the continuity of care that is so vitally important for a child’s personality and character development.

There is also impressive evidence that financial subsidy to families adopting “hard to place” children results in more such adoptions. There is also impressive evidence that financial subsidy to families adopting “hard to place” children results in more such adoptions.\(^{21}\) Studies also indicate that adoption with subsidy results in savings to the state averaging thirty-seven percent as compared with keeping that child in foster care.\(^{22}\) Unfortunately, even with the documented savings, many states including Florida are reducing, or at least not increasing, funds for adoption subsidy. As one commentator has said, “[c]utting state adoption subsidy budgets will not save tax dollars, but actually will increase tax spending in that same year and in the years to come. Why? Every child who is not placed for adoption with subsidy will remain in costlier foster or institutional care (which can run four times as high as foster care).”\(^{23}\)

### III. Recent Views on Funding for Less Costly Services

Throughout professional literature and in the media there are constant references to this nation’s penchant for ignoring or neglecting less costly alternatives for treating social problems. The Honorable Herbert L. Fields, a juvenile court judge, relates his experience that utilization of family-based services can reduce foster care placement from sixty to seventy percent.\(^{24}\) Unfortunately, family-based services designed to prevent foster care placement are totally unavailable in most jurisdictions. In child welfare generally, the focus is on the care of children after disaster has struck. Insufficient attention is given to the possibility of a


\(^{22}\) Id.

\(^{23}\) Id.

child remaining in his own home. Efforts are concentrated on providing quality child-care services in foster homes, in institutions or in group homes. The question has been asked why we are building resources at the bottom of the hill to catch children after they fall, instead of building fences at the top of the hill so that children will not fall at all.\textsuperscript{25}

Some recent articles in the \textit{St. Petersburg Times} approach the problem from different perspectives but essentially make the same point—we are sacrificing families, the well-being of children and society at large by ignoring less costly and more effective methods. For example, Sidney M. Goetz, adjunct professor at Stetson University College of Law, advances persuasive arguments that mediation is a better way to settle divorce disputes than our present adversarial system.\textsuperscript{26} He points out the murders by divorce litigants, the kidnappings of children in custody disputes and the open court battles which air the most lurid sexual accusations and which are reported in detail by the media.\textsuperscript{27} He states that our adversarial system is a disaster in the settlement of marital and custodial disputes and concludes by saying:

\begin{quote}
When push comes to shove, perhaps the bottom line in determining whether mediation can replace litigation in divorce and custody disputes will not be the savings in lost human lives and misery that prevail under our present system, but the huge savings to be realized from lower public costs for criminal prosecutions, imprisonment, hospitalization, mental and emotional breakdowns, social service agencies, and other costs both publicly and privately endured under our present system.\textsuperscript{28}
\end{quote}

Another recent article reporting on a conference concerning delinquent and dependent children cites several authorities elaborating on the deficiencies in the current state systems for dealing with these children.\textsuperscript{29} These authorities indicate that many of Florida's emotionally disturbed children end up in state training schools, hospitals or on waiting lists because the services they need are not available.\textsuperscript{30} Runaways

\begin{footnotesize}
\begin{enumerate}
\item R. Wright, \textit{Our Troubled Children-Our Community's Challenge} 92 (1967).
\item \textit{Id}.
\item \textit{Id}.
\item Huntley, \textit{Legislature to Look at Runaways, Other Children's Issues}, St. Petersburg Times, Nov. 19, 1983, at B 7, col. 4.
\item \textit{Id}.
\end{enumerate}
\end{footnotesize}
are sent to detention centers simply because judges don't have any other place to send them.\(^{31}\) Inappropriate placement of children is one of the major problems in state training schools. Inadequate salaries and training for staff at these schools are other problems.\(^{32}\) A legitimate question then is why cost-conscious legislators continue to fund the more costly programs for institutions, foster care, juvenile detention and training schools and at the same time are penurious with programs providing family support or community-based care?

IV. Why the Funding Paradox Exists

The answers to that question are very complex and to some extent obscure. Obviously lawmakers do not follow this pattern by deliberate choice. Part of the rationale for this paradox is fairly obvious but other aspects are far more difficult to decipher. In fairness to lawmakers at all levels of government, they cannot be expected to have the degree of knowledge necessary to vote from a thorough base of fact on the myriad issues which confront them. Consequently they tend to be swayed by the pressure groups seeking funding for a particular problem.

Pressure groups begin to form when a given problem reaches some degree of intensity and universality. This intensification rallies those who are touched by the problem into a creative nucleus demanding alleviation. Without planned intervention, it is inevitable that such a process occurs. It is extremely difficult to secure funding to prevent a problem that cannot be demonstrated fairly conclusively. The more universally the problem cuts across all income levels, the greater is the power base and the easier it is to secure funding. Consider the relative ease with which funds have been obtained for mental illness, drug abuse and mental retardation once these conditions "come out of the closet." These are afflictions that strike all economic categories and every strata of society. Contrast this with the difficulty in securing adequate funds for quality foster home care, prison reform and day care services which tend to be disproportionately utilized by lower income families and individuals.\(^{33}\)

A second factor negatively affecting funding for less costly services is the elusive nature of preventive efforts. It is extremely difficult to prove that a given effort in social services has reduced the incidence of

\(^{31}\) Id.
\(^{32}\) Id.
\(^{33}\) STATUS OF CHILDREN, supra note 10, at 39, 65.
the problem being addressed. The global nature of social problems and the multitude of variables affecting any single symptom creates significant difficulties in research design. The need for longitudinal studies creates problems in obtaining ongoing funding. Social service research has lagged so far behind other forms of research that few “thermometers” have been developed to assist in charting progress. It is impossible to determine, for example, if Florida’s initiatives in child welfare services including foster care review, adoption subsidy, purchase of adoption services and similar programs are responsible for the steady decline of children in foster care. The dramatic reduction from 8,653 children in foster care in 1978 to 5,973 in 1983 may very well be due to these initiatives.34

It is equally impossible to ascertain if community-based programs are responsible for the reduced crime rates and arrests of juveniles currently being experienced in Florida. Since 1979, arrests for juvenile crime have decreased by twenty-four percent but no one is quite sure why this has happened.35 Authorities credit a number of possibilities ranging from neighborhood crime watch programs to the state’s “get tough with juvenile crime” attitude which began in 1981.36 An increase in community-based programs parallels the decline but there are no specific research studies which have addressed this issue. Consequently cause and effect relationships cannot be determined nor any firm conclusions drawn.

The decrease in juvenile crime in general is in stark contrast to the rates for violent crimes (rape, homicide and attempted murder) which have continued to rise among juveniles.37 The increase from the 1960s to the 1980s has been labelled “dramatic” by one researcher. Dr. Kathleen M. Heide of the University of South Florida has been conducting research on violent crime among incarcerated juveniles based upon intensive three-hour interviews.38 The thirty juveniles interviewed have been convicted of first degree or second degree murder or attempted murder.39 She reports that eighty-eight percent had prior arrests, some

34. FLA. HRS, CHILD WELFARE SERVICES IN FLORIDA, 27 (1983) [hereinafter cited as HRS].
36. Id.
37. Id. at B 21, col. 1.
38. Id.
39. Id. at B 11, col. 2.
as many as sixteen. Forty percent had prior arrests for violent crime. Forty-three percent felt no responsibility and many denied having deep feelings about things or deep emotional involvements. While the rest seemed to know their crime was morally wrong, few displayed remorse or empathy for the victim or survivors. Dr. Heide's research raises many more questions than it answers. Is it possible that a failure to have continuity of care during infancy and early childhood does more than make it difficult for that child to form meaningful relationships? Does it perhaps create a situation in which such children become disassociated from society to the extent that violent crimes carry no emotional impact for them? Are they able to engage in violent crime because the victims become objects without feelings—like themselves? Are they able to kill a fellow human being in the same way that most kill a fly or mosquito? Much more research will be needed before we can begin to answer these questions and, unfortunately, research funds are difficult to find.

When research funds are allocated for social services, they are largely limited to pilot projects or demonstrations. More emphasis is placed on the alleviation of symptoms of social distress than on a solution to the problem itself. Any program designed as a research vehicle is in fiscal jeopardy unless it addresses a specific symptom or syndrome. Pure research or even service programs designed primarily for research are rare in the social service arena. In this respect there is an interesting contrast between the fields of medicine and social services. In medicine, huge amounts of money are made available for research. So much money is available for researching the more popular diseases, it is rumored, that more funds are available than the research facilities can prudently spend. Many of these research efforts lead to dead ends, and are, in effect, failures. No stigma attaches to the researchers in these instances. In fact, more failures are expected than successes. That is the essential nature of pure research. Unfortunately, it does not appear that social services will receive the same research treatment enjoyed by medicine in the foreseeable future.

While we continue to pursue funds for research and preventive efforts, we need to ponder the ultimate costs of this protracted delay. This is exemplified by the comments of noted psychiatrist Dr. Lee Salk,
“[c]learly, if adult personality is markedly influenced by an individual’s earliest experiences, we should concentrate preventive efforts on the very young. While most professionals in the mental health field recognize this, relatively little effort is directed toward assisting those who are primarily responsible for the personality development of infants and young children—their parents.’’ This benign neglect of parents and their children along with other grave social problems indicates that our economy may be engulfed by social ills which will cause it to implode if we do not soon begin to deal with them. Although these are unpopular topics which arouse emotions and biases and which are surrounded by stereotypical thinking and prejudice, the implications are ominous if these problems are not addressed.

A 1979 study by the United States Department of Health and Human Services revealed that minority children are in correctional facilities at a rate four hundred percent higher than whites but are found in medical and special educational facilities at a rate only twenty percent higher than whites. Unless one subscribes to the erroneous theory that white children are somehow inherently mentally healthier and more law abiding, these figures raise critical questions about social attitudes toward methods of handling ‘‘problem behavior’’ among different cultural and social groups. The apparent differential treatment afforded whites as compared to minorities leads to another aspect of the paradox; that is, the expending of increasingly greater amounts on ineffective correctional facilities while neglecting adequate educational and medical modalities. It masks and circumvents a less expensive approach over the long run. This approach is to address the root causes of behavior and circumstances which lead to the necessity for correctional facilities, remedial educational facilities and institutions and services by the socially, physically and mentally impaired. Such in-depth investigation would necessitate attention to more mundane areas including slum housing, poor nutrition and lack of educational and job opportunities. It would also include an examination of the unavailability of medical care for the poor, federal programs such as Aid to Families with Dependent Children which militate against keeping families intact, and the higher birthrate among minorities. In the aggregate these conditions help to insidiously create the very climate in which crime flourishes and in which the seeds of mental illness are sown.

44. H. James, supra note 1, at 64.
45. Status of Children, supra note 10, at 65. The author presumes that the term educational facilities used in the cited source denotes special education facilities.
Mental retardation was also identified as a problem of the poor in this Department of Health and Human Services study. It pointed out that about 100,000 children each year are identified as retarded.\textsuperscript{46} About ninety percent of these are considered "mildly" retarded—an I.Q. between fifty and seventy.\textsuperscript{47} A significant amount of "mild" retardation is believed to be the result of deprived social environment often associated with poverty. One likely cause is improper nutrition.\textsuperscript{48} Maternal nutrition during pregnancy and lactation is critical for child health. Pregnant women lacking proper nutrition have a greater chance of bearing a low birthweight or stillborn infant.\textsuperscript{49} Low birthweight is correlated with mental retardation and other serious developmental defects. There are few programs that rival nutritional programs in repayment to society for a given financial outlay. These nutrition services are critical for low income women and young children. Most people are aware of the federally supported school lunches, but there have also been the federal Special Supplemental Food Program for Women, Infants and Children (WIC) providing nutritional supplements for low income women, infants and young children and school breakfast programs.

School lunches at reduced rates or completely free for low income children are generally well known and noncontroversial. At the same time the WIC program and school breakfasts are largely unknown. Both these efforts may very well be more beneficial than the lunches if we accept the nutritional admonition that a good breakfast is a necessity to enhance learning capabilities for all children to say nothing of low income children who may go to bed without an adequate evening meal. Further, since the WIC program would begin affecting children \textit{in utero} via better nutrition for their mothers and would provide beneficial results for infants and young children before they reach school age, thereby being more preventive, it seems these programs should receive wider support and acclaim. Unfortunately we seem bent on waiting until the situation reaches a greater degree of severity at school age before we are willing to commit significant resources.

A final comment on the problems confronting legislators in funding such efforts is in order. It is apparent that preventive efforts require either additional expenditures or diversion of some funds that would

\textsuperscript{46} \textit{Id.} at 45.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} at 32.
otherwise be spent on the more costly programs. In view of the uncertainties of preventive efforts it is understandable why legislators are reluctant to underwrite such programs either by increased expenditures or by utilizing funds that are vitally needed in existing services. There are, however, some encouraging indications that the tendency to fund more costly alternatives is undergoing a gradual evolution in Florida.

V. Evolutionary Developments in Funding Preventive Programs

There have been a number of developments within the past several years that are noteworthy. They touch, however, only a very small segment of the total needs of Florida’s children. Except for one very recent example in prison reform, the areas of abuse, neglect and dependency are the focal points of the new developments discussed in this article. With that caveat there are a number of new programs for which Florida’s legislators and its Department of Health and Rehabilitative Services (HRS) deserve commendation. In at least one broad area, Florida has become one of the nation’s leaders. It is one of only five states presently carrying out a full-service statewide preplacement prevention program to avoid foster care of children.

These efforts began in 1971 with a statewide child abuse registry and child protective services programs. In 1975 status offenses were decriminalized to provide that children committing status offenses such as running away, being truant or beyond parental control, are treated as dependent rather than delinquent children. Programs providing shelters for runaway children and the guardian ad litem project were important innovations. The guardian ad litem program was established through the state courts administrator’s office in 1980, and provides for the appointment of an advocate who represents the best interests of the child in abuse and neglect proceedings before the court. Interspersed with these efforts to prevent placement were equally important endeavors to move children out of foster care into adoption or return them to their biological parents. In 1976, the state instituted a system of judicial review of children in foster care. This required a study and report

50. See infra note 60 and accompanying text.
52. FLA. STAT. § 39.01(10)(h) & (i), (ii) (1975).
of each child's status to the circuit court. That same year Florida began providing adoption subsidies to children with special needs in order to increase the placement of children whose cost of care inhibited their prospects for adoption. In 1978, HRS received a three hundred percent increase in adoption staff and began purchasing adoption services for children with special needs from private adoption agencies. One child protection team was funded as a pilot project in that year. These have since been expanded to fourteen primary teams and seven satellite teams in fifteen metropolitan areas. The teams are designed to offer a multidisciplinary approach to the problems of children at risk and now serve all sixty-seven of Florida's counties.

Two additional child welfare initiatives during the period 1981-83 have enormous potential and deserve special recognition. The first of these is Florida Statutes section 827.075, known popularly as the "Mills Bill." This act allocates funds to each HRS district to prevent child abuse and neglect. Through an advisory council concept, each HRS district can develop a tailor-made plan consistent with its self-determined needs. Consequently, a wide variety of preventive services is emerging. There is still some concern that with the volume of needed services and the minimal amount of funding, it is virtually impossible to evaluate the efficacy of the various approaches. Nevertheless it is anticipated that HRS will be tracking the various projects statewide and sharing information among districts. It is highly desirable that the funding continue in an amount sufficient to incorporate results-oriented research into the projects. If sufficient allocations continue for the period of time necessary to do longitudinal studies of child abuse prevention, the framework is in place to begin impacting child abuse on a large scale.

The second recent allocation that deserves highlighting is that for the Intensive Crisis Counseling Program (ICCP), designed to prevent removal of children from their families into foster care. The cost effectiveness of this type of program has been mentioned earlier. The long-term positive effects on the families and children involved are incalcu-

54. Id.
55. HRS, supra note 34, at 3.
56. Id.
57. Id.
59. Id.
labe. The ultimate benefit to society is equally difficult to measure but is of enormous significance. Unfortunately, these programs are minimally supported. Pinellas County with nearly 750,000 residents has an annualized allocation of $60,000. Since the service is targeted to families in immediate danger of having their children removed, the caseworkers must be available twenty-four hours a day, seven days a week. The limited funds available provide only a skeletal program. The encouraging aspect, however, is that families are eligible only before their children are removed. This not only avoids the more costly alternative of foster care but provides an evaluating mechanism. By tracking the success rate of the project in preventing placement over a predetermined period of time, a true research dimension will be put into place.

Presuming successful intervention, the programs can begin not from the point at which children are in imminent danger of removal but at earlier periods in the parent-child life cycle. Effective intervention at earlier stages significantly reduces the trauma that accrues to children and to parents who reach the point of imminent removal. It is this positive process of moving to even earlier points of intervention that will enable us to move from alleviation of symptoms to tertiary, secondary and finally primary prevention of the problem. Each succeeding step backward will utilize our resources to serve ever increasing numbers at less cost while having more positive impact on ultimate causes.

One final program should be mentioned. While not directly related to children, it demonstrates how creativity can indirectly relate to children’s needs by preserving the family unit. It also indicates the universality of the concept of funding more costly alternatives and the back door methods which finally and belatedly have begun breaking the pattern. The program in question is one providing house arrest for convicted felons. It is designed for those offenders who would not be good probation material and most likely would be sentenced to prison for short terms of twelve to thirty months. They typically are nonviolent property offenders. They can be sentenced to house arrest for periods up to two years. There are rigid regulations and close supervision to enforce the rules. While difficult for the “prisoners” to endure, the new program is ideal for offenders with families since it does not deprive

60. Pinellas County Family Service Centers, ICCP funding, effective Oct. 18, 1983.
children of their parents or innocent spouses of their partners. Offenders in the project can continue to work and leave home occasionally for other approved purposes. It is estimated by state prison officials that the new program will save the taxpayers $34,000,000 in its first year.\(^2\)

As commendable as the experiment is, it is regrettable it did not emerge from the state’s concern for families and children. Rather it was devised as a partial answer to the overcrowding of state prisons. While its \textit{raison d’etre} may be less family oriented than one might wish, it nevertheless serves these ends and deserves enthusiastic support.

As laudable as the efforts made in Florida are, they still constitute bits and pieces of “the system.” The system has often been described a difficult to see and even more difficult to understand. The system is made up of many subsystems. To understand it, one must begin with our methods of mating, which do not necessarily bring together people who are well-suited and trained to be parents. This can result in neglected, battered, and disturbed children. There are problems of contraception, abortion, prenatal care and the parenting system or systems. There are alternative systems for children whose parents are killed, for victims of divorce, abuse, neglect, for unwanted children, for those born to parents who live in poverty or born to parents who cannot care for a handicapped child or those born out of wedlock. The list includes the school system, welfare system and the mental health system. In addition we have the juvenile justice system, the day care system, the religious system, the special education system, the system for retarded, parks and recreation systems, those designed to meet the needs of blind, deaf or crippled children, the health-care system and others. If these systems were properly designed, they would function in harmony like an orchestra. But the system dealing with children is not an orchestra. Each subsystem from the family to the prison, fiddles with its own tune paying no attention either to harmony or rhythm. This results in discord and damaged children, crime, mental illness and much pain.\(^3\)

This may be too harsh an indictment of the infrastructure of people, services and institutions which has evolved to serve our children and families. Nevertheless it comes too close to the truth to be ignored. A great deal needs to be done to create a logical sequence of services to meet social problems. This is a massive undertaking and runs afoul of

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62. \textit{Id.}

63. H. JAMES, \textit{supra} note 1, at 40-42.
pressure groups, vested interests, cronyism, fraud, graft, incompetence, philosophical differences and religious convictions to name just a few. While we may never create a perfect system, we must not abandon efforts to improve the ones we have.

VI. Conclusion

It is evident that legislators are under intense pressure to address those problems in society that are creating the most dramatic statistics. Faced with finite resources and infinite need, it becomes extremely difficult to finance unproven or even proven preventive efforts or those designed for early intervention. However, the failure to do so almost certainly assures a continuation of ever more severe problems necessitating larger and larger fiscal outlays. It has been predicted that some future generation will stand incredulous at the barbarity of their twentieth century ancestors who dealt with the needs of children by creating more jails and prisons, more mental hospitals and mental health centers, and institutions for retarded and handicapped children. The will be startled to find that we ignored the child-production and child-rearing systems and invested in guns, police cars and policemen, more social and mental health workers and handed out more and larger doles of money to so-called welfare mothers who produced more and more unwanted children. This is a cynical prediction with a ring of denigration of those who find themselves caught up in the vicious cycle of poverty. As cynical and demeaning as these comments may be, they merit consideration. It is imperative that we begin trying to build a fence around the hill to keep our children from falling off.

If we are genuinely concerned about the quality of family life and the welfare of children, we must support our legislators in appropriating funds for various levels of research and prevention. If every allocation of funds to treat the results of familial or societal breakdown had a companion allocation to investigate and prevent the problem, we would soon begin making major advances in treatment. The movement in Florida toward this goal is encouraging. The initiatives need to be expanded as results oriented research continues to demonstrate its cost-effectiveness. Unless this movement continues, we appear destined to perpetuate in large measure the expensive and unrewarding process of funding the most costly and least preventive alternative.

64. Id. at 65.
65. Id. at 65.
Accreditation of Florida’s Child Welfare Services: An Idea Whose Time has Come

Monsignor Bryan O. Walsh*

One has only to look in the yellow pages of any metropolitan area telephone book under “social services” to be faced with a bewildering selection of agencies, public and voluntary, non-profit and proprietary. Information and referral has, as a result, become a standard service of United Way and other public and voluntary agencies. Americans are a generous people. They respond instinctively to the cry of a hurting fellow human being, a newspaper story of a stranded family, or an abandoned child. Americans are a pragmatic people. When they see a problem, they have an urge to do something about it, to come together and find a solution. It is a cultural characteristic which is a relic of pioneer days when survival often depended on neighbors and even strangers getting together in mutual aid. Alexis de Tocqueville noted this in his classic commentary on American life, Democracy in America.

Consumers of social services, contributors and funding sources all face the same problem of identifying agencies that meet some recognized standards for quality services. Stories of fraudulent charities are commonplace in the media. Occasionally there are stories of neglect and child abuse even in social service agencies. Less sensational, but nonetheless real, are the inadequate or inappropriate interventions in the lives of children and families. Private industry developed quality control methods to assure that the goods and services produced meet accepted standards. In the area of human services, a peculiarly American solution has evolved to protect those who receive services and those who pay for them. It is called accreditation. In other countries and cultures, government fulfills this role by laying down strict regulations which govern every aspect of the service delivery system. Americans, with their healthy suspicion of too much government intervention in the fields of education and health, have developed an accreditation methodology. The several regional accreditation associations in education and the Joint Commission on the Accreditation of Hospitals have for a long

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time been the recognized instruments of quality control in their fields of human services.

Accreditation is defined as a methodology which assures:

that the organizational providers of service, whether in education, health care or social service, meet the recognized standards of their domain and its professionals. The accreditation of the agency providers is part of a larger system of quality control that includes accreditation of training programs and institutions and the certification and licensing of individual professionals.¹

The specific purpose of accreditation is to assure that services are delivered in effective and efficient ways which are consistent with the canons of good practice and organizational operation. The core of any accreditation system is the norm against which a program is judged. However, to be effective, the system has to be accepted by its constituency and have recognition in the community and in society at large. Accreditation is, thus, a living process which expands to cover new services as they are developed in the field. Accreditation as a process has to win acceptance and achieve credibility, not only among the agencies it seeks to evaluate, but also among consumers and funding sources. Armed with the seal of accreditation, a provider of human services demonstrates to the world that it:

has established policies and procedures for its effective management, is financially sound, manages its financial affairs prudently and is committed to the principle of public disclosure, shapes its programs of services to meet community needs and concerns, continually evaluates its services and operation, respects and protects the clients it serves, is staffed by qualified personnel who work under conditions that promote effective performance, has the facilities and equipment suited to the delivery of quality services.²

Accreditation, as it has developed in the United States, is essentially a voluntary effort as opposed to governmentally imposed regulations. “It began in the field of education in answer to the need educational institutions had to have some objective method of evaluating

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1. PROVISIONS FOR ACCREDITATION OF AGENCIES SERVING FAMILIES AND CHILDREN V. (Council on Accreditation of Services for Families and Children 1982).
2. COUNCIL ON ACCREDITATION FOR FAMILIES AND CHILDREN, INC., WE ARE ACCREDITED BY COA AND YOU SHOULD KNOW (1982).
Accreditation

education transfer credits and diplomas issued by schools in the absence of any nationwide governmental standards.\(^3\) Accreditation has worked in the field of education "[d]espite certain limitations and the thorny problems inherent in the establishing of criteria and procedures, educational accreditation has greatly contributed to raising academic standards on both secondary and higher educational levels.\(^4\)

The second field of human services to look at accreditation as a means of assuring quality care was medicine. In 1918, the American College of Surgeons began its hospital standardization program. More than any other movement in North American medicine, it is credited with substantial influence in improving hospital care. In 1953, this responsibility was turned over to a special body known as the Joint Commission on Accreditation of Hospitals (JCAH). The Commission is sponsored by four medical organizations; the American Medical Association, the American College of Physicians, the American Hospital Association, and the American College of Surgeons. Today, JCAH accreditation is the recognized standard-setter for the field.

Authorities in the field of social services have long recognized the need for standard-setting in this rapidly expanding field. The Child Welfare League of America (CWLA) was founded in 1920 for the purpose of improving services for children away from their own homes. This was the era of big orphanages which often were little more than warehouses for dependent children. By the mid 1920s, graduates of the new schools of social work began to influence the field and to work for change. Similar forces were at work in other national organizations, such as the Family Service Association (FSA), founded in 1911, and the National Conference of Catholic Charities, founded in 1910.

In 1954, the Child Welfare League established a membership-linked accreditation system and the Family Service Association followed suit. The efforts of these two standard-setting organizations introduced the concept of accreditation to the field of child and family services. By 1976, between them, these two groups had 580 accredited agencies on their rosters. However, the fact that accreditation was linked to membership tended to limit widespread acceptance of the system by the field. The boards of CWLA and FSA saw the need for a national accreditation system that was open to all public and voluntary agencies without regard to membership in any organization. Membership in a national organization is costly and many agencies which de-

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4. Id. at 83
sired accreditation by a nationally recognized agency such as CWLA, were faced with paying a second set of national dues in addition to their own national affiliation. In 1976, of the 545 agencies in the National Conference of Catholic Charities, only twelve, including the Catholic Community Services of Miami were accredited by the Child Welfare League of America.

In 1976, the boards of CWLA and FSA decided to initiate a joint project, the Council on Accreditation of Services for Families and Children (COA). The COA was to be an independent agency with its own governing board. It would be sponsored by the two national organizations. It was expected that other national organizations would join them, but membership in a national organization would not be a requirement for accreditation, thus removing a possible conflict of interest. Funding for the project was received from the U.S. Department of Health, Education and Welfare, the Ittleson Foundation, the Benjamin Rosenthal Foundation, and the W.R. Grace Corporation. The preliminary work was done by staff from the national offices of the original sponsors, directed by a joint committee of both boards.

The Council was legally incorporated in August 1977 and hired its first executive director a month later. In June 1978, the first full board took office. It consisted of individuals with broad backgrounds and experience in the family and children’s field. Major national organizations assisted in the selection of the first board: the American Federation of Labor and Congress of Industrial Organizations, American Association for Marriage and Family Therapy, Association of Jewish Family and Children’s Agencies, National Association of Black Social Workers, National Conference of Catholic Charities, and the National Council of the Churches of Christ in the USA.

In July 1978, the Council took over accreditation functions from its two sponsors. One of its first acts was to change the existing accreditation cycle from five years to four. This compares with a ten year cycle for education and a three year cycle in the medical field. The new organization had a formidable task, since it took over an ongoing process, with fifty-nine CWLA and FSA agencies up for accreditation in the first year. Each of these agencies had to be re-educated to a new method of operation. One of the first changes noted was a change in terminology. What had formerly been referred to as standards for accreditation now became provisions. The reason for the change was expressed by the new executive director in these words:

The Council term for its accreditation requirements is provi-
Accreditation, as distinguished from the goal standards which have traditionally been developed by its national sponsor organizations. The sponsors of COA continue to be the source of the criteria upon which we base our provisions. Provisions are rigorous, but realistic operational requirements we distill from the sponsors' standards and their positions on critical issues. Provisions describe the quality practice of the present; goal standards could be said to lead the field into the future.  

The first edition of the Provisions for Accreditation was published in September 1978 and was widely distributed to local agencies, national organizations, public agencies and officials, libraries, and interested persons in the field. It was the product of two years' work which involved not only the national staffs and boards of CWLA and FSAA, but input from hundreds of persons representing local service agencies, national professional, advocacy and service organizations.

In 1980, the board of the Council took another step forward. It adopted a peer review methodology. Previously site visits had been made by the professional staffs of the two sponsors. In this regard the Council had chosen to follow the education rather than the hospital accreditation model. In February 1980, a new sponsor joined the fold, the National Conference of Catholic Charities (NCCC), with its 545 diocesan and branch agencies and 200 member institutions. It brought a new element into the movement towards widespread acceptance of the accreditation system. NCCC is a voluntary membership organization of Catholic charities agencies. By July 1980, the Council could report that in its first three years:

- It had published the first comprehensive accreditation provisions for family and children's agencies, developed accreditation instruments and the policies and procedures governing the accreditation process, established a decisionmaking structure, trained staff and peer accreditors, published a directory of accredited agencies, conducted agency accreditations and reaccreditations, instituted evaluation systems, expanded its national support, and begun recognition efforts at several levels.  

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5. Interview with Jeffrey Hantover, Executive Director of the Council on Accreditation of Services for Families and Children, in New York, New York (Nov. 15, 1983).
The Council was also able to report that it had received an additional two-year grant from the Ittleson Foundation and a three-year grant from the Administration for Children, Youth and Families. With these grants, the Council was able to add a small division for evaluation and development. The purpose is to develop provisions for the accreditation of services not previously covered as well as the modification of the rating system and evaluation instruments. During the next two years, provisions for mental health, residential treatment, substance abuse, refugee resettlement, home health aide service, volunteer services, and non-residential elderly services were developed. Work has begun on provisions for the accreditation of programs for runaway youth, under a new grant from the Youth Development Bureau. Under a grant from the Kellogg Foundation, the Council is adding volunteer friendship services, such as Big Brother organizations and social development groups, such as scouting and boys' clubs. These accreditation provisions will be in effect by January 1985, and, by 1987, provisions for the accreditation of several other services such as information and referral, credit-counseling and employee assistance will likely be available in a truly comprehensive system.

Accreditation seeks to accomplish several goals. It helps consumers as they decide on their choice of service providers. It tells the community that the agency and the service it provides has met accepted standards of performance. It helps private and public funding sources to identify which agencies are worthy of financial support. It helps a community to plan its referral networks with confidence in the services rendered. Accreditation therefore is a valuable tool for the community in bringing help to its hurting members. Accreditation also helps the agency in several different ways. It provides the governing board and its chief executive officer with an outside independent evaluation of its operation. It thus complements the work of the external financial auditor. Like the financial audit, it establishes specific goals for agency improvement. On the opposite side, it helps to protect the agency against pressures to lower its standards.

The Council for the Accreditation of Services for Families and Children was conceived, designed and established to accomplish these goals. It is structured to provide a careful balance between broad community interests and professional expertise. Its structure provides for the "participation of all elements in the field from the line professional to the national professional organization, from the consumer of service..."
The basic elements of any legitimate accreditation process are: 1) provisions or standards against which an agency's organization and service or services can be judged and 2) a systematic process for examining an agency in an objective review.

The provisions are the basis for the accreditation. They cover the entire range of agency operation, from governance by its board to contacts between staff and client, including the agency structure, policies, procedures and personnel. Provisions must reflect the best practice in the field, the state of the art. Thus, they must be constantly reviewed, modified and expanded as advances in research and practice are made. In undertaking this project, the Council built on the standards developed over the years by its two founding sponsors, the CWLA and the FSA. They are the product of a long cooperative process which must go on as long as accreditation exists and there are services and agencies to be accredited. Provisions should be distinguished from the licensing requirements of governmental agencies, which usually set only minimum standards involving life safety and quantitative measurements such as child-adult rations. Provisions are intended to represent the best practice in the field. They are specific objectives to be attained. They serve to set the sights of agencies as they look to their futures.

The systematic process for applying these principles developed by the Council includes the following steps:

1. a self study completed by the agency;
2. on-site evaluation by the accreditation team;
3. an accreditation report on the agency's compliance with the provisions;
4. agency opportunity to review and comment on the report;
5. objective evaluation of the report by a group of individuals experienced and knowledgeable in the realities of agency operation;
6. appeals process for agencies denied accreditation;
7. public identification of accredited agencies; and
8. monitoring of agencies to ensure continued compliance.

The Council's provisions are divided into generic and service categories. The Council describes them as:

8. Id. at vii.
The generic provisions encompass those aspects that apply to all agencies regardless of the service provided. Whether an agency offers adoption, foster care or substance abuse services, there are policies and practices of administration, fiscal management, personnel management, or evaluation that must be met. For example, all agencies must prepare annual budgets; not all agencies are required to utilize volunteers, but those who do should meet the provisions (for volunteers), whether these volunteers contribute to advocacy or day care services for children. 9

The service provisions provide the requirements specific to each service offered by the agency. If the Council has provisions for a given service, an agency that offers that service to the public must submit for review and meet at least the mandatory requirements for that service or lose accreditation as an agency.

The Council has established service councils for different areas of the country. It is the responsibility of the service council to review the report of the accreditation team and recommend one of four actions to the board of trustees: accreditation for four years; denial; deferment up to one year to allow the agency to bring itself into compliance with specific provisions; and deferment for additional information.

In October 1983, the Council had 458 accredited agencies. The number in Florida was only ten, yet there are some 700 child service agencies licensed by the state. Clearly, accreditation has a long way to go in Florida. Florida legislators and child advocates can encourage quality control in child welfare agencies by considering accreditation status when reviewing funding requests, and otherwise lending support to programs. On the national scene, the idea continues to gain more acceptance. The Council now numbers among its sponsors the Association of Jewish Family and Children's Agencies and the Lutheran Social Service System.

For accreditation to be truly effective it must have widespread recognition. The seal of Good Housekeeping and the stamp of Underwriters' Laboratories serve a double purpose in the manufacturing industry. They give the buying public assurances of quality and they also help the manufacturer sell products. Thus both consumer and provider benefit. This occurs when the stamp of approval is widely recognized in the community. The same is true for the seal of accreditation. The medical and educational accreditation associations have won widespread accept-

9. Id. at viii.
ance not only in their own specific fields, but in the community at large. No service provider in these fields can hope to survive very long without the associations’ approval. Funding sources demand it and the consumer expects it. The Council has recognized this from the beginning and has worked to cultivate such recognition. The following are some examples of progress toward formal recognition:

1. Blue Cross-Blue Shield of Michigan requires COA accreditation for participation in its outpatient psychiatric program.

2. The California United Way Bay Area Group Insurance Trust Fund covers outpatient services for mental and nervous disorders only if the provider is COA accredited.

3. Nationally, Xerox and IBM Employee Assistance Contracts with FSA require COA accreditation.

4. The Association of Mental Health Administrators, the National Association of State Mental Health Program Directors and the National Mental Health Association recommend COA accreditation as one way of assuring that out-patient psychiatric services eligible for insurance reimbursement meet accepted standards of quality.

It is only with the formal recognition of accredited child welfare services that effective quality control can take place. As the Council on Accreditation has stated, “[a]ccreditation as a form of private, voluntary quality control is carried out in the spirit of helping agencies. Accreditation is part of the process of agency education and improvement that will serve the interests of the agency, client, and the community as a whole. Quality control is a natural and necessary part of a responsible and accountable system of service delivery.”

10. Id.
HRS and The Health and Welfare of Florida’s Children

William W. Ausbon, M.D.*

I. Introduction

Recent information concerning children and families arising from 1980 census data and several national reports reveals certain situations and trends which will have far-reaching consequences for Florida and the nation. Section II of this article presents some highlights from those reports and certain information which focuses on the status of children. Included are economic, social, emotional and health factors, areas of particular concern to Florida’s legislators. Section III is devoted to brief sketches of some of the public programs in Florida administered by the Department of Health and Rehabilitative Services (HRS) which are intended to improve the lives of children and families, particularly those serving the low-income sector of our society.

II. The Status of the Nation’s Children

A. The Changing Composition of Families

The composition and size of the nation’s families is changing. During the 1970s, there was a decline in the percentage of families that included children, as well as in the number of children in the nation’s population. Although one might conclude that fewer children in each family and in society as a whole make it possible to devote greater care to those children we have, there is a danger that families with children will become increasingly isolated and that the nation may devote less—not more—of its attention and resources to children.1 The types of families in which children grow up today have also changed. The

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percentage of children living with just one parent rose by 1978 to nineteen percent. It is estimated that by 1990 twenty-five percent of all children will be living with just one parent. These percentages are much higher for black families. In 1978, forty-five percent of black children were living in single parent families. Another trend with major implications for society is the proportion of mothers who work outside the home. In 1979, 54.5 percent of all mothers of children under eighteen and 45.5 percent of all mothers of children under six were in the labor force.

B. The Economic Status of Children

As noted earlier, in 1978 approximately one-fifth of the nation's children were living in single-parent families. Those children are at a serious economic disadvantage compared to children living in two-parent homes. This is particularly true when the single parent is female. The median income of families headed by women in 1981 was $8,653. This compares with a median income of $25,636 in husband-wife families in that same year. When all the nation's children under eighteen are considered, whatever the composition of their family, 19.5 percent were living below the poverty level in 1981. The plight of black children and those of Hispanic origin was particularly severe; 44.9 percent of black children and 35.4 percent Hispanics lived below the poverty level in that same year.

C. Infants at Risk

The infant mortality rate in the United States has fallen dramatically since the 1950s when it stood at 29.2 per 1,000 live births. It

2. Id.
3. Id. at 54 and 56.
4. Id.
5. Id. at 56.
6. Id. at 54 & 56.
8. Id.
9. Id. at 17.
10. Id. at 17.
11. Id. at 31.
was recorded as 12.5 in 1980. Most infant deaths occur in the first month after birth. Those infants who are of low birth weight (2,500 grams or less) are at particular risk. They are twenty times as likely as heavier infants to die in the first year. The chances that an infant will be of low birth weight and at greater risk for developmental problems or death are increased when early, regular prenatal care has not been provided. The American College of Obstetrics and Gynecology has suggested that nine prenatal visits are the minimal level of obstetrical care. In 1977, twenty-four percent of white women and forty-seven percent of black women did not have this minimal level of care. Teenaged mothers accounted for 17.2 percent of all infants born in 1977. These infants had a low infant birth weight incidence of about 1.5 times the national average. In addition, statistics reveal that thirty-four percent of expectant mothers under age fifteen who gave birth in 1980 received no care during the first three months of their pregnancy, a particularly critical period of fetal development.

D. Children's Health

Overall, the health of the present generation of America's children is good in comparison to the past. Relatively few children suffer from chronic health problems or from serious limitation of activity. Yet, we must continue to focus attention on those who suffer from physical or mental handicaps, however small their numbers, lest we forfeit the recent gains made through medical, educational and rehabilitative programs which offer promise of the realization of these children's potential and a better quality of life. Additionally, there are major problems when we focus on children in low-income families. They are in poorer

12. Id. at 31.
15. J. Richmond & B. Filner, supra note 13, at 309.
16. Id.
17. Id.
18. Id.
health and are more likely to have health-related limitations.\textsuperscript{20} Poverty is the single biggest predictor of poor health in this country.\textsuperscript{21}

An area of major concern when considering the health of children is accidents. Accidents are the leading cause of death and disability among children and adolescents. Motor vehicle accidents account for one-fifth of all accidents among children each year.\textsuperscript{22} Although other accidental deaths and injuries result from drownings, burns, falls, and various forms of substance abuse,\textsuperscript{23} the fact remains that death rates among children and youth under age eighteen would be reduced by twenty percent if no child died in an automobile accident.\textsuperscript{24}

E. The Health and Behavior of Adolescents

The period of adolescence is regarded in our society as a separate life stage. The magnitude of change and growth that are typical of this period are second in intensity only to those of infancy.\textsuperscript{25} The physiological, emotional and social changes that occur during adolescence make this a period of special vulnerability. Adolescence is a life stage when experimentation is necessary, and to be encouraged. It is also a time when young people sample adulthood by trying out behaviors which are risky. Driving conduct and sexual behaviors are formed, either wisely or poorly, during this phase of development.\textsuperscript{26} It is apparent from the data on accidents which was previously presented that the major causes of death and disability among teenagers are related to behavior and the social environment. They usually involve temporary misjudgment, anger, or depression, combined with access to automobiles and guns. Inappropriate use of alcohol and drugs often interacts with these factors to appreciably increase the risk. Violence and accidents account for about seventy percent of the deaths of adolescents between the ages of twelve and seventeen.\textsuperscript{27}

Many of the behaviors that are a threat to the health and life of

\textsuperscript{20} 3 BETTER HEALTH FOR OUR CHILDREN, supra note 1, at 41.

\textsuperscript{21} 1 BETTER HEALTH FOR OUR CHILDREN, supra note 1, at 56 & 58.

\textsuperscript{22} Id. at 29.

\textsuperscript{23} Id.

\textsuperscript{24} 3 BETTER HEALTH FOR OUR CHILDREN, supra note 1, at 42.


\textsuperscript{26} 1 BETTER HEALTH FOR OUR CHILDREN, supra note 1, at 117.

\textsuperscript{27} S. Brown, supra note 25, at 341.
adolescents are deeply embedded in our society’s adult culture. Prominent examples are the use of alcohol, tobacco and mood-altering drugs, especially marijuana. These behaviors are perceived by teenagers as desirable symbols of independence, maturity and sophistication. Additionally, society’s expectations for adolescents are not clear. In some ways the adolescent is treated as a child, in others as an adult. Consequently, adolescents are often confused about their social duties and responsibilities, just as they are unclear about their rights and privileges.

F. Child Care

With nearly one-half of mothers of children under six currently in the work force, the need for child care has increased. Additionally, a trend toward child care outside the home is apparent, particularly if the mother is employed full time. While in 1958, 56.6 percent of care for children under age six was provided in the child’s own home, that figure dropped to 28.6 percent by 1977. In that year, 47.4 percent of these children received care in another home and 14.6 percent in a group child care center. In the past, there has been concern about the possible negative consequences of day care on the child’s psychological development. However, existing research indicates that children of working mothers develop as well on the average as those whose mothers remain at home and show no difference in the rate of psychological disorders.

Longitudinal studies can provide an accurate measure of the advantages or disadvantages of preschool child care programs on later school performance. Such an analysis of fourteen preschool programs has documented the benefits which can be afforded by appropriate day care programs. Academic performance, measured by a decrease in the likelihood of a child being retained in grade or being placed in special education classes, was improved for children in preschool programs as compared to those not participating in these programs. A number of professional organizations have recognized the significance of preschool

28. 1 Better Health for Our Children, supra note 1, at 341.
31. Id.
32. 1 Better Health for Our Children, supra note 1, at 58-9.
and day care settings for providing early opportunities for health and parent education and identifying health problems in children. These organizations include the American Academy of Pediatrics, the American Dental Association and the American Nurses Association. 84

G. Mental Health

Opportunities for promoting positive mental health among our country's population present themselves in infancy and continue throughout the child's various periods of growth. During the early years a child is not only vulnerable to infection and injury, but also to behavioral and emotional problems arising from social and interpersonal situations. If special risks such as poor nutrition, child abuse or neglect, or insufficient fostering of intellectual and psychological development are not identified and dealt with early, the child may be profoundly affected. 85 Neglect and abuse of children is a particularly critical problem in society today. Without preventive measures to strengthen parents' coping skills and improve family functioning, abuse and neglect can lead to family disintegration as well as delinquency by the child and distorted values concerning the role of parents.

Many of the psychosocial problems of children are identified when they begin school. 86 Problems include withdrawal, learning disabilities, truancy, aggression and delinquency. Boys are found to have higher rates of behavior problems than girls. 87 Behavior that leads to low achievement, falling behind grade level, or dropping out of school is of major concern. More than one-fourth of boys and one-sixth of girls still in school during their mid-teens have dropped below grade level. 88 The rates are much higher among minority students, forty percent for boys and thirty percent for girls. 89

From the perspective of the most serious forms of mental illness, adolescents constitute the fastest growing admissions category in psychiatric hospitals. 90 Suicide and homicide rates among both children and adolescents are increasing. 91 In addition, growing numbers of

34. 1 Better Health for our Children, supra note 1, at 110.
35. Healthy People, supra note 14, at 36.
36. 1 Better Health for our Children, supra note 1, at 47.
37. Id.
38. Id.
39. Id. at 47-8.
40. Id. at 300.
41. Id.
young people display problems with drug and alcohol abuse. In seeking remedies for these problems it is apparent that they are inextricably bound up with the most basic problems of living and can not be “treated” apart from the family, neighborhood, school and community which make up the normal socializing influences of society.42

III. Programs For Children and Families

Florida is fortunate to have a state human services agency that combines health, social and rehabilitative services under one umbrella structure. Virtually all of the public programs which focus on the health and welfare of Florida’s children and families are operated by the Department of Health and Rehabilitative Services (HRS). This agency was created by the Florida Legislature through the Reorganization Act of 1975.43 HRS program offices include: Alcohol, Drug Abuse and Mental Health; Children’s Medical Services; Children, Youth and Families; Developmental Services; Economic Services; Health; Medicaid; and Vocational Rehabilitation.44 This section contains brief descriptions of some of these HRS programs which deal primarily with infants, children and families.

A. Aid To Families With Dependent Children

Aid to Families With Dependent Children (AFDC) provides financial assistance to families who lack the support of one or both parents. Among other qualifications for AFDC, children must be under eighteen, unmarried, Florida residents and live in the home of a parent or close relative. Those sixteen and older must register for the Work Incentive Program (WIN) if they are not in school. Assets of the family must be less than $1,000.45 Family net income cannot exceed the AFDC payment amount which, in October, 1983 was $231 for a family of three.46 There were 285,806 AFDC recipients in Florida in October, 1983.47 Of these recipients, 197,207 were children, representing sixty-

42. Id. at 300-1.
43. 1980-81 FLA. DEPT. HRS ANN. REP. 1.
44. Id.
47. Id. (Sept. 1983).
nine percent of the total.\textsuperscript{48} The average grant per person was $74.\textsuperscript{49} More than seventy-seven percent of Florida's AFDC caseload is composed of families made up of three persons or less.\textsuperscript{50} Families of five or more persons represent less than ten percent of the total caseload.\textsuperscript{51}

B. Child Day Care

HRS receives federal funds through a Social Services block grant to contract for child day care services for certain low-income families.\textsuperscript{52} The state and local communities are also required to participate in the cost of services.\textsuperscript{53} Those eligible for services include: 1) recipients of AFDC and Supplementary Security Income (SSI); 2) families whose income is at or below a specific maximum for family size; 3) children at risk of abuse or neglect; and 4) children of migrant workers.\textsuperscript{54} In order to qualify for the program, day care services must be necessary: 1) to enable the adult(s) responsible for the child to accept or continue employment or participate in training leading to employment; 2) because the responsible adult is incapacitated; or 3) because the child has been abused, neglected or exploited by one or both parents and services will help to remedy the situation.\textsuperscript{55}

As of October 1, 1983, the estimated number of day care units contracted by HRS for infants was 4,100 and those for preschool children was 11,538, making a total of 15,638 units.\textsuperscript{56} The number of eligible children on waiting lists was 13,495.\textsuperscript{57} This included school-age children but no separate statistics for infants and preschool children were available.\textsuperscript{58} Fifteen of Florida's sixty-seven counties have no federal-state funded child day care program.\textsuperscript{59} The requirement of local

\begin{flushright}
\textsuperscript{48} Id. \\
\textsuperscript{49} Id. (Oct. 1983). \\
\textsuperscript{50} Id. (Sept. 1983). \\
\textsuperscript{51} Id. \\
\textsuperscript{52} FLA. HRS, CHILD DAY CARE PURCHASE OF SERVICE MANUAL 1-2 (Oct. 1983). \\
\textsuperscript{53} Id. \\
\textsuperscript{54} Id. \\
\textsuperscript{55} Id. at 1-3. \\
\textsuperscript{56} OFFICE OF CHILDREN, YOUTH AND FAMILIES, FLA. HRS, CHILD DAY CARE PURCHASE OF SERVICE ELIGIBILITY-TASK FORCE INFORMATION (Oct. 1983). \\
\textsuperscript{57} Id. \\
\textsuperscript{58} Id. \\
\textsuperscript{59} Personal Communication, Office of Children, Youth and Families, Support Services Section (Oct. 26, 1983).
\end{flushright}
participation in the cost of the services may account for the lack of public day care programs in these counties.

C. Medicaid

Florida's Medicaid Program provides reimbursement for medical services to categorically eligible persons, including recipients of AFDC and SSI. In September, 1983, 490,631 persons were on the Florida Medicaid rolls. Of that number, 214,365 were children under age eighteen. However, of all Medicaid expenditures, the proportion represented by medical services for children is small. In 1982, children represented forty-eight percent of all Medicaid recipients in the nation, yet their proportion of total Medicaid expenditures was only thirteen percent. In Florida, hospital inpatient services, nursing home services and services to clients in intermediate care facilities for the mentally retarded accounted for more than sixty percent of Medicaid expenditures during 1982-83.

D. Food Programs

Three major food programs affecting children and youth are funded wholly, or in part, by the United States Department of Agriculture. They are the Special Supplemental Food Program for Women, Infants, and Children (WIC), the School Lunch Program and the Food Stamp Program.

The Food Stamp Program began in Florida in 1969, with all sixty-seven counties participating by May, 1972. "It is intended to provide an adequate diet to members of low-income households by extending their food purchasing power through regular retail channels. Food stamps cannot be used to purchase such items as alcoholic beverages, tobacco products, household supplies, paper products, medicines, ready-to-eat foods, or pet supplies." The food stamp program income limit for most households is 130 percent of the Poverty Index, or a maximum

60. FLA. HRS ANN. REP., supra note 43, at 24.
61. Personal Communication, Fla. HRS, Office of Deputy Assistant Secretary for Medicaid, Fiscal Planning and Program Section (Oct. 26, 1983).
62. Id.
63. U.S. CHILDREN, supra note 7, at 53.
64. FLA. HRS ANN. REP., supra note 43, at 25.
65. ECONOMIC SERVICES PROGRAM, FOOD STAMP OFFICE, FLA. HRS, FOOD STAMP PROGRAM 2 (July 1983).
gross income of $1,073 per month for a household of four. To Eligible households are provided food stamps based on the number of persons in the household and adjusted net income. Thirty-eight percent of the food stamp caseload is composed of one-person households, one-half of whom are over fifty years of age. Twenty-one percent of the caseload is made up of two-person households. Since the basis of food stamp eligibility is income, the food stamp program differs from other food and welfare programs where dependency or health status are additional criteria. Approximately sixty percent of households receiving food stamps do not receive public assistance or social security income assistance.

The National School Lunch Program was initiated in 1946 to offer nutritious food for school children while providing an outlet for the country's agricultural surplus. In 1983, 2,122 sites in Florida participated in the school lunch program. One thousand of these also offered a school breakfast. For the month of April, 1983, the average daily number of lunches served throughout Florida was 911,358. Forty-four percent of the students paid for the school lunch; forty-eight percent met the income criteria to receive a free lunch; seven percent received a reduced price lunch. The National School Lunch Program designates the food groups and portion sizes for students and subsidizes the cost of school lunches to the state. Of all the federal funds coming to the Florida Department of Education, the school lunch program is the largest single entity. The Child Nutrition Act of 1966 also is the basis for the other food programs, including the Supplemental Milk

66. Id. at 7.
67. Id.
68. Id. at xiv.
69. Id.
70. Id.
71. Fla. Dept. of Educ., Dev. of School Food Since 1970, 4 (March 1983) [hereinafter cited as School Food].
74. Id.
75. Id.
Program, Summer Feeding Program, and Summer Camp Program. The school lunch program requires a state to match funds and to earn reimbursement based on a complex formula. In 1983, Florida was reimbursed over $126 million for school lunch and school breakfast sponsorship.

The Special Supplemental Food Program for Women, Infants and Children (WIC) was authorized by Congress through the Child Nutrition Act of 1966, as amended in 1972. It is totally federally funded. Florida’s WIC Program began in 1974. Thirty-seven local projects, primarily based in county health departments, provide WIC checks to eligible pregnant women or nursing mothers and children under age five. These checks are redeemable at specific vendors for the purchase of certain foods of high nutritional value, including juice, eggs, dairy products, infant formula and iron fortified cereals. Participants also are offered nutrition education, a mandatory provision of WIC regulations. Eligibility is based on both income and medical-nutritional risk. Local WIC programs are permitted to set income limits between 100-185 percent of the poverty index. Medical or nutritional risk is based on a health screening. The most common reason low-income children are eligible for WIC is because of the risk of iron deficiency anemia. During 1983 approximately 70,000 WIC checks were issued per month. In Florida the total number served by this program in 1981 was 152,000 women, infants, and children.

79. Id.
80. See Cumulative School Lunch, supra note 72.
82. FLA. HRS, HEALTH PROGRAM OFFICE, FLA. STATE PLAN OF PROGRAM OPERATIONS AND ADMINISTRATION FOR FY 1983 Intro. (1983) [hereinafter cited as PLAN OF PROGRAM OPERATIONS AND ADMINISTRATION].
83. FLA. HRS, Special Supplemental Food Program For Women, Infants and Children in HRS MANUAL 3-1 (1983) [hereinafter cited as Special Supplemental Food Program].
84. Id. at 4-31-2.
85. Id. at 3-2.
86. Id. at 3-3.
87. Special Supplemental Food Program, supra note 83, at 3-3.
E. Programs for Mothers and Infants

Florida has recognized that maternity care is an effective prevention strategy benefiting the health of infants. The state’s Improved Pregnancy Outcome Program (IPO) offers maternity care for low-income women. Emphasis is on screening to identify those at risk and initiate proper therapy or referral. Florida’s Regional Perinatal Intensive Care Centers Program (RPICC) offers specialized health care to women with high-risk pregnancies, and to sick or premature newborns. To be eligible for this program patients must meet medical as well as financial eligibility requirements.89

1. Improved Pregnancy Outcome Program

Florida was one of fourteen states awarded federal grant funds in 1977 to improve pregnancy outcomes.90 In 1982, federal support was terminated and general state revenues were appropriated for an expanded Improved Pregnancy Outcome Program (IPO). The purpose of the program is to reduce infant and maternal mortality and morbidity by providing medical services where access to maternity care is limited by either the women’s ability to pay or the number of physicians available for such care.91 Eligibility is based on income, and limited to certain geographical areas.92

2. Regional Perinatal Intensive Care Centers Program

The need for a regionalized medical care program that could impact on Florida’s infant mortality was recognized by the legislature in 1974. In that year, general revenue funds were appropriated to establish five regional centers specializing in the care of low birth weight and sick infants.93 In 1977 the program was expanded to include the

91. Id.
92. Id.
provision of obstetrical services and the addition of three new centers.\textsuperscript{94} The program currently includes ten Regional Perinatal Intensive Care Centers and five affiliated step-down centers for infants who no longer require intensive care.\textsuperscript{95} Periodic evaluation of the development of infants who received care in the RPICCs is an important component of the program. Other components include transportation of newborns to the centers, a twenty-four hour toll-free communication and referral line (CARE) and an on-line computerized data system.\textsuperscript{96} In 1981-82, the RPICC Program served 4,414 newborns and 2,112 women.\textsuperscript{97}

IV. Conclusion

Infants and children are powerless to exert influence on the political decisions of the state and nation in which they live. Rather, they must depend on the advocacy and initiatives of communities, groups and individuals. An approach to the needs of children which draws upon the interest, knowledge and strengths inherent in the professional and business sectors of Florida can be a vital force in fostering a better quality of life for each of our children. All of Florida's citizens would benefit from such an approach. Although children may represent less than one-third of our population, they surely are one hundred percent of our future.

\textsuperscript{94} See \textit{ANN. REP.}, supra note 89, at Intro.
\textsuperscript{95} See Ausbon, supra note 93.
\textsuperscript{96} See \textit{PERINATAL REP.}, supra note 89, at 2.
\textsuperscript{97} \textit{Id.} at 4.
The Use of Videotape in Child Abuse Cases

Dennis A. Haas*

Child abuse investigations typically involve a myriad of social and criminal justice agencies, each on an independent fact-gathering mission. All too often the child abuse victim is forced to repeatedly recount the details of the abuse and as a result, further traumatization is risked. A collective interview of the child abuse victim would alleviate some of these concerns. The most possible advantages are likely to be realized if the collective interview is preserved on videotape. The intent of this article is to provide basic guidelines and a systematic approach for the utilization of videotapes in child abuse investigations.

I. The Benefits and Disadvantages of the Videotaped Interview

The product of a videotaped interview, in appropriate cases, may be viewed by the alleged perpetrator and his attorney. This may motivate plea negotiation if there is a related criminal case. Likewise, if there is a pending dependency proceeding, the alleged abuser may be more likely to stipulate to an adjudication of dependency. The videotape of an investigatory interview is probably subject to discovery in dependency and criminal cases. Moreover, these videotaped interviews would fall within the limited confidentiality exemptions of section 415.51, Florida Statutes, allowing disclosure to parents who are alleged to be the abusers. Accordingly, consideration should be given to

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1. For example, the Department of Health and Rehabilitative Services (HRS), police agencies, guardians ad litem, child protection teams, mental health evaluators, etc.
5. Fla. Stat. § 415.51 (1983) providing that all records concerning child abuse and neglect and all records generated as a result of such reports are confidential and exempt from the provisions of Fla. Stat. § 119.07(1) (1983) and shall only be disclosed as specifically authorized by Fla. Stat. § 415.51 (1983).
whether videotaping the investigatory interview would increase the ability of opposing counsel to impeach the child abuse victim in the resulting dependency or criminal proceeding.

Videotaping collective investigatory interviews of child abuse victims would enhance the ability of multi-disciplinary child protection teams\(^6\) to evaluate and formulate recommendations in individual cases. Child protection teams consist of pediatricians, psychologists, psychiatrists, lawyers, and case coordinators with nursing and social work backgrounds, each with child abuse expertise within their respective fields. The teams act as consultants and make recommendations to the Department of Health and Rehabilitative Services\(^7\) (HRS) counselors in child abuse cases, as well as providing various other services. When a case is referred to a child protection team, it is assigned to a case coordinator who is responsible for obtaining information from all parties involved, such as law enforcement agencies, the guardian ad litem, HRS, and the school system. Case staffings are held where members of the child protection teams and representatives from the agencies involved in the particular case exchange information, verify facts with one another, and arrive at recommendations as to what course of action should be taken. The availability of the videotaped investigatory interview for viewing at child protection team staffings would provide participants with an enhanced sense of the facts and circumstances involved.

Guardians ad litem must be appointed in all child abuse cases, to protect the child abuse victim's interests.\(^8\) As a practical matter, guardians ad litem are appointed at various stages of dependency proceedings, and very often must become familiar with the facts involved within a short period of time. The ability to view the videotaped collective investigatory interview would greatly facilitate this process. The same logic applies to attorneys who are often appointed by the court to represent child abuse victims.

Due to the many agencies involved in the investigation of child abuse cases it is common for the person assigned to a particular case

\(^6\) FLA. STAT. § 415.51(1)(c) (1983) (authorizes HRS to develop and coordinate one or more multi-disciplinary child protection teams in each of its various districts. This provision also provides that HRS may convene these teams when necessary to assist in its diagnostic, assessment, service, and coordination responsibilities).

\(^7\) HRS is primarily responsible for conducting social investigations of allegations of child neglect and abuse. FLA. STAT. § 415.51 (1983).

\(^8\) FLA. STAT. § 415.51 (1983) (requiring that a guardian ad litem be appointed by the court to represent the child in any child abuse or neglect judicial proceeding).
within a given agency to change. Accordingly, it is not unusual for a newly assigned case worker or detective to become involved in a case which is well underway. Moreover, as a child abuse case proceeds, responsibility may be transferred among the many units of HRS such as crisis, intake, foster care, protective services, and adoption. As a result of budget reductions these case workers are typically overloaded and hard pressed to find time to meticulously review the multitude of paperwork inherited with a particular case file. The ability to view videotaped collective interviews of the child abuse victim would significantly contribute to a clearer understanding of such newly assigned cases.

Similarly, the legal management of child abuse cases would be enhanced by the ability to view the videotaped collective investigatory interview. In dependency proceedings, attorneys participating in the adjudicatory phase of the case are often not the same attorneys providing representation at review hearings. Videotaped collective interviews would assist in providing continuity in legal management of these particular cases as well as impressing upon the newly assigned attorney the severity of the abuse originally perpetrated. This should minimize the scenario which occurs all too often in which the state is successful in a hotly contested adjudicatory proceeding but loses much of the protections obtained at a later review hearing. This is partially due to the fact that the case workers change, the lawyers change, and few of their replacements fully realize the severity of the original abuse from the mounds of papers and records they inherit. Additionally, prosecutors may view the videotaped collective interview of the child abuse victim to assist them in determining whether a particular case should be prosecuted, or in determining an appropriate plea to offer an alleged perpetrator. This would also assist the state attorney in determining whether to bring a case to the grand jury.

Child abuse cases typically involve psychiatric or psychological evaluation and treatment of child abuse victims. Counselors, therapists, psychologists, psychiatrists and the like should have access to the videotaped interview of the child abuse victim for purposes of assisting in

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9. Legal representation in dependency cases is provided to the state under various arrangements depending on the particular district of HRS throughout the state of Florida. In some districts the state attorney’s office provides representation at contested adjudicatory hearings only, and HRS contracts with its own attorney for representation at contested review hearings. In some instances, HRS provides its own attorneys in both phases.
their evaluations and treatment plans. Training and educational uses of videotaped collective investigatory interviews would also be beneficial in teaching techniques for interviewing child abuse victims although use for this purpose would be limited by confidentiality restrictions.  10

II. The Mechanics of the Videotaped Interview

All involved agencies should be consulted and agreement sought as to the uniform procedures to be used in videotaping collective investigatory interviews of child abuse victims. Additionally, agreement should be sought so that wherever possible repeated individual interviews of the child abuse victim will be minimized and participation in a collective investigatory interview will be encouraged. This typically will occur after a child has been removed to shelter care. This collective investigatory interview, however, is not intended to eliminate or replace the initial crisis interview.  11

Physically, the room for such a collective investigatory interview should be conveniently accessible for all involved and decorated to create a comfortable non-threatening atmosphere for young children. Anatomically correct dolls should be available as well as other accepted interviewing aids. The decor should be that of a child's playroom. Cameras and microphones should not be visible or identifiable by the child. A one-way mirror should be provided so that the child does not observe any activity other than that within the video room. Immediately in front of the one-way mirror outside the video room, a desk or table-like area should be constructed for comfortable note-taking by observers and participants. A loudspeaker and microphones should be located nearby this table area.

A neutral non-threatening person with whom the child is most likely to feel at ease should be designated to pose questions to the child directly. This neutral person may be the child's therapist, guardian ad litem or some similar individual. When possible, questions should be written in advance and provided to the neutral questioner. As the neutral questioner poses questions, involved parties should have the opportunity to ask additional and follow-up questions. This is accomplished by communicating with the neutral questioner through headphones au-

11. FLA. STAT. § 415.505(a)(a) (1983) (requiring HRS to commence a child protective investigation within 24 hours of receipt of a report of child abuse or neglect).

https://nsuworks.nova.edu/nlr/vols/iss2/13
vidible only to the neutral questioner. It is recommended that there be
two exit doors to avoid the child seeing the great number of people
participating in the interview.

Special care must be given to the skill of the camera operator, the
quality of the camera, the film itself, and appropriate lighting. Consider-
ation must also be given whether to videotape in color or black and
white, and with one camera or several so as to be able to project all
images at once to the viewer, using a split screen technique. The im-
portant concern, of course, is whether the tape ultimately gives an ac-
curate representation of what actually occurs at the interview.

Sites which should be considered for such a videotape room in-
clude a local sexual assault treatment center, child protection team of-
fices, state attorney’s offices, the local courthouse, a court reporter’s of-
office, HRS offices and local law enforcement offices. In order to truly
realize the benefit of videotaping collective investigatory interviews of
child abuse victims, it is imperative that participants have the ability to
view the videotaped product as conveniently as possible. Accordingly,
videotape viewing facilities should be provided by all agencies involved
in child abuse investigations. Moreover, it may be necessary to make
several copies of the videotaped collective interview to maximize its use.

It should be emphasized that videotaped investigatory interviews
will, in all likelihood, not be admissible evidence at the criminal trial of
the perpetrator and probably not at the adjudicatory stage of a depend-
dency proceeding because they would be subject to a hearsay objec-
tion. The videotape of the collective investigatory interview may, how-

12. In the case of U.S. v. Benfield, 593 F.2d 815 (8th Cir. 1979), the defendant
was excluded from the room while a deposition took place. However, he was able to
observe the proceedings on a monitor and halt the questioning by sounding a buzzer at
which time the deposition would be interrupted and his counsel would leave the room to
confer with the defendant. In that particular case the court held that the scheme was
constitutionally infirm considering the purpose for which the deposition was utilized.
Id.

13. See Dee, Videotape as a Tool in the Florida Legal Process, 5 Nova L.J
243, 246 (1981) (citing Vermont Chapel, Crockett, Jacoubovich, & McGuire, J uror
Responses to Pre-recorded Videotape Trial Presentations in California and Ohio, 26
Hastings L.J. 975, 984 (1975)).

14. The accepted test today regarding the type of equipment acceptable by the
court is whether the tape gives an accurate representation of what actually occurred.
Paramore v. Florida, 229 So. 2d 855, 859 (Fla. 1969).

15. Video tapes of collective or investigatory interviews as suggested in this arti-
cle would be subject to hearsay objection under Fla. Stat. §§ 90.801-02 (1983).
ever, be used for the purposes discussed in Part I of this article. When utilized as such there is no requirement that the alleged perpetrator be present or even notified that a collective investigatory interview is being undertaken or videotaped. In this sense the child abuse victim is merely a witness, albeit with special needs. The collective investigatory interview is akin to taking a statement of a witness under oath. Accordingly, there are no constitutional barriers at this phase of the process such as the accused perpetrator’s right to confrontation.

III. Procedural Hurdles in the Use of Videotaped Interviews

The use of videotapes in child abuse cases can be expanded beyond those discussed in this article. Use of videotape as evidence in the court room is not new to Florida. However with such expanded use of videotape as evidence in these cases comes additional procedural hurdles. In dependency cases, a discovery deposition of a child abuse victim is permitted and all parties of record in the proceeding must be duly noticed and permitted to attend.

If the alleged abuser is a natural parent or legal guardian of the child abuse victim and therefore a party in interest in the dependency case, the issue arises as to whether the alleged abuser must have the opportunity to be present and cross-examine the child abuse victim at a discovery deposition in a dependency case. Although there are no specific Florida cases addressing the right of the alleged perpetrator-parent or legal guardian to be present at a discovery deposition related to a dependency case, it has been held that the alleged abuser need not be present at a discovery deposition in a child abuse criminal case so long as the child will be available for trial. Defendant’s counsel however, should have the opportunity to attend the deposition and cross-examine the child abuse victim. In any event, duly noticed discovery depositions in dependency cases are available for use

16. See supra text accompanying notes 2-6. There is no statutory, constitutional or case law prohibition against the collective investigatory interview being conducted as suggested herein, assuming it is used for the specific purposes described.

17. U.S. CONST. amend. VI: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . .”

18. FLA. R. JUV. P. 8.070(d)(2)(i): “The party taking the deposition shall give written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined.” Id.

at trial for purposes of impeaching the child abuse victim.\textsuperscript{20}

Additionally, in dependency cases, a discovery deposition may be utilized in limited circumstances at trial in lieu of live testimony.\textsuperscript{21} The Florida Rules of Juvenile Procedure provide in pertinent part the following:

\begin{quote}
(3) Any deposition taken pursuant hereto may be used at any hearing covered by these rules by a party for the following purposes; . . .

(ii) In dependency proceedings for testimonial evidence when the deponent, whether or not a party, is unavailable to testify because: . . .

(d) He is unable to attend or testify because of his age, illness, infirmity, or imprisonment.

(e) It has been shown on application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court to allow the deposition to be used.\textsuperscript{22}
\end{quote}

The argument can be made that pursuant to Rule 8.070(d)(3)(ii)(d), Florida Rules of Juvenile Procedure, a child abuse victim is unable to attend or testify at a dependency proceeding because of his or her age. Neither the rule nor the committee note specifies whether old age or youth is intended as the basis for the inability to attend or testify. Thus, this rule could be interpreted as including a child abuse victim being unable to testify because of his young age. The court would then be required to make a specific finding that the child is unable to attend or testify.

Further, pursuant to Rule 8.070(d)(3)(ii)(e), Florida Rules of Juvenile Procedure, it can be argued “exceptional circumstances exist as to make it desirable in the interest of justice”\textsuperscript{23} to present the testimony of a child abuse victim by videotape deposition. The alleged perpetrator, assuming he or she is the parent or natural guardian of the child abuse victim, would have to be given the opportunity to be present at

\textsuperscript{20} FLA. R. JUV. P. 8.070(d)(3)(i): “Any deposition taken pursuant hereto may be used at any hearing covered by these rules by any party for the following purposes:
(1) For the purpose of impeaching the testimony of the deponent as a witness. . . .” \textit{Id.}

\textsuperscript{21} FLA. R. JUV. P. 8.070(d)(3).

\textsuperscript{22} \textit{Id. (emphasis added).}

\textsuperscript{23} \textit{Id.}
such a deposition face-to-face with the child victim with the opportunity to cross examine, since the child would not be available at trial.\(^{24}\) In criminal cases, depositions of child abuse victims for the most part are treated and entitled to be used as other depositions in criminal cases. Moreover, the defendant is entitled to be present, face-to-face with the witness, and to have an opportunity to cross-examine.\(^{25}\)

Recognizing the unique sensitivity of the child abuse victim witness, the Florida Legislature has attempted to balance the needs of such children for special protection against the rights of defendants.\(^{26}\) Florida law currently permits the use of videotaped testimony of child abuse victims in lieu of the child's live testimony in open court in the prosecution of sexual battery and aggravated child abuse cases.\(^{27}\) The statute provides that, upon application to the court and reasonable notice to the defendant, the state may apply for an order to videotape, out of open court, the testimony of certain children who have been the victims of sexual batteries or aggravated child abuse.\(^{28}\) The court is required to make certain findings, including that the child is eleven years of age or younger and that there is a substantial likelihood that the child will suffer severe emotional or mental strain if required to testify

\(^{24}\) State v. Dolen, 390 So. 2d at 407.


\(^{26}\) FLA. STAT. § 918.17 (1983), provides the following:

1. Upon application to the court and reasonable notice to defendant, the state may apply for an order to videotape out of open court the testimony of a child eleven (11) years of age or younger who has been the victim of a sexual battery under § 794.011, or to videotape the testimony of a child 11 years of age or under, who has been the victim of aggravated child abuse under § 827.03 or child abuse under § 827.04. The court may grant an order to videotape testimony as provided here only if it finds that:

   a. The victim of the offense is a child eleven (11) years of age or younger; and

   b. There is a substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court.

2. The trial judge shall preside at such proceeding and shall rule on all questions as if at trial.

3. The application referred to in Subsection (1) shall be made prior to trial, and the videotaping of the testimony shall be made only after the trial has commenced. The videotaped testimony shall be admissible as evidence in the trial of the cause.

\(^{27}\) FLA. STAT. § 918.17(1) (1983).

\(^{28}\) Id.
in open court. Moreover, the application by the state to videotape the child's testimony must be made prior to trial, but the actual videotaping of the testimony is not permitted to take place until after the trial has commenced. The trial judge must preside at the videotaping proceeding and rule on all questions as if at trial. As a practical matter it is recommended that a videotape filming room be available in close proximity to the judge's chambers so as to facilitate full utilization of this statute.

There is no legal obstacle to videotaping collective investigatory interviews in child abuse cases and to do so has a great many beneficial uses. The use of videotaped depositions for discovery purposes and in lieu of live testimony at trial, however, requires much closer procedural scrutiny in order to assure that it will pass constitutional muster.

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In the political lexicon of the 1980s, a “constituency” has come to mean a special interest group coalesced around a single issue. These single-issue constituencies, or special interest lobbies, range from right wing to left wing, from neighborhood associations to well-organized political action committees, from environmental causes to tax-slashing referenda. Although “special interest” is a phrase now given a pejorative connotation, the political climate of America has made single-issue, special interest groups an efficient means for participation in the process of government. In an era of decline in party influence and ascendancy of media campaigns, a sixty-second message must be concise and simple. Similarly, the special interest groups’ message to politicians is concise and simple: this is our issue and we measure good government by its adherence to our point of view. Whether a candidate campaigns with the help of special interest money or gets media exposure by railing against special interest money, the special interests have taken center stage. More to the point, they have been given it.

Business interests, senior citizen voting blocs, minority rights groups, right-to-life organizations, animal protection and similar societies exist, after all, because the right to speak out is an American tradition. Whether we adore or abhor the phenomenon of this caucus or that caucus influencing our public priorities, single-issue constituencies are the building blocks of power. As varied as these single-issue constituencies are, they share two common characteristics: first, they are composed of adults, and second, their members know enough to manipulate the system to, if not respond to their demands, at least acknowledge the existence of their cause.

Children have no such advantage. Yet children, who constitute a substantial minority, can neither comprehend nor articulate their own needs. Most assuredly, no one will say he is against children. However, the reality is that when budgets have to be cut, children cannot lobby...
to save the programs that help them and children cannot vote the people out of office who cut those programs. Adults must therefore coalesce around the needs of all children and not leave their welfare at the door of the schoolhouse, the steps of the social service office, or the threshold of government. Those who are able to speak for the needs of children must take their message into the corporate boardrooms and government meeting halls and make it the focus of growth management, taxation, and public policy.

Although there are groups in Florida which address the needs of children on an issue-by-issue basis—education, child abuse, juvenile justice—a mechanism to unite all the efforts on behalf of children has been lacking. The recent creation of a Constituency for Children by Governor Bob Graham and the Florida Legislature signals an end to earlier fragmented efforts. It is a call for action and involvement by all segments of the adult population who realize that they are ignoring their future at their own peril. As Governor Graham stated, "the more children we can help to grow up physically healthy, intellectually curious and free from crime, the fewer we will have to arrest, prosecute, adjudicate and incarcerate."

The Governor's Constituency for Children is a blueprint for creating new relationships: first, between government and voluntary agencies and traditional special interest groups, especially business; and second, between this Constituency and all children. The Constituency for Children concept, and its success, hinges on two factors not previously incorporated in efforts on behalf of children: the inclusion of concerned individuals, business and community leaders and the pairing of those leaders with social work case managers in representative case studies. Community and business leaders have the proven ability to get things done. Witness the very successful Dade County Citizens Against Crime, as an example. Business and government teamed up and focused on an issue which was plaguing the community. It was the persistence of this leadership structure that brought resources old and new to bear on resolving the problem. An equally representative Constituency for Children can expect similar efficacy on behalf of children. When the Constituency in turn selects one or more representative cases and resolves life problems for one child a pattern for assisting thousands will be at hand. And when the Constituency sees, by its active involvement, that current resources are stretched as far as they can go or there is a gap in the system it will know how to effect changes. In addition to assuring that adequate resources are available to serve children and families in need, one of the Constituency's primary functions
will be to improve the coordination of public programs already in place. To put it bluntly, adults need to utilize the clout of the leadership structure to keep the cause of children in the forefront of policy decisions.

The Constituency, then, is a coalition of any and all adults and children starting with school superintendents, Department of Health and Rehabilitative Services (HRS) leaders, civic organizations, business groups, professional and religious organizations, court systems and social service representatives, all joined by their interest in children. Only the power structure can provide opportunity to a child who requires psychological treatment, job training, a job, basic necessities, counseling, and self-esteem. The Constituency will improve and perpetuate the quality of life in Florida communities by focusing energies on a single issue: our children.

If, as has been observed, all politics are local, then by extension all worthwhile political efforts are similarly local. The Constituency is essentially a local mandate. It needs to be organized with the strength of the grass roots and the clout of leadership at the community level, with problems to be resolved at that level whenever possible. Local constituencies will need to organize and fund themselves, but will have the technical assistance of the state level Constituency whenever necessary. As Governor Graham has stated, "[t]he Constituency for Children will organize county by county. It will solve local needs at a local level whenever possible. It will point out shortfalls that require state action when local efforts are not enough."

The Florida Legislature authorized the creation of the Governor's Constituency for Children at the close of the 1983 session. As a matter of design and necessity, the only expenditure of state funds will be for the executive director and essential staff at the state level. The state council of the constituency will be structured with permanent and rotating members. The Governor is the chairman, and will appoint someone outside of government to be the vice chairman. The permanent members of the state council, all heads of the departments whose programs and agencies affect children, are Education Commissioner Ralph Turlington, Attorney General Jim Smith, HRS Secretary David Pingree, Labor Secretary Wally Orr, Community Affairs Secretary John DeGrove and Administration Secretary Nevin Smith, in whose department the program is housed. The remaining sixteen members of the state council will be either elected by local councils or appointed by the governor. In the formative stages of this program the governor has appointed an organizational committee, the members of which are: Judge
Theodore Bruno, Escambia County; Harold Henderson, Gadsden County; Helene Coleman, Duval County; Dr. Gerald Schiebler, Alachua County; Jack Eckerd, Pinellas County; Robin Gibson, Polk County; Joan Nabors, Brevard County; Judge Hugh Glickstein, Broward County; Berta Bleck, Dade County; Judge William E. Gladstone, Dade County; Ellen Hoffenberg, Leon County; Margaret Kempel, Dade County; and Coleen Bevis, Hillsborough County. The executive director of the governor's Constituency for Children is Samuel "Buddy" Streit, who assumed his duties in the Department of Administration on November 10, 1983.

The Constituency for Children is you. It is everyone who has prepared an article for this special edition of the Nova Law Journal, everyone who is taking the time to read this special edition, Judge Hugh Glickstein and the members of the Florida Bar Board of Governors’ Special Committee for the Needs of Children, all task force members, committee members, in short, all knowledgeable and concerned people. Many details must evolve as the program grows and develops. The legal community can be very helpful by assisting local communities in setting up the non-profit mechanisms for making the constituency work in all areas of the state. The task involves a serious commitment of time and energy.

While Florida may be the third largest state in the union by the turn of the century, it risks not being the third in quality of life or abundant opportunity unless its best resource, its children, are the focus of planning efforts. The two major state agencies which most directly address the needs of children, the Department of Education and HRS, face the constant threat of reduced funding. Efforts to maintain and improve services in some instances, have amounted to little more than running in place. Your involvement in the Constituency for Children is of vital and immediate importance because the 1984 Florida legislative session will be a critical one for the children of Florida. The speaker-designate, Representative James Harold Thompson, is the chairman of the Select Committee on Family and Youth which is composed of the chairs of all the substantive committees dealing with these issues in the Florida House of Representatives. The select committee was designated during the 1983 session, but did not have the time or the resources to accomplish its goals. In this session the committee will have a staff director and it is hoped that the work of this committee will have significant impact on other programs and agencies. The Constituency for Children should play a pivotal role in facilitating the work of this committee and helping to ensure that its goals of meeting the
needs of Florida children are met. As Governor Bob Graham has declared, "[t]he Constituency for Children is...a noble experiment to knit together the strands of state and local policy affecting a vital part of Florida's future—our children."**

** During the 1983 legislative session a very detailed concept paper for the Constituency was prepared. A copy of this, and any other information, is available from Mr. Streit at 904-488-4116. His mailing address is Governor's Constituency for Children, Department of Administration, 435 Carlton Building, Tallahassee, Florida 32301. If this article and the others in this issue have convinced you of the many needs of children in this state, please contact Mr. Streit as soon as possible so that the Constituency in your community may share your expertise, talents, and special interest.
Florida Nonsmokers Need Legislative Action to "Clear the Air"

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I. Introduction

Even with the onset of the health-conscious '80s, approximately thirty-eight percent of adult males and thirty percent of adult females actively smoke tobacco products.\(^1\) Although these figures are down from their 1965 counterparts of fifty-two and thirty-four percent,\(^2\) active smokers make up a substantial minority of the population. More than thirty million Americans have quit smoking,\(^3\) and millions more are trying. The major catalyst for this decline was the 1964 Surgeon General's report which revealed the dangers of tobacco smoking to the public for the first time.\(^4\) This information eventually led the federal government to require warning labels on cigarette packs and abolish cigarette television commercials.\(^5\) Unfortunate discoveries about tobacco smoke continued, with the possibility of harm to nonsmokers first suggested in the 1972 Surgeon General's Report.\(^6\) The 1979 Surgeon General's report\(^7\) and many scientific and medical studies confirmed that suspicion.\(^8\)

As a result of these findings, nonsmokers, previously willing to endure the annoyance caused them by the smell and irritation of tobacco smoke, realized that they were smoking tobacco products involuntarily, simply by being exposed to tobacco smoke.\(^9\) A proliferation of legal

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2. \textit{Id.}
4. \textit{Public Health Service, U.S. Department of Health, Education and Welfare, Smoking and Health (1964). "On the basis of prolonged study and evaluation of many lines of converging evidence, the Committee makes the following judgment: Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." Id. at 33}
7. \textit{1979 Report, supra note 3, at II—5-35.}
8. \textit{See infra text accompanying notes 11-70.}
9. Actually the terms nonsmoker and smoker are inaccurate since everyone inhales tobacco smoke and is, therefore a smoker. Involuntary smoker and voluntary smoker are more accurate terms. \textit{See 1979 Report, supra note 3, at II—5. To avoid confusion this note refers to the involuntary smoker as the nonsmoker.}
actions began when nonsmokers learned of the many harmful effects of secondary smoke they are forced to inhale.\textsuperscript{10} Nonsmokers' efforts to obtain relief through the courts and their legislatures have met with inconsistent results.

This note discusses the major issues of nonsmokers' rights, as developed through the courts and legislatures, and explores the possible emerging issue of the relationship between parental smoking and the negligent treatment of children. As a primary objective, this note focuses upon the current rights of nonsmokers in Florida and advocates the enactment of a Florida Clean Indoor Air Act.

II. The Underlying Premise: Injury to the Nonsmoker

Regardless of which legal forum the nonsmoker elects to seek relief, essential to his argument is the premise that unavoidable contact with secondary tobacco smoke is harmful to his health, significantly enough to warrant government intervention. Perhaps because smoking is still a legitimate social activity and perhaps because the tobacco industry’s power and influence through advertising keeps it legitimate, the general public remains very much unaware of the extent to which tobacco smoke is believed harmful to the nonsmoker. Although an in-depth study of the medical and scientific evidence is better suited for a medical journal, a basic understanding of the nonsmoker’s underlying premise is so crucial to his argument that a brief overview of the evidence is necessary.

A. Tobacco Smoke Pollution

The United States Surgeon General’s 1975 report asserts that tobacco smoke is a major cause of indoor air pollution.\textsuperscript{11} In fact, indoor smoke pollution is potentially more harmful than outdoor pollution, even on air-pollution emergency days.\textsuperscript{12} Scientists have discovered over 4,000 substances in tobacco smoke.\textsuperscript{13} Many of these substances are very toxic. “Upwards of 90% of cigarette smoke is composed largely of a dozen gases that are hazardous to health, and the remainder is par-

\begin{enumerate}
\item See \textit{Smoking Digest}, \textit{supra} note 5, at 77-91.
\item See \textit{Smoking Digest}, \textit{supra} note 5, at 26, and \text{Repace & Lowrey, \textit{Indoor Air Pollution, Tobacco Smoke, and Public Health}}, 208 \text{SCIENCE} 464 (1980).
\item \text{1983 REPORT, \textit{supra} note 1, at 209, 232.}
\end{enumerate}
Some of the hazardous chemicals in tobacco smoke include "tar, nicotine, carbon monoxide, nitrogen dioxide, ammonia, benzene, formaldehyde, and hydrogen sulphide."\textsuperscript{16} Hydrogen cyanide, polonium, hydrocyanic acid, and aldehydes are other toxic substances found in tobacco smoke.\textsuperscript{16}

Tobacco smoke permeates the air from two sources: sidestream smoke and mainstream smoke.\textsuperscript{17} Sidestream smoke invades the air directly from the burning end of the tobacco product. Mainstream smoke is first inhaled by the smoker, then enters the atmosphere when exhaled. Today's common knowledge that mainstream cigarette smoking is harmful is no great wonder. Yet "[e]ighty to ninety percent of the volatile and particulate agents and 50% of the carbon monoxide are filtered out of inhaled smoke before reaching the smoker's lungs. Thus, the sidestream smoke has twice the toxic material, or more, than the inhaled or mainstream smoke."\textsuperscript{18}

Most of the tobacco smoke pollution comes from sidestream smoke. "Even when a smoker inhales into the lung, two-thirds of the smoke from the burning cigarette goes directly into the environment. The ratio of pollution from cigar and pipe smoke is even greater. . . ."\textsuperscript{19} Usually a smoker inhales each cigarette "8-9 times. . . .for a total of 24 seconds, but the cigarette burns for 12 minutes and pollutes the air continuously. . . ."\textsuperscript{20} Both smokers and non-smokers inhale this unfiltered smoke. "Inhalation of atmospheric pollutants from the smoke of tobacco products is referred to as passive (involuntary, secondhand) smoking."\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{14} SMOKING DIGEST, \textit{supra} note 5, at 17.
  \item \textsuperscript{15} Epstein, \textit{The Effects of Tobacco Smoke Pollution on the Eyes of the Allergic Non-Smoker}, \textit{2 SMOKING AND HEALTH}, 337, 338 (1975).
  \item \textsuperscript{16} Tate, \textit{The Effects of Tobacco Smoke on the Non-Smoking Cardio-Pulmonary Public}, \textit{2 SMOKING AND HEALTH} 329, 332 (1975).
  \item \textsuperscript{17} 1979 REPORT, \textit{supra} note 3, at 11—5.
  \item \textsuperscript{18} Tate, \textit{supra} note 16, at 332. See 1983 REPORT, \textit{supra} note 1, at 211, for a chart comparing toxic levels of sidestream and mainstream smoke.
  \item Arguably the major cause of harm to the smoker is sidestream smoke. Studies conclude that smoking is harmful, but the apportionment of that harm between mainstream smoke and sidestream smoke is not known. Perhaps if smokers could inhale only the filtered mainstream smoke, the harm would not be as great. Smokers, however, are unavoidably exposed to high concentrations of sidestream smoke from the burning ends of cigarettes.
  \item \textsuperscript{19} Epstein, \textit{supra} note 15, at 338.
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} Lefcoe, Ashley, Pederson & Keays, \textit{The Health Risks of Passive Smoking};
\end{itemize}
B. Known and Suspected Risks of Passive Smoking

Cancer is widely believed to be the primary risk of tobacco smoke. Probably nothing is further from the truth. Although cancer is a known, serious risk of tobacco smoke, a multitude of other harms exist which are more common, and some are just as deadly. Research is unfolding the sad news that these harms are adversely affecting the non-smoker as well as the smoker. Considering the physical nature of tobacco smoke described, one should not be surprised. In heavily smoke-filled rooms “in a relatively short time a non-smoker can inhale the equivalent of 5-6 cigarettes.”

1. Carbon Monoxide Poisoning

One known risk to the nonsmoker from passive smoking is his exposure to higher levels of carbon monoxide. Carbon monoxide averages “5 volumes percent in mainstream and 10 to 15 volumes percent by weight in side-stream smoke.” “Safe limits for levels in working areas have been set at 8.7 ppm [parts per million] for 8 hours, or 35 ppm for 1 hour. . . .” Yet the “concentration in inhaled tobacco smoke is 400 ppm.” Enclosed areas with heavy smoke concentrations often reach levels of 50 ppm to 100 ppm. A nonsmoker who works five eight-hour days in a room with smokers cannot avoid inhaling a great amount of tobacco smoke, and thus high levels of carbon monoxide. Inhaling carbon monoxide raises the level of venous-blood carboxyhemoglobin (COHb) in the blood. The normal level of COHb in nonsmokers is

The Growing Case for Control Measures in Enclosed Environments, 84 CHEST 90 (July 1, 1983).

22. Tate, supra note 16, at 332.
23. Lefcoe, supra note 21, at 90.
Carbon monoxide is a common industrial pollutant generated by any burning process. It is odorless and tasteless and gives no warning of its presence in most circumstances, thus allowing for chronic exposure over extended periods of time. The early symptoms of carbon monoxide poisoning often resemble those of a variety of diseases; thus tissue hypoxia might occur in healthy persons without forewarning.

1983 REPORT, supra note 1, at 244 (footnote omitted).
24. Tate, supra note 16, at 331.
25. Id.
26. Id.
27. See 1979 REPORT, supra note 3, at 11—15-24; SMOKING DIGEST, supra note 5, at 17. “Atherosclerosis is a multifactorial disorder in which cigarette smoking and
between .5% and 2.0%. Smokers' normal levels range between 2.0% and 15% depending on the average number of cigarettes smoked.

These levels change when passive smoking begins. One study placed nine smokers and twelve nonsmokers in a room. The subjects remained in the room for about one hour, and during that time the ambient carbon monoxide concentration from the smokers' tobacco smoke reached 38 ppm. "The mean COHb of the twelve non-smokers increased from 1.6% to 2.6%, while the six cigarette smokers . . . increased[d] from a mean of 5.9% to 9.6%." The effect of even low levels of COHb can be very hazardous to one's health. Because of the lack of oxygen that results from higher levels of COHb, everyone may be more susceptible to cardiovascular disease. This threat is even greater for individuals with a pre-existing cardiovascular problem. One study of ten angina patients exposed to the sidestream smoke of only fifteen cigarettes over two hours in a well-ventilated room still showed an increase in "resting heart rate, systolic and diastolic blood pressure, and venous carboxyhemoglobin and decreased their heart rate and systolic blood pressure at angina." The duration of exercise until angina was decreased 22 percent. . . . Of course, even larger increases and decreases occurred in an unventilated room with a 38% decrease in the exercise duration. The study concluded that "[p]assive smoking aggravates angina pectoris."

Tobacco smoke may be a direct cause of many auto accidents. Evidence shows that reaction time and other sensory abilities necessary
for driving are impaired when COHb levels reach 2.0% to 3.0%. Considering the carbon monoxide levels several smokers in a car can create, one may reasonably hypothesize that even a nonsmoking driver’s COHb level may reach well above 2.0%.

In addition, doctors at the University of South Florida College of Medicine observed acute Raynaud’s phenomenon in both the former and current nonsmoking wives of a heavy smoker. The first wife’s symptoms disappeared after divorce; the second wife’s symptoms subsided after the husband began smoking in a separate room.

2. Respiratory Disease

Many of the toxic substances permeating the air in tobacco smoke are known to be damaging to the lungs. Hydrogen cyanide, for example, is a poison which destroys cells of the lining of the respiratory systems. It is believed that exposure to only 10 ppm of hydrogen cyanide over a long period causes this damage, and tobacco smoke may contain as much as 1600 ppm. Nitrogen dioxide (250 ppm in tobacco smoke) is linked to emphysema. Cadmium, another toxic substance found in tobacco smoke, possibly “damages the air sacs in the lungs and causes emphysema. Once cadmium gets into the lungs it remains there.”

A study correlated a relationship between damage to the small airways in the lungs and passive smoking of nonsmokers. The researchers examined 2,100 subjects and found that “nonsmokers chronically exposed to tobacco smoke had a lower forced mid-expiratory flow rate. . . than nonsmokers not exposed. . . .” The study “conclude[s]
that chronic exposure to tobacco smoke in the work environment is deleterious to the nonsmoker and significantly reduces small-airways function."\textsuperscript{49}

3. **Cancer**

Studies of nonsmoking women, some married to smokers and others married to nonsmokers, suggest a real risk of cancer from passive smoking.\textsuperscript{50} One prospective fourteen-year study found that nonsmoking wives of husbands who smoked less than one pack a day had one and one half times the risk of lung cancer than nonsmoking wives of nonsmoking husbands.\textsuperscript{51} When the husbands smoked more than one pack per day, the risk was twice as great.\textsuperscript{52} A subsequent similar study "[e]stimates...the relative risk...associated with having a husband who smokes were 2.4 for a smoker of less than one pack and 3.4 for...husbands smok[ing] more than one pack of cigarettes per day."\textsuperscript{53}

4. **General Illness**

In addition to the effects mentioned, evidence suggests tobacco smoke exposure "significantly lower[s] the level of antibody production to influenza virus A2..."\textsuperscript{54} suppresses the lymphocytes function in the immune process,\textsuperscript{55} and "affects the body's ability to utilize Vitamin C."\textsuperscript{56} The obvious result is an increased risk of common illness. Indeed, a 1965 study "estimate[s]...that smoking-related illness or disease each year costs the United States 77 million workdays lost, 88 million days spent ill in bed, and 306 million days of restricted activity."\textsuperscript{57} Another estimate suggests "that more than 10% of all hospital and medi-

\textsuperscript{49} Id.


\textsuperscript{51} Repace, supra note 50, at 23 (citing Hirayame, Nonsmoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study from Japan, 282 BRITISH MED. J. 183 (1981)).

\textsuperscript{52} Repace, supra note 50, at 2.


\textsuperscript{54} See Tate, supra note 16, at 333.

\textsuperscript{55} Id.

\textsuperscript{56} SMOKING DIGEST, supra note 5, at 22.

\textsuperscript{57} Id. at 23.
cal expenses in the United States are tobacco-related. This raises the overall cost of health insurance and taxpayer-supported health programs. Logic suggests that long-term passive smoking at home or at work not only reduces a nonsmoker's ability to stay healthy, but also costs him money.

5. Allergies

Tobacco smoke is extremely aggravating to those who suffer from allergies, and many of these people may not be aware that tobacco smoke is the source of their aggravation. "The American Medical Association estimates that at least 34 million Americans are sensitive in one way or another to cigarette smoke." For these people, passive smoking "can precipitate acute attacks of asthma requiring an emergency visit to a physician's office or hospital emergency room. . . ." "Tobacco smoke from any source is like salt rubbed into a raw sore." Certainly thirty-four million Americans is a large enough minority to receive protection.

6. Special Hazards to Children

Although an adult has a choice whether to live in a home fraught with tobacco smoke, the fetus, infant and minor child do not. Children respire more than adults, and therefore, inhale more secondary smoke. Young children of smoking parents also probably spend more time in smoke-filled environments than nonsmoking adults who have a choice. "It has already been conclusively proven that in homes where smoking occurs, children are seriously affected."

Some of the research concludes as follows: Children who grow up in households with at least one heavy smoker have 46% more restricted days and 43% more bedridden days than children who grow up in smoke-free homes. "Babies born to women who smoke during pregnancy are, on the average, 200 grams lighter than babies born to com-

58. Id.
60. Epstein, supra note 15, at 337.
61. Tate, supra note 16, at 329.
62. Id. at 330.
63. 1979 REPORT, supra note 3, at 11—31.
64. Tate, supra note 16, at 334.
65. Repace, supra note 50, at 4 (citing Bonham & Wilson, Children's Health in Families with Cigarette Smokers, 71 AM. J. PUB. HEALTH 290 (1981)).
parable women who do not smoke."66 "The infants of mothers who smoke [have] . . . significantly more [hospital] admissions for bronchitis or pneumonia. . . ."67 Mothers who smoke have a higher "risk of having stillborn children . . . , and their infants have higher neonatal death rates."68 Research suggests that fetuses and children who do survive are damaged by the lower levels of Vitamin C.69

Even more distressing is the evidence that passive smoking by children has long-term, permanent effects.70 For example, smokers' children show "measurable deficiencies in physical growth, intellectual and emotional development, and behavior."71 "Children whose mothers smoked 10 or more cigarettes a day during pregnancy were on the average 1.0 centimeter shorter [ages 7 and 11 years] and 3 to 5 months retarded in reading, mathematics, and general ability as compared with the offspring of nonsmokers."72

More studies of the ill effects of passive smoking on children exist. Typical is the latest suggestion "that passive exposure to maternal cigarette smoke may have important effects on the development of pulmonary function in children."73 The study states:

The data. . . , which suggest that after five years, the lungs of nonsmoking children with mothers who smoke grow at only 93 per cent of the rate of growth in nonsmoking children with mothers who do not smoke, are certainly plausible in terms of the magnitude of the effect that one might predict for an environmental pollutant such as cigarette smoke. The size of the effect is consistent with that hypothesized to be sufficient as an underlying risk predictor for obstructive airways disease in adult life.74

68. Smoking Digest, supra note 5, at 26; See also 1980 Report, supra note 66, at 191.
69. Smoking Digest, supra note 5, at 26.
70. 1980 Report, supra note 65, at 196-225.
71. Id. at 196.
72. Id. at 199.
74. Id. at 702.
Recent evidence reveals that significant levels of thiocyanate (SCN), a biproduct of tobacco smoke, appear in the fetuses of non-smoking mothers who are exposed to passive smoking.\(^{75}\) A logical conclusion is that even mothers who have quit smoking or have never smoked subject their unborn to these harms if they live or work in smoke-filled environments.

Most studies demonstrate that although the risks of harm from tobacco smoke are still greater to the smoker, risks to the nonsmoker are real and significant. As concluded in a recent cardiopulmonary journal, “[t]here is still much research to be done into the health effects of passive smoking; however, the need for such research should not be used as an excuse of inaction.”\(^{76}\) At the very least, the present scientific evidence supports an overwhelming likelihood that passive smoking causes a substantial and irreparable harm to nonsmokers. This familiar legal standard of harm\(^{77}\) has created legal conflicts between smokers and nonsmokers.

III. Nonsmokers' Attempts to Gain Judicial Relief

A. Federal Courts Decline to Recognize Fundamental Right

Despite the medical evidence, nonsmokers have been unsuccessful in establishing rights based on the United States Constitution. For example, the nonsmoking plaintiffs in *Gaspar v. Lousisiana Stadium and Exposition District*\(^{78}\) sought a smoking ban in the Louisiana Superdome. Plaintiffs asserted that secondary tobacco smoke causes physical harm and discomfort; interferes with the enjoyment of events; and, therefore, violates the rights guaranteed under the first, fifth, ninth and fourteenth amendments of the Constitution.\(^{79}\) Essentially, *Gaspar* nonsmokers attempted to shade themselves under the penum-
bral privacy rights first surfacing in *Griswold v. State of Connecticut*. Declining to extend that right to the tobacco smoking controversy, the district court stated: "To hold that the First, Fifth, Ninth or Fourteenth Amendments recognize as fundamental the right to be free from cigaret smoke would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries."81

A group of nonsmoking federal employees attempting to have smoking in federal buildings restricted to designated areas met with rejection of their constitutional argument in *Federal Employees for Nonsmokers' Rights (FENSR) v. United States*. FENSR plaintiffs alleged two constitutional violations: 1) by failing to provide a safe, smoke-free environment the government has impaired plaintiffs' first amendment right to petition and receive redress for their grievances, and 2) through the same failure, the government has "discriminated against them and denied them their life, liberty and property without due process of law in violation of the fifth amendment."84 Relying on and quoting extensively from *Gaspar*, the FENSR district court granted the government's motion to dismiss the constitutional claims.85 In part, the FENSR and Gaspar courts based their conclusions on previous decisions holding that no claim to any clean environment is constitutionally grounded.86

Unfortunately, both opinions express some of the common misconceptions clouding the issue. For example, *Gaspar* relies on and FENSR repeats the hackneyed comparison between alcohol and cigarettes suggesting that the allowance of smoking is no different than the allowance of drinking beer, and, therefore, no more a violation of constitutional rights.87 However, the comparison of an individual's right to drink alcohol in public and his right to smoke tobacco does not address

83. *Id.* at 183-84.
84. *Id.* at 184.
85. *Id.* at 184-85.
the essential complaint of nonsmokers. The distinction is simple and basic. When an individual exercises his right to drink alcohol, any ill effects directly caused by the dangers of alcohol are hazardous only to that individual. The risks that individual takes are self-contained. The same is not true with tobacco. When an individual exercises the decision to smoke tobacco he inescapably subjects other individuals who breathe the air in his vicinity to the hazards of tobacco smoke. His choice to injure himself entails a concomitant injury to others. The issue is not whether an individual has the right to subject himself to the known hazard; the issue is whether in the process of doing so he has the right to subject others to the same known hazard. An individual may legally drink alcohol only to the degree he does not harm others. To apply the analogue of this principle is the goal of nonsmokers. Any comparison of smoking to other social activities which do not contain this necessary similarity is misleading. 88

Whether Gaspar and FENSR have closed the door on nonsmokers’ chances of prevailing on a constitutional basis is not certain. Any future recognition of a constitutional right to be free from cigarette smoke will depend on more than relevant comparisons. Nonsmokers must surmount the initial problem of establishing smoking as a form of “state action” since constitutional protections against a private interference do not exist. 89 Perhaps the taxing of tobacco products makes public smoking an act authorized by the government. 90 Assum-

88. UCLA Associate Dean, economist and Tobacco Institute consultant, Lewis Solmon, was recently quoted as saying: “‘It scares me if a president of a company implements a [no smoking] policy that takes away your individual rights [;]...[w]hat’s next, limiting the consumption of red meat in the company cafeteria?’” Brophy, A Burning Issue: Smokers Say It’s Their Right as More Employers Snuff It Out, USA Today, Jan. 13, 1984, at 3B, col. 3. This typical, misleading statement fails to recognize that no matter how close one sits to an individual who chooses to eat red meat, any potential hazard from its consumption will not harm the bystander who chooses not to eat red meat.

89. See generally Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-22 (1961) (fourteenth amendment inhibits only state actions, not individual actions). Gaspar raised the issue of state action but declined to address it since the court found that there would be no constitutional violation in any event. 418 F. Supp. at 717, 722. In FENSR, state action was not an issue.

90. See Sapolsky, The Political Obstacles to the Control of Cigarette Smoking in the United States, 5 J. HEALTH POLITICS, POLICY AND LAW 277 (1980). The federal government receives over two billion dollars a year in excise taxes alone from cigarette sales. Id. at 285. In Burton, a private restaurant operator’s practice of racial discrimination was found to be state action because public funds supported the building and
ing state action was judicially acknowledged, nonsmokers would then have to convince the courts to re-evaluate present-day scientific and medical evidence and find the harm great enough to warrant placing nonsmokers' interests within the penumbral protections of the Constitution. Although Akron v. Akron Center for Reproductive Health, Inc., 91 demonstrates the Supreme Court's willingness to adapt prior decisions to fit "present medical knowledge," 92 the Court has been unwilling to extend the penumbral fundamental rights concept beyond the areas of family relationships and abortions. Smoking falls into neither category; consequently, it is unlikely that recognition of a constitutional right to be free of involuntary smoking will be forthcoming.

B. Footholds Gained in State Court Actions

1. Common-law Theories Lead to Success for Workers

Although no constitutional right to a smoke-free environment presently exists, some nonsmokers have achieved a smoke-free workplace through the common law applied in their state courts. The syllogism is simple: All employers have a common-law duty to provide employees with a safe place to work. Tobacco smoke in the workplace creates an unsafe condition. Therefore, an employer must provide employees with a smoke-free workplace.

Shimp v. New Jersey Bell Telephone Co. 93 is the landmark case which established this syllogism. Through standard grievance procedures, Donna Shimp, a secretary for the telephone company, had complained of tobacco smoke in her work area. In response, her employer grounds he leased. 365 U.S. 715. A number of years later, however, the Supreme Court held that a state's granting of a liquor license to a private club was insufficient to make that club's discrimination practices a state action. Moose Lodge v. Irvis, 407 U.S. 163 (1972). Subsequent decisions signal a retreat from the liberal interpretation of state action in Burton, suggesting that failure to enact and enforce smoking regulations in private facilities would not be found to be state action giving nonsmokers a remedy under the fourteenth amendment. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (private school's fiscal dependence on government insufficient to make discharge of teachers a state action).

91. ___ U.S. ___, 103 S. Ct. 2481 (1983). Because of new and safer procedures, Akron expanded a woman's right to receive an abortion at an outpatient facility during the second trimester even though the state's interest in the fetus at that time is "compelling." Id. at ___, 103 S. Ct. at 2495.
92. Id. at ___, 103 S. Ct. at 2496.
installed an exhaust fan, but for various reasons the remedy failed. Unhappy and ill from involuntarily breathing her co-workers' secondary smoke, Ms. Shimp brought suit against the telephone company. She alleged that the company's permitting employees to smoke at their workstations created an unsafe condition, "deleterious to her health," and that the company, therefore, breached its common-law duty to provide her a safe place to work.

After recognizing an employer's "affirmative duty to provide a work area that is free from unsafe conditions," the Shimp court took "judicial notice of the toxic nature of cigarette smoke and its well-known association with emphysema, lung cancer and heart disease." Relying on the various Surgeon General's reports, and the affidavits of various experts, the court further stated that "mere presence of cigarette smoke in the air pollutes it, changing carbon monoxide levels and effectively making involuntary smokers of all who breathe the air." The court concluded:

The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs.

The first progeny of the Shimp decision is a Missouri case, Smith v. Western Electric Co. At the time of suit, Paul Smith had been employed by Western Electric for more than thirty years. Since 1975, however, Mr. Smith had suffered severe physical reactions when exposed to secondary tobacco smoke. After various complaints and several unsuccessful attempts to alleviate the conditions, Smith's employer

94. Id. at 521, 368 A.2d at 410.
95. Id. at 520, 368 A.2d at 410.
96. Id. at 521, 368 A.2d at 410.
97. Id.
98. Id. at 527, 368 A.2d at 414.
99. Id. at 528, 368 A.2d at 414.
100. Id. at 527, 368 A.2d at 414.
101. Id. at 528, 368 A.2d at 414.
102. Id. at 530-31, 368 A.2d at 415.
103. 643 S.W.2d 10 (Mo. Ct. App. 1982).
instructed him not to submit any more complaints, for none would be processed.104 Rather than prohibiting smoking in the work area, Western Electric responded by offering Smith the alternative of wearing a respirator or transferring to the computer room at a $500 per month pay cut.105 Unimpressed with the alternatives, Smith filed suit to enjoin Western Electric from breaking its common-law “duty to provide a safe place in which to work.”106 The trial court granted Western Electric’s motion to dismiss for failure “to state a claim upon which relief can be granted.”107

After recognizing Missouri’s acceptance of the employer’s duty and reciting the Shimp syllogism,108 the court of appeals focused on whether an injunction is an appropriate remedy for breach of that duty.109 The standard for determining the appropriateness of injunctive relief is whether “irreparable harm is otherwise likely to result. . . .and [the] plaintiff has no adequate remedy at law.”110 The Smith court held that one may reasonably infer that cigarette smoke is causing the plaintiff irreparable harm, and when a harm’s full effect takes many years to be realized, money damages are inadequate compensation.111 The plaintiff had stated a cause of action, and his case was remanded for determination on the merits.

In California, Hentzel v. Singer Co.112 extended the possible causes of action for smoking in the workplace beyond the employer’s common-law duty. Paul Hentzel, a former attorney for the Singer Company, alleged he had been fired because of his repeated complaints and demands for a smoke-free workplace.113 Although he relied tangentially upon Shimp,114 Hentzel based his case on wrongful termination, breach of contract, and, most interestingly, on intentional infliction of

104. Id. at 12.
105. Id. Ironically, Western Electric offered Smith the computer room position because smoke is harmful to computers and, therefore, banned only in the computer room. Id.
106. Id. at 11.
107. Id.
108. Id. at 12, 13.
109. Id. at 13.
110. Id. (citations omitted).
111. Id.
113. Id. at 294, 188 Cal Rptr. at 160.
114. Id. at 296 n.2, 188 Cal. Rptr. at 162 n.2.
emotional distress.\footnote{Id. at 294, 188 Cal. Rptr. at 160.}

On the count of intentional infliction of emotional distress, Hentzel alleged that his employer, knowing of Hentzel’s desire for a reasonably smoke-free environment, . . . place[d] him in a working area with a heavier concentration of smoke. . . failed to segregate conference rooms into smoking and non-smoking areas, and failed to prevent other employees from ‘directly antagonizing, him in various ways. . . ’\footnote{Id. at 294, 188 Cal. Rptr. at 161.} The trial court dismissed the complaint on the grounds that the California Workers Compensation Act preempted the cause.\footnote{Id. at 306, 188 Cal. Rptr. at 169.} However, the court of appeals reversed, stating that intentional infliction of emotional distress was neither contemplated by, nor included in, the workers’ compensation law.\footnote{Id.} As long as the recovery sought is beyond the scope of compensation covered by workers’ compensation law, a suit may be maintained. Therefore, Hentzel’s complaint had stated a cause of action for the intentional infliction of emotional distress.\footnote{Id.}

Of course, not every complaining nonsmoker has achieved success. The recent case of \textit{Gordon v. Raven Systems and Research, Inc.}\footnote{462 A.2d 10 (D.C. 1983).} from the District of Columbia is the \textit{Shimp} antithesis. Like the plaintiffs in \textit{Shimp, Smith,} and \textit{Hentzel,} Adel Gordon informed her employer of her sensitivity to tobacco smoke and her desire to be free from such smoke during working hours. Her employer’s attempts to accommodate her fell short of preventing smoking in the workplace and, therefore, failed to assuage Ms. Gordon.\footnote{Id. at 11, 12.} Because Ms. Gordon refused to return to her assigned workgroup, continuing instead to work in a secluded area, her employer fired her for insubordination.\footnote{Id. at 12.} Ms. Gordon brought suit for wrongful termination and breach of an employer’s duty to provide a safe place to work\footnote{Id. at 11.} 

The court’s reasoning in \textit{Gordon} is widely disparate from that in \textit{Shimp.} The \textit{Gordon} court began with the same major premise of the employer’s duty to provide a safe workplace, but added that this duty does not require an employer “to adapt his workplace to the particular
sensitivities of an individual employee. . . ."\textsuperscript{124} The court of appeals affirmed the trial court's directed verdict in favor of defendant Raven Systems by stating, "[w]ithout such duty, appellant can complain of no wrong."\textsuperscript{125} Of course, the implied minor premise of the Gordon syllogism appears to be that tobacco smoke is unsafe only to those with particular sensitivities.\textsuperscript{126}

The Gordon opinion does not completely ignore Shimp. The court acknowledged that Shimp had taken judicial notice of the hazards of tobacco smoke to everyone, based on expert testimony and scientific studies.\textsuperscript{127} Nevertheless, the Gordon court distinguished its facts from Shimp because the plaintiff Gordon had not produced her own medical evidence of the dangers of tobacco smoke, and because she had pleaded only that the duty was owed to her due to her particular sensitivities.\textsuperscript{128} It seems anomalous that the court would deny Gordon relief because tobacco smoke affected her even more adversely than the average person. Perhaps the court would have granted relief had her injury been less dramatic.

Whether the court would have granted Ms. Gordon relief even had she offered scientific and medical evidence that tobacco smoke harms everyone is doubtful. Because she failed to plead these general claims, the court stated, "we need not pass on [Shimp's]. . .suitability as substantive law."\textsuperscript{129} This language may be a subtle indication of an unwillingness to have found Shimp persuasive had the court felt compelled to analyze its substance.

An even stronger indication of Ms. Gordon's doubtful chances for success is the court's dictum prefacing its discussion. The court first noted: "The issue of nonsmokers' rights is a relatively new one in American jurisprudence."\textsuperscript{130} The court cited Gaspar and other cases denying nonsmokers a constitutional right, and then stated that "the issue of nonsmokers' rights is one better left to the legislature[;]. . .appellant encourages us to act where the legislature has not, [and] [w]e

\textsuperscript{124} Id. at 14 (emphasis added). Gordon ignores that 34 million Americans are hypersensitive to tobacco smoke. \textit{See supra} text accompanying note 59-62.

\textsuperscript{125} Id. at 15.

\textsuperscript{126} But see \textit{supra} text accompanying notes 11-77 (tobacco smoke pollution is harmful to everyone).

\textsuperscript{127} Gordon, 462 A.2d at 15.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 14.
The Gordon decision is troubling for several reasons. The fact that a legislature has not acted on an issue well suited for it is irrelevant when a common-law remedy already exists. Furthermore, even when a legislature does act, the statutory remedy in these situations is usually cumulative to the common-law remedy unless the statute clearly indicates otherwise. Leaving aside its very narrow reading of the plaintiff's complaint, Gordon seems to suggest that an existing common-law right can be destroyed by legislative inaction. Certainly the court would not intentionally advocate such a doctrine without support.

2. OSHA: Support without Remedy

Contrary to the Gordon court's belief in legislative inaction, an argument exists that Congress has codified the common-law duty by enacting the Occupational Safety and Health Act of 1970 (OSHA). Pursuant to its power to control interstate commerce, Congress recognized that "illnesses arising out of work situations impose a substantial burden upon, and...[are] a hindrance to, interstate commerce." The purpose of OSHA is "to assure so far as possible...safe and healthful working conditions..." The Act defines "occupational safety and health standard" as a condition requiring the adoption of "practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." This Act, which applies to a wide array of workplaces, provides in section 654(a)(1) that "[e]ach employer shall furnish...his employees...a place...free from recognized hazards that are causing or are likely to cause death or serious physical harm..." In determining what constitutes a "recognized hazard" under section 654(a)(1), courts have looked at many factors, including condi-
tions detectable by human senses or through the aid of instrumentation, and employers’ constructive knowledge.  

138 American Smelting and Refining Co. v. Occupational Safety and Health Review Comm’n holds that section 654(a)(1) encompasses “a health standard recognized nationally for many years.”  

139 American Smelting, similar to the nonsmoking cases, involved levels of lead in the air which were higher than the nationally-recognized safe level. The court found these levels to be within the meaning of “recognized hazard” even though the levels could be detected only through measuring air quality, not through sense detection.  

141 Most offices and workplaces which permit smoking probably contain toxic air levels many times higher than any safe standard, but the Secretary of Labor has not, as yet, promulgated any standard for tobacco smoke.  

Considering the scientific and medical evidence, the Secretary could reasonably conclude: 1) that the absence of cigarette smoke in the workplace would reduce illness, thus easing the burden on interstate commerce; 2) that this absence could be achieved by adopting reasonable bans on smoking; and 3) that the result would free employees from a recognized hazard.  

Although FENSR, Shimp, Smith, and Hentzel all discussed OSHA, none could be decided based on OSHA since it is well established that OSHA does not provide a private cause of action. However, in construing the California OSHA, modeled after the federal Act, Hentzel held that OSHA is cumulative rather than exclusive of

138. See, e.g., Usery v. Marquette Cement Mfg. Co., 568 F.2d 902 (2d Cir. 1977) (hazardous condition detectable through observation and common sense); American Smelting & Refining Co. v. Occupational Safety and Health Review Comm’n, 501 F.2d 504 (8th Cir. 1974) (hazardous condition detectable only through instrumentation); Otis Elevator Co. v. Occupational Safety & Health Review Comm’n, 581 F.2d 1056 (2d Cir. 1978) (hazardous condition satisfied if employer should have known).

139. 501 F.2d 504 (8th Cir. 1974).

140. Id. at 512.

141. Id. at 510-11.

142. See supra text accompanying notes 23-29.

143. 28 U.S.C. § 655 (1976) authorizes the Secretary of Labor to set standards based upon a national consensus. But see Smith, 643 S.W.2d at 14 (no standard has been set).

144. FENSR, 446 F. Supp. at 183; Shimp, 145 N.J. Super. at 522, 368 A.2d at 410; Smith 643 S.W.2d at 14; Hentzel, 138 Cal. App. 3d at 300-301, 188 Cal. Rptr. at 166.

the common law.\textsuperscript{146} Indeed, section 653(4) of the federal OSHA makes very clear that OSHA shall neither "supersede . . . nor affect . . . the common law. . . ."\textsuperscript{147}

The Occupational Health and Safety Act itself, even without a private right of action, is persuasive evidence that Congress accepted the major premise on which the nonsmoking plaintiffs have relied. Therefore, the legislative action the Gordon court sought for authority to grant relief may exist in OSHA, demonstrating Congress' desire to provide \textit{everyone} a safe place to work.

3. \textit{Relief for the Hypersensitive Nonsmoker}

Other nonsmokers who suffer from extreme physical reactions to secondary tobacco smoke have sought relief as handicapped or disabled persons. For example, in \textit{Vickers v. Veterans Admin.},\textsuperscript{148} the plaintiff Vickers, very sensitive to tobacco smoke, worked in a crowded room with several heavy smokers.\textsuperscript{149} Vickers alleged that his sensitivity to tobacco smoke qualified him as a handicapped person under the Rehabilitation Act of 1973,\textsuperscript{150} and the district court agreed with this classification.\textsuperscript{151} Vickers further alleged that his superiors' animosity toward him and Veterans Administration's failure to provide him a smoke-free workplace constituted discrimination against a handicapped in violation of 29 U.S.C. § 794.\textsuperscript{152} The district court disagreed, stating that evidence showed Vickers received promotions, work assignments, and incentives as any other employee,\textsuperscript{153} and that Vickers "failed to cite any authority from the decided cases to the effect that the Veterans Administration was under a duty to make 'reasonable accommodations' to plaintiffs' sensitivity to tobacco smoke."\textsuperscript{154} This language resembles the Gordon court language, but can be distinguished since the duty under

\begin{thebibliography}
\bibitem{146} 138 Cal. App. 3d at 301, 188 Cal. Rptr. at 166.
\bibitem{147} 28 U.S.C. § 653(4); \textit{See also} Shimp, 145 N.J. Super. at 522, 368 A.2d at 410.
\bibitem{148} 549 F. Supp. 85 (W.D. Wash. 1982).
\bibitem{149} \textit{Id.} at 88-89.
\bibitem{152} \textit{Vickers}, 549 F. Supp. at 87 (29 U.S.C. § 794 prevents discrimination against those qualifying under the Act as handicapped persons).
\bibitem{153} \textit{Vickers}, 549 F. Supp. at 87.
\bibitem{154} \textit{Id.}
\end{thebibliography}
inquiry is the duty to the handicapped, not the duty to all employees to provide a safe work place. The Vickers court deliberately states: "This is not an action to determine whether all government employees have a right to work in offices which are free from tobacco smoke. It is an action solely to determine whether this one plaintiff has the right to work in an environment wholly free from tobacco smoke."\(^{155}\)

In *Parodi v. Merit Sys. Protection Bd.*,\(^{156}\) another hypersensitive nonsmoker sought disability retirement benefits. Under the applicable law at that time "a person [was] totally disabled if unable to perform 'useful and efficient service in grade or class of position last occupied. . . because of. . . injury not due to vicious habits, intemperance, or willful misconduct on his part within five years before becoming disabled.'"\(^{157}\) Both the Office of Personnel Management and the Merit Systems Protection Board determined Parodi was not disabled. The Ninth Circuit, however, reversed both administrations' determinations\(^{158}\) stating Parodi is disabled because "[s]he cannot perform her job, not due to choice or bad habits. . . ."\(^{159}\) The court remanded the case to determine whether a smoke-free work environment is available for her\(^{160}\)

Several courts have denied nonsmokers' requests for unemployment compensation after the nonsmokers quit work, refusing to work in smoke-filled environments.\(^{161}\) In *Alexander v. Unemployment Ins. Ap-
peals Bd., a nonsmoking X-ray technologist quit work because her employer failed to enforce its policy against smoking. The court of appeals affirmed the trial court's mandate to pay her unemployment compensation. The court stated that a nonsmoker "has good cause for rejecting work where cigarette smoke is present because such work is not 'suitable employment' since it would be injurious to her health."

Although Vickers, Parodi, and Alexander provide encouragement for the hypersensitive nonsmoker, these cases did not ban or limit smoking in the workplace. None addressed the Shimp issue of the employer's common-law duty to all employees.

4. Florida Common Law Supports Judicial Activism

Although no nonsmoking employee cases have yet been reported, the Shimp syllogism should work well in Florida. A line of Florida cases recognizes the legal premise, i.e., the employer's duty. The Florida Supreme Court held that the common-law doctrine gives an employer "a positive duty to provide his servant with reasonably safe. . .places to work." Whether a Florida employer has breached this duty is determined by weighing the risk of injury against the utility of the condition. Whatever utility exists, if any exists at all, in allowing high levels of tobacco smoke to permeate the workplace could not possibly outweigh the risk of harm to all employees, including those who smoke.

57 Pa. Commw. at 302, 426 A.2d at 721 (emphasis added). Without this presumption, a plaintiff has the burden of proving a sufficient health detriment exists justifying termination. Id. Because the claimant in Ruckstuhl had produced only her doctor's statement that she is allergic to tobacco smoke, the court ruled that she had not met her burden. Id. Arguably, a similarly situated plaintiff could prevail under the Pennsylvania law by providing the existing medical evidence demonstrating serious physical harm. See supra text accompanying notes 59-62.

163. Id. at 99-100, 163 Cal. Rptr. at 412.
164. Id.
165. Id. at 100, 163 Cal. Rptr. at 412.
169. See supra text accompanying notes 11-77 (reviewing many of the risks of
One may suggest that the utility involves respecting the rights of workers to smoke. On the issue of a safe workplace, however, recognizing smokers' rights may be inappropriate. Even though an employer may wish to respect an individual's desire to assume the risks of tobacco smoking, an argument still exists that the employer has the duty to provide even the smoker with a safe place to work by protecting that individual from tobacco smoke during working hours. This is analogous to an individual who chooses not to wear a seat belt while driving his private car. The employer of this individual still has a positive duty to require that individual to wear a seat belt while operating a dangerous instrumentality on the job. Therefore, the issue is not the rights of smokers versus the rights of nonsmokers in the workplace. The issue is whether the presence of tobacco smoke in the workplace creates an unsafe environment for all workers regardless of anyone's desire to assume the risks of the condition.

A Florida plaintiff has another potential basis for recovery. In addition to the available medical and scientific evidence he can use to establish the harm to any person exposed to tobacco smoke, a complaining party may refer to the preamble of Florida Statutes section 255.27, regulating smoking in state buildings. The preamble states in part: "[E]ven low levels of tobacco smoke in stagnant room air constitutes a substantial health hazard...[the nonsmoker's] right to be free of annoying and possibly harmful tobacco smoke...should be protected..." Even though the plaintiff may not be invoking Florida Statutes section 255.27, the preamble is still useful as persuasive authority. Preambles demonstrate, at the very least, the legislature's concern, intent, and purpose in enacting legislation.

To avoid the particular sensitivity basis for rejection of Ms. Gordon's complaint, the Florida plaintiff must plead the harm of tobacco smoke to everyone exposed to it, and produce scientific affidavits. In addition, he should refer to the third paragraph of the section 255.27 preamble which states, "persons with allergies, respiratory ailments, and other related infirmities are adversely affected by tobacco

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170. FLA. STAT. § 255.27 (1983).
171. 1977 Fla. Laws 73, ch.77-52 (emphasis added).
172. For a discussion of the various effects and uses of preambles, see Note, Legal Effect of Preambles—Statutes, 41 CORNELL L.Q. 134 (1955).
173. See supra text accompanying note 124. Pleading particular sensitivity was Ms. Gordon's nemesis.
smoke which results in the state and private industry incurring each year substantial losses in productivity due to days lost by personnel, not to mention the personal suffering and inconvenience of those affected. . . .” 174 Perhaps this language provides the nexus and authority the Gordon court believed it lacked to extend the common-law duty to include those with particular sensitivities.

IV. Florida’s Need for a Clean Indoor Air Act

Both Gordon v. Raven Systems and Research, Inc., 175 and Federal Employees for Nonsmokers’ Rights (FENSR) v. United States 176 suggest that the issue of defining nonsmokers’ rights should be determined by a legislative body rather than a court. 177 While the more accurate view is that a court has the power to recognize the rights of nonsmokers under existing laws and should not hesitate to do so when called upon, the legislature is undoubtedly the better forum to define those rights. Before 1974 no state had ever enacted comprehensive smoking regulations designed to assure air quality or protect the health of those who do not smoke. 178 What regulations did exist were usually designed for fire or explosion prevention or for the protection of minors. 179 Only after publication of the 1972 Surgeon General’s report and subsequent medical studies did legislatures have reason to begin recognizing rights of nonsmokers. Since then, however, the movement towards legislative recognition of these rights gained rapid momentum. Between 1974 and 1980 twenty-five states enacted comprehensive anti-smoking statutes designed to protect nonsmokers from involuntary exposure to harmful tobacco smoke, 180 three states enacted piecemeal groups of anti-smok-

175. 462 A.2d 10 (D.C. 1983).
179. Id. at 453.
180. Id. at 451, 452.

ing statutes, and seven states enacted laws protecting nonsmokers’ rights in very limited areas. Thirteen other states still had restrictions for traditional reasons, and three states had no restrictions.


Legal Conflict, supra note 178, at 450 n.57.

181. Legal Conflict, supra note 178, at 452.


Legal Conflict, supra note 178, at 451 n.57.

182. Legal Conflict, supra note 178, at 452.


Legal Conflict, supra note 178, at 451 n.57.

183. Legal Conflict, supra note 178, at 452.

ILL. ANN. STAT. ch. 96 1/2, § 2105 (Smith-Hurd 1979) (mines); ILL. ANN. STAT.RECOVERY CH.127 § 109 (SMITH-HURD CUM. SUPP. 1976) (fireworks); IND. CODE ANN. §§ 16-1-22-21, 16-6-4-23 (BURNS 1973) (food
Not surprisingly, states in or near the tobacco belt generally fall into the latter two categories.

A. Smokers' and Nonsmokers' Rights Distinguished

As discussed in section three of this note, apparently the fundamental rights afforded under the United States Constitution do not include the right to a smoke-free environment. Likewise, of course, there is no fundamental right to smoke tobacco. In other words, neither the smoker nor the nonsmoker can rely directly on the Constitution to resolve the conflict. The state and local governments may, however, use their police power to define and regulate the rights of smokers and nonsmokers. Nothing is more vital to a state than the health, safety and welfare of its citizens.

A suggestion made earlier is that when applying the common-law doctrine of the employer's duty, comparing nonsmokers' and smokers' rights may be improper since the hazardous condition rather than competing rights is at issue. In legislating, however, comparing the rights of smokers and nonsmokers is a proper consideration since the competing rights are as issue.

Freedom is a basic presumption of our society. Generally, individ-
uals have the right to engage in lawful activities and to use their own free will and discretion in determining the extent of that engagement. This right includes the right to take risks. Nevertheless, the right of personal autonomy is not absolute.\(^{187}\) Not only may a state regulate, restrict or even prevent an otherwise lawful activity if the regulation bears any rational relationship to a legitimate state interest;\(^ {188}\) a state may also impinge a fundamental right if the restriction is necessary to further a compelling state interest.\(^ {189}\) Presently the smoking of tobacco products is a lawful activity, but probably not a fundamental right. Therefore, a state may restrict or prevent the right to smoke if the prevention or restriction is rationally related to furthering a legitimate state interest. The health, safety, and well-being of citizens is at the very least a legitimate state interest.\(^ {190}\)

Once a legislature recognizes the scientific and medical evidence that secondary smoke is a health hazard, the question is not whether smoking should be restricted, but where and when.\(^ {191}\) The simple answer is by whatever regulation is reasonably designed to enhance the goal of protecting the health, safety and well-being of the citizens. Perhaps the most reasonable general rule is that individuals should have the right to smoke only when and where the act does not endanger the health and safety of others. Certainly this is exactly the standard used in other types of legislation. For example, individuals may lawfully operate motor vehicles, but only under clearly-defined conditions which vary according to place and time and under the threat of penalties for violations. The restrictions extend from the rationale that individuals have the right to operate motor vehicles only to the extent they do so without endangering the safety of others. The rationale of anti-smoking laws should be commensurate with this. The rights of smokers to endanger their own bodies should end when their acts begin to endanger

\(^{187}\) Crowley v. Christensen, 137 U.S. 86, 89-90 (1890); Roe v. Wade, 410 U.S. 113, 154 (1973); see also Kelley v. Johnson, 425 U.S. 238 (1976) (even one's hair length may be regulated).


\(^{189}\) See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973) (discussing the higher level of strict scrutiny applied to fundamental rights).

\(^{190}\) Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) states: "Protection of health and safety of the public is a paramount governmental interest. . . ." Id. at 300.

others. Some states have implemented this rationale by passing Clean Indoor Air Acts; others, like Florida, have not.

B. The Inadequacy of Present Legislative Measures

Florida has two statutes designed to restrict smoking. One must hesitate to describe them as anti-smoking statutes since neither affords great protection from tobacco smoke.

1. Florida Statutes Section 823.12

Florida Statutes section 823.12 makes smoking in elevators a second degree misdemeanor. Of course, because there is rarely any prohibition against smoking before getting on an elevator or after getting off, the law is often ignored. At least one person, however, received a $250 fine for blowing smoke in the face of another elevator occupant who had requested that he extinguish his cigar. This is a good law, but in the absence of other restrictions, it does little to promote public health. People spend a small fraction of their time on elevators.

2. Florida Statutes Section 255.27

Florida Statutes section 255.27, enacted in 1977, represents Florida’s first real attempt at anti-smoking legislation. The statute’s preamble in very strong language recognizes: 1) the potential health hazard of “even low levels of tobacco smoke.” 2) the “right to be free of . . . tobacco smoke.” and 3) the potential loss of worker productivity from exposure to tobacco smoke. The statute itself, however, falls far short of the preamble’s stated aspirations. Under this statute, “[t]he supervisor of each unit of government located in a government building shall establish rules governing smoking in that portion of the building for which he is responsible.”

Section 255.27 gives the government supervisor guidelines to follow, but these guidelines appear more permissive of smoking than restrictive. For example, in conference rooms and auditoriums,

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193. Legal Conflict, supra note 178, at 458 (citing Good Housekeeping, Apr. 1979, at 118).
195. 1977 Fla. Laws 73, ch. 77-52 (emphasis added).
"[s]eparate smoking and nonsmoking areas shall be set aside."\(^{197}\) This means smoking is still permitted in these rooms, only not on certain sides. Considering the physical qualities of tobacco smoke and how it rapidly permeates a room, one realizes that dividing a room provides no real protection.\(^{198}\) Furthermore, "[t]here will be no limitation on smoking in corridors, lobbies, and restrooms."\(^{199}\) Common sense suggests that these areas are often the smallest and least ventilated of a building. Unless nonsmokers who use or work in state buildings can miraculously avoid these areas, they are assured of exposure to high levels of tobacco smoke.

In fact, Florida Statutes section 255.27 does not guarantee that individuals will be totally free from tobacco smoke in any area. In medical care facilities smoking is "restricted to staff, lounges, private offices, and specially designated areas."\(^{200}\) Apparently, this "specially designated areas" language permits a supervisor to divide all open rooms into smoking and nonsmoking sides, thereby creating the same problem as discussed with conference rooms. In designating nonsmoking areas, the supervisor is required to consider only "the individual characteristics of the building or room such as size, ventilation, the purposes for which it is utilized, and other criteria relating to public health, safety and comfort."\(^{201}\) The law does not guarantee that any area will be absolutely void of tobacco smoke.

Florida Statutes section 255.27 suffers from two other even greater deficiencies. First, the law does not provide penalties for violations. Secondly, whatever smoking restrictions do exist for the protection of public health apply only in state government buildings or offices leased by the state government. No other public places are affected.

In short, the Florida Legislature formally recognizes that tobacco smoke is a serious public health hazard only when inhaled in certain unspecified areas of state government buildings. However, it is doubtful that the toxic effect of tobacco smoke discriminates in such a manner. Florida should recognize, as other states have, that tobacco smoke is a detriment to public health and welfare regardless of where or when

\(^{197}\) Id. § 255.27(1) (emphasis added).

\(^{198}\) Lefcoe, Ashley, Pederson & Keays, *The Health Risks of Passive Smoking and the Growing Case for Control Measurements in Enclosed Environments*, 84 CHEST, July 1, 1983, at 93 (smoke permeates entire room.).

\(^{199}\) FLA. STAT. § 255.27(3) (1981).

\(^{200}\) Id. § 255.27(2) (emphasis added).

\(^{201}\) Id. § 255.27(4).
inhaled. Florida needs to follow through to the logical conclusion of its declarations stated in the preamble to Florida Statutes section 255.27 and enact a comprehensive Clean Indoor Air Act.

C. Elements to be Included in Florida's Comprehensive Legislative Response

Like any effective legislation, anti-smoking legislation must make a clear statement of its intent and purpose, define terms, places, and conditions under which smoking will be permitted, require adequate posting of regulations, authorize individuals and agencies to enforce the regulations, and provide adequate penalties for violations. This section discusses these elements and illustrates how some selected anti-smoking laws have employed them. In addition, this section raises a new issue concerning legislative protection of children from passive smoking. The Florida Legislature should use the discussion as a guide and should satisfy all elements in its Clean Indoor Air Act.

1. Intent and Purpose

Effective legislation should make clear the reasons and intent of the restrictions. Such a statement is useful for interpretation and implementation of restrictions. The best method is to incorporate the intent as part of the statute. For example, Colorado Revised Statutes section 24-14-101 states: "Legislative declaration. The general assembly hereby declares that the smoking of tobacco...under certain conditions is a matter of public concern and that in order to protect the public health, safety and welfare it is necessary to control such smoking in certain public places."203

Perhaps the strongest statement of purpose of any anti-smoking legislation appears in the newly-enacted city of San Francisco's Smoking Pollution Control Ordinance. Section 1001 of this ordinance states:

Because the smoking of tobacco...is a danger to health and is a

cause of material annoyance and discomfort . . . , the purposes of
this article are (1) to protect the public health and welfare by regul-
ating smoking in the office workplace and (2) to minimize the
toxic effects of smoking . . by requiring an employer to adopt a
policy that will accommodate, insofar as possible, the preferences
of nonsmokers and smokers and, if a satisfactory accommodation
cannot be reached, to prohibit smoking in the office workplace.206

The section further emphasizes that the ordinance does not “create any
right to smoke . . .”, nor does it prevent an employer from banning
smoking altogether.207 The spirit of the ordinance merely allows an em-
ployer to attempt satisfying all employees, smokers, and nonsmokers.
However, this attempt at accommodating everyone does not imply
striking a balance or compromise. On the contrary, the ordinance
makes very clear that the right to be free from smoke is superior to the
right to smoke.208 Any smoking policy set by an employer must satisfy
all nonsmoking employees.207

2. Definitions and Restrictions

Most essential to any clean indoor air act are its definitions and
restrictions. Enforcement of any regulation requires knowing exactly
what is restricted and where it is restricted. For example, the term
smoking requires precise definition. Because the most harmful smoke
emanates from the burning ends of tobacco products and equipment,
the definition of “smoking” should include not only inhaling and exhal-
ing but also the burning or carrying of any lighted tobacco or other
smoking product.210 Other important terms include public place, public
meeting, office, workplace, building, and enclosed area.211 It may even
be appropriate to define for purposes of protecting children, “private
home” and “automobile.”212

Of course, the actual regulations are the most critical. Many anti-
smoking regulations enumerate areas where smoking is prohibited.213

205. Id. at § 1001.
206. Id.
207. Id.
208. Id. § 1003(1)(b).
209. Id. (emphasis added).
211. Id.
212. See infra text accompanying notes 236-42.
The most common areas listed include elevators, theaters, libraries, buses, waiting rooms, government buildings, schools, etc. While these lists have the benefit of making the restricted areas somewhat clear, their exclusionary method unfortunately promulgates the traditional presumption that smoking is permitted anywhere unless otherwise provided.

The Minnesota Clear Indoor Air Act, the leading comprehensive state statute to date, takes a refreshing approach. Minnesota Statutes section 144.414 states, “[n]o person shall smoke in a public place or at a public meeting except in designated smoking areas.” The Act defines a public place “as any enclosed, indoor area used by the general public or serving as a place of work . . . .” In effect, the Minnesota Clean Indoor Air Act reverses the traditional presumption. Smoking is prohibited in public unless an area has been set aside for smoking. Nonsmokers are assured of clear indoor air in common, public areas, but some areas may be set aside for smoking if certain precautions are taken. This approach is the most reasonable, and one Florida should follow.

The Minnesota Act exempts some areas. Private enclosed offices are not subject to the restriction, and neither are “factories, warehouses and similar places of work not usually frequented by the general public, except that the [labor department and. . .health commis- sioner]. . .shall establish rules to restrict or prohibit smoking. . .where the close proximity of workers or inadequacy of ventilation causes smoke pollution. . . .” Furthermore, the Minnesota section providing for designation of smoking areas requires the use of “physical bar- riers and ventilation systems. . .to minimize the toxic effect of smoke in adjacent non-smoking areas.”

The controversial San Francisco ordinance requires office employ- ers operating businesses within the city to establish and enforce a written smoking policy. As discussed earlier, employers may attempt to accommodate smokers, but if ventilation or separation is insufficient to protect all nonsmokers, total abolition of smoking is required.

214. Id.
216. Id. § 144.414.
217. Id. § 144.413.(2)
218. Id. § 144.414 (emphasis added).
219. Id. § 144.415.
3. Enforcement

A major problem with anti-smoking legislation is the lack of adequate enforcement provisions.\textsuperscript{221} Of course, most people obey laws; therefore, the mere enactment of an anti-smoking law coupled with greater public awareness of the reasons and purposes of the law may achieve substantial public compliance. But more is needed. While one has difficulty imagining police officers using smoke detectors to catch recalcitrant tobacco smokers as they use radar to catch speeding motorists, effective anti-smoking laws do require adequate and enforceable fines and penalties.

Enforcement provisions vary greatly, even among states with extensive anti-smoking laws.\textsuperscript{222} For example, although the Colorado statute gives a strong anti-smoking declaration, defines essential terms, lists extensive restrictions for certain public places, creates optional prohibitions, and makes clear that local governments may regulate even more extensively than the state statute, it fails to provide a section for enforcement.\textsuperscript{223} Several states have made a violation a petty misdemeanor.\textsuperscript{224} Alaska may fine an individual violator of its anti-smoking act between $5 and $25,\textsuperscript{225} and managers of buildings or others responsible for enforcing restrictions may be fined between $10 and $100.\textsuperscript{226} New Jersey fines individuals up to $100, and fines those responsible with enforcement $25 for the first offense, $100 for the second, and $200 for each offense thereafter.\textsuperscript{227}

Sometimes statutes make clear who may enforce the restrictions and by what methods. The California Clean Indoor Air Act,\textsuperscript{228} for example, permits an individual to apply for a writ of mandate to comply with the restrictions.\textsuperscript{229} If the plaintiff is successful, not only must the entity enforce the restrictions, but the plaintiff will also receive reason-

\textsuperscript{221.} \textit{Smoking Digest}, \textit{supra} note 202, at 84.
\textsuperscript{222.} \textit{Id.} at 84-86.
\textsuperscript{224.} \textit{See e.g., Minn. Stat. Ann.} \S 144.417 (West Supp. 1983); \textit{Neb. Rev. Stat.} \S 71-5712 (1981) (Nebraska's Clean Indoor Air Act is almost identical to Minnesota's.).
\textsuperscript{225.} \textit{Alaska Stat.} \S 18.35.340(a) (1982).
\textsuperscript{226.} \textit{Id.} \S 18.35.340(b). Proprietors must also post conspicuous no smoking signs. \textit{Id.} \S 18.35.330.
\textsuperscript{229.} \textit{Id.} \S 25945.
able costs and attorney's fees.\textsuperscript{230} Other statutes provide that an "affected party" may file suit to enjoin violators.\textsuperscript{231}

The San Francisco ordinance appears to have the strictest enforcement provisions. Employers who fail to institute and enforce a written smoking policy which satisfies all nonsmokers may receive up to a $500 fine.\textsuperscript{232} In addition, "[e]ach day such violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such."\textsuperscript{233} The enforcement provision also requires the Director of Public Health to enforce the ordinance by serving notices to violators and having the city attorney sue to enjoin violators.\textsuperscript{234}

The San Francisco ordinance takes a serious approach to enforcing an otherwise easy-to-ignore ordinance. Most nonsmokers find it difficult to speak up about violations. Many would rather suffer the health consequences and annoyance than risk alienation. Under this ordinance suits are brought in the name of the city rather than an individual employee.\textsuperscript{235} The burden is on the employer to institute and enforce a policy on behalf of the nonsmokers. Knowledge of the potential for huge fines for continued violations makes what is good for the nonsmoker good for the employer.

4. Protection for Children

In her cover letter submitting the 1980 Surgeon General's report to the House of Representatives, Patricia Roberts Harris, Secretary of Health, Education and Welfare, stated: "Perhaps more disheartening [than the harm tobacco smoke has on women] is the harm which mothers' smoking causes to their unborn babies and infants."\textsuperscript{236} A possible emerging issue is whether parental smoking should be restricted to times when and places where children are not present. Arguably a relationship between parental smoking in the child's environment and the negligent treatment of children exists. Florida's negligent treatment of

\textsuperscript{230} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id. § 1005(1).
\textsuperscript{235} Id. § 1005(2).
\textsuperscript{236} Letter from Patricia Roberts Harris to Speaker Thomas P. O'Neill, Jr. (printed inside front cover of Public Health Services, U.S. Department of Health and Human Services, The Health Consequences of Smoking for Women (1980)).
children statute provides in part: "Whoever permits a child to live in an environment... [which] causes the child's physical or emotional health to be... in danger of being significantly impaired shall be guilty of a misdemeanor of the second degree..." Medical evidence demonstrates that children who live in smoke-filled homes are in danger of significant physical impairment.

Although a government walks on thin ice when it attempts to regulate parental control and management of their children, the serious detrimental effect parental smoking has on children arguably should not be ignored. On the one hand is the traditional notion of the right of parents to raise their children without state interference. On the other hand, states are enacting legislation designed to protect non-smokers, and yet no provisions exist to protect children, the group of nonsmokers who may be in most need of protection. The Supreme Court has stated: "we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." In the same opinion the Court stated, "[t]he statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition."

The dilemma is not easily resolved. It would be unrealistic to expect Florida agencies to prosecute parents who smoke cigarettes in their own homes, whether under the child neglect statute or otherwise. It is realistic, however, to expect Florida to protect children by educating the public and focusing attention on the harm passive smoking has

237. FLA. STAT. § 827.05 (1983).

238. See supra text accompanying notes 62-75 for a review of medical evidence of harm to children from passive smoking.

Additionally, it could be argued that the dangers to children rise to the level of child abuse. FLA. STAT. § 827.04(2) (1983) states: "Whoever... knowingly or by culpable negligence, permits physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree..." Also, FLA. STAT. § 827.04(1) (1983) states: "Whoever... knowingly or by culpable negligence, permits physical injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree..." Id.

239. Parham v. J.R., 442 U.S. 584, 601-02 (1979); Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944). In Prince, the Court spoke of "the parent's claim to authority in her own household and in the rearing of her children." 321 U.S. at 165. "Against these sacred private interests, basic in a democracy, stand the interest of society to protect the welfare of children..." Id.

240. Parham, 442 U.S. at 603.

241. Id. (emphasis original).
on children. One of the many ways this may be accomplished is to include a provision in a Clean Indoor Air Act advising parents and other adults not to smoke in enclosed areas when children are present, for example, the home and automobile. Even without active enforcement, such a provision may open "those pages of human experience that teach that parents generally do act in the child's best interest."\(^{242}\)

5. **Proposal**

A Florida Clean Indoor Act should include a clear statement of intent and the following minimum protections: 1) prohibit smoking in all places open to the public, exempting only designated rooms where nonsmokers realistically need not be present; 2) guarantee all nonsmokers a smoke-free workplace; 3) provide adequate enforcement and penalty provisions; and 4) lead the nation in protecting the health of infants by restricting parental smoking in areas when children are present. The act should permit municipalities to place further restrictions on smoking, but not permit them to create exemptions.

V. **Conclusion**

Twenty years ago the United States Surgeon General officially informed the public of the dangers of tobacco smoke. Since that first report, hundreds of medical studies have linked tobacco smoke to a multitude of serious illnesses, and today tobacco smoking is recognized as the number one cause of premature death and disability in America.\(^{243}\) Included in these findings is the discovery that secondary tobacco smoke pollutes the air and is a significant health hazard to nonsmokers. Using this as an underlying premise, nonsmokers have sought legal remedies in their campaign for clean air. Nonsmokers do not attack the privilege of smokers to assume the risks of tobacco smoking. The issue nonsmokers present is whether an individual has the right to take a risk which concomitantly involves an unavoidable risk of harm to others near him. Nonsmokers argue that the privilege to smoke, as with any other privilege, must end when its exercise endangers the health and safety of others. Smokers should have the burden to smoke only in areas where nonsmokers are not present. The free

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242. *Id.* at 602.

choice of one should not take away the free choice and good health of another.

Although no court has yet recognized a constitutional right to be free from the dangers of tobacco smoke exposure, some nonsmokers have achieved smoke-free workplaces under the employer's common-law duty to provide each employee a safe place to work. While piecemeal remedies through the courts applying this theory hold promise, the better forum for granting relief is the legislature. In 1964 only half of the population believed smoking should be restricted in certain places, but in 1975 seventy percent favored controls. In all likelihood that figure is even larger today. Responding to the medical evidence and desire of the majority, half of the states have enacted comprehensive legislation prohibiting smoking in public places. Regrettably, Florida has not. Pursuant to its power and duty to protect the health and welfare of its citizens, the Florida Legislature should enact a Florida Clean Indoor Air Act.

Curtis R. Cowan

244. SMOKING DIGEST, supra note 202, at 8.
The War Powers Resolution Of 1973: An Attempt To Regulate War Powers Proves Inadequate

I. Introduction

The executive and legislative branches of government have struggled over control of the war powers since the adoption of the Constitution in 1789.1 However, the nation lacked any statutory procedure to handle its "highly complex, confused use-of-force problems" until 1973.2 The War Powers Resolution of 1973,3 enacted by the Ninety-Third Congress, was to provide a framework for the application of shared powers.

The Ninety-Eighth Congress, in 1983, deviated from both the letter and spirit of the War Powers Resolution by not requiring Presidential compliance with its provisions, and then by passing the Multinational Force in Lebanon Resolution.4 The alleged "compromise"5 between the executive and legislative branches, represented by the Multinational Force in Lebanon Resolution, demonstrated that the War Powers Resolution had failed to change the way the United States engaged its military forces. The result of political maneuvering, the Multinational Force in Lebanon Resolution permitted the government to escape all the safeguards built into the War Powers Resolution.

This note examines the War Powers Resolution, its text and background, and analyzes its application to the military situation in Leba-

2. Reveley, supra note 1, at 86.
non during 1982 and 1983. Since that application was the first comprehensive test of the War Powers Resolution, it offers a unique opportunity to evaluate the Resolution's efficacy and conclude that, in fact, neither the concept of shared powers or the procedural requirements of the Resolution have been implemented.

II. The Text of the War Powers Resolution

The War Powers Resolution of 1973 culminated several years of national debate over the Vietnam war and the relative warmaking powers of Congress and the President. Underlying the Resolution was an intent to harness executive powers and to ensure that future military engagements would be endorsed through the democratic process and gain public acceptance and support. In adopting the War Powers Resolution, Congress set forth its intent to avail itself of its constitutional role in war-making decisions. The “Purpose and Policy” section of the Resolution states:

It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

This language explicitly calls for a sharing of the power, between Congress and the President, to make war. The act embraces a wide scope of military operations and is not limited to situations of formally declared war.

The war powers of the federal government are within the “zone of

6. If a majority does not acquiesce, at least, in national policy, the country plunges into controversy, with a devastating impact on national effectiveness at home and abroad. In this century Versailles and Vietnam are witness to the dismal consequences of a failure to create and maintain consensus behind U.S. initiatives abroad. The antidote for this affliction was termed bipartisanship during the days when foreign affairs significantly divided Republicans from Democrats. An end to the acrimony between the executive and Congress is the more pressing concern today, followed by an articulation by both of a foreign policy acceptable to the country at the large.

Reveley, supra note 1, at 92.

7. War Powers Resolution, at § 1541(a).
twilight” as described by Justice Jackson in *Youngstown Sheet and Tube Company v. Sawyer.* In the famous “Steel Seizure Case,” Justice Jackson expounded the proposition that some constitutional powers of the executive and legislative branches are meant to overlap, and that the extent of independent authority that one branch may properly exercise within this “zone of twilight” is dependent upon the degree to which corresponding authority is exercised by the other branch. Justice Jackson concluded that when a President acts inconsistently with the expressed will of Congress in an area of shared power, “[c]ourts can sustain exclusive Presidential control in such a case only by disabling Congress from acting on the subject.”

Congress expressed its claim of right to share war powers in section 2(b) of the War Powers Resolution. That section bases the legitimacy of the Act on Congress’ constitutional “necessary and proper” powers. Although not mentioned in the Resolution, the Constitution also grants Congress the power to “declare war,” to “raise and support armies,” to “provide and maintain a navy,” to regulate the “land and naval forces,” and to have authority over the militia. The subject of war powers, therefore, is not one from which the courts could “disable” Congress. The foundation established, the Resolution goes on to construct a procedural mechanism for the exercise of shared powers. It mandates that the President “shall” consult with Congress prior

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8. 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
9. *Id.* at 635.
10. *Id.* at 637.
11. War Powers Resolution, at § 1541(b) states:

Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers, but also all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof.

*Id.*
17. U.S. CONST. art. I, § 8, cl. 15, 16.
18. The Constitution also vests the president with war powers, its “pertinent language is rife with vague terms, frequent grants of competing authority, and outright omissions.” Reveley, *supra* note 1, at 90.
to military actions, whenever possible. Further, it requires regular consultation with Congress for the duration of any American military engagement.

The War Powers Resolution specifies a formal procedure for regular reports from the president to Congress. Absent a declaration of war, these reports must begin within forty-eight hours of the introduction of American forces into any one of three possible situations: into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances; into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments that relate solely to supply, replacement, repair, or training of such forces; or when sending military forces in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. The presidential reports must set forth certain specific information designed to increase accountability, including:

19. War Powers Resolution, at § 1542 states:
The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Id.

20. Id.

21. War Powers Resolution, at § 1543(a) states:
In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; The President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth —

(A) the circumstances necessitating the introduction of United States Armed Forces;
(B) the constitutional and legislative authority under which such introduction took place; and
(C) the estimated scope and duration of the hostilities or involvement.

Id.
the circumstances necessitating the introduction of United States Armed Forces; the constitutional and legislative authority under which such introduction took place; and the estimated scope and duration of the hostilities or involvement.\textsuperscript{22}

The War Powers Resolution, however, does not require a presidential report submitted pursuant to the Act to specify which of the three situations is involved. Consequently, each President who has reported under the Act\textsuperscript{23} has avoided citing a particular section, thereby sidestepping the force and effect of the most important safeguard in the Act, section 5(b).\textsuperscript{24} This section sets a time limit on any presidential deployment of armed forces unless Congress acts to declare war, specifically authorizes a longer period for deployment, or finds itself unable to meet due to war conditions. However, this safeguard applies only when a President reports, pursuant to the War Powers Resolution, on one of the three types of situations discussed above. Therefore, if the

\textsuperscript{22.} Id.

\textsuperscript{23.} On April 4, 1975, President Ford reported on United States participation in efforts to transport refugees from Danang and other seaports to safer areas in Vietnam. On April 12, 1975 President Ford reported on United States military actions to evacuate Americans from Cambodia. On April 30, 1975, President Ford reported on United States military forces' actions to evacuate Americans from Vietnam. On May 15, 1975, President Ford reported on United States military action to recover the ship and crew of the Mayaguez from Cambodian forces. On April 26, 1980, President Carter reported on an attempt by the United States military to rescue American hostages being held in Iran. On March 19, 1982, President Reagan reported on the involvement of United States Forces in the Multinational Force and Observers (MFO) in the Sinai. On August 12, 1982, President Reagan made his first report on the dispatch of United States forces to Lebanon. Only President Ford's first report, on April 4, 1975 cited a section of the War Powers Resolution.

\textsuperscript{24.} War Powers Resolution, at § 1544(b) states:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

\textit{Id.}
President either fails to specify a situation type and its corresponding section or to make a report at all, and if Congress fails to require both a report and a section cite, the section 5(b) time limit will not apply.

The War Powers Resolution contains a concurrent resolution provision. Congress intended this provision to enable it to direct the removal of American forces from engagement at any time, regardless of section 5(b) time frames. The concurrent resolution purports to carry the force of law without presidential participation. In effect, the concurrent resolution provision of the War Powers Resolution gave Congress a veto power over presidential decisions to commit American armed forces.

In the recent case of Immigration and Naturalization Service v. Chadha, the United States Supreme Court held that the legislative veto violates the constitutionally prescribed method for lawmaking; the process must include presentment of a bill to the President. Although the Chadha case involved a veto provision whereby one house of Congress claimed a veto power over an executive decision, the subsequent Supreme Court affirmation of a lower court ruling against a two-house veto provision in United States Senate v. Federal Trade Commission expanded the scope of Chadha to concurrent resolutions. Thus, it has been suggested that Congress consider the War Powers Resolution’s concurrent resolution provision unconstitutional. Removal of that provision, section 5(c), would not cloud the entire Resolution; the Act contains a severability clause that purports to protect remaining provisions from any decision rendering a particular section invalid. A similar severability clause involved in the Chadha case was upheld and given effect by the Supreme Court.

25. Id.
26. War Powers Resolution, at § 1544(c) states:
Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Id.
Although the elimination of the concurrent resolution provision weakens the potential for congressional action, it does not dispossess Congress of the power to directly effectuate changes in military policy. Congress is now relegated to expressing its will through a joint resolution which, unlike a concurrent resolution, must be presented to the president. Should a president veto such a joint resolution, the veto would be subject to a potential congressional override. Thus, it appears that Congress could still have the last word in a dispute with the President over policy.

III. The Historical Context of the War Powers Resolution

The War Powers Resolution is a historic piece of legislation. As the Vietnam war was entering its final stages, Congress enacted the Resolution to attempt to ensure against future catastrophic military ventures. Congressional concern arose, in part, from an awareness that the Vietnam experience was fueled by federal statutes providing Presidents with both funds and broad discretion to carry out the war.\(^{32}\) By far the most important such statute was the 1964 Gulf of Tonkin Resolution\(^{33}\) which gave the President sweeping authority to conduct military operations in Southeast Asia. The Tonkin Resolution provided blanket Congressional consent for whatever actions the President might take. As a practical matter, it afforded the cloak of a federal law for a major escalation that Congress did not foresee. The Gulf of Tonkin Resolution was repealed in 1970 when its usefulness, as an independent source of authority for the President, had evaporated.\(^{34}\)

Long before its repeal, the Tonkin Resolution had lost most of its support in Congress as an appropriate federal policy. Growing numbers of congressmen were demanding a greater role in foreign and military affairs.\(^{35}\) The Senate passed the National Commitments Resolution\(^{36}\) in

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32. Congress supplied billions of dollars for the war effort through appropriations bills. In addition, Congress passed legislation that provided for selective service and sharply increased manpower limits for the armed forces. For example, the 1967 appropriations act proclaimed Congress' "firm intention to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam. . . ." Pub. L. No. 90-5, 81 Stat. 5 (1967).
35. "Vietnam undermined the simple confidence in each of the arguments that had traditionally supported congressional deference to the President in the area of for-
1969. This measure defined the nature of an American military commitment as one which had to receive the approval and endorsement of both the President and Congress. First introduced in 1967 by Senator William Fulbright, the Resolution expressed the “sense of the Senate” but had no binding effect on either the president or Congress.

The Senate intended the National Commitments Resolution to be an expression of its desire to share war powers with the President. Had that desire been satisfied, it is unlikely that any further legislation on the subject would have been enacted. The desire proved to be a naive one, however, as the executive branch made no change in its policies as a result of the non-binding Resolution. In a 1972 Foreign Relations Committee report, the Resolution’s failure was noted: “Following the adoption of the National Commitments Resolution it was hoped that the newly installed Nixon administration would take a different view from that of its predecessor. That hope has not been realized.” It became obvious to the Committee that congressional expressions without the force of law would not bring about a sharing of power.

Congress began to search in earnest for a more effective tool. The appropriations power, through which Congress could either fund military operations or terminate them, was one alternative. However, interest began to focus on legislation which would deal with war powers generically, rather than ways to control particular events and policies. In the summer of 1970, Senator Jacob Javits was one of the many outspoken advocates who introduced generic war powers proposals in Congress.

During the early seventies, war raged on in Southeast Asia as American invasions and bombings of Cambodia and Laos were revealed. These revelations spurred a fear that the war was widening. At home, a critical series of domestic issues relating to the Watergate scandal—which eventually forced President Richard Nixon from of-
War Powers Resolution

fice—was becoming explosive in its own way. In this historical context, the House of Representatives and the Senate each produced a war powers bill. The Senate, led by Senators Javits, Fulbright, and others passed a version which adopted an “authority” test under which the President’s ability to commit forces without congressional authorization was restricted to emergency situations. The key restraint in the Senate bill was a thirty-day time limit which would begin to run upon deployment of the forces. Unless Congress authorized a longer deployment within those thirty days, the forces would automatically be withdrawn. The House favored a “performance” test under which the President would be required to report to Congress within seventy-two hours of deployment. The filing of the report, not the deployment, would trigger a 120-day period for independent presidential action. The House deleted any form of prior restraint upon the President; the Senate version defined specific emergency situations and purported to limit independent presidential power to them. A congressional conference committee produced a compromise—the War Powers Resolution of 1973—that consisted of the performance test and a maximum time period of ninety


The most fundamental difference to be resolved concerned the triggering of the 30- or 120-day period allowed for the President to obtain congressional approval for his deployment of the armed forces. From the first war powers legislation introduced by Senator Javitz, the Senate consistently has specified the emergency situations which would permit Presidential commitment of armed forces without particular congressional authority. Congressman Zablocki’s brief flirtation with this so-called “authority” approach had received short shrift from his committee colleagues in the House who favored a “performance” test. Under the House test the 120-day period would begin to run when the President reported to Congress within 72 hours after having deployed the armed forces, whereas under the Senate’s “authority” test the 30-day period would begin to run upon deployment of the troops. The House conferees argued that an attempt to delineate the President’s warmaking powers specifically was “constitutionally questionable and from a practical standpoint unwise” and that language in the Senate bill giving the President the right to forestall an attack could license preemptive war.

Id. (footnotes omitted)

45. Id.


47. War Powers Resolution, supra note 2.
days for presidential action without Congressional concurrence. The basis of the Senate's provision delineating presidential warmaking authority survived, but only as an element of the bill's non-binding Purpose and Policy section:

The Constitutional powers of the President as Commander-in-Chief to introduce the United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

The Senate overwhelmingly approved the compromise, 75-20, on October 10, 1973, and two days later, the House followed suit by a vote of 238-123. Senator Fulbright, expressing his satisfaction with the product sent to President Nixon, said that the bill was a "historic recapture" of Congressional powers and predicted that "[n]ever again will the war making practices of this country be the same." By the time the War Powers Resolution reached President Nixon's desk, the President's public support and credibility had nose-dived. Only his constitutional veto power stood in the way of the bill's climb to the status of law. Citing constitutional, institutional, and policy objections to the legislation, the President vetoed it. Efforts to override the veto began immediately thereafter. The outcome was in doubt because the War Powers Resolution had not attained a two-thirds majority when it was initially approved and sent to the President; additional votes were needed for a successful override attempt. On seven previous occasions, the President had been able to stave off an override of his veto. On this occasion, it was different. Congress was influenced by public distress over the Vietnam war and the unfolding Watergate

48. If congressional authorization for further deployment was not forthcoming within 60 days, the deployment had to be terminated; the president could extend the period by another 30 days if he certified that the additional time was necessary for the safety of American forces.
49. War Powers Resolution, at § 1541(e).
54. Staff of House Comm. on Foreign Affairs, supra note 40, at 159,160.
scandal. The President was not able to garner the necessary support from the House of Representatives, which had protected five of President Nixon's eight previous vetoes; the House voted to override, by four votes. The Senate also voted to override, 75-18. The War Powers Resolution became law in the face of presidential opposition. "It was an overwhelming demonstration of the interests of the people who had been aroused."

IV. The Passage of the Multinational Force in Lebanon Resolution

For ten years after passage of the War Powers Resolution there were no major confrontations over war powers. Congress resorted to statutes which expressed its will on particular issues without invocation of War Powers Resolution procedures. However, ten years of dormancy had not buried the Resolution. In 1983, President Ronald Reagan and the Ninety-Eighth Congress gave the Resolution its first comprehensive test.

A. Background

Lebanon, for thousands of years the site of violence, terrorism, and war, served as an arena for conflicting international interests in 1982. By the summer of 1982, Israeli armed forces had pushed the Palestine Liberation Organization's combatants from the Israeli-Lebanese border to the Lebanese capital of Beirut. Hesitant to carry the battle into the

60. See, e.g., Boland Amendment to the 1983 Department of Defense Appropriations Act, Pub. L. No. 97-337, § 793 (1982), which prohibited certain military activities in Central America.
city, the Israelis entered into international negotiations.\textsuperscript{62}

On July 6, 1982, President Reagan announced that he had approved a plan for United States participation in a multinational force which would supervise the evacuation of the Palestine Liberation Organization fighters from Beirut.\textsuperscript{63} According to press reports, the President approved the plan on July 2.\textsuperscript{64} However, he did not consult with Congressional leaders until the day of his announcement.\textsuperscript{65} That same day, House Foreign Affairs Committee Chairman Clement Zablocki\textsuperscript{66} sent a letter to the President warning of "incalculable effects on executive-legislative relations" if Reagan failed to trigger the War Powers Resolution.\textsuperscript{67} While the President acquiesced in reporting to Congress concerning the deployment, he rebuffed Representative Zablocki's admonition by failing to specify which of the several sections of the Resolution applied. In so doing, he prevented the time limitations, after which he could not act on his own authority, from beginning to run.

The Marines completed their evacuation mission on September 10, 1982, and withdrew from Lebanese territory.\textsuperscript{68} However, during the next week three events occurred which precipitated a Presidential order for the Marines to return: the assassination of Lebanese President Bashir Gemayel, a massacre of civilians by the Christian Phalangist Militia, and the entry of Israeli forces into West Beirut.\textsuperscript{69} On September 29, the Marines and their fellow "peace-keepers" landed in Lebanon once again. President Reagan issued a second report to Congress, again failing to cite a section of the War Powers Resolution.\textsuperscript{70}

Section 4(a)(1) of the War Powers Resolution, which triggers the time limits for presidential action, applies to situations of "hostilities" or "imminent involvement in hostilities."\textsuperscript{71} Had President Reagan classified the situation in Beirut in terms of this section, the sixty-day period would have begun. The President's refusal to acknowledge the ap-
plicability of section 4(a)(1)\textsuperscript{72} continued even after Marines were killed or wounded on September 30, 1982, March 15, 1983, and September 6, 1983. While the President steadfastly rejected a label of "hostilities" for the Marine's predicament, he nevertheless continued to increase the might of American forces at the scene. By September 1983, the combined naval and land battle group totalled over twelve thousand personnel and a large number of surface ships.\textsuperscript{73} On September 6, 1983, elements of the naval group fired on gun positions in the mountains overlooking the Marine contingent. This episode marked the first use of American naval artillery since the Vietnam war.\textsuperscript{74}

In Washington, concern over the course of events was brewing in Congress. In early September, several leaders called on the President to give Congress a greater role in the situation and to invoke section 4(a)(1) of the War Powers Resolution.\textsuperscript{75} However, the administration responded that any Congressional action would hinder the executive branch's strategy in the region, and took the position that the War Powers Resolution was an unconstitutional interference with presidential authority.\textsuperscript{76} Despite the President's summary rejection of Congress' contentions, representatives of the two branches met to work towards agreement on policy. These negotiations collapsed on September 15, 1983,\textsuperscript{77} the President's representatives having refused to accept any Congressionally-imposed time limit whatsoever. The administration argued that the Lebanon situation did not qualify as "hostilities" within the meaning of the War Powers Resolution. Secretary of State George Shultz maintained that the Marines were not engaged in hostilities, but rather were "in a situation where there is violence."\textsuperscript{78} Such statements drew heated retorts from members of Congress.\textsuperscript{79} A consensus within

\begin{itemize}
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Democratic Study Group, The Lebanon Resolution, Fact Sheet No. 98-17 at I (Sept. 27, 1983).
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Congress Wants Greater Role On U.S. Presence in Lebanon, CONG. QUART. 1876 (Sept. 3, 1983).
\item \textsuperscript{76} Democratic Study Group, supra note 73, at 1.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Congress Wants Greater Role On U.S. Presence in Lebanon, supra note 75.
\item \textsuperscript{79} "We have people up in helicopters, we're shooting rockets and artillery—if that isn't imminent hostilities, I don't know what is," remarked Senate Foreign Relations Committee Chairman Charles Percy (Republican, Illinois) Id. "It makes a mockery out of law to suggest that our forces are not engaged in hostilities," concluded Senator Gary Hart (Democrat, Colorado). Letter from Senator Hart to author (October 6, 1983).
\end{itemize}
Congress, that "hostilities" existed as of the first Marine death, began to take shape. 80

Despite its desire to produce bipartisan support for the deployment, the administration rejected a proposal from the Democrat-controlled House Foreign Affairs Committee that called for invocation of War Powers Resolution procedures and authorized a stay of up to eighteen months for the Marines in Lebanon. Senate Democrats responded to this rejection by formally introducing a bill to declare that section 4(a)(1) of the War Powers Resolution and its accompanying time restraints applied to the situation in Lebanon. The White House immediately softened its position, re-opened negotiations with House leaders, and reluctantly struck a "compromise" that was "virtually identical to the resolution that was rejected by the administration a week earlier."81 The President accepted the House Foreign Affairs Committee proposal as a bipartisan compromise. Despite his acceptance of the eighteen month authorization, concept however, President Reagan did not retract his opinion that the War Powers Resolution was unconstitutional. In fact, he adhered to the position that neither the Lebanon Resolution nor the War Powers Resolution could have any impact on his constitutional powers as Commander-in-Chief.

B. Legislative Process

Titled the Multinational Force in Lebanon Resolution, the compromise measure was introduced as a joint resolution into both houses of Congress. From the outset, Congressional debate over the Multinational Force in Lebanon Resolution was a compilation of expressions on the Constitution, the War Powers Resolution, and current Presidential policies in Lebanon. Within both houses of Congress there was an apprehension that the proposed resolution was, as characterized on the floor of the Senate, a "political compromise to [sic] the Lebanon situation [which] instead compromises the very nature of the War Powers Resolution."82 There was a growing fear that the War Powers Resolution would be invoked in name only, without any actual limitations on executive action: "[i]t is a compromise put together to help the admin-

81. Democratic Study Group, supra note 73.
istration avoid invoking the War Powers Resolution.\textsuperscript{83}

The Multinational Force in Lebanon Resolution was taken up by
the full Senate on September 27, 1983. One of the architects of the
War Powers Resolution, former Senator Jacob Javits, submitted a
statement that expressed his view that the Multinational Force in Leb-
anon Resolution was a device beneficial to both the President and Con-
gress.\textsuperscript{84} Opponents of the bill were equally vocal, however.\textsuperscript{85} One Sena-
tor, seeing no benefit to Congress, described the measure as an
invitation for the President to “take 1,600 Marines and the Battleship
New Jersey, and call us in 1985.”\textsuperscript{86} A number of attempts to amend
the authorization bill were made and rejected. Senator Robert Byrd\textsuperscript{87}
introduced an amendment\textsuperscript{88} which would have invoked the War Powers
Resolution’s time restraints. The Byrd amendment was tabled, 55-45.\textsuperscript{89}
Senator Clairborne Pell\textsuperscript{90} presented an amendment which provided for
six months of authorization rather than eighteen.\textsuperscript{91} Senator Pell’s
amendment was tabled, 62-38.\textsuperscript{92} Senator Christopher Dodd\textsuperscript{93} and Sena-
tor Edward Kennedy\textsuperscript{94} proposed an additional condition to the continu-
ation of American participation in the multinational force; their
amendment required an American withdrawal if all other contributing
nations withdrew. This amendment was accepted and incorporated into
the Multinational Force in Lebanon Resolution.\textsuperscript{95} Senator Paul Tson-
gas sought to “codify the statements that ha[d] been made,”\textsuperscript{96} referring

\begin{itemize}
\item \textsuperscript{83} 129 CONG. REC. S13,132 (daily ed. Sept. 29, 1983) (statement of Senator
Jim Sasser).
\item \textsuperscript{84} 129 CONG. REC. S12,991 (daily ed. Sept. 27, 1983).
\item \textsuperscript{85} 129 CONG. REC. S13,126-13,132 (daily ed. Sept. 29, 1983).
\item \textsuperscript{86} 129 CONG. REC. S13,044 (daily ed. Sept. 28, 1983) (statement of Senator
Edward Kennedy).
\item \textsuperscript{87} Democrat, West Virginia.
\item \textsuperscript{88} Amendment No. 2231, at 129 CONG. REC. S13,041 (daily ed. Sept. 28,
1983).
\item \textsuperscript{89} 129 CONG. REC. S13,138 (daily ed. Sept. 29, 1983).
\item \textsuperscript{90} Democrat, Rhode Island.
\item \textsuperscript{91} Amendment No. 2228, at 129 CONG. REC. S13,139 (daily ed. Sept. 29,
1983).
\item \textsuperscript{92} 129 CONG. REC. S13,143 (daily ed. Sept. 29, 1983).
\item \textsuperscript{93} Democrat, Connecticut.
\item \textsuperscript{94} Democrat, Massachusetts.
\item \textsuperscript{95} 129 Cong. Rec. S13,145-46 (daily ed. Sept. 29, 1983). The Dodd-Kennedy
amendment was also incorporated into the House version of the Multinational Force in
Lebanon Resolution.
\item \textsuperscript{96} 129 CONG. REC. S13,147 (daily ed. Sept. 29, 1983).
\end{itemize}
to the administration’s assertions that Marine operations were confined to the geographic boundaries of Beirut. Tsongas’ amendment was tabled, 56-42.97 Senator Thomas Eagleton,98 himself an important contributor to war powers legislation, urged his colleagues to “tighten-up” the Resolution by replacing the word “protective” with the word “defensive” within the context of limits on military activities. “ ‘Protective’ is a more ambiguous word and susceptible to somewhat broader interpretation than ‘defensive.’”99 Senator Eagleton’s amendment, which would have changed those words, was tabled 66-34.100

Another amendment, introduced by Senators Carl Levin and Jennings Randolph, attempted to ensure that later judicial review of executive acts under the War Powers Resolution could not be avoided by the “political question” doctrine.102 The fact that a case challenging American military activities in El Salvador, Crockett v. Reagan,103 was dismissed as a non-justiciable case involving a “political question” concerned many Senators. In Crockett, the United States District Court for the District of Columbia held that the issue of whether American troops were engaged in hostilities in El Salvador required resolution by the political branches, not by the judiciary.104 According to the district court, which was subsequently upheld on appeal, the case was “non-justiciable because of the nature of the fact finding that would be required.”105 The text of the proposed amendment included stipulated facts on which a future judicial decision could be based, including a factual finding that hostilities existed as of the first Marine death. However, the Senate defeated the effort to “eliminate any escape clause,”

97. Id.
98. Democrat, Missouri.
99. Senator Eagleton contributed to the Senate version of the War Powers Resolution, but did not support the Resolution as it emerged from Conference Committee in 1973. He believed that the Committee’s product amounted to a loss of, rather than a gain in, Congressional authority.
100. 129 CONG. REC. S13,149 (daily ed. Sept. 29, 1983).
101. Id.
104. 558 F. Supp. at 888, 889.
105. 558 F. Supp. at 896.
Rather than a finding of fact, the Multinational Force in Lebanon Resolution dealt with the "hostilities" issue as a Congressional declaration, which could not bind the President.

Despite opposition on various grounds, including wide differences of opinion on policy matters and the need for literal adherence to the War Powers Resolution, proponents of the Multinational Force in Lebanon Resolution found the votes necessary to secure its passage. On September 29, 1983, the Senate voted largely along party lines and approved the so-called "bipartisan" measure, 54-46.107

In the House of Representatives, the debates did demonstrate a higher degree of bipartisanship than existed in the Senate. Still, many of the arguments were the same. It was asserted that the Multinational Force in Lebanon Resolution "maintain[ed] congressional responsibility but allow[ed] the President the latitude he must have."108 The House debates also revealed the entanglement of issues that existed in the Senate. Expressing a preference for dealing with the policy questions, Representative Raymond McGrath109 said that "[t]he issue today is not really whether the President should or should not have invoked the War Powers Act in the first place. It is whether a majority of the people in this House believe our commitment to Lebanon, via the peace-keeping force, should continue or not."110

Under a semi-closed rule of procedure,111 which restricted floor debate, the House basically had only two alternatives to consider. The first was the Multinational Force in Lebanon Resolution; the second was a substitute offered by Representatives David Obey112 and Gillis Long.113 The Obey-Long substitute would have cut off funds for United States forces in Lebanon after ninety days unless the President either submitted to section 4(a)(1) of the War Powers Resolution, or certified that a cease-fire existed and reported on a monthly basis pursuant to the War Powers Resolution. This alternative proposal was designed to "provide a meaningful way for Congress to exercise a role in the deci-

111. H.R. Res. 318 (129 CONG. REC. H7560, daily ed. Sept. 28, 1983) limited debate; Representative Levitas labeled the limitations a "gag rule" (at H7561).
112. Democrat, Wisconsin.
113. Democrat, Louisiana.
sion to leave Marines in Lebanon as events change. . . .” 114 The Obey-
Long substitute was defeated, however, 272-158. 115
With the substitute eliminated, the House turned its attention to a
block of amendments offered by Chairman Zablocki. 116 These amend-
ments, which were accepted by the House acting as a Committee of the
Whole and incorporated into the Multinational Force in Lebanon Reso-
lution, 117 changed the requirement for Presidential reports under the
Multinational Force in Lebanon Resolution from at least once every six
months (which would have been consistent with War Powers Resolu-
tion reporting requirements) 118 to at least once every sixty days. 119
These amendments also noted specific areas to be covered by such re-
ports, and expressed Congressional policy concerns over such matters
as a partition of Lebanon. 120
As Representative William Lehman 121 had noted before the de-
bates had begun, “[w]hen the President and the House leadership get
together on something, they usually get what they want.” 122 The only
order of business remaining was a vote on the Multinational Force in
Lebanon Resolution as amended. As predicted, the joint resolution
passed, 270-161. 123
The next day, September 29, the resolution passed by the Senate
was reported to the House. The significant difference between the Sen-
ate and House versions was the difference in reporting requirements;
the House bill required a report at least every sixty days, 124 whereas
the Senate bill required a report at least every ninety days. 125 Chair-
man Zablocki told the House that the President had voluntarily agreed
to a sixty-day requirement, 126 and that there was “no further need for

118. War Powers Resolution, at § 1543.
119. The Senate’s version, as debated and passed, specified a 90 day reporting
requirement.
120. These items were eventually deleted from the bill; the House later adopted
the Senate version, which did not contain specified areas to be reported or on policy
opposition to a partition of Lebanon. See infra text accompanying notes 124-29.
121. Democrat, Florida.
122. Interview with Representative William Lehman, in Miami (Sept. 21, 1983).
discussion or delay."127 The House promptly voted to accept the Senate version, 253-156,128 to lay aside the previously approved House version, and to send the Multinational Force in Lebanon Resolution to the President.129 The net effect of the bill’s language was to provide statutory authorization for continued deployment, pursuant to the War Powers Resolution, without addressing the failure of both Congress and the President to realize the aspirations of the Resolution.

President Reagan signed the statute into law on October 12, 1983, and in an accompanying statement130 emphasized the “bipartisan basis” upon which foreign policy should be conducted.131 As expected, the President expressed “reservations about some of the specific Congressional expressions”132 in the Resolution. The President’s statement characterized the automatic termination provision of the War Powers Resolution as an “arbitrary and inflexible”133 deadline that improperly restricts presidential authority. President Reagan argued that “isolated and infrequent”134 attacks upon American forces did not constitute hostilities which would invoke the “unwise”135 timetable of the War Powers Resolution.

Most significantly, the statement expressed the President’s conviction that despite his signing the Multinational Force in Lebanon Resolution into law, he could not be bound by it:

I believe it is, therefore, important for me to state in signing this Resolution, that I do not and cannot cede any of the authority vested in me under the Constitution as President and Commander-in-Chief of United States Armed Forces. Nor should my signing be viewed as any acknowledgement that the President’s constitutional authority can be impermissibly infringed by statute, that congressional authorizations would be required if and when the period specified in section 5(c) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that section 6 of the Multinational Force in Lebanon Resolution may be

127. Id.
129. Id.
130. Statement of the President, 19 WEEKLY COMP. PRES. DOC. No. 41 (Oct. 12, 1983).
131. Id.
132. Id.
133. Id.
134. Id.
135. Id.
interpreted to revise the President's constitutional authority to deploy United States Armed Forces.136

The President signed the Multinational Force in Lebanon Resolution to gain a minimum of eighteen months of congressional blessing for his policies. It was the President's position that the statute in no way put a maximum time limit on deployment because no statute could diminish his independent authority over war powers.

V. Conclusion: The Continuing Need For Accountability

The saga of the Multinational Force in Lebanon Resolution highlights a need for the nation to once again focus on the process by which it becomes engaged militarily. Lives of American soldiers were at stake, yet neither the legislative nor executive branch of the federal government was willing to stand firm and abide by the provisions of the War Powers Resolution. Just ten years after its passage, the purpose of the War Powers Resolution has been substantially undermined. Although just a few months have elapsed since the Multinational Force in Lebanon Resolution became law, it is not premature to conclude that the effect of this measure was essentially to restore the pre-War Powers Resolution status quo in the form of unchecked presidential discretion. Have the wounds from the Vietnam experience healed so completely that the nation has forgotten, and failed to learn from them?137 In the days since the Lebanon Resolution's enactment, more than 240 Americans have lost their lives in Lebanon, and hostilities continue.

Since the inception of American troop deployment in Lebanon, President Reagan chose not to comply with the procedural regulations and safeguards built into the War Powers Resolution. Before he acquiesced in the compromise which evolved into the Multinational Force in Lebanon Resolution, the President chose not to challenge the constitutionality of the War Powers Resolution in court as a means of forestalling and/or terminating Congressional demands for a role in military

136. Id.
policy.\textsuperscript{138} That alternative had little political appeal and presented the potential for an enormous erosion of executive power; a ruling adverse to the President’s position would inspire more frequent and more effective congressional action.

The course of action clearly anticipated by the War Powers Resolution would have been for President Reagan to admit the existence of hostilities in Lebanon as of September of 1982, and to seek congressional authorization for continued deployment. Had the President taken this step he would have abided by and upheld the law, and realized the sharing of responsibility that was the intent behind the War Powers Resolution; further, he would have been in a favorable position to build truly bipartisan support for his policies both within Congress and amongst the people. Instead, President Reagan apparently ignored the letter and spirit of the War Powers Resolution for as long as he could. When American casualties in Lebanon forced the issue to the forefront, the President resorted to semantics and arguably attempted to sidestep the law. In the process, he demonstrated that the United States can still become involved in a military conflict without due regard for its own law.

Perhaps Congress is culpable for permitting President Reagan to evade the War Powers Resolution. For more than a year, Congress sat idle as American soldiers dug in between warring factions. Congress failed to require the President to submit to section 4(a)(1) of the War Powers Resolution, and the sharing of responsibility did not take place. Congressional abstinence from its lawful role revealed its ignorance of the fact that “once our troops are committed to a hostile situation, it is almost impossible to pull them out.”\textsuperscript{139} In September of 1983, deaths

\begin{itemize}
\item \textsuperscript{138} “[The President] and his aides have produced no legal brief or other document justifying their refusal to comply with the [War Powers Resolution]. And the reason is simple: They have none. There is talk in the newspapers, for example, that the Congress is demanding something that is ‘unconstitutional’; but we have seen no Opinion of the Attorney General reaching that conclusion.” Lewis, \textit{\_\_\_\_}, N.Y. Times, Sept. 19, 1983 at A-19.
\textit{O}nce we are at war, Congressional control—which in my view Congress continues to have—becomes largely hypothetical. In Indochina, Congress had constitutional authority, by resolution or through the appropriation process, to terminate, confine, or otherwise limit our participation. But a large majority of Congress felt it could not break with the President without jeopardizing the lives of American troops and other national interests.
\end{itemize}
and injuries to American troops partially awoke Congress from its hibernation. As Senator Lawton Chiles \(^{140}\) remarked, "[f]ive of our boys had already died by the time Congress got around to consider invocation of the War Powers Act."\(^{141}\)

Under pressure of public concern for the Marines and the possibility of war, Congress did pass legislation under the War Powers Resolution. That legislation—the Multinational Force in Lebanon Resolution—does little more than "rubber stamp"\(^{142}\) the President's policies. The objective of the War Powers Resolution, according to the House Foreign Affairs Committee, was to "allow the President and Congress to work together in mutual respect towards their ultimate, shared goal of maintaining the peace and security of the nation."\(^{143}\) Neither the objective of the War Powers Resolution, nor the "ultimate goals" involved were achieved by the Multinational Force in Lebanon Resolution.

The Lebanon experience sets a dangerous precedent for the future. The President and Congress have failed to demonstrate an understanding that "loophole-making is not in [their] own, nor in the country's best interest."\(^{144}\) With the judiciary an unlikely participant in the resolution of war powers issues,\(^{145}\) concurrent irresponsibility on the part of the executive and legislative branches upsets the treasured American notion that the United States is a "nation of laws, not men."\(^{146}\)

The Multinational Force in Lebanon Resolution, and the national policies that it represents, have rekindled public concern over "presidential credibility and integrity, [over] congressional gullibility, and [over] the effectiveness of our foreign policy system."\(^{147}\) The experience, and the possible renewal of attention to the process through which war powers are implemented, may bring about refinements in

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In a word, the constitutional restraints on the President existed but were not effective.

\(^{140}\) Democrat, Florida.

\(^{141}\) Letter from U.S. Senator Lawton Chiles to author (Nov. 29, 1983).

\(^{142}\) Id.


\(^{144}\) FRANCK & WEISBAND, supra note 56, at 75.

\(^{145}\) War powers are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952).


\(^{147}\) Henkin, supra note 135, at 761.
the process and an increased awareness both within the government and the public. In the future, both the President and Congress must overcome the tendency to confuse a military policy with the lawful procedure to implement that policy. The procedure, the War Powers Resolution, requires democratic control over questions of war and peace. "Democratic control involves decisions made by all the federal representatives of the people—the president, the Senate, and the House—on a timely and informed basis."148 Both the President and Congress must abide by the War Powers Resolution, or change it through the legislative process. This note makes no suggestion for changes in the statute, because absent a commitment to the principles of shared power and responsibility, a change of language will not compel either the President or Congress to be faithful to the ideal. Only an informed public, a citizenry that keeps watch over the process by which its country enters into international hostilities, can require adherence to the law and to democratic principles on the part of their elected representatives.

Paul D. Novack

148. Reveley, supra note 1, at 93.
Immigration and Naturalization Service v. Chadha: A Legislative “House of Cards” Tumbles

I. Introduction

In Immigration and Naturalization Service v. Chadha, decided June 23, 1983, the United States Supreme Court held unconstitutional an exercise by Congress of a legislative veto provision under section 244(c)(2) of the Immigration and Nationality Act. The ramifications of the Court’s decision, affirming the Court of Appeals for the Ninth Circuit, are broad in scope, affecting both the theoretical implications of the doctrine of separation of powers and its practical application to a wide range of federal statutes. Consequently, the Court’s ruling in Chadha has received public attention usually afforded only to Supreme Court decisions concerning first or fourteenth amendment rights.

The scope of this comment will be threefold. First, it will examine generally the roots of the decision in Chadha by focusing on the doctrine of separation of powers. The philosophical basis for the doctrine will be shown as it affected the Framers’ vision finally set out in the United States Constitution. The structure of the Constitution will be investigated, to better glean specific instances, as well as general principles, of the doctrine. Case law prior to Chadha will also be discussed to better understand the Supreme Court’s past interpretation of the doctrine leading up to the Chadha case. Second, the Chadha case itself will be treated, focusing separately on the majority, concurring, and dissenting opinions and the relative merits of each position. Finally, the

1. ___ U.S. ___, 103 S. Ct. 2764 (1983) (the decision was 7-2; Burger, C.J. writing for the majority, Powell, J. concurring, and White and Rehnquist, JJ. dissenting in separate opinions).
3. Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980).
4. Justice White states “[t]oday the Court... sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’” Chadha, ___ U.S. at ___, 103 S. Ct. at 2792 (White, J. dissenting). For an exhaustive list of statutes so affected see id. at ___, 103 S. Ct. at 2811-16 app. 1.
"aftermath" of Chadha will be discussed: its effect on statutory law in general, questions of severability, and the possible contours of a legislative response to the case.

II. Separation of Powers Doctrine

A. Philosophical Basis

Since the writings of Plato, the idea that coordinate branches of government should be separate as to their essential functions and powers has been axiomatic to various theories of benign government. Aristotle first authored that which may be seen as a treatise on the doctrine of separation of powers. Yet, it was not until after the Enlightenment that the doctrine gained force and proved a ground for heated debate. Locke discussed the doctrine at length. He rested his arguments for separation of powers on the need for a balance of powers, not only to check the executive and legislative branches, but also to provide a buffer against monarchial tyranny. However, it was in 1748 when Charles de Montesquieu published his treatise, The Spirit of the Laws, that the doctrine of separation of powers was first articulated in the form later adopted by the Framers of the United States Constitution.

Montesquieu begins his treatment of separation of powers by identifying three types of power constitutive of government in general: the legislative, the executive, in terms of matter of civil law. This tripar-
tite scheme closely follows that proposed by Locke, a fact not the least startling since Montesquieu models his utopian form of constitutional government on the English constitution. Indeed, the entire section of *The Spirit of the Laws* dealing with the separation of powers is subtitled “On the English Constitution.” Montesquieu then elucidates his notion of the third power of government and ascribes to it the power of judgment, thus closely paralleling the modern notion of the judiciary. He goes on to point out that these three powers should be exercised separately by branches of government entrusted to each, lest tyranny result. The political liberty of all subjects of government would be compromised if one hand should wield two or more powers concurrently.

Interpretation of Montesquieu’s theory led to two widely divergent schools. The first school states that Montesquieu’s exposition of the doctrine of separation of powers can best be seen as an advocacy for a “pure” doctrine of separation of powers:

[A] “pure doctrine” of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislative, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government. ... Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches."

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12. See M. Vile, supra note 7, at 86. The English judiciary had strong feelings embracing the separation of powers. Blackstone states:

In all tyrannical governments the supreme magistracy, or the right of making and enforcing the laws, is vested in one and the same man. ... But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject.


13. C. Montesquieu, supra note 10, at 63.
14. Id. (“la puissance de juger. ...”).
15. Id. at 63-64.
16. Id. at 64.
17. M. Vile, supra note 7, at 13 (emphasis added).
Thus, the ‘pure’ doctrine would opt for complete autonomy of the separate branches of government. It would constitute “a thoroughgoing separation of agencies, functions, and persons.” Indeed, it has been argued that Montesquieu’s treatment of separation of powers cannot, by definition, be seen to admit of any mixing of function.

A second school argues, however, that Montesquieu’s theory can be interpreted as allowing for a partial separation of powers. This would result in a system of checks and balances between branches to ensure the non-encroachment of one branch upon another’s exercise of its essential functions. The argument here is that without the strong need for independence of branches, due to the fact that the representative branches would cease to be coordinate in nature: if subordinate to another, could not a priori check another’s abuse of a power vested to a third branch.

It is difficult to ascertain with exactitude Montesquieu’s actual position relative to the two schools. However, it is readily apparent which school of thought was adopted by the Framers of the United States Constitution.

B. The Framers’ Vision

It is clear that there was a general consensus that Montesquieu’s ideas were to be interpreted, for the purpose of drafting the Constitution, as advocating a mixed form of partial separation of powers. This
uniformity of thought as to the *horizontal* aspect of separation of powers, concerning separation of the executive, legislative, and judicial functions, traversed the political rift dividing the Federalists and the non-Federalists concerning the *vertical* aspect of the doctrine, concerning the separation of federal as opposed to state powers. Even Jefferson, firmly a non-Federalist, gave his stamp of approval to the separation of branches of government.24

Of course, the incorporation of the separation of powers into the Framers' vision of the Constitution must be set upon a backdrop of the Articles of Confederation, a decidedly nonfederalist document. To those living under the Articles "[the] union was merely a means to their end, the independence of the several states. . .centralization was to be opposed."25 Indeed, the non-Federalist sentiments backing the Articles were "antagonistic to any government with pretensions toward widespread dominion."26 Thus, any federal structure superimposed on the several states must be controlled. Although such control is afforded by an adoption of the vertical doctrine of separation of powers allotting to the states certain sovereign rights, such protection is also given through implementation of the horizontal doctrine. Through the horizontal doctrine, in its mixed form, each branch provides protection against encroachment by coordinant branches. This translates into greater protection of individual citizens when confronted with the federal system.27 Thus for example, the peoples' will, as represented in the legislative branch, could not be foiled by an executive override which would invade the essential function of the legislature.

James Madison wrote, concerning the idea of partial horizontal separation of powers:

From these facts by which Montesquieu was guided it may clearly

25. M. Jensen, The Articles of Confederation 161 (1940). See also U.S. Art. of Confed. art. II.
be inferred, that in saying 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no partial agency in, or no control over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, [the English constitution], can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted. 28

This view was reiterated by Madison in debate during the Constitutional Convention of 1787, where he emphasized the need for separation on a partial basis between the executive and judicial branches. 29 The means by which this separation should be instituted "consists in giving those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." 30 In this way the checks and balances of power will check ambition against ambition. 31


But when we speak of a separation of the three great departments of government, and maintain that the separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.

Id.

29. See 2 Records of the Federal Convention of 1787 34-35 (M. Farrand ed. 1911) (debate of Tuesday, July 17, 1787). Here Madison argues for the full collateral nature of the judiciary in the scheme of government. There are suggestions that this full treatment of the nature of the judiciary is the great American innovation on Montesquieu's initial theory. See W. Gwyn, The Meaning of the Separation of Powers 125 (Tulane Studies in Political Science No. 9, 1965). The judiciary had a special place in the separation of power since "[t]he aid of the judges as council of revision would double the advantages and diminish the dangers of his [the executive's position]." 1 F. Thorpe, The Constitutional History of the United States 343 (1901). See also The Federal Convention and Formation of the Union of the American States lxxxiv (W. Solberg ed. 1958) (introduction by W. Solberg).


31. Id.
C. The Constitutional Text and pre-Chadha Interpretation

Cases concerning the separation of powers are few in relation to other areas of constitutional interpretation. The cases deal with a wide variety of governmental powers. Additionally, cases concerning separation of powers arise in a decidedly intense political setting, due to the primordial nature of the doctrine in the constitutional scheme. Factually, the cases concern seizure by the executive of steel production, claims of executive privilege in the Senate "Watergate" investigation, the nature of the executive's position as Commander in Chief of the armed forces, and, of course, the propriety of the legislative veto. Therefore, the constitutional principles of separation of powers are at times best described as obscure.

The Supreme Court has, since its inception, maintained Madison's view of partial horizontal separation of powers. Justice Brandeis explicitly stated in Myers v. United States:

The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial.

Justice Brandeis also pointed out that the "[c]hecks and balances were established in order that this should be 'a government of laws and not men.' " This language finds further support in Buckley v. Valeo where the Court states, "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." This, however, is exactly the problematic aspect of adjudications on separation of powers; namely, how much encroachment is constitutional? To state this query conversely: what is an essential function of a given branch for purposes of determining the constitutionality of the acts of a coordinate branch?

In general, there are two ways to violate the separation of powers.

36. 272 U.S. at 291 (Brandeis, J. dissenting).
37. Id. at 292.
38. 424 U.S. 1, 121 (1976).
First, one branch may interfere with another branch’s assigned function. Second, one branch may assume a function entrusted to another branch. When a constitutional violation takes place in the first instance, it is usually due to an unconstitutional claim of privilege, in an attempt to exclude a member of one branch from a process associated with an essential function of another branch. Thus, the Court held as unconstitutional, as violation of separation of powers, a claim by President Nixon to “an absolute privilege of confidentiality for all Presidential communications.” The failure to produce documents upon the issuance of a subpoena *duces tecum* for judicial consideration interfered with the judicial branch’s primary function: “to say what the law is.” The Court stated that since “the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.” It is interesting to note that the claim of Presidential privilege itself was based on an absolute view of separation of powers. However, the need for partial separation was again reaffirmed. The Court revisited this problem in *Nixon v. Administrator of General Services.* After his resignation from the Presidency, Nixon had executed an agreement with the Administrator of General Services which limited access to certain documents accumulated during his term of office. After five years of limited access, the agreement stipulated that the documents could be destroyed at Nixon’s behest. Congress passed a bill signed into law by President Ford which directed the Administrator to take custody of the documents. On appeal, Nixon argued that the act was unconstitutional as violation of separation of powers. The Court rejected this contention stating that “the proper inquiry focuses on the


40. *Nixon,* 418 U.S. at 703.


42. *Nixon,* 418 U.S. at 707.

43. *Id.* at 706.

44. The judiciary, early in its history, had held that a subpoena may issue to the President to both compel his attendance as a witness to trial and to produce any paper which a party to the suite has a right to avail himself or for purposes of testimony. See *United States v. Burr,* 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C. J., presiding).


46. *Id.* at 441.
extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned function,”\footnote{47} thereby rejecting any pure doctrine of separation of powers.

Separation of powers may also be constitutionally violated when one branch assumes a function constitutionally entrusted to a coordinate branch. Early in its history the Court addressed legislative encroachment in uncertain terms:

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.\footnote{48}

However, in latter cases the degree of constitutionally permissible infringement by the legislature upon other branches was further refined. In \emph{J. W. Hampton, Jr., \& Co. v. United States},\footnote{49} the Court held constitutional a delegation of quasi-legislative power to the President, which allowed the President to increase or decrease import and export duties.\footnote{50} The Court distinguished between an unconstitutional delegation of law making ability to the executive and a constitutional conference of discretion to the executive as to the execution of the law.\footnote{51} It further held:

Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of regulations.\footnote{52}

\footnote{47} \textit{Id.} at 443.  
\footnote{48} Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).  
\footnote{49} 276 U.S. 394 (1928).  
\footnote{50} \textit{Id.} at 411.  
\footnote{51} \textit{Id.} at 407. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-19 (1936) where the Court upheld a delegation of legislative power to the President. The Court stated that the contention of invalid delegation was irrelevant in the area of foreign affairs where the executive has full plenary authority.  
\footnote{52} \textit{J.W. Hampton, Jr. and Co.}, 276 U.S. at 406.
In *Springer v. Government of the Philippine Islands*, decided the same year as *Hampton*, it was held that the legislature had unconstitutionally assumed an executive function when it appointed corporate directors of the government held National Coal Company. The Court stated that the legislature had exercised an appointment power wholly within the province of the executive branch. Thus, "[t]he appointment of managers...of property or a business is essentially an executive act which the legislature is without capacity to perform." 

Legislative usurpation of a judicial function was the issue in *United States v. Brown*. The respondent was convicted under an act of Congress which made it a crime for a member of the American Communist Party to hold a position on the executive board of a labor organization. The Court first stated that the bill of attainder clause was intended to implement the doctrine of separation of powers by prohibiting a legislative exercise of judicial power. The clause should be liberally construed in order to prevent legislative punishment and a denial of an individual's constitutional rights.

Executive incursions into coordinate branches' constitutionally prescribed functions have met with less equivocation on the part of the Supreme Court. In *Little v. Barreme* (the "Flying Fish" Case) the President's seizure of ships on the open seas, without legislative authority, was seen to be an unconstitutional fashioning of law by the executive. It is difficult to say with precision why intrusions by the executive were initially dealt with on more firm ground than the legislative intrusions. Perhaps acts by the executive were *sui generis* more suspect by the Court due to the spectre of the British monarchy still present in the minds of many. Another explanation might also be that the President, by virtue of his singular position in the infant executive department, brought close scrutiny of his every act to bear upon his office.

54. *Id.* at 202. See U.S. Const. art II, § 2, cl. 2.
55. *Springer*, *277 U.S.* at 203.
57. U.S. Const. art. I, § 9, cl. 3.
60. The individual rights of freedom of speech and belief and the right to due process under the laws were at issue in *Brown*.
62. *Id.* at 177.
Clearly, the most representative case of the executive overreaching is *Youngstown Sheet and Tube Co. v. Sawyer* (the "Steel Seizure" case). President Truman had commandeered the nation's steel mills without statutory authority, to avert a national strike of steelworkers. The President claimed authority for his actions from the aggregate powers vested in the executive branch under Article II of the Constitution and particularly under the President's powers as Commander in Chief of the Armed Forces. Both of these arguments were rejected by the Supreme Court. It was clear that the "military powers of the Commander in Chief were not to supersede representative government of internal affairs."

It is very rare indeed for the court to call the judiciary into question on a violation of separation of powers. This may be due to the unique position the judiciary enjoys vis-à-vis the doctrine. Although a third branch of government, set out separately in article III of the Constitution, and thus subject to the same constraints under the doctrine as the executive and the legislature, the judiciary is the branch which enforces the constitutional mandates of the doctrine. It thus is preeminent among the branches as arbiter of the doctrine. Indeed, the judiciary, for the purposes of separation of powers, must determine the limits of

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64. U.S. Const. art. II, § 2, cl. 1.

65. Youngstown Sheet and Tube Co., 343 U.S. at 587-89; cf. United States v. Russell, 80 U.S. (13 Wall.) 623 (1872) (where the Court upheld a seizure of private vessels in order to transport military supplies, during the time of war. This was justified due to the direct emergency at hand, even though there was no statute in force). *Id.* at 629.

In dicta in *Youngstown Sheet and Tube Co.*, Justice Jackson proposes that there is substantial diminution in the "war powers" of the executive where there is merely a conflict and not a *de jure* war:

But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

343 U.S. at 642 (Jackson, J. concurring).

its own power. The very equilibrium of the doctrine depends on the courts.\textsuperscript{67} One case where the Court called the judiciary into question was \textit{In re Debs}.\textsuperscript{68} There, the Court upheld a lower court of equity's issuance of an injunction without express statutory authority. Although the injunction was upheld and did not encroach upon the legislative lawmaking function, modern commentary points out that \textit{Debs} "might be viewed as a case in which both the Court and the executive usurped the legislative function of Congress."\textsuperscript{69}

Thus it may be said, as an overview of Supreme Court decisions treating separation of powers, that there exist no clear lines of demarcation concerning that which constitutes a violation of the doctrine. This is a field of constitutional decisionmaking where very broad, yet primordial, principles are applied on a case-by-case basis, each subsequent case further elucidating the meaning of separation of powers. In \textit{Chadha}, the Supreme Court once again faced the task of interpreting this difficult doctrine.

### III. Immigration and Naturalization Service v. Chadha

#### A. The Facts of Chadha

Jagdish Rai Chadha was admitted to the United States on a non-immigrant student visa in 1966. He is an East Indian, born in Kenya and the possessor of a British passport. His student visa expired on June 30, 1972. The District Director of the Immigration and Naturalization Service ordered Chadha to show cause why he should not be deported. This occurred on October 11, 1973. Pursuant to statute\textsuperscript{70} a deportation hearing was held on January 11, 1974 before an immigration judge. Chadha admitted his deportable status, but the hearing was adjourned in order to allow him to file an application for suspension of deportation under statute.\textsuperscript{71}

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\textsuperscript{68}. 158 U.S. 564 (1895).

\textsuperscript{69}. Levi, \textit{supra} note 39, at 382.

\textsuperscript{70}. Immigration and Nationality Act, § 242(b), 8 U.S.C. § 1252(b) (1976).

\textsuperscript{71}. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a) (1) provides in relevant part:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien
The deportation hearing was continued after Chadha had submitted his application for suspension. On June 25, 1974, on the basis of a character investigation by the Immigration and Naturalization Service and supporting affidavits, the immigration judge ordered Chadha's deportation suspended and submitted a report of suspension to Congress. Congress had the power by statute to veto such a suspension. Congress did not exercise this veto power until the first session of the Ninety-Fourth Congress. On December 12, 1975 a resolution was introduced into the House of Representatives opposing the suspension of deportation of Chadha and five other aliens. The resolution was

who applies to the Attorney General for suspension of deportation and—(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character and is a person whose deportation would in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

72. Immigration and Nationality Act, § 244(c)(1), 8 U.S.C. § 1254(c) (1) provides in relevant part:
Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension.

73. Immigration and Nationality Act, § 244(c)(2), 8 U.S.C. § 1254(c) (2) provides in relevant part:
(2) In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law.

74. H.R. Rep. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40247 (1975). The resolution was passed onto the House Committee on the Judiciary for consideration. It is fairly clear that the Committee's consideration was perfunctory at best, as is attested to by Representative's Eilberg's simplistic rationale for the revocation of Chadha's suspension of deportation:
It was the feeling of the committee, after reviewing 340 cases, that the
passed without debate or a recorded vote. It was neither presented to
the Senate nor to the President, as is constitutionally mandated for
legislation.

In the wake of this resolution, deportation proceedings were re-
opened. The immigration judge held that he had no authority to rule on
the constitutionality of the House’s actions. On November 8, 1976,
Chadha was ordered deported. Chadha appealed to the Board of Immi-
gration Appeals which summarily affirmed the lower administrative
court. Chadha then sought judicial review, under statute, of the admin-
istrative appeal court’s decision. He filed a petition for review in the
United States Court of Appeals for the Ninth Circuit. The Immigra-
tion and Naturalization Service agreed with Chadha’s position and
joined with him in arguing for the unconstitutionality of the House’s
actions. The court of appeals invited both the Senate and the House of
Representatives to file briefs amicus curiae.

The court of appeals held that the House was in violation of the
doctrine of separation of powers in its exercise of the legislative veto.75
The House and Senate then filed motions to intervene and petitions for
rehearing. The court of appeals granted the motions to intervene but
denied rehearing. Later motions for rehearing en banc were also de-
nied. Certiorari was granted by the United States Supreme Court as to
the appeal taken by the House of Representatives.76 Oral arguments
were had on February 22, 1982. The case was reargued October 7,
1982. The Court filed its final decision June 23, 1983.77

aliens contained in the resolution did not meet these statutory require-
ments, particularly as it relates to hardship; and that it is the opinion of
the committee that their deportation should not be suspended. I should
emphasize that this is a disapproval resolution and unless it is adopted in
this session of Congress permanent residence will be granted to those
aliens named in the resolution.


75. Chadha, 634 F.2d at 436. The case was originally argued before and submit-
It was then reassigned to a panel consisting of circuit judges Ely, Kennedy and Hug on
August 13, 1980.

76. 454 U.S. 821 (1981). Judgment as to jurisdiction over the Immigration and
Naturalization Service was postponed until the merits.

77. Counsel present in the case were as follows: Alan B. Morrison for Chadha,
the Solicitor General Rex Lee for the Immigration and Naturalization Service, Eugene
Greensman for the House of Representatives, and Michael Davidson for the Senate.
Briefs amicus curiae were filed by the American Bar Association and the Counsel on
B. The Majority Opinion

1. Threshold Issues

Before embarking upon the constitutional inquiry concerning the legislative veto provision in the Act, the Court addressed several threshold issues challenging the justiciability and the jurisdiction of the case.

First, the Court considered a challenge to its appellate jurisdiction. The Court reasoned that the Supreme Court was a proper forum for the purposes of 28 U.S.C. § 1252, that the proceeding below was a civil suit pursuant to the statute, and that the appellant in this case was aggrieved by the proceeding below within the meaning of section 1252. Even though the Immigration and Naturalization Service together with Chadha sought the invalidation of the House’s action, the Service was aggrieved because it was bound by statute to execute an order of Congress which might be held unconstitutional. Thus, appellate jurisdiction was found to have been properly taken.

The Court next turned to the issue of severability. The Court soundly rejected the contention that section 244(c)(2) was not severable from the remainder of the Immigration and Nationality Act. The Court noted that if the subsection was not severable, the entire statute would be unconstitutional. Chadha would, therefore, be deported since the Attorney General would have no power to suspend deportation. However, the Court took notice that the Act employs a self-executing severability clause which renders any portion of the Act held unconstitutional void and severed from the remainder of the Act. Furthermore, the legislative history of the Act demonstrated that it was intended by its drafters to facilitate severability. Finally, it was stated that, as a general rule, a provision is presumed severable if the remainder of the statute after severability would be operative as law. Thus “section 244(c)(2) survives as a workable administrative mechanism...”

79. Chadha, ___ U.S. at ___, 103 S. Ct. at 2773. See supra note 78.
80. Id.
81. Id. at ___, 103 S. Ct. at 2774.
82. Id.
84. Chadha, ___ U.S. at ___, 103 S. Ct. at 2775.
85. Id.
without the one-House veto." Chadha also had standing to appeal. The Court rejected the position that Chadha lacked injury in fact and merely represented the interests of the executive branch. The injury was possible deportation; an injury which would be redressed if the legislative veto were to be held unconstitutional.

Likewise, the Court rejected the argument that it should avoid the constitutional issue in the case on the grounds that Chadha had alternative statutory relief available to redress his injuries. Although Chadha married a citizen of the United States during the pending appeal and might have been accorded resident status as an immediate relative, such classification was speculative at best. Equally speculative was the possibility that Chadha may have been granted asylum by the Attorney General if he was unable to return to his homeland for fear of persecution. Thus, Chadha had no substantive alternative relief available to him which might have precluded the Court from consideration of the constitutional aspects of the case.

The Court also refuted a challenge to the jurisdiction of the court of appeals under the Act. It was claimed by the House of Representatives that 8 U.S.C. § 1105(a) could not sustain jurisdiction since Chadha was not challenging the deportation determination but rather the constitutionality of the legislative veto provision. Nevertheless, it was held that since Chadha's status as deportable was de facto dependent upon the constitutionality of the Act, he was challenging the deportation determination itself. The relief he sought was directly inconsistent with the deportation order. Therefore, jurisdiction was properly taken in the court of appeals.

Next the Court focused on the contention that the case did not constitute a genuine controversy under the "case or controversy" clause.

86. Id. at ___, 103 S. Ct. at 2776.
87. Id.
89. Chadha, ___ U.S. at ___, 103 S. Ct. at 2777.
92. Chadha, ___ U.S. at ___, 103 S. Ct. at 2778.
93. Id.
of the Constitution. It was argued that this question was moot since the House and the Senate intervened in the action. However, the Court continued to point out that even “prior to Congress' intervention, there was adequate article III adverseness even though the only parties were the Immigration and Naturalization Service and Chadha.”

Resting on the same rationale employed to dispel the challenge to its appellate jurisdiction, the Court held that, notwithstanding the fact that Chadha and the Immigration and Naturalization Service both saw the legislative veto as unconstitutional, Chadha would still have been deported by the Service. This provided the requisite adverseness.

2. Political Question Doctrine

The justiciability of the case was also brought into question under the political question doctrine. The gravamen of the contention was that the “naturalization” and the “necessary and proper” clauses conferred upon Congress unbridled power over the disposition of aliens. Thus any adjudication in the case would amount to a decision of a nonjusticiable political question.

The Court rebutted this argument by indicating that “[t]he plenary authority of Congress over aliens. . .is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power.” Baker v. Carr states that a political question may arise when there is “a textually demonstrable constitutional commitment of the issue to coordinate political department. . .” If it were to be held that means of implementing a plenary authority was beyond judicial scrutiny under the political question doctrine, then it would follow that “virtually every challenge to the constitutionality of a statute would be a political question.” This conclusion is untenable since it would wrest constitutional decisionmaking from the judiciary, impeding, if not totally disrupting, its primary article III function.

95. Chadha, — U.S. at —, 103 S. Ct. at 2778.
96. Id.
100. 369 U.S. 186, 217 (1962).
101. Chadha, — U.S. at —, 103 S. Ct. at 2779.
102. Id.
3. The Constitutionality of the Legislative Veto

Chief Justice Burger, writing for the majority, began with the pre-
sumption of validity of the challenged legislative veto provision. The only inquiry which the Court was concerned with was the constitutional basis of the statute, not its wisdom. The Chief Justice, however, offset this token bow to judicial restraint with the statement that mere utilitarian virtues will not shield the statute from constitutional scrutiny. Indeed, "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ." This statement serves two functions. First, it posits a constitutional truism. Second, it anticipates and undermines Justice White's characterization of the legislative veto as a useful mechanism.

The Chief Justice then turned to a discussion of the "presentment" clauses of the Constitution. It was the Framers' intent that the presentment clauses provide the necessary safeguards to protect the separation of powers. Both the presentment to the President and the Presidential veto were considered integral to the entire fabric of the Constitution. The powers given to Congress were "to be most carefully circumscribed." This was to protect the public from any oppressive legislation which might be passed under the guise of a "private bill." This danger is one of contemporary concern, given the various political sentiments which might prompt self-interest legislation not calculated to evince the will of the people in general. The Chief Justice also pointed out that the presentment clauses insure a national view-

104. Chadha, ___ U.S. at ___, 103 S. Ct. at 2770.
105. Id. at 2781.
106. Id. at 2785 (White, J. dissenting). This, as is seen later, is a vast oversimplification of Justice White's position in his dissent, amounting to the commission of a "straw man" fallacy.
107. U.S. Const. art. I, § 7, cl. 2, 3 provide in relevant part:
Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States. . . . Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations presented in the Case of a Bill.

Id.
108. Chadha, ___ U.S. at ___, 103 S. Ct. at 2782.
109. Id.
point in the legislative process. Although the legislature is the elected body representative of the aggregate of the people, so too is the President elected. There may be some situations in which the people's will is better represented by him. It is in this capacity as the executive representative of the people that his veto has full significance. It manifests a check for the people on improvident legislative measures, just as the two thirds veto override of Congress operates as a cross-check for the people against ill-advised executive denials of the legislative will.

Having dealt with the presentment clauses, Chief Justice Burger turned to the issue of bicameralism. He stated that a primary purpose of bicameralism is to protect against hately considered legislation. The requirement of passage by both Houses of the legislature makes mandatory careful and full consideration of any proposed law before it could take effect. Nonadherence to the bicameralism principle could erupt into a legislative tyranny. At first blush, this view seems plausible. However, upon perusal of the Chief Justice's bicameral argument, it becomes apparent that his conclusion rests upon an ill reasoned interpretation of the purposes of bicameralism. Certainly the primary purpose of the bicameral requirement was to assuage the lesser populated states as to their representation in the legislature. By providing for the Senate, the Framers called for equal representation by state, regardless of the relative population of the states. This was not the case with the representation of the House of Representatives, allotted solely on the basis of population. This protected individual state identity-if not, in a sense state sovereignty-in the congress. Thus, any legislation to be put into effect must both pass a vote by the representatives of the numbers of people and by the representatives, irrespective of the numbers, of the several states. This is not to say that the Chief Justice's reasoning is without merit. Close scrutiny of proposed laws is an important incident to bicameralism. However, it is misleading to place this rationale upon the Framers as an exclusive one.

The majority then turned to the analysis of the constitutionality of

110. Id. at 2782-83.

111. U.S. Const. art. I, § 1 provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 7, cl. 2 also insures bicameralism. See supra note 107.

section 244(c)(2) under the presentment causes, bicameralism, and the separation of powers. Chief Justice Burger stated that "[a]lthough not 'hermetically' sealed from one another, . . . the powers delegated to the three branches are functionally indentifiable." When a branch acts, there is a presumption that it acts constitutionally within its sphere of delegated powers. However, in order that the acts of the House may be held to the letter of the presentment clauses and bicameralism, it must be established that the House acted in a legislative manner. The Chief Justice held that there can be no doubt that the House of Representatives acts were legislative in nature. The House sought to alter the legal rights of Chadha, the Attorney General, and administrative officials in general. This alteration could only have been achieved by legislation, since there is no plenary authority under the Constitution for such acts by the House. The intent of Congress in authorizing the one-house legislative veto also demonstrates its legislative nature:

After long experience with the clumsy, time consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I.

Thus, given the legislative character of its acts, the House has invaded the executive's constitutionally delegated powers by circumventing the presentment clauses and bicameralism. There are four situations in which one house may act without presentment and these situations are expressly set out in the Constitution: 1) the House of Representatives may initiate impeachment proceedings, 2) the Senate may conduct trials of impeachment and convict pursuant to those

113. Chadha, __ U.S. at __, 103 S. Ct. at 2784.
114. Id.
115. Id. at 2784-85.
proceedings,\textsuperscript{118} 3) the Senate has final approvement power over presidential appointments,\textsuperscript{119} and 4) the Senate may ratify presidentially-negotiated treaties.\textsuperscript{120} In the face of these express exceptions to presentment and bicameralism, it is apparent that the Framers intended that these be special instances and that no implied powers along these lines should be recognized.\textsuperscript{121} The constitutional tapestry is woven with the inviolable thread of separation of powers which was "intended to erect enduring checks on each Branch."\textsuperscript{122}

The House of Representatives argued, however, that the affirmaance of the court of appeals would have the effect of sanctioning lawmaking by the Attorney General, which in turn would amount to a circumvention of the bicameral process.\textsuperscript{123} The Chief Justice cogently pointed out that even though agency activity may be viewed as quasi-legislative, bicameral checks on this activity are not constitutionally mandated since executive acts within the administrative activity are limited in scope by statutory enactments of Congress, pursuant to article I, sections 1 and 7. Therefore, the Attorney General acts presumptively in an executive capacity, although delegated by Congress certain quasi-legislative responsibilities; a capacity which does not receive constitutional scrutiny under bicameralism or under the presentment clauses.\textsuperscript{124}

Thus, the majority in \textit{Chadha} held section 244(c)(2) unconstitutional in violation of separation of powers as set forth in the presentment clauses and the mandate for bicameralism, affirming the judgment below in the court of appeals.\textsuperscript{125}

C. Justice Powell's Concurrence

Justice Powell, concurring in the judgment of the majority, would

\begin{thebibliography}{9}
\bibitem{118} Chadha, \textit{--} U.S. at \textit{--}, 103 S. Ct. at 2786. \textit{See} U.S. CONST. art. I, § 3, cl. 5.
\bibitem{119} Chadha, \textit{--} U.S. at \textit{--}, 103 S. Ct. at 2786. \textit{See} U.S. CONST. art. II, § 2, cl. 2.
\bibitem{120} Chadha, \textit{--} U.S. at \textit{--}, 103 S. Ct. at 2786. \textit{See} U.S. CONST. art. II, § 2, cl. 2.
\bibitem{121} Chadha, \textit{--} U.S. at \textit{--}, 103 S. Ct. at 2787.
\bibitem{122} \textit{Id.}
\bibitem{124} Chadha, \textit{--} U.S. at \textit{--}, 103 S. Ct. at 2785 n.16.
\bibitem{125} \textit{Id.} at 2788.
\end{thebibliography}
hold the legislative veto as applied in this case unconstitutional as a violation of separation of powers on different grounds from the majority. Justice Powell rightly noted the breadth of the majority’s holding; it “will invalidate every use of the legislative veto.”

In a plea for judicial restraint, Justice Powell stated that the holding of the Court “should be no more extensive than necessary to decide this case.” Congress evidently viewed the legislative veto as an essential check on its delegation of power to the executive in the form of administrative agencies. Due to the nature of the legislature as a coordinate branch of government, due respect should be accorded its judgments, inasmuch as the constitution will countenance such respect. Thus, Justice Powell would hold that Congress has assumed a judicial posture in violation of separation of powers in its use of the legislative veto in this case. He would not reach the overly broad questions of validity under the presentment clauses and bicameralism. However, Justice Powell’s opinion must not be easily dismissed as a limited holding, merely deferential to a coordinate branch of government. The opinion is tightly reasoned, and provides a more secure rationale for Chadha than the majority furnishes.

Justice Powell begins his analysis by establishing the Framers’ attention to the necessity of the separation of the legislative and judicial branches. Such intent may be seen in the text of the Constitution in the bill of attainder clause, which must be read as an implementation of the separation of powers doctrine. The doctrine may be violated in two ways. First, a branch may interfere with another branch’s constitutionally delegated function. Second, a branch may actually assume a function delegated to a coordinate branch unconstitutionally. This case is of the second genre.

That the House usurped a judicial function in Chadha is clear. First, they had not enacted a general rule, rather they had specifically determined the status of Chadha’s individual rights. Second, even if the House’s actions were not to be seen as providing a de novo adjudication...

126. Id. (Powell, J. concurring).
127. Id. at 2789.
128. Id. at 2792.
129. Id. at 2789-90. See U.S. CONST. art. I, § 9, cl. 3. Although Justice Powell does not assert that the legislative veto is a bill of attainder per se, such a position has been advanced. See Keefe, supra note 103, at 103.
131. Id. at ___, 103 S. Ct. at 2791.
cation, they have taken on the color of an appellate tribunal. This has dangerous implications for Chadha's rights. Congress, unlike the courts, is not bound constitutionally by substantive rules of due process, nor "procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal. . . ." This danger was further compounded in this case where the House abandoned even its own normal procedures for considering resolutions due to time constraints. Indeed, "[t]he only effective constraint on congress' power is political." This hardly provides a procedural safeguard against an abuse of a person's individual rights. Further, although Congress "is most accountable politically when it prescribes rules of general applicability," here it prescribed a special rule determinative of Chadha's individual rights. Thus, there is no shred of political accountability here.

Justice Powell also successfully rebutted the majority's criticism of his position that Congress had assumed a judicial function. Chief Justice Burger states that Justice Powell's position cannot be maintained because the determination of the Immigration and Naturalization Service presented an nonjusticiable issue, unreviewable by a court on appeal. Justice Powell aptly reasoned in retort that "reviewability" is not coextensive with "adjudication." Although procedurally a court of appeals may not review a substantive decision by the Attorney General in such a case, this does not diminish the judicial character of Congress' acts.

The strength of Justice Powell's opinion can best be seen in the light of Consumer Energy Comm'n of America v. FERC, summarily affirmed by the Court subsequent to Chadha. In FERC, a legislative veto in a natural gas pricing rule promulgated by the Federal Regulatory Commission was held unconstitutional. However, in FERC the

132. Id.
133. Id. at ___, 103 S. Ct. at 2792.
134. Id. at ___, 103 S. Ct. at 2791 n.6. Congress had the Attorney General's report on the suspension of Chadha's deportation for a year and a half. However, there was no action taken until three days prior to the running of the statute of limitations period. Thus, the resolution was neither circulated nor effectively debated.
135. Id. at ___, 103 S. Ct. at 2792.
136. Id.
137. Id.
138. Id. at ___, 103 S. Ct. at 2787 n.21 (majority opinion).
139. Id. at ___, 103 S. Ct. at 2791 n.8 (Powell, J. concurring).
140. ___ U.S. ___, 103 S. Ct. 3556 (1983). The lower court's opinion may be found at 673 F.2d 425 (D.C. Cir. 1982).
veto was a two-House veto. This vitiates the force and applicability of one prong of the majority’s holding in Chadha.

Thus, Justice Powell was not willing to declare, as the majority did, the unconstitutionality of every legislative veto provision. These provisions are extant in numerous enactments of Congress and may present differing degrees of intrusiveness, some of which may be unconstitutional, others which may not.141

D. Justice White’s Dissent

Justice White strenuously dissented from the majority’s holding. He joined Justice Powell in a plea for judicial restraint, although Justice White would not hold the legislative veto in this case unconstitutional. Initially, Justice White recognized the utility of the legislative veto as evidenced by its historical application.142 In his view Congress faces a dilemma in the absence of the legislative veto. Either the legislature must refrain from delegating authority to the executive or it must allow the administrative agencies unbridled lawmaking power.143 He then attacked the majority’s heavy reliance on the Framers’ intent in deciding the constitutional question. The complexities of modern government are well beyond those which confronted the Framers.144 However, not willing to rely solely upon this utilitarian argument, Justice White proceeded to the conclusion that the legislative veto in Chadha does not violate the doctrine of separation of powers.

Justice White argued that only bills and equivalent enactments of Congress should be required to pass muster under the presentment clauses and the requirement of bicameralism. The legislative veto does not rise to the dignity of a bill because “[t]he power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration.”145 The legislative veto no more gives Congress lawmaking ability through one house than the presidential veto gives such power to the executive.146 The presentment clauses only apply to actions for which concurrence of the two houses is “nec-

141. See Chadha, ___ U.S. at ___, 103 S. Ct. 2792-2816 passim (White, J. dissenting).
142. Id. at ___, 103 S. Ct. at 2793-96.
143. Id. at ___, 103 S. Ct. at 2793.
144. Id. at ___, 103 S. Ct. at 2798.
145. Id. at ___, 103 S. Ct. at 2799.
146. Id.
necessary." It is not clear that this mandate covers the legislative veto in this instance. Legislative authority is delegated to agencies as a matter of course. Justice White argued that the Congress must have an effective means to check the power of such agencies which is thus delegated. Paradoxically, the majority held that the independent agencies may indulge in making "rules" with the force of law, whereas the legislature, the branch constitutionally entrusted with lawmaking authority, may not check such power in the agencies.

Justice White also urged that there is a de facto concurrence of opinion on the part of both houses and the President. The Attorney General manifests the President's approval in submitting a report to Congress recommending suspension of deportation. The House and Senate may tacitly approve this recommendation by their silence. If either the Senate, the President, or the House of Representatives disagrees, then Chadha's status is maintained deportable. The suspension order does not in and of itself maintain Chadha as nondeportable, it merely defers deportation. Thus, there has been a concurrence of the three interested entities before a change of Chadha's status.

Justice White's argument is suspect on three points. First, there has not been a concurrence of the House and Senate in this case. The House of Representatives acted on its own in its veto. Second, the concept of tacit approval by either the Senate of the House's action or by both houses of the Attorney General's suspension of deportation is highly debatable. It is more likely that silence on the part of either house manifests nescience or apathy rather than considered approval. Third, the contention that Chadha's status is not altered from that of a deportable alien to that of a nondeportable alien by the Attorney General's suspension of deportation begs the question. Concurrence of opinion on the part of the two houses and the executive are necessary to establish the status of Chadha.

Justice White's arguments against the necessity of presentment and bicameralism for the validity of the legislative veto further draw light upon the insufficiencies in the majority's opinion, lending transitively more force to Justice Powell's concurrence. Justice White attempts to draw Justice Powell's opinion into question by asserting that

147. U.S. CONST. art. I, § 7, cl. 3.
148. Chadha, ___ U.S. at ___, 103 S. Ct. at 2802 (White, J. dissenting).
149. Id. at ___, 103 S. Ct. at 2804.
150. Id. at ___, 103 S. Ct. at 2806.
151. Id. at ___, 103 S. Ct. at 2807.
Congress has not exercised a judicial function, since a refusal of suspension by the Attorney General is judicially reviewable.\textsuperscript{152} However, this argument is ill-founded. In \textit{Chadha}, it is the reviewability of granting of suspension of deportation that is the question. The problem is that Congress has put itself into that reviewing posture.

Therefore, even though Justice White would not hold that all legislative vetoes are constitutional, he would hold that in \textit{Chadha} the veto did not violate the separation of powers. Indeed, the veto provides "a necessary check on the unavoidably expanding power of the agencies... as they engage in exercising authority delegated by Congress."\textsuperscript{153}

E. Justice Rehnquist's Dissent

Justice Rehnquist declined to reach the merits of the case. He opined that section 244(c)(2) was not severable from the remainder of the statute. Stating that a severability clause was not dispositive on the issue of severability in general, he argued that the intention of Congress discloses the section's inherent unseverability. Congress never intended that a class of persons in Chadha's position would be able to take advantage of a suspension of deportation.\textsuperscript{154} Thus the statute is only severable if Congress would have intended that the Attorney General be able to suspend deportations without the section in question. To hold otherwise would be to expand the statute beyond its own bounds.\textsuperscript{155} However, the majority's tripartite test for severability entirely undercuts this offering.\textsuperscript{156} Justice White joined in the dissent.

IV. After the Fall: What May Congress Do?

It is evident from the Court's decisions subsequent to \textit{Chadha} that the breadth of the majority's holding will reach all legislative veto provisions in other statutes.\textsuperscript{157} The central issue now is: how may Congress constitutionally implement alternative schemes for checking powers delegated to the administrative agencies?

\textsuperscript{152} \textit{Id.} at \textsuperscript{153} 103 S. Ct. at 2810.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at \textsuperscript{155} 103 S. Ct. at 2816 (Rehnquist and White, JJ. dissenting).
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at \textsuperscript{157} 103 S. Ct. at 2774-76 (majority opinion). \textit{See supra} p. 22.
\textsuperscript{157} \textit{See FERC} \textsuperscript{158} U.S. \textsuperscript{159}, 103 S. Ct. 3556; Consumers Union v. FTC, \textit{U.S.} \textsuperscript{160}, 103 S. Ct. 3556 (1983) aff'g 691 F.2d 575 (1982) (en banc).
One issue left open by Chadha is severability. Although the legislative veto provision in Chadha was deemed severable, such may not be the case in all statutes, depending on explicit statutory language and legislative history. A constitutional attack on a non-severable legislative veto provision would result in the unconstitutionality of the otherwise valid remainder of the statute in question. Thus Congress may step back and allow the judiciary to invalidate legislative veto provisions on constitutional grounds, on a case-by-case basis. The main drawback with this “wait and see” scheme is that the courts will have to determine in each case the severable or non-severable nature of each veto provision, hardly an efficient or uniform method of settling the dispute at hand. It seems clear that the first step in a resolution of Congress’ dilemma must be to excise all legislative veto provisions from statutory law. Having done this, Congress has numerous options at its disposal to replace the checks on the administrative agencies previously afforded by the legislative veto.

Although some doomsayers have proposed that all rulemaking capacities of agencies should be eliminated or that there be a constitutional amendment to validate the legislative veto,158 there exist more prudent measures available to Congress. Congress may choose to delegate with greater specificity to the agencies.159 With greater restrictions accompanying delegation to the agencies, Congress would retain a check on agency overstepping without putting itself in the unconstitutional role of an appellate body. This would result in extremely complicated statutory law making in many ways resembling code enactment.160 It would require a virtual overhaul of well over one hundred statutory provisions. A more expeditious alternative along these same lines simply would be to revoke much of the authority already residing in the agencies. More than likely, a combination of these two approaches would prove most effective.

Congress may also opt for a more formal scheme to check agency power. One such scheme might be a “delayed effectiveness” provision allowing Congress a period of time to enact legislation to annul or oth-

erwise affect a newly enacted regulatory rule. The problem with this approach is that such a provision would seem to be subject to bicameralism and presentment criteria, as was the case with the legislative veto.

Congress may also resort to a more coercive measure. It may curtail agency power by declining to authorize funds for activities it deems undesirable. This approach may be lacking since it would foster "special interest" lobbying concerning funds allotted to specific agencies. It may be argued that this is already a common practice regarding agency funding; however, it is clear that this common practice would be escalated if such withholding of funds became "formalized" as a Congressional check against the executive agencies.

V. Conclusion

The Supreme Court's ruling in Chadha has vast implications on the relationship between the executive and legislative branches. It denudes as unconstitutional a longstanding legislative mechanism for checking agency abuse of delegated rulemaking power, making it necessary for Congress to adopt alternative schemes to accomplish this goal. The range of statutes so affected is broad; so broad that the Court invalidated more legislation in Chadha than was invalidated cumulatively in the entire history of the court.

There are reservations concerning the breadth and logic of the majority's holding. Justice Powell's well reasoned concurring opinion provides a better rationale for the unconstitutionality of the legislative veto and demonstrates a properly narrow holding on facts of the case, a holding which would not unadvisedly call to task all legislative veto provisions.

Regardless of the wisdom of the majority's holding, Chadha stands as the most recent pronouncement on the doctrine of separation of powers, a doctrine which commands a central position in the development of constitutional interpretation. From its inception in Greek philosophy, through its crucial formulation by Montesquieu and ultimately to its uneven treatment in the Supreme court, the doctrine has remained at

161. Smith and Struve, supra note 158, at 1261.
162. Id.
163. Id. at 1262.
the vortex of political controversy. *Chadha* is no exception to this observation.

*Fred L. Rush, Jr.*