QUASI-MARITAL CHILDREN: THE COMMON LAW'S FAILURE IN *PRIVETTE* AND *DANIEL* CALLS FOR STATUTORY REFORM

THE HONORABLE CHRIS W. ALTENBERND*

* Judge, Second District Court of Appeal, Tampa, Florida. LL.M., University of Virginia, 1998; J.D., Harvard University, 1975; B.A., with honors, University of Missouri, Columbia, 1972. This Article is adapted from a thesis submitted by the author in partial fulfillment of the requirements for the degree of Master of Laws in the Judicial Process at the University of Virginia. The author wishes to thank Professor Amy L. Wax.

I. INTRODUCTION

For over two hundred years, the common law divided children into two categories—marital and nonmarital.[1] The mother's husband was automatically, and almost conclusively, the father of a marital child. The biological father of a nonmarital child was determined, when necessary, by bastardy or paternity proceedings. As recently demonstrated by two Florida Supreme Court cases,[2] a third category of children has emerged—children who appear to be marital children but whose biological fathers are not their mothers' husbands. Now that genetic testing can accurately, rapidly, and inexpensively determine paternity, this third category, "quasi-marital children," presents distinct and complex legal issues regarding fatherhood.

The disparate treatment of quasi-marital children in *Department of Health and Rehabilitative Services v. Privette*[3] and *Daniel v. Daniel*[4] illustrates the need for substantive and procedural clarification. In both cases, mothers seeking support for their children were unsuccessful due to inadequate legal rules. In *Privette*, the Florida Supreme Court provided a complex procedure for shifting the status of "legal father" from the marital father to the biological father if, in the court's view, such action would be in the child's best interests.[5] The opinion left many issues open for redress including jurisdictional questions,[6] issues regarding guardians ad litem,[7] and questions as to when the standards set forth in *Privette* should apply.[8] Four years later, in *Daniel*, the court complicated jurisdictional issues further and ultimately fictionalized the right to legitimacy recognized in *Privette*.[9]

New statutory rules for determining paternity and parental rights and responsibilities for quasi-marital children must supplant the common law. Both the courts and the Florida Legislature must ad-

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1. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 434-37 (Univ. of Chicago Press 1979) (1765). Under strict English common law, parents had to be married prior to the child's birth for the child to be legitimate. *See id.* at 434. In comparison, a bastard was a child born out of lawful matrimony, even if his parents married subsequent to his birth. *See id.* at 442.

2. *See* Daniel v. Daniel, 695 So. 2d 1253 (Fla. 1997) (holding that in a dissolution of marriage, a husband has no legal duty to support a child who is not his natural or adopted child); Department of HRS v. Privette, 617 So. 2d 305 (Fla. 1993) (holding that the law presumes a child's best interest is served by upholding legitimacy in a paternity action).

3. 617 So. 2d 305 (Fla. 1993).

4. 695 So. 2d 1253 (Fla. 1997).

5. *See Privette*, 617 So. 2d at 308.

6. *See id.* (requiring a showing of good faith and the likelihood of a favorable outcome as a prerequisite to bringing a suit).

7. *See id.* (suggesting the appointment of a guardian ad litem to ensure the child's best interests).

8. *See id.* at 309-10 (pointing to a lack of factual development in the record).

9. *See infra* Part IV.A.

dress the conflict between two opposing ideologies: one that gives deference to biology and the other, deference to the family unit. As a general rule, this conflict must be resolved in the best interests of the child.

Part II of this Article provides a more precise, less judgmental vocabulary with which to analyze and define the issues surrounding quasi-marital children. Part III then provides a historical overview explaining how and why these issues have recently emerged and how the common law used the presumption of legitimacy as a procedural tool to conceal an unresolved substantive conflict within natural law theory. This procedural mechanism allowed the common law to favor marital fathers and family interests while purporting to favor biological fathers. Next, Parts IV and V examine two recent Florida Supreme Court decisions that demonstrate how the common law is inadequate to protect quasi-marital children in a legal world where genetic testing weakens the presumption of legitimacy's substantive function.

Finally, Part VI introduces a proposed statutory revision to chapter 742, *Florida Statutes*. The proposal is based in part on the California parentage statute[10] but is refined to address the issues identified in *Privette*, *Daniel*, and other recent cases. The proposal aims to provide quasi-marital children with family units and economic support whenever possible, while also providing reasonable remedies for biological fathers, marital fathers, and biological mothers. The proposal does not resolve the inherent conflict within natural law theory because it does not exclusively implement either the family ideology or the biological ideology. The proposal, however, exposes the conflict and attempts to select family interests over biological interests. The proposed statutory revision is designed to stimulate debate in the hopes that a final version can be submitted to the Florida Legislature for enactment in the near future.

II. NEUTRAL TERMINOLOGY

Initially, a more precise, less judgmental vocabulary should be used in analyzing the legal issues surrounding quasi-marital children. Common law concepts of paternity, parentage, and legitimacy, created to address two categories of children—marital and nonmarital—prove inadequate when used in reference to the third category, quasi-marital children.

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10. CAL. FAM. CODE § 7540 (West 1997). The United States Supreme Court upheld the constitutionality of the California parentage statute in 1989. *See* Michael H. v. Gerald D., 491 U.S. 110, 131-32 (1989).

A. The Legal Lexicon of Fatherhood

Existing legal terms are often too vague and ambiguous to sufficiently describe the legal complexities of children born to married women when the biological father is not the woman's lawful husband at the time of the child's birth. The current vocabulary uses old terms, such as "natural father"[11] and "legitimacy,"[12] which are either legally undefined or have inconsistent definitions in current law. New terms, such as "legal father,"[13] have no established definition in

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11. The evolution of the modern concept of "natural father" could be the subject of a lengthy article. It is undefined in BLACK'S LAW DICTIONARY (6th ed. 1990). The term is used in the Uniform Parentage Act to designate the biological father based on five situations giving rise to the presumption of natural lineage. *See* UNIF. PARENTAGE ACT § 4, 9B U.L.A. 298-99 (1987).

The term "natural father" has not always been limited to situations where a genetic test has been performed or where it is otherwise virtually certain that the putative father is the biological father. It is often used to describe the marital father after the family unit has been altered in some manner. *See, e.g.*, Department of HRS v. Dougherty, 700 So. 2d 77, 78 (Fla. 2d DCA 1997) (using the term "natural father" to indicate that the biological father was divorced from the mother); Fitts v. Poes, 699 So. 2d 348, 348 (Fla. 5th DCA 1997) (concerning a biological father, referred to as the "natural father," who, after the death of the biological mother, married a woman who is now the adoptive stepmother).

Earlier courts tended to use the term only in reference to the presumed biological father of a bastard child. *See, e.g.*, *In re* Cotton, 6 F. Cas. 617, 618 (D. Conn. 1843) (holding that a "child born in lawful wedlock has a right to claim of its father protection, support, and education; and these are all duties, in their nature and essence, similar to the duty which the natural father owes his illegitimate child").

12. Legitimacy, as a legal concept, was initially more important for determining the child's rights of inheritance than the father's parental rights. *See* 2 SIR FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 260 (Cambridge Univ. Press 2d ed. 1898). Some states attempt to carefully distinguish between legitimacy in the context of inheritance and in the context of paternity. *See* Denbow v. Harris, 583 A.2d 205, 207 n.1 (Me. 1990) (stating that paternity is a question of biology while legitimacy is relevant to inheritance law). Nonmarital and quasi-marital children present difficulties in the law of inheritance that are not always well addressed by the concept of legitimacy. *See, e.g.*, Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94.

13. The use of the term "legal father" could also warrant discussion in a separate article. The term is used extensively in law review articles and in the case law of other states, which usually employ a meaning comparable with the use in this Article—the individual legally recognized as having all rights, responsibilities, and obligations of fatherhood with respect to the specific child or children. Prior to *Privette*, the word had no definition in Florida case law, and it still has no definition in *Florida Statutes*. *See Privette*, 617 So. 2d at 307 (defining "legal father" as the father named on the birth certificate).

The Florida Supreme Court used the term "legal father" on only two occasions prior to *Privette*. *See In re* Brown, 85 So. 2d 617, 619 (Fla. 1956) (regarding an adoption proceeding in which "legal father" was used in quotation marks to describe a putative or biological father—not a marital father); Theis v. City of Miami, 564 So. 2d 117, 119 (Fla. 1990) (using the term "legal father" to describe the marital father of a quasi-marital child who sought workers' compensation death benefits).

In the Florida District Courts of Appeal, the term "legal father" was first used to describe the marital father of a quasi-marital child born after 40 weeks of marriage but before permanent separation. *See In re* J.P., 220 So. 2d 665, 666 (Fla. 3d DCA 1969). Ironically, the Third District Court of Appeal held that the term be stricken from the trial court's order on

either case law or statutes. "Father" is ambiguous because the term may include several different men or functions. A child whose biological mother had an affair, divorced, remarried, and then separated, for example, could have a biological father, a marital father, and an adoptive stepfather, and still fail to have a man to provide emotional support as a functional father or economic support as a support father. Because marital children, especially infants, have only a presumptive legal father under the common law, there is an inherent ambiguity in the term "father."[14]

Following the Florida Supreme Court's decision in *Privette*, "paternity" and "parentage" have been used to describe either a determination of biological fatherhood or a determination of parental rights unrelated to biology.[15] Finally, our lexicon is cluttered with

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the assumption that the term implied that the marital father was the biological father. *See id.* In *Randolph v. McCullough*, 342 So. 2d 129 (Fla. 1st DCA 1977), the West Publishing Company used the term in its synopsis to describe a marital father of a quasi-marital child that was born after 40 weeks of marriage but before permanent separation. *See id.* at 129. In *In re Baby Boy S.*, 349 So. 2d 774 (Fla. 2d DCA 1977), the court described the marital father, who had consented to an adoption of a quasi-marital child born after 40 weeks of marriage but before permanent separation, as a "legal father." *See id.* at 775. In *Perez v. Stevens*, 362 So. 2d 998 (Fla. 3d DCA 1978), the term describes the father of a nonmarital child as established by a paternity order. *See id.* at 999. This use is compatible with *Privette* in the sense that this father's name will be placed upon the birth certificate. *See Privette*, 617 So. 2d at 307.

In *In re Estate of Broxton*, 425 So. 2d 23 (Fla. 4th DCA 1982), a marital father of a possible quasi-marital child was described as "the natural as well as the legal father." *Id.* at 24. In *Hess v. Hess*, 466 So. 2d 1179 (Fla. 3d DCA 1985), a post-dissolution marital father of quasi-marital children born 40 weeks after marriage, but before permanent separation, described himself as the "spiritual and legal father," although it was unclear whether he was the legal father. *Id.* at 1180. *Erwin v. Everard*, 561 So. 2d 445 (Fla. 5th DCA 1990), is similar to *Privette* because the mother sued the biological father for support of a quasi-marital child without joining the marital father. The terse opinion strangely describes the biological father as the "natural biological father." *Id.* at 445. The court later describes the marital father as a "legal father," meaning that he would be required to pay support under the trial court's erroneous ruling. *See id.* at 446.

In *Kalbach v. Department of HRS*, 563 So. 2d 809 (Fla. 2d DCA 1990), and *Walden v. Munson*, 593 So. 2d 1215 (Fla. 2d DCA 1992), the term "legal father" describes the father of a nonmarital child whose fatherhood had been established by a final judgment of paternity. *See Kalbach*, 563 So. 2d at 809-10; *Walden*, 593 So. 2d at 1215. Finally, in *E.V. v. Department of HRS*, 615 So. 2d 251 (Fla. 3d DCA 1993), E.V. is described as the "legal father" of A.L.M., whose mother is C.M. *See id.* It is unclear whether the court relied upon marriage or some other basis to describe E.V. as the legal father.

In *Long v. Long*, 716 So. 2d 329, 329 (Fla. 2d DCA 1998), the Second District Court of Appeal removed the word "legal" from the final judgment, which described the marital father as the legal father. The court apparently thought that "legal" suggested that the trial court had determined that the marital father was the biological father.

14. *See* Eldridge v. Eldridge, 16 So. 2d 163, 163-64 (Fla. 1944) (recognizing the common law's strong presumption of legitimacy).

15. Although chapter 742, *Florida Statutes*, is entitled "Determination of Parentage," the chapter determines "paternity" as a biological fact. *See* FLA. STAT. ch. 742 (1997 & Supp. 1998).

terms like "bastard,"[16] "illegitimate,"[17] and even "out-of-wedlock,"[18] which have strong religious and moral overtones that tend, at least subconsciously, to interfere with objective, rational analysis.

Because the present dialogue lacks objective terminology, this Article employs the following terms: marital child, nonmarital child, and quasi-marital child. "Marital child" refers to a child conceived by or born to a married woman when the biological father was the woman's husband at the time of conception or birth.[19] A "nonmarital child" refers to a child born to an unmarried woman. This is the antiquated bastard or spurious child, which *Florida Statutes* now typically describe as a child "out-of-wedlock."[20] This more neutral term is used in other states.[21] "Quasi-marital child" describes a child born to a married woman when the biological father is not the woman's lawful husband. This term is an appropriate, neutral term because only the husband, or the marital father, is identified on the child's Florida birth certificate,[22] and the child often appears to be a "marital child."[23]

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16. Florida's Bastardy Act was renamed the Paternity Act in 1975. *See* Act effective Oct. 1, 1975, ch. 75-166, § 10, 1975 Fla. Laws 298, 302. All references to bastardy proceedings and the term "bastard" were removed from the entire Act. *See id.*

17. The word "illegitimate" was also removed from the Bastardy Act in 1975. *See id.* However, "illegitimate" was featured prominently in *Privette* and was used as a factor in the supreme court's analysis concerning the steps necessary to support an order requiring genetic testing. *See Privette*, 617 So. 2d at 308.

18. "Out-of-wedlock" replaced the term "illegitimate" in the Parentage Act in 1975. *See* Act effective Oct. 1, 1975, ch. 75-166, 1975 Fla. Laws 298. The term is sometimes used to describe both nonmarital and quasi-marital children. *See, e.g.*, 14 C.J.S. *Children Out-of-Wedlock* § 1 (1991). This loose clumping resulted from the fact that both nonmarital and quasi-marital children were historically deemed "illegitimate" under the common law of some states. *See, e.g.*, State v. Palmer, 439 So. 2d 174, 175 (Ala. Civ. App. 1983) (noting that an illegitimate child can be born in or out of wedlock); *see also* MICHAEL GROSSBERG, GOVERNING THE HEARTH 200-07 (1985) (highlighting the post-Revolutionary trend toward expanding the legal notion of legitimacy).

19. The common law legitimized, or at least presumptively legitimized, any child born in lawful wedlock or within a competent time afterwards. *See* BLACKSTONE, *supra* note 1, at 434; *see also* Dennis v. Department of HRS, 566 So. 2d 1374, 1376 (Fla. 5th DCA 1990). By statute, Florida now allows a nonmarital child to become a marital child by virtue of a marriage between the biological parents following the birth of the child. *See* FLA. STAT. § 742.091 (1997). This Article's statutory proposal does not affect this rule, which presumably would remain in Part II of the proposed act.

20. *See* FLA. STAT. § 742.10 (1997) (establishing paternity for children born out of wedlock).

21. *See In re* Estate of Sekanic, 653 N.Y.S.2d 449 (N.Y. App. Div. 1997) (using the term "out-of-wedlock" exclusively in an action to determine paternity for inheritance purposes); *see also* Brashier, *supra* note 12 at 93.

22. *See* FLA. STAT. § 382.013(2) (1997).

23. Although the term "quasi-marital child" is used extensively in this Article, it is not used in the proposed statute, which addresses three distinct types of quasi-marital children.

A father is described as a biological father, a marital father, a legal father, a functional father, or a support father. Any one father may occupy one or several of these definitions simultaneously. A biological father is the man whose sperm fertilized the mother's egg, usually through an act of sexual intercourse.[24] The term is used on three occasions in *Florida Statutes* and frequently in case law.[25] Although the term "genetic father" is sometimes used as an equivalent for biological father,[26] this Article will reserve genetic father for the limited purpose of describing a sperm donor's role in an artificial insemination.[27]

The "marital father" is the mother's husband on the day the child is born. Except in very rare cases involving a judicial determination of paternity prior to the child's birth, this is the father whose name appears on the birth certificate for each child born to a married woman in Florida.[28] In the proposed statute, the term "husband" is used to describe the marital father.[29] However, in cases involving

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24. *See generally* Tracy Cashman, *When Is a Biological Father Really a Dad?*, 24 PEPP. L. REV. 959 (1997) (explaining the benefits to the child if biological fathers are prevented from asserting rights long after birth).

25. *See* FLA. STAT. § 63.212(1)(i)(2)(d) (1997) (concerning contracts to transfer parental rights); *id.* § 742.12(4) (1997) (concerning scientific testing for paternity); *id.* § 751.011(2) (defining "putative father"). Based on a Westlaw search on November 11, 1998, "biological father" has been used over 100 times in Florida case law and was first used in 1973. *See* Taylor v. Taylor, 279 So. 2d 364, 369 (Fla. 4th DCA 1973) (relieving the marital father of child support obligations, over Judge Walden's strong dissent, because the marital father was not the child's biological father).

26. *See* Brashier, *supra* note 12, at 134-37.

27. The scope of this Article does not include the complex issues of surrogacy. There is a considerable body of literature discussing artificial insemination, surrogate mothers, gay parenting, and other contemporary issues. *See generally* Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343 (1995); David L. Chambers, *What If: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996); Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996); Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and The New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473 (1996); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329 (1995); Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951 (1996); Benjamin L. Weiss, *Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare "Reform,"* 15 LAW & INEQ. J. 215 (1997). The legal issues surrounding these matters are complex and fascinating.

In the artificial insemination scenario, the legal father is often the marital father, and in the surrogate motherhood scenario, the legal father is often the biological father or the receiving mother's husband. *See, e.g.*, FLA. STAT. § 742.16 (1997). In this way, the legislative policies for these rare children are compatible with the approach this Article suggests for quasi-marital children.

28. *See* FLA. STAT. § 382.013(2)(a) (1997); *cf.* UNIF. PARENTAGE ACT §4, 9B U.L.A. 298-99 (1987).

29. *See infra* Appendix, § 742.301.

mothers who have been married multiple times, "husband" is not always accurate.

In this Article and in the proposed statute, the term "legal father" means the man who is legally identified as the person with all the rights, privileges, duties, and obligations of fatherhood for a specific child.[30] The man who actually raises the child is referred to as the "functional father." More traditionally, this is "dad": the man who provides both economic and emotional support for the child,[31] and with whom the child develops a lasting emotional bond. Two or more men (or arguably women) can perform these functions. In the setting of a divorced family, it may now be common for a child to have two functional fathers—a stepfather and a marital father.[32]

A "support father" describes a man who only is expected to provide economic support for a child, and either has no visitation or custody rights or is not expected to fulfill these nurturing functions for personal reasons. Until recently, a bastardy or paternity action was designed primarily to identify a support father for a nonmarital child.[33] The "putative father" is a man who is merely alleged to be the

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30. As discussed later, the term "legal father" does not have this meaning in *Daniel* and has not been consistently defined in the case law. *See* Daniel v. Daniel, 695 So. 2d 1253, 1254 (Fla. 1997) (holding that a husband who is not the biological father and not an adoptive parent does not have a legal obligation to support the child, despite the child's legitimate status). The term "legal father" had little legal significance in Florida until the supreme court used the term in *Privette*. That decision rather casually defined the term parenthetically as "the one listed on the birth certificate." Department of HRS v. Privette, 617 So. 2d 305, 307 (Fla. 1993).

31. *See* Nancy E. Dowd, *Rethinking Fatherhood*, 48 U. FLA. L. REV. 523, 527 (1996) (discussing gender biases and the father's nurturing role). This Article uses the term "functional father" because it is more neutral, although this man may be someone who nurtures the child. Because a functional father can be a surrogate of many varieties, the term includes psychological fathers and others who willingly perform the functions of fatherhood. *See generally* CHRISTOPHER P. ANDERSEN, FATHER: THE FIGURE & THE FORCE (1983).

32. There is an ongoing debate concerning the need for fathers in the family and the role that fathers should play within that structure. The author believes functional fathers are needed, and the state should strongly promote the existence of such fathers for children. Further discussion of this policy may be found elsewhere. *See generally* DAVID BLANKENSHIP, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995); Fred A. Bernstein, *This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1 (1996); Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375, 392 (1996) (having a functional father helps to ensure that the reality of the family structure will not be destroyed in the child's mind); Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 MICH. J. RACE & L. 491, 533 (1996) (stating that the presence of a functional father in the family increases the chances of raising a law-abiding citizen, thereby imposing fewer costs on society).

33. Even today, chapter 742, *Florida Statutes*, contains no express provisions for visitation or other parental rights for fathers determined in paternity actions. To avoid constitutional issues, the Determination of Parentage Act was construed in 1974 as giving the biological father parentage rights comparable to the rights of a father in a divorce proceeding. *See* Brown v. Bray, 300 So. 2d 668, 670 (Fla. 1974). Until 1951, the biological fa-

father, usually the biological father. The allegation is normally made in a lawsuit in which the putative father may or may not be a party.[34] "Putative father" is defined in *Florida Statutes*, but only in the context of a putative father seeking to obtain temporary custody of a child.[35]

The term "paternity" should only refer to *biological* fatherhood. Once paternity is determined, the law decides what rights and responsibilities, if any, to give the biological father. Allocating these rights and responsibilities is not a paternity decision, but a parentage decision. Accordingly, "parentage" should only be used to refer to *legal* fatherhood. Parentage determination places the rights and responsibilities of a legal guardian for a specific child in one man (or perhaps two or more persons). Parentage may or may not be based on paternity. The presumption of legitimacy, for example, is actually a rule of parentage *not* based on paternity.

While this Article attempts to use the terms parentage and paternity as consistently and carefully as possible, the use of these terms in existing law may make this effort difficult.[36] Not all of these terms and definitions are used, or used consistently, in *Florida Statutes* and case law.

B. Three Types of Quasi-Marital Children

Quasi-marital children, children who appear to be marital children but whose fathers are not their mothers' husbands, have existed in society since very early times.[37] Accurate information on the numbers of these children is virtually impossible to obtain. However, one report suggests that as many as ten percent of all children born to

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ther was "condemned by the judgment" to pay the incidental expenses of the birth and up to $50 annually to the mother. FLA. STAT. § 742.03 (1941) (*repealed by* Act effective June 9, 1951, ch. 26949, § 9, 1951 Fla. Laws 1185, 1187). After 1951, the statute contained modest child support provisions, which often discriminated against nonmarital children. *See* FLA. STAT. § 742.041 (1961) (*repealed by* Act effective October 1, 1986, ch. 86-220, § 157, 1986 Fla. Laws 1603, 1726). Occasionally, this Article and the proposed statute refer to a "putative biological father" to avoid any possible confusion.

34. For example, the putative father was not a true party in *Daniel*; he was merely deposed in the action as a witness. *See Daniel*, 695 So. 2d at 1254 n.1.

35. *See* FLA. STAT. § 751.011(2) (1997) (stating that a putative father is "a man who reasonably believes himself to be the biological father of the minor child, but who is unable to prove his paternity due to the absence of the mother of the child").

36. One of the reasons that the Florida Supreme Court had difficulties determining parentage in *Privette* is that the Legislature had entitled chapter 742, "Determination of Parentage," but the provisions therein, for all issues other than surrogate parentage, are designed to determine paternity, not parentage.

37. The possible magnitude of this problem is reflected in the fact that 2000 years ago, the Ten Commandments contained not one, but two provisions related to the subject: "thou shalt not commit adultery," and "thou shalt not covet thy neighbor's wife." *Exodus* 20:14, 17.

married women in the 1940s were quasi-marital children.[38] Quasi-marital children comprise a group that can be divided into at least three separate categories based on the timing of the child's birth in relation to the status of the marriage. This Article defines these categories simply as Type I, Type II, and Type III quasi-marital children.[39] Each category presents distinct issues requiring potentially different solutions. Existing law, however, does not recognize this categorical distinction. There are many different sets of circumstances resulting in quasi-marital children within each category, but the children present legal issues allowing similar analysis and solutions.

1. Type I

Type I quasi-marital children are conceived prior to marriage but born during the marriage. The woman is impregnated by the *biological* father, then marries the *marital* father during the pregnancy. The child in these cases is the product of premarital sex, not an act of adultery.

In Type I cases the parties can have varying degrees of knowledge regarding the circumstances of the pregnancy. The biological father may be aware of the child before the marriage, or he may never know of the child. At the time of the marriage, the marrying couple may have complete knowledge of the circumstances, or they may discover these circumstances a few months later. The marital father may have engaged in premarital sex with the mother and believes he is the biological father. The mother may know the marital father is not the biological father, may be uncertain, or may mistakenly believe the marital father is the biological father. The mother may be unaware of the pregnancy at the time of the marriage. Finally, there are instances when the marital father knows the biological father abandoned the mother, but he chooses to marry her regardless.

The marital father of a Type I child is similar in some respects to a stepfather. If the mother had married the biological father, divorced him (even prior to the birth), and then re-married, the new husband would be the marital father and the stepfather. Regardless of the mother's marriage to another man, the biological father has a reasonable basis to request a relationship with a Type I quasi-marital child. In addition, the marital father may reasonably believe

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38. JARED DIAMOND, THE THIRD CHIMPANZEE 85-87 (1992). Given the extensive testing of families for donor organ purposes, it is likely that more recent information is available, but the author has not located such data.

39. In the proposed statutory revision, Type I is described as children born within 40 weeks of marriage, Type III as children born after permanent separation, and Type II as all children born between these two periods. *See infra* Appendix.

that he should not be forced to support the child, even if he does not want to divorce his wife. However, both men could conceivably want nothing to do with the child.[40]

2. Type II

Type II quasi-marital children are conceived when the mother is lawfully married and living with her husband. The biological father, however, is not the marital father. These children are conceived through an act of adultery.[41] Normally, these children are born during the marriage, although sometimes birth occurs after a marital separation.

As with Type I quasi-marital children, there can be varying levels of knowledge in Type II cases. The biological father may not know of the child's existence. He may not realize that he is the father of his lover's child. The mother may not know for certain which man is the biological father. The marital father may be aware of the adultery, or he may be ignorant of the relationship and believe that he is the biological father. The biological father may not know that his lover is married.

Unlike Type I children, these children are more likely to have older siblings. The fact that the child is a Type II child often may be concealed from the child, his or her siblings, and from the community. Type II children are the ones who, in many cases, are raised "as if" they are marital children. The biological father will have a more difficult time establishing a reasonable basis to claim an interest in a Type II child. The marital father, however, may still wish to avoid

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40. This Article does not discuss the type of child that exists between nonmarital and Type I. If a child is conceived and delivered before marriage, and the mother marries shortly after the birth, it is likely that her new husband will be the functional father even if he is not the biological father. Section 742.091, *Florida Statutes*, allows a "reputed" father to become the legal father by such a marriage. *See* FLA. STAT. § 742.091 (1997). In light of recent amendments, a declaration of paternity becomes an establishment of paternity after 60 days, subject to challenge for fraud, duress, or material mistake of fact. *See* Act effective July 1, 1997, ch. 97-170, § 70, 1997 Fla. Laws 3202, 3255 (amending FLA. STAT. § 742.10(1) (1995)). In a statutory revision, any refinements addressing these children should occur in a provision dealing with nonmarital children. *See* L.A. v. H.H., 710 So. 2d 162 (Fla. 2d DCA 1998).

41. Adultery is arguably more of a religious, moral, or ethical factor than a legal factor. Historically, adultery of any variety was a capital offense in the colonies. *See* THE LAWS AND LIBERTIES OF MASSACHUSETTS, 1641-1691, at 12 (Scholarly Resources, Inc. 1976) (1648). Today, open adultery, or adulterous cohabitation, is a crime in Florida, but private extramarital sexual activity is legal. *See* FLA. STAT. § 798.01 (1997). Although the open adultery law is rarely enforced, adultery, nevertheless, remains a factor that may be considered in determining financial issues in dissolution of marriage proceedings. *See id.* § 61.08(1). Thus, while we no longer tend to criminalize adultery, legal and social policies still discourage such conduct.

paying support for the child if he is obviously not the child's biological father.

3. Type III

A Type III quasi-marital child is conceived and born after a married couple has permanently separated but prior to their divorce. With a Type III quasi-marital child, it is often clear that the marital father is not the biological father. It is also possible that the mother cannot identify the biological father and that the biological father is unaware of the child's existence. On the other hand, the mother and the biological father may have a stable marriage-like relationship. Finally, the marital father may be so estranged that he is unaware of the child's existence.

If the separation has been lengthy, the marital father will likely have little interest in serving as either a functional or a support father. If Florida recognized some concept of *de facto* divorce,[42] the marital father would not be a father at all, but he is nevertheless the legal father on the child's birth certificate—"stuck" with a support obligation for the child because he failed to divorce the child's mother.

From the child's perspective, these three situations may present somewhat different needs and interests. A Type I child may have a meaningful, functional relationship with his or her biological father, just like many children in divorced families have good relationships with their divorced marital fathers.[43] A Type II child may want to fit quietly into his or her present, stable family. A Type III child may simply have no connection to his or her marital father. All three types of quasi-marital children, however, share a need for adequate food, shelter, clothing, and adult affection. As a matter of public policy, all of these children need a functional father, or at least a support father.[44]

Controversies surrounding the category of quasi-marital children can arise in several different fora. Several different parties can raise paternity issues at various times in the child's life. Either the husband or the wife can raise the issue in a divorce. Determination of paternity, pursuant to chapter 742, *Florida Statutes*, can be filed by any man, woman, or child, and the chapter does not contain a specific

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42. Florida has not recognized common law marriages since January 1, 1968. *See id.* § 741.211. Common law marriages created too many ambiguities and confusions. Ironically, as divorce has become more complex and expensive, there seems to be a growing group in Florida who obtain legal marriages but do not obtain a divorce upon permanent separation.

43. The phrase "divorced marital father" is used because there is no guarantee that the ex-husband is the biological father.

44. *See* discussion *supra* note 32.

statute of limitations.[45] Moreover, it is somewhat unclear who has standing to file the paternity action on behalf of the child. The action can be maintained by the marital or putative biological grandparents, other relatives, a guardian ad litem, or, as *Privette* demonstrates, even by the state if welfare benefits are at stake.[46] Paternity can also be raised in a probate action;[47] in a proceeding to terminate parental rights; in an adoption; or, in a temporary custody proceeding filed by a putative father or other members of the extended family, including grandparents.[48] Because paternity can be raised in so many contexts, it is difficult to know who has standing to raise the issue and when it may be raised.

The proposed statute in the Appendix of this Article would limit the parties, fora, and time for filing such an action. Legal parentage would generally need to be resolved in the first two years of the child's life in a chapter 742 proceeding in which the biological mother, marital father, and putative father were parties. The child could be represented by a guardian ad litem, but no provisions are included for suits filed by or on behalf of the child by such a guardian.

III. THE EMERGENCE OF LEGAL ISSUES CONCERNING QUASI-MARITAL CHILDREN

If the two categories described by Blackstone, "legitimate" and "spurious or bastards,"[49] were adequate for two hundred years, why has a third category, containing at least three types of children, emerged since the mid-1970s? Some religious and political commentators suggest that these children are simply a manifestation of society's collapsing morals.[50] Although there may be some truth in this argument, courts and legislators have limited ability to address such moral issues directly. This Article suggests that it is more productive for legislators to look at changes in our socio-economic structure, the recent development of genetic testing, and the common law's long-term failure when deciding whether the law should base paternal rights and responsibilities primarily on biology or marriage—nature or nurture.

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45. *See* FLA. STAT. § 742.011 (1997).

46. *See* Department of HRS v. Privette, 617 So. 2d 305 (Fla. 1993).

47. *See generally* Brashier, *supra* note 12, at 93 (discussing children's inheritance rights outside the traditional nuclear family).

48. *See* FLA. STAT. § 751.02 (1997).

49. *See* BLACKSTONE, *supra* note 1, at 434.

50. This moral argument also affects some scholarly presentations. *See, e.g.*, David V. Hadek, *Why the Policy Behind the Irrebuttable Presumption of Paternity Will Never Die*, 26 SW. U. L. REV. 359, 395 (1997) (stating that society's growing concern for individuals' rights has been a detriment to the marital family).

A. The Social, Economic, and Scientific Emergence of Quasi-Marital Children

Socio-economic changes resulting in increased controversy concerning quasi-marital children can be broadly described as a shift from an agrarian society, in which the family unit was also the most common business entity, to an urban society where the family is rarely an important economic unit.[51] Even at the beginning of this century, before mechanized farming, divorce was rare. This was partly true for moral and religious reasons, but also because the family unit was essential to the survival of the farm and the small business. The family business fed, housed, and clothed the children and adults, and children were useful workers and an asset essentially belonging to the marital father.[52] A legal forum rarely existed in which to litigate issues surrounding quasi-marital children, except in the occasional divorce.[53]

As our country urbanized and our economy shifted away from the family farm and small family business toward large corporations with massive capital investments, the family unit was no longer as essential for basic survival. In turn, children were more likely to be seen as an economic liability.[54] This shift contributed to a sizeable in-

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51. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 292-93 (1989) (describing the shift as one from an economic family unit to an emotional support group for individuals).

52. A father's claim to a child is often expressly or implicitly described as a property right. As recently as 1952, the Florida Supreme Court stated that a father had a "legal property interest in the services of his child." Ripley v. Ewell, 61 So. 2d 420, 422 (Fla. 1952). The influence of this property concept is most obvious in tort law. *See* United States v. Dempsey, 635 So. 2d 961, 965 (Fla. 1994) (holding that a parent of a negligently injured child has a right to recovery for the loss of filial consortium, including day-to-day services); *see also* GROSSBERG, *supra* note 18, at 234-37; Barbara Bennett Woodhouse, "*Who Owns the Child?*": Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1036-50 (1992) (presenting an overview of the historical notion of children as property).

The shift in our view of children can also be seen in the evolution of the school year. Historically, schools started late enough each day to allow chores to be completed on the farm and scheduled vacations to accommodate local agricultural needs. As children ceased to be workers on the family farms and in the family businesses, the schools could develop far more flexible schedules.

53. Florida has not retained official statistics on divorce prior to 1927. The rate per 1000 adults in the 1930s was between one and three. The rate went up dramatically during the late 1930s and the years surrounding World War II. The rate stabilized at about four per 1000 in the mid-1950s, and jumped to approximately seven per 1000 when no-fault divorce became available in 1971. Interestingly, the rate has been relatively stable at seven per 1000 since the mid-1970s. *See* INSTITUTE OF SCIENCE OF PUB. AFFAIRS, ATLAS OF FLORIDA 151 (Edward A. Fernald & Elizabeth D. Purdum eds., 1992).

54. *See generally* CARL ABBOTT, THE NEW URBAN AMERICA: GROWTH AND POLITICS IN THE SUNBELT CITIES (rev. ed. 1987) (discussing the overall social and economic changes of urbanization in the southern United States).

crease in divorce and "illegitimacy."[55] Child support became a major national concern.[56] Both dissolution and paternity proceedings created legal fora in which parties had economic and emotional reasons to litigate paternal rights and responsibilities for quasi-marital children.

These socio-economic changes alone, however, would not have resulted in the failure of the common law's two-category system. Prior to 1975, genetic science was in its infancy. Blood tests could exclude the possibility of paternity in some instances, but they rarely could identify the biological father. After some controversy, human leukocyte antigen testing (HLA) became admissible evidence in paternity actions in the mid-1970s.[57] Suddenly, a court could identify biological fathers with high statistical probability. Over the last twenty years, improved genetic testing has permitted even more exact tissue typing. Any layperson who watches television knows that a simple test of blood, saliva, or other human tissue can pinpoint a criminal or a biological father.

B. The Natural Law's Tension Between Biology and Marriage

Improvements in genetic testing were the straw that broke the back of the common law's two-category system for classifying children. The common law approach failed because of an unresolved tension between natural law rules favoring biology and similar rules favoring the family unit as the source of paternal rights and responsi-

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55. The rate of nonmarital births per 1000 is commonly reported as increasing from about seven in 1940 to 45 in 1993. VENTURA ET AL., THE DEMOGRAPHY OF OUT-OF-WEDLOCK CHILDBEARING, REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING (U.S. Dep't of Health & Human Servs. 1995).

56. *See* BLANKENSHIP, *supra* note 32, at 124-47; Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 520 (1996); W. Craig Williams, Note, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL'Y 261, 261-62 (1997).

57. HLA testing was not permitted in *Simons v. Jorg*, 375 So. 2d 288 (Fla. 2d DCA 1979). Shortly thereafter, the author represented the biological father in a case in which the HLA test was admitted. *See* Stratton v. McQueen, 389 So. 2d 1190 (Fla. 2d DCA 1980). There was considerable debate over the admissibility of genetic testing at that time. *See generally* Jack P. Abbott et al., *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247 (1976-77); Leonard R. Jaffee, *Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: A Response to Terasaki*, 17 J. FAM. L. 457 (1978-79); Mark Edward Larson, Jr., *Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond*, 13 J. FAM. L. 713 (1973-74); Paul I. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1977-78); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971); A.S. Wiener & W.W. Socha, *Methods Available for Solving Medicolegal Problems of Disputed Parentage*, 21 J. FORENSIC SCI. 42 (1976). For a discussion of HLA testing after these decisions, see Jean E. Maess, *Admissibility, Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases*, 37 A.L.R. 4th 167 (1985).

bilities. This conflict arose because the natural law theories at and before Blackstone's time viewed both procreation and marriage as "natural."[58]

Common law judges in the Blackstone era almost certainly wanted to provide families for quasi-marital children because they saw families as desirable for such children and for the kingdom as a whole.[59] They were confronted, however, with long-standing social, religious, and legal traditions granting fathers property rights to children based, at least rhetorically, on biology. This conflict between policies—those favoring families for children and those favoring the "natural" or property rights of men—was not resolved during the early common law era. Instead, it was avoided by a rigorous application of the presumption of legitimacy[60] and by the passage of bastardy statutes. With the advent of admissible genetic testing, however, lawmakers can no longer avoid these two competing policies. Courts and legislatures must now directly confront the unresolved tension between biology and family in the field of paternal rights and responsibilities.

On the biological side, natural law theory viewed paternal rights as prepolitical, arising from a relationship that was entirely separate from the power of the state but deserving of the state's protection.[61] The source of these rights was often expressed in biological terms. Blackstone, for example, explained that a father's willingness to sup-

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58. The tension is expressed in the writings of Samuel von Pufendorf. He explained:

> 1. From the marriage spring children, over whom parental authority has been established,—the most ancient and at the same time the most sacred kind of rule, under which children are bound to respect the commands and recognize the superiority of parents.
>
> 2. The authority of parents over their children arises from two main causes: first, because the natural law itself, in commanding man to be social, enjoined upon parents the care of their children; and that this might not be neglected, Nature at the same time implanted in them the tenderest affection for their offspring. . . . And then that authority rests upon the tacit consent also of the offspring. . . . Actually, however, the parents' authority over their offspring is established when they take up the child and nurture it, and undertake to form it, to the best of their ability, into a fit member of human society.

SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 97 (Frank Gardner Moore trans., Oxford Univ. Press 1927) (1682).

59. In 1829 Florida adopted the common law as it existed in England on July 4, 1776. *See* Act effective Nov. 6, 1829, § 1, 1829 Fla. Laws 8, 8-9. This patriotic date is convenient because it roughly aligns with the publication of Blackstone's *Commentaries on the Laws of England* in 1765.

60. The presumption was apparently created before this era. *See* BLACKSTONE, *supra* note 1, at 445 (presuming that a child born to a married couple was legitimate); POLLOCK & MAITLAND, *supra* note 12, at 398-99.

61. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 886-90 (1984) (discussing the traditional parental rights doctrine and its relationship to natural law).

port a child was because "providence" had provided for this by "implanting in the breast of every parent that natural . . . insuperable degree of affection, which not even the deformity of person or mind . . . can totally suppress or extinguish."[62] He argued that a man had an obligation to provide for those "descended from his loins."[63]

The concept of a "natural father" evolved from this biological influence. Although this term was used with relative infrequency prior to 1950, judicial opinions and statutes now commonly refer to the biological father or even the putative father as a "natural father."[64] This warm and fuzzy term is never defined,[65] but it now provides significant constitutional due process rights to biological or putative fathers.[66]

Natural law theory viewed marriage as the source of paternal rights. Both Blackstone and Pufendorf, an earlier natural law theorist, assumed that a man would "naturally" marry the woman who carried or would carry his child.[67] The father's rights and responsibilities for the child arose from the contract of marriage or the natural family unit.

The natural law theory, however, was confronted by inexplicable realities. For example, the natural law argument in favor of marital fathers and their biological ties could not justify an obligation on the part of the marital father to support a child who was clearly not the

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62. BLACKSTONE, *supra* note 1, at 435.

63. *Id.* at 436.

64. *See* discussion *supra* note 11.

65. The term "natural father" is not even defined in *Black's Law Dictionary*. *See* discussion *supra* note 11. Perhaps it is obvious that the term intends to identify the biological father. On the other hand, natural law theory clearly wavered on whether the rights possessed by this man, as a member of a prepolitical human institution, were given to him based on the act of sexual intercourse or the process of nurturing children within the family unit. Given the use of this term in a constitutional context, the legal community should pin down which act makes a natural father "natural."

66. *See* Lehr v. Robertson, 463 U.S. 248, 261 (1983) (recognizing that a father's due process rights are afforded substantial protection when he demonstrates "full commitment" to active participation in parenting); Santosky v. Kramer, 455 U.S. 745, 758 (1982) (holding that the "fair preponderance of the evidence" standard in a parental rights termination proceeding violated the parent's due process rights); Caban v. Mohammed, 441 U.S. 380, 394 (1979) (stating that a New York statute allowing unwed mothers, but not unwed fathers, to block adoption by withholding consent violated the Equal Protection Clause); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (noting that the due process rights of an unwed father were not violated by the child's adoption by a stepfather when the unwed father never had, nor sought, actual custody of the child); Stanley v. Illinois, 405 U.S. 645, 648 (1972) (holding that the Due Process Clause requires a parent, even an unwed father, to be granted a hearing before terminating parental rights); *see also* Hadek, *supra* note 50, at 363-74 (discussing the legal history and cases from *Stanley* to *Lehr*); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406-07 (1995) (examining various legal theories concerning the parent-child relationship).

67. *See supra* note 58. Relying on Montesquieu, Blackstone saw the "establishment of marriage in all civilized states" as "built on this natural obligation of the father to provide for his children." BLACKSTONE, *supra* note 1, at 435.

biological product of the marriage. This problem was avoided, but not solved, by the presumption of legitimacy, which gave families to children (or children to marital fathers) without regard to biology. The natural law argument in favor of biological fathers also failed to explain why so many nonmarital children could not rely on their biological fathers for support. This problem was partly ameliorated by bastardy statutes providing support for nonmarital children.

C. The Presumption of Legitimacy: Quietly Upholding the Family Unit Over Biology

The presumption of legitimacy presumes that a child of a marriage is a marital child.[68] At common law, this presumption was aided by Lord Mansfield's Rule, which prohibited either a husband or a wife from testifying that a child born during the marriage was not the marital father's child.[69] These rules appear to be, and arguably are, procedural or evidentiary rules. In a court of law, the husband may overcome this presumption, but only with satisfactory evidence before he can divest himself of the duty to maintain a child.[70] The level of proof required to overcome this presumption was extremely high,[71] especially since the wife and husband were prohibited from testifying and the biological father's testimony would have been a confession of a serious criminal offense.[72] In these instances, the presumption was effectively substantive law, requiring a husband to raise all children born to a marriage. The common law indirectly announced and implemented a policy that children need families, homes, heritage, and inheritance more than biological fathers need rights or even responsibilities.[73]

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68. *See* Eldridge v. Eldridge, 16 So. 2d 163, 163-64 (Fla. 1944) (stating that if the child is born during a marriage, the husband must overcome a presumption of legitimacy in order for the child to be "bastardized").

69. Lord Mansfield's Rule stated, "[I]t is a rule, founded in decency, morality and policy, that [the father or mother] shall not be permitted to say after marriage, that . . . [their] offspring is spurious." Goodright v. Moss, 98 Eng. Rep. 1257, 1258 (1777).

70. *See Eldridge*, 16 So. 2d at 163-64 (stating that a husband may overcome the presumption of legitimacy, but only with "sufficiently strong" testimony).

71. *See id*. The standard was less than the criminal "reasonable doubt" standard but similar to the modern "clear and convincing" standard. Indeed, in *Privette*, the court translated the older concept that the presumption "will not fail unless common sense and reason are outraged" into a standard requiring proof by clear and convincing evidence. Department of HRS v. Privette, 617 So. 2d 305, 309 (Fla. 1993).

72. *See* discussion *supra* note 41.

73. The author does not necessarily maintain that the common law's creators expressly intended to create laws establishing families for children. Perhaps the male judges who announced these rules simply saw the husband's "possession" of the child as nine-tenths of the law justifying rights and responsibilities. The effect, however, was a body of law that gave virtually all children born into a marriage a definite family from birth.

This indirect approach to establishing paternity allowed the marital rights prong of the natural law to prevail without discussing and eliminating the rhetoric of biology or the concepts of natural fathers and legitimacy. We often become trapped by our own rhetoric, and the presumption of legitimacy proved to create such a trap. This presumption demonstrates the danger of disguising substantive law as procedural law.

After genetic testing developed, any interested party could overcome the presumption of legitimacy. Suddenly, legitimacy yielded to genetics and thus biology. One suspects that neither Blackstone nor Pufendorf would "naturally" have given substantive or procedural due process rights to a father who was no more than a momentary participant in a casual act of sexual intercourse. Nevertheless, without actually intending to select biological fathers over marital fathers to serve either as functional or support fathers for quasi-marital children, the common law was logically postured to give rights and impose responsibilities upon biological fathers.

Although this "ancient" history may seem irrelevant to today's policy-makers, it is important to understand that the judiciary is bound by its common law roots. The common law never abandoned natural rights concepts for biological fathers of quasi-marital children, even long after the presumption had accomplished that practical effect. As a result, especially in a technological society with a high rate of divorce, it will now be very difficult for the judiciary, relying upon the common law, to return to the substantive law concealed within the historic presumption of legitimacy, a law providing family units for children. The judiciary can no longer consistently select marital fathers as legal fathers, now that the presumption of legitimacy can be regularly overcome by scientific testing. If we wish to further the real policies promoted by the presumption of legitimacy, in whole or in part, we must create new substantive law either judicially, on a case-by-case basis, or legislatively in a more structured format.

D. Bastardy and Paternity: Support Rather than Parentage

At common law, a biological father had no legal obligation to support a nonmarital child. Bastardy statutes were enacted to require biological fathers to support nonmarital children if they did not do so "naturally."[74] These statutes were not formally adopted as part of

74. *See* Bartlett, *supra* note 61, at 963 n.196. This is interesting in light of the common law's reliance on natural law theory. Instead of having an obligation to support his biological children, a man had an obligation to support his marital children. This is another example of the extent to which the common law used natural law terminology but did not implement its biological theory. If it is "natural" for biological fathers to support their

Florida's common law,[75] but Florida created its own comparable quasi-criminal bastardy act prior to statehood in 1828.[76] These statutes, however, have complicated the judiciary's effort to preserve the substantive policies of the presumption of legitimacy.

Bastardy statutes were designed to obtain support for nonmarital children from men who were violating the laws of nature; however, they were not designed to resolve the problems of marital or quasi-marital children. Nevertheless, the Legislature made cosmetic amendments to these statutes that attempted to transform them into statutes addressing the needs of quasi-marital children.

In 1975 the words "bastard" and "illegitimate" were removed from chapter 742, *Florida Statutes*, and the Legislature changed the chapter's title to "Determination of Paternity."[77] In 1983 the Legislature amended this statute again to permit a married woman to bring an action for determination of paternity.[78] In 1986 the Legislature first allowed an action to be filed by a putative father.[79] Thus, it is only recently that the statute has become a tool for examining situations involving quasi-marital children.

An overall examination of the parentage chapter reveals that it has retained its bastardy heritage, and it is not well designed to resolve the current issues involving quasi-marital children. The chapter does not recognize quasi-marital children as a distinct third category. To the extent that it recognizes these children, chapter 742 treats them as if they were nonmarital children. As the examination of *Privette* will reveal, it is simply impossible to resolve parentage issues by relying on the judicial concept of "legal father" under statutory provisions designed to find only a biological father as a matter of paternity. Chapter 742 currently provides no foundation or procedures to select a marital father over a biological father in the case of a quasi-marital child.

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children, then bastardy statutes were quasi-criminal statutes to punish what were considered "unnatural" acts.

75. The specific English statutes in 1776 that concerned bastardy were not adopted under section 2.01, *Florida Statutes*. *See* Report of Leslie A. Thompson under Act of December 27, 1845, in Volume 1 of the *Florida Statutes Annotated*.

76. *See* Act effective Jan. 5, 1828, § 1, 1828 Fla. Laws 32, 32.

77. *See* Act effective Oct. 1, 1975, ch. 75-166, § 5, 1975 Fla. Laws 298, 301 (codified at FLA. STAT. § 742.011 (1975)). In 1993 the Florida Legislature changed the chapter's title back to "Determination of Parentage," but the statutes within the chapter still concern "determination of paternity." *Compare* FLA. STAT. ch. 742 (Supp. 1992) *with* FLA. STAT. ch. 742 (1993).

78. *See* Act effective June 24, 1983, ch. 83-214, § 13, 1983 Fla. Laws 845, 849 (codified at FLA. STAT. § 742.011 (1983)).

79. *See* Act effective Oct. 1, 1986, ch. 86-220, §§ 150-54, 1986 Fla. Laws 1603, 1723-27 (codified at FLA. STAT. §§ 742.011-.12 (Supp. 1986)).

After 1975 the remnants of the presumption of legitimacy encouraged judges to grant rights and responsibilities to the marital father. However, when biological fatherhood was established as a scientific fact, neither the common law nor chapter 742 gave the judiciary an adequate means of replacing the biological father with the marital father. As a result, post-1975 case law addressing quasi-marital children is inconsistent and confusing. Without a third category of children, recognized either by statute or case law, one would expect courts to treat quasi-marital children like marital children and, on other occasions, like nonmarital children without a set of controlling rules. Despite the Florida Supreme Court's best intentions, *Privette* and *Daniel* fulfill these expectations.

Both *Privette* and *Daniel* involved mothers seeking support for their quasi-marital children. In both cases, neither the biological fathers nor the marital fathers were likely to serve as functional fathers. In *Privette*, the mother filed a chapter 742 paternity proceeding seeking child support from the marital father without joining the biological father.[80] In *Daniel*, the mother sought support from the marital father in a divorce proceeding, in which the biological father was not a true party.[81] The court's heavy reliance upon the presumption of legitimacy in *Privette* did not promote the selection of a stable family unit or locate a source of support. Moreover, in *Daniel*, the court's reliance on paternity concepts not only failed to provide a source of support but also neglected to consider the child's need for a family unit. Each case creates serious procedural and substantive problems that call out for major legislative or judicial reform.

IV. *PRIVETTE V. DEPARTMENT OF HRS*: AN EXPANSIVE READING OF CHAPTER 742, *FLORIDA STATUTES*, IN THE BEST INTERESTS OF CHILDREN

In *Privette v. Department of HRS*,[82] the State filed a paternity action against Mr. Privette on behalf of Mrs. Sease and her child.[83] While Mrs. Sease sought paternity determination, the award of child support, and other costs, the form complaint contained no allegations specific to the case except for Mrs. Sease's name, Mr. Privette's name, and limited information about the child.[84] The standard form

80. *See* Privette v. Department of HRS, 585 So. 2d 364, 365 (Fla. 2d DCA 1991), *aff'd and remanded for further proceedings*, 617 So. 2d 305 (Fla. 1993).

81. *See* Daniel v. Daniel, 681 So. 2d 849, 849 (Fla. 2d DCA 1996), *aff'd*, 695 So. 2d 1253 (Fla. 1997).

82. 585 So. 2d 364 (Fla. 2d DCA 1991).

83. *See id.* at 365.

84. *See id.*

incorrectly stated that the child was born out-of-wedlock.[85] Mrs. Sease apparently filed a motion to obtain HLA testing from Mr. Privette, and he objected. To aid in resolving the objection, the parties filed a short stipulation containing all of the facts known in the case.[86]

Mrs. Sease gave birth to the child in October 1989.[87] She conceived and delivered the child during her marriage to Mr. Sease, making the child a Type II or III quasi-marital child.[88] Surprisingly, the record contains no factual information describing the marital relationship between Mr. and Mrs. Sease.[89] One assumes from reading the briefs that the couple had been separated when she filed this petition, but no record information to support that assumption exists.[90] Further, no birth certificate is in the record, but the parties stipulated that Mr. Sease is shown as the father on the birth certificate.

At the trial court hearing, no one argued that the State should be suing Mr. Sease, the marital father, for child support. The parties merely argued the propriety of a blood test.[91] The court ordered Mr. Privette to submit to a blood test, and he petitioned the Second District Court of Appeal for certiorari review of that order.[92] The narrow issue before the Second District was whether a putative father had standing to raise the presumption of legitimacy in a paternity proceeding to delay or prevent a compulsory HLA blood test.[93] The Second District announced conflict with the First District Court of Ap-

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85. *See id*. The author sat on the panel of judges deciding this case in the Second District Court of Appeal. The record is still intact at the court.

86. The stipulations are not reported in the opinions. *See* Stipulated Facts, Department of HRS v. Privette, No. 90-1521 (Fla. 12th Cir. Ct. 1991).

87. In both *Privette* and *Daniel*, the name of the child is contained in the record. This Article will not disclose the children's names. *See* Fla. R. App. P. 9.146(e) (stating that children are referred to by initials in traditional termination proceedings).

88. Mrs. Sease was still married to Mr. Sease at the time of the discovery hearing. *See* Stipulated Facts ¶ 1, HRS v. Privette, No. 90-1521 (Fla. 12th Cir. Ct. 1991).

89. The facts as reported in *Privette* are extremely limited because the case came to the Second District Court of Appeal in 1991 as a certiorari petition involving a discovery dispute and contained no depositions or evidentiary hearings.

90. Even at the time the Florida Supreme Court gave its opinion, Mr. Privette's attorney, Daniel A. David, knew little about Mr. Sease. Mr. David closed his practice shortly thereafter and relocated to Tallahassee. Stephen F. Ellis undertook Mr. Privette's representation. On remand, the State amended the complaint to include Mr. Sease as a party but never served him. Mrs. Sease may have moved from the state. The action was never resolved. Interview with Daniel A. David, Att'y, and Stephen F. Ellis, Att'y (Oct. 1997).

91. *See Privette*, 585 So. 2d at 365.

92. *See id*.

93. *See id*.

peal in *Pitcairn v. Vowell*[94] and held that the putative father could raise the presumption.[95]

In an effort to balance the putative father's rights of privacy and the best interests of the child, the Second District Court of Appeal required a "threshold showing that the complaint is brought in good faith and is likely to be supported by reliable evidence," prior to entering an order compelling a genetic test in any paternity proceeding filed pursuant to chapter 742.[96] If a case involved a child whose marital father was listed on the birth certificate, the court additionally required a determination of whether "the child's interests [would] be adversely affected by allowing a party to circumvent that presumption."[97] Specific trial procedures were not discussed in any great detail; instead, the court simply quashed the order compelling a blood test and remanded the case for further proceedings.[98] Significantly, the court did not use the phrase "legal father" in its opinion, nor did it use the phrase "natural father."

The Florida Supreme Court accepted jurisdiction in *Privette* to resolve the express conflict between *Privette* and *Pitcairn*[99] and approved the Second District's decision.[100] The court's decision, however, went far beyond *Privette*'s narrow discovery issue. In dicta, which was written as the holding, the court announced the concept of a "legal father" and provided a complex procedure by which the marital father's status as legal father could be terminated, shifting the mantle of legal father to the biological father.[101] The court clearly contemplated situations in which the marital father would remain the legal father if in the best interests of the child, even after litigation determined paternity in another man.[102]

The complex two-phase procedure for shifting legal father status from the marital father to the biological father requires some explanation. The Florida Supreme Court held that before ordering a blood test, the trial court must hear arguments from "the parties, including the legal father if he wishes to appear and a guardian ad litem appointed to represent the child."[103] This hearing, however, is not

94. 580 So. 2d 219, 222 (Fla. 1st DCA 1991) (holding that the "putative father does not have standing to raise the presumption of legitimacy in avoidance of the potential ordering of support for the child").

95. *See Privette*, 585 So. 2d at 366.

96. *Id.*

97. *Id.*

98. *See id.*

99. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv) (stating that the Florida Supreme Court can accept jurisdiction when a conflict exists between two or more district courts of appeal).

100. *See* Department of HRS v. Privette, 617 So. 2d 305, 309 (Fla. 1993).

101. *Id.* at 307.

102. *See id.* at 308.

103. *Id.*

merely a time for legal argument. The party seeking the HLA test is required to prove the following: (1) the complaint is apparently factually accurate; (2) the complaint is "brought in good faith and is likely to be supported by reliable evidence; and (3) the child's best interests will be better served even if the test later proves the child's factual illegitimacy."[104] Even if the putative father in the paternity proceeding admits he is the biological father, the opinion implies that a blood test could be denied. Thus, if the party fails to establish this initial burden, a paternity action could be dismissed without an adjudication of paternity on the merits. The court states that "in a real sense, the trial court ordering the blood test must decide one of the ultimate issues: whether the child's best interests will be served by being declared illegitimate and having parental rights transferred to the biological father."[105]

Following this hearing on the discovery issue, if the trial court orders a genetic test and it shows that the putative father is the biological father, *Privette* provides for another hearing. The opinion states that "if a test shows that [the] Respondent is the child's biological father, this fact *without more* does not constitute grounds to grant a paternity petition."[106] In a footnote, the court states that "the mere fact of a blood test establishing the putative natural father's paternity does not in itself result in a legal declaration of illegitimacy or a legal termination of the legal father's parental rights."[107] *Privette* contemplates that at the final hearing, the trial court will decide, based upon an ad hoc best interests analysis,[108] whether or not to terminate the current legal father's parental rights and shift those rights and responsibilities to the biological father. The court provides no structured guidelines or set of factors for this determination, and none exists in chapter 742 or elsewhere in the *Florida Statutes*.

The concept of a legal father, when used as a method to select functional or support fathers for quasi-marital children, has enormous potential. Furthermore, the notion that legal father status could be shifted from one man to another is an exciting idea. However, the *Privette* opinion rapidly proved unsatisfactory, both for practical procedural reasons and because its substantive concepts had so little support in existing law.[109]

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104. *Id.*
105. *Id.* at 309.
106. *Id.*
107. *Id.* at 307 n.2.
108. *See id.* at 309.
109. *See* Kimberly G. Montanari, *Does the Presumption of Legitimacy Actually Protect the Best Interests of the Child?*, 24 STETSON L. REV. 809, 842 (1995) (arguing that *Privette* should only apply in contested paternity cases that implicate the presumption of legitimacy).

A. Procedural Problems

The practical procedural problems after *Privette* centered on three broad issues. First, it was unclear whether *Privette* procedures applied only in paternity actions or also in divorce proceedings. Second, there were few guardians available and willing to accept these cases in many circuits, and no one knew what the scope of their work should entail. Finally, jurisdictional issues arose because the marital father was not a party in *Privette*.[110]

While *Privette* adopted the two-part procedure for use "in cases of this type,"[111] disputes quickly arose concerning the range of cases within the category.[112] Did the procedure apply only in paternity actions filed under chapter 742, or did it apply in divorce actions filed under chapter 61 as well? District courts of appeal applied the procedure in divorce proceedings, but not without considerable uncertainty.[113] Many, if not most, circuit court judges assumed that *Privette* must be followed in any divorce in which a quasi-marital child was revealed in the pleadings.

Interestingly, an argument could have been made that *Privette* only applied to paternity actions filed by the State seeking reim-

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110. These problems are not discussed to any extent in published documents. In 1996 and 1997, The author participated in continuing judicial education programs with Florida circuit court judges who must address *Privette* issues at trial. These judges commonly voiced concerns regarding these issues.

111. *Privette*, 617 So. 2d at 308 (referring to "quasi-marital children").

112. *See* Montanari, *supra* note 109, at 835.

113. For example, in one Florida case, the court required a guardian to represent a "Type II quasi-marital child" in a divorce. *See* Alchin v. Alchin, 667 So. 2d 477, 479 (Fla. 2d DCA 1996). In *Alchin*, the boyfriend intervened in the divorce after he and the mother had obtained a blood test without the marital father's knowledge. The marital father sought to remain the legal father. *See id.* By invoking *Privette*, the district court recognized the possibility that the status of legal father could be shifted to another man. *See id.* at 479-80. In *Ownby v. Ownby*, 639 So. 2d 135 (Fla. 5th DCA 1994), the court reached a similar result in a divorce where the husband sought custody of all six of the couple's children, the youngest being a possible "quasi-marital child." Judge Griffin's separate opinion voices concerns as to joining putative fathers in divorce actions. *See id.* at 139 (concurring in part; dissenting in part). In *White v. White*, 661 So. 2d 940 (Fla. 5th DCA 1995), the court reviewed on certiorari a nonfinal order in a divorce proceeding. The marital father, who had proof that he was not the biological father of a "Type I quasi-marital child," sought a determination of paternity in the divorce. *See id.* The trial court denied his request without appointing a guardian. *See id.* The district court remanded, requiring that appointment of a guardian and, apparently, a determination of paternity and parentage be made. *See id.* at 940-41. Note that *White* is identical to *Daniel*, except that the mother in *White* did not concede the accuracy of the 0% blood test. Finally, in *Robinson v. State*, 661 So. 2d 363 (Fla. 1st DCA 1995), the district court declined to require a guardian in a paternity action because the marital father had been determined not to be the biological father in a pre-*Privette* divorce. The putative father was not allowed to challenge the elimination of the child's legal father even though the legal father had been eliminated in a proceeding to which he was not a party and in which it did not appear that the child had a guardian. *See id.* Under *White*, a guardian would have been necessary in the *Robinson* divorce proceeding if the divorce had occurred just a few months later.

bursement of welfare benefits. In the opening paragraphs of the *Privette* opinion, the court emphasizes the impropriety of the State interfering in the family unit and "impugning the legitimacy of a child for the sake of money allegedly owed to the State of Florida."[114] Although the court was clearly influenced by this factor, it is doubtful that *Privette*'s holding could have been limited to Title IV-D actions, or that those actions are primarily to benefit the State.[115]

1. Guardian Ad Litem

The circuit courts' broad interpretation of *Privette* compounded problems concerning guardians ad litem. If the child must be represented by a guardian ad litem, and the child or the guardian is "an indispensable party" to the *Privette* proceeding,[116] then the courts need a larger supply of guardians. Chapter 742 contains no statutory provisions for guardians and, unlike chapter 61, contains no express immunity for their activities.[117] Guardians ad litem are generally volunteers and, even prior to *Privette,* were already in scarce supply to perform their statutorily mandated tasks.[118] After *Privette,* divorce and paternity cases involving quasi-marital children languished in some circuits because of the requirement that a guardian be appointed.[119]

Even when guardians were available, volunteers were hesitant to serve without immunity when it was unclear what the guardian should determine or evaluate prior to the first or second hearing. For example, if one of the goals of the first hearing was to protect the putative father's privacy rights, it was questionable whether the guardian should interview his family, friends, and employer. On the other hand, these interviews may be essential to resolving the merits of the issues under the heightened burden of proof used at the hearing on the discovery issue. Chapter 742 was designed to place a name on the child's birth certificate, not to shift names on a birth certificate. It provided no guidelines to the guardians. As a result, some circuit judges decided that the risks and problems associated with

114. *Privette,* 617 So. 2d at 307.

115. *See* FLA. STAT. § 409.2561(1) (1997) (giving priority to the state for the establishment of support even in public assistance cases).

116. *Privette,* 617 So. 2d at 308 n.5.

117. *See* FLA. STAT. § 61.405 (1997).

118. *See In re* E.F., 639 So. 2d 639, 640 (Fla. 2d DCA 1994) (noting that the trial court did not "fundamentally" err when it attempted to locate a guardian ad litem but was unable to do so because of the inadequate supply of volunteers).

119. *See* White v. White, 661 So. 2d 940, 941 (Fla. 5th DCA 1995) (stating that the trial court was in no position to rule on the paternity issue absent a guardian ad litem to protect the child's best interests).

these cases required that the guardians be lawyers.[120] In larger jurisdictions, it quickly became apparent that *Privette* could not be effectively administered without at least a few trained professional guardians ad litem paid by the state.

It is important to realize that the procedures in *Privette* might be workable but not in the existing statutory framework. These procedures need funded, professional guardians with specific "best interests" guidelines. The guardians should be used conservatively and sparingly as needed, not as an essential participant in every case.

2. Personal Jurisdiction

Privette also raised personal jurisdiction issues. In *Privette*, Mr. Sease, the marital, legal father, was not a party to the lawsuit. The record does not reflect where he lived or whether the court had a basis to exercise jurisdiction over his person. It seems odd that the court discussed terminating a man's status as a "legal father" when he was not a true party to the proceeding. Yet, the court stated, "The legal father must be given notice of the hearing either actually if he is available or constructively if otherwise; and he must be heard if he wishes to argue personally or through counsel."[121] The court suggests that this proceeding could result in "a legal termination of the legal father's parental rights."[122]

Parental rights are usually terminated in a chapter 39 "Termination of Parental Rights" proceeding[123] or occasionally in a chapter 63 adoption proceeding.[124] Termination requires that the legal father be a named party in the action. In a chapter 39 proceeding, the legal father is entitled to free legal representation if he is indigent, and he is given many opportunities to preserve his rights to his children.[125] It seems inconceivable that a court could remove a person's name from a child's birth certificate and thereby terminate parental rights in a proceeding in which the parent is not a party. Likewise, it seems inconceivable that the biological father could be designated the legal

120. The author has encouraged this precaution at continuing judicial education seminars.

121. *Privette*, 617 So. 2d at 308 n.4.

122. *Id.* at 307.

123. *See* FLA. STAT. §§ 39.46, 63.072(1) (1997). Technically, a parent who has abandoned a child waives the right to consent to the adoption, but the judgment has the effect of relieving this parent of all parental rights and responsibilities. *See id.* § 63.172.

124. *See id.* § 63.172.

125. *See In re* D.B., 385 So. 2d 83, 91 (Fla. 1980) (holding that the Due Process and Equal Protection Clauses of the Federal and the Florida Constitutions require the court to appoint counsel to an indigent parent in termination proceedings).

father unless he was personally served and became subject to the court's jurisdiction.[126]

Rules for personal and constructive service of process need to be established with clear requirements as to the parties who must participate in the proceeding. The parentage proceeding under the second prong of *Privette* must be separate and distinct from a biological determination of paternity. Also, the proceeding must be separate from any related dissolution proceeding to prevent divorces from stalling because of an inadequate supply of guardians or a lack of jurisdiction over putative fathers.

B. Substantive Problems

The assumption that a legal father was intended to be at least a support father was buttressed by the Florida Supreme Court's striking decision to categorize as a constitutional right, the child's right to legitimacy and, thus, to a marital father as a legal father.[127] The *Privette* court stated, "Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interests."[128]

One wonders whether the court intended this right to be a substantive or a procedural due process right. Presumably, the court did not base this right on a deprivation of life. Is it based on a property right or a liberty right? The court does not enlighten its reader. Even for those who believe children should have greater rights independent of their parents, it is difficult to argue that these rights emanate from the due process provision of the 1968 Florida Constitution.

The substantive problems with *Privette* demonstrate the courts' struggle to uphold the "best interests" function of the presumption of legitimacy in a world of genetic testing. The supreme court's concern with "legitimacy" and the "stigma of illegitimacy" can hardly be overstated, as those ideas are discussed repeatedly throughout the opinion.[129] However, rather than focus on the presumption of legitimacy as a tool to provide the child with a stable family unit, as argued in

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126. Constructive service of process is not authorized in Florida for use in a paternity action. *See* FLA. STAT. § 48.011 (1997); Drucker v. Fernandez, 288 So. 2d 283, 283 (Fla. 3d DCA 1974). Constructive service in parental terminations was first authorized as recently as 1994. *See* Act effective Oct. 1, 1994, ch. 94-164, § 45, 1994 Fla. Laws 963, 1015 (amending FLA. STAT. § 49.011(13) (1993)).

127. *See Privette*, 617 So. 2d at 307.

128. *Id.* (citing FLA. CONST. art. I, § 9). Article I, section 9 of the Florida Constitution is the state counterpart to the Federal Due Process Clause. *See* U.S. Const. amend. XIV, §1. The U.S. Supreme Court has not decided whether a child has such a liberty interest. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.").

129. *Privette*, 617 So. 2d at 307.

this Article, *Privette* describes the presumption as a "policy of protecting the welfare of the child."[130] Admittedly, a stable family unit is good for a child's welfare, but the presumption was designed to select a family for a child, not to give the court leeway to do whatever is "best" for a child. Once the court transforms the presumption of legitimacy into a process of doing what is best for a child, genetics can no longer overcome the presumption.

On the other hand, legitimacy has little or no definition once this occurs. The court had to create the concept of a legal father because it was no longer presuming that the marital father was the biological father. Florida law, however, does not provide any clear definition of the rights and responsibilities of a "legal father," nor does it contain any statutory basis to place permanent obligations on the man listed on a birth certificate. Furthermore, Florida law does not provide any adequate constitutional theory to support the *Privette* court's claim that a child has a constitutional right to legitimacy and thus a legal father.

In Florida, the concept of legal father had a very limited history prior to *Privette*.[131] "Legal father" is not a statutory term and was not used for any specific purpose in earlier case law. The *Privette* opinion defines a legal father as "the one listed on the birth certificate."[132] The father on a birth certificate is established as a matter of vital statistics pursuant to section 382.013(2), *Florida Statutes*.[133] Under this statute, the name of the marital father is automatically placed on the birth certificate, absent a rare prior judicial determination that some other man is the father.[134]

Because this procedure is automatic, the marital father does not consent to his name being placed on the certificate. Any obligation that results from this process is imposed on him by case law and not by any voluntary act. At least in the absence of a statute making legal fatherhood a consequence of the marital contract, this obligation cannot be viewed as contractual, quasi-contractual, or a product of estoppel, and is certainly not "natural."

The presumption of legitimacy under the common law never made the marital father a legal father. It made him a presumptive father. Prior to *Privette*, most children, including marital children, had no legally established father. On its face, *Privette* appears to treat a birth certificate, which is prepared with little judicial or administrative oversight, similar to an order of adoption, an order of surrogate

130. *Id.*
131. *See supra* note 13.
132. *Privette*, 617 So. 2d at 307.
133. *See* FLA. STAT. § 382.013(2) (Supp. 1998).
134. *See id.*

parentage, or an order of paternity.[135] Perhaps this is too literal a reading of *Privette*, and the supreme court intended the marital father to be only a presumptive legal father.[136]

If the marital father is the automatic legal father, what rights and responsibilities did the *Privette* court intend to place upon this father? Because the court started "from the premise that the presumption of legitimacy is based on the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child,"[137] many lawyers and judges assumed that "legitimacy" entitled the child to a "legal father" having all the rights and responsibilities traditionally vested in a legal guardian.

When *Privette* returned to the trial court, it withered on the vine. Ultimately, the State did not obtain reimbursements from either father, and the child obtained neither a family unit nor a future right of support.[138] Applying a best interest test to establish a legal father, at least as a support father, was a failure for the child. The court's reasoning pushed the common law rules beyond logic where genetic evidence would likely overcome the traditional presumption of legitimacy. The supreme court clearly struggled for a fair outcome and a reasonable rule, but the common law provided no foundation on which to base a satisfactory opinion.

V. *DANIEL V. DANIEL*: A RETREAT TO TRADITIONAL RULES THAT MAY DISADVANTAGE EVEN MARITAL CHILDREN

Four years after *Privette*, the Florida Supreme Court was given the opportunity to clarify some of the problems *Privette* created and to explain the type of cases in which *Privette*'s procedures should be applied.[139] In *Daniel*, the supreme court limited *Privette*'s procedures by holding that *Privette* does not apply in divorces where the issue of

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135. If the birth certificate actually made the marital father the legal father, the doctrine of fatherhood by estoppel would not be necessary. *See* Wade v. Wade, 536 So. 2d 1158, 1159-60 (Fla. 1st DCA 1988) (estopping a former husband from "disavowing [a] child as his own for purposes of parental support"); Marshall v. Marshall, 386 So. 2d 11, 12 (Fla. 5th DCA 1980) (stating that the child's best interests would not be served by allowing the husband to disavow his prior recognition of paternity). There would be no need to estop the marital father from denying his biological fatherhood if his status as legal father were fixed and permanent by virtue of the birth certificate.

136. The author is indebted to Professor Iris Burke of the University of Florida, College of Law, who provided many constructive suggestions during the writing of this Article. She first suggested this very reasonable interpretation of *Privette*. The supreme court probably views the legal father as a presumptive category, allowing the doctrine of fatherhood by estoppel to continue to exist. It also makes the result in *Daniel* more compatible with *Privette*.

137. *Privette*, 617 So. 2d at 307.

138. Interview with Daniel A David, Att'y, and Stephen F. Ellis, Att'y (Oct. 1997).

139. *See* Daniel v. Daniel, 695 So. 2d 1253 (Fla. 1997).

paternity is uncontested,[140] and thereby reduced the demand for guardians ad litem. However, *Daniel* did not clarify the other procedural problems that *Privette* created. By treating the putative biological father as if he were a party to the action when he was not, *Daniel* muddied the issues surrounding personal jurisdiction even further. More importantly, *Daniel* made a paper fiction out of the child's constitutional right to legitimacy—to a legal father. Ironically, by relying on the concept of paternity, which was created to provide support for nonmarital children, *Daniel* gave a child both a legal, marital father and a putative, biological father, but no meaningful right of support from either. The outcome in *Daniel* may be entirely fair for Mr. Daniel, but the analysis will place the best interests of children at risk.

A. Confusion of Legitimacy and Paternity

Prior to *Daniel*, many lawyers and judges believed that a child could be deprived of the legitimacy right announced in *Privette* only after the court, with a guardian's help, decided that the child would be better off if the paternal rights and responsibilities were shifted to the biological father. If legitimacy was the child's constitutional right as the *Privette* court decided, then the marital father should not be able to voluntarily relinquish his status as legal father, unless that decision benefited the child.[141] Otherwise, the child's due process right to a marital father would compete in some unspecified fashion with the biological father's due process rights.[142]

In 1992 Mrs. Daniel became pregnant at nineteen years old.[143] The day after Christmas, she married Mr. Daniel, whom she had met while working at a drugstore. Mr. Daniel knew his wife was pregnant at the time he married her. He also knew he was not the child's biological father. Mr. Daniel consulted an attorney prior to the marriage, but the record does not reflect what, if any, advice the attorney provided. The couple did not execute a prenuptial agreement. The Daniels' baby was born in March 1993 and, therefore, fell into the

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140. *See id.* at 1255.

141. Neither parent may voluntarily abandon a child in a state-initiated parental termination proceeding unless termination is in the child's manifest best interests. *See* FLA. STAT. § 39.4611(1)(c) (1997). Thus, it is logical that a parent cannot relinquish rights in a *Privette* hearing without consideration of the child's interests.

142. *See generally* Santosky v. Kramer, 455 U.S. 745 (1982) (holding that parents who are party to a state-initiated termination of parental rights proceeding are entitled to due process).

143. *See* Petitioner's Initial Brief app. at 2, Daniel v. Daniel, 695 So. 2d 1253 (Fla. 1997) (No. 89, 363). The facts in *Daniel* are not described in detail in the published opinions. The statement of the facts in this section is derived from the appellate briefs and from the guardian ad litem's written report to the trial court.

Type I quasi-marital child category. Mr. Daniel fully participated in the pregnancy and birth and allowed his name to be placed on the birth certificate.[144]

Less than six months from the child's birth, the couple developed marital difficulties and separated in November 1993. In the divorce proceeding, Mrs. Daniel admitted that Mr. Daniel was not the biological father of her daughter. The trial court assumed that it was bound to follow *Privette*.[145] Accordingly, the court appointed a guardian ad litem, an attorney skilled in marital law.

The guardian ad litem interviewed the Daniels and their respective parents, and also deposed the putative father, Mr. Staggers.[146] From the guardian ad litem's investigation, it appeared that Mr. Daniel had a good job with a regional drugstore chain and had a net monthly income of approximately $1500. He bonded with his legal daughter during the six- to eight-month period in which he lived with her, and loved and supported her like any good marital father.[147]

The investigation further revealed that the putative father lived approximately fifty miles away and that he was on probation for minor felony offenses.[148] Mr. Staggers was living with a woman and was the admitted biological father of her four-month-old daughter. He was also supporting her older daughter from a prior relationship. He lived in a trailer and made about $7.25 per hour as a cook. He had no contact with the Daniels' little girl, did not formally admit that the child was biologically his, and had no interest in supporting the child either emotionally or monetarily.[149]

The guardian ad litem filed a report recommending that Mr. Daniel remain the girl's legal father.[150] In November 1995 the trial

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144. *See id.* app. at 3.

145. The trial judge was following a procedure that the author recommended to the trial bench in a continuing judicial education program in May 1996. *See* Chris W. Altenbernd, *Privette's Puzzle: The Shifting Legal Father*, Advanced Judicial Studies (May 1996) (on file with Office of the State Courts Adm'r, Tallahassee, Fla.).

146. Although Mr. and Mrs. Daniel agreed that Mr. Staggers was the biological father, no testing was done. Thus, he cannot be accurately described as a biological father.

The putative biological father, Mr. Staggers, was never a true party to this divorce proceeding. Third parties are a rarity in divorce. Although both the Second District and the Florida Supreme Court referred to Mr. Staggers as a party, he participated only to the extent that he honored the guardian ad litem's witness subpoena.

The Second District Court of Appeal's opinion states that "the trial court . . . made the biological father a party to the proceedings." Daniel v. Daniel, 681 So. 2d 849, 850 (Fla. 2d DCA 1996). The court then explains in a footnote that he only participated to the extent that his deposition was taken. *See id.* at n.1. In fact, he was never shown in the style of the case as a party nor were pleadings filed that described him as a party. *See id.* The supreme court describes him similarly. *See Daniel*, 695 So. 2d at 1254.

147. *See* Petitioner's Initial Brief app. at 1, *Daniel* (No. 89, 363).

148. *See id.* app. at 4.

149. *See id.* app. at 5.

150. *See id.* app. at 1.

court determined that it was not in the child's best interests for the court to shift the legal father status from Mr. Daniel to Mr. Staggers.[151] Accordingly, the court did not enter an order requiring a blood test and ordered Mr. Daniel to pay child support of $520 per month.[152] Mr. Daniel, of course, could establish visitation and expanded custody rights if he desired.

At the intermediate appellate stage, Mr. Daniel challenged his obligation to provide support.[153] The Second District struggled with this case because the rules announced in *Privette*, with an emphasis on legitimacy, were not easily reconciled with earlier cases. Previous cases held that a husband in a divorce could not be ordered to pay child support for a child "who is neither his natural nor his adopted child and for whose care and support he has not contracted."[154] Following the First District in *Robinson v. State*,[155] the court severed legitimacy from paternity.[156] Thus, the court held that the *Privette* best interests analysis applied only when three conditions existed: (1) a child faces the threat of being deemed illegitimate; (2) a legal father faces the risk of losing his parental rights; and (3) "the matter involves contested *paternity* with the request for blood tests or similar genetic testing."[157]

Because the Daniels' daughter was born during a lawful marriage, the Second District held that she was legitimate and that Mr. Daniel was the legal father for purposes of legitimacy.[158] The court emphasized that his name would remain on the birth certificate.[159] By reversing the trial court, the Second District effectively relieved Mr. Daniel of any obligation to support the child after the judgment of dissolution.

The Second District's decision may seem "fair" from Mr. Daniel's perspective. From his point of view, he was trying to help out a friend in trouble. The marriage did not work out, so he should not be stuck paying child support to someone else's child for the next seventeen years. In its simplest terms, the Second District merely held that *Privette* did not overrule the earlier cases relieving marital fathers of their obligation to support quasi-marital children after a divorce. The

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151. *See id.* app. at 9.
152. *See id.*
153. *See* Daniel v. Daniel, 681 So. 2d 849, 850 (Fla. 2d DCA 1996).
154. Albert v. Albert, 415 So. 2d 818, 820 (Fla. 2d DCA 1982); *accord* Portuondo v. Portuondo, 570 So. 2d 1338, 1342 (Fla. 3d DCA 1990); Bostwick v. Bostwick, 346 So. 2d 150, 151 (Fla. 1st DCA 1977); Taylor v. Taylor, 279 So. 2d 364, 366 (Fla. 4th DCA 1973).
155. 661 So. 2d 363 (Fla. 1st DCA 1995).
156. *See Daniel*, 681 So. 2d at 851 (discussing and agreeing with the *Robinson* court).
157. *Id.* (emphasis added).
158. *See id.*
159. *See id.*

court followed that case law and certified the following question to the Florida Supreme Court: "Is the presumption of legitimacy overcome when a married husband and wife stipulated that the child's father is not the husband but do not challenge the child's legitimacy, and the birth certificate remains unchanged?"[160]

The question reveals the difficulties that modern courts are having with the common law theories when confronted with genetic evidence. First, a husband and wife in Lord Mansfield's day would not have been permitted to enter into this stipulation because they were not allowed to testify to its content.[161] Second, a couple cannot stipulate that a child is not the husband's biological child without challenging its legitimacy under any traditional definition of "legitimate." Ultimately, the Florida Supreme Court agreed with the Second District's conclusion that the *Privette* best interests standard was limited "to those instances where a child faces the threat of being declared illegitimate and the 'legal father' also faces the threat of losing parental rights which he seeks to maintain."[162] Thus, *Privette* was inapplicable to the issues in *Daniel*.

In a short opinion with little new analysis, the Florida Supreme Court answered the Second District's certified question in the negative and approved the three conditions that the Second District required for use of the *Privette* best interests analysis.[163] The supreme court's opinion, however, is notable for its discussion of both legitimacy and paternity in terms that are hard to reconcile with *Privette*.

Concerning legitimacy, the court recognized that Mr. Daniel did not dispute that he was not "asserting any rights he might have *had* as [the child's] 'legal father' during the time of the couple's marriage."[164] In addition, the parties did not dispute the child's status as legitimate.[165] The court concluded that the child's legitimacy "will not be affected by a determination of paternity or any orders of support that may follow such a determination."[166] It is clear that the supreme court saw Mr. Daniel as merely a paper legal father, who no longer had any rights or responsibilities for his legal daughter.[167] Gone is

160. *Daniel*, 681 So. 2d at 852.
161. *See* Goodright v. Moss, 98 Eng. Rep. 1257, 1258 (K.B. 1777).
162. *Daniel*, 695 So. 2d at 1253.
163. *See id.* at 1254.
164. *Id.* at 1255.
165. *See id.*
166. *Id.*
167. Because Mr. Daniel remains on the birth certificate as the legal father, if Mrs. Daniel and Mr. Staggers both die in accidents, does Mr. Daniel have any responsibility to support his legal daughter? Does he have some backup or inchoate obligation even if he has no support obligation at this time? The court in *Daniel* did not directly address this scenario. However, by approving the *Albert* line of cases, the opinion strongly suggested that Mr. Daniel would have no obligation to support the child even if she were orphaned by

the discussion in *Privette* that the presumption of legitimacy exists to protect the best interests of the child. *Daniel* reduces legitimacy to nothing more than a name on a publicly recorded birth certificate.[168]

Near the end of its opinion in *Daniel*, the supreme court stated, "Just as [the daughter's] natural lineage was unaffected by her mother's marriage, [the daughter's] legitimacy will not be affected by a determination of paternity or any orders of support that may follow such a determination."[169] This assertion may be legally incorrect if the biological father's paternity is ever declared in a standard chapter 742 paternity action.[170] Moreover, the statement demonstrates the muddle that has become of the older common law concepts. The daughter has "natural lineage" to her biological mother; there is apparently no dispute that she does not have "natural lineage" to Mr. Daniels. If legitimacy has anything to do with the marriage of biological parents, a determination of paternity will affect her "legitimacy." In fact, the court's own opinion, identifying this child by name,[171] is a public disclosure that her mother was unmarried at the time of her conception and that the mother's husband at the time of

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her biological parents. If that is true, legitimacy now has little more practical value than the buttonhole on a suit's lapel.

168. The opinion does not discuss fatherhood by estoppel, an issue that the parties did not address. Nevertheless, Mr. Daniel entered into this marriage with full disclosure. The law of fatherhood by estoppel is not well developed in Florida, but Mr. Daniel would have remained the legal father, essentially by estoppel, in some other jurisdictions because he married a pregnant woman. *See* Wade v. Wade, 536 So. 2d 1158 (Fla. 1st DCA 1988); Marshall v. Marshall, 386 So. 2d 11, 12 (Fla. 5th DCA 1980). Florida clearly recognizes that both the husband and the wife can be estopped to deny the husband's paternity of a child. However, the case law does not establish what actions for what period of time are necessary to create an estoppel. It is a theory without any established parameters. *See, e.g.*, L... v. L..., 497 S.W.2d 840, 842 (Mo. Ct. App. 1973) (finding that a husband must pay child support in a divorce because he married the wife knowing she was pregnant); Hartford v. Hartford, 371 N.E.2d 591, 596 (Ohio Ct. App. 1977) (requiring that a husband pay support for a Type II quasi-marital child conceived during a temporary separation). In *Daniel*, a good argument can be made that Mr. Daniel's marriage vows created a contract that should have estopped him from denying parentage in this case. The proposed statute would leave Mr. Daniel as the legal father unless he had a written agreement with the mother to determine paternity following the birth of the child. If a similar statute had been in effect when Mr. Daniel visited his attorney prior to the marriage, it is likely that he would have had such a prenuptial agreement.

169. *See* Daniel, 695 So. 2d at 1255.

170. A judgment of paternity invokes the provisions of sections 382.013(2)(c) and 382.015 of the *Florida Statutes*. *See* FLA. STAT. § 382.013(2)(c) (Supp. 1998); *id.* § 382.015 (1997). If a paternity determination showed Mr. Staggers as the biological father, the birth certificate would normally be amended to show Mr. Staggers as the father on the birth certificate. Mr. Daniel would no longer be the legal father and his role to protect some concept of legitimacy would be over. The only reason the birth certificate would not be amended is because of the supreme court's specific ruling that the child's legitimacy "will not be affected by a determination of paternity." *Daniel*, 695 So. 2d at 1255. The trial court might feel compelled to ignore the statute requiring this change and obey the supreme court's mandate.

171. *See id.* at 1254.

her birth was not her biological father. Under any reasonable definition, the supreme court itself has declared this child "illegitimate."

Just as *Privette* demonstrates the difficulty of relying on the presumption of legitimacy to resolve quasi-marital children's issues after the advent of genetic testing, both *Daniel* opinions demonstrate a similar difficulty with the concept of paternity. The Second District concluded that when all parties to a divorce agree that the husband is not the "natural father," then the presumption of legitimacy is not at issue and that a separate "presumption of paternity" applies.[172] The supreme court agreed that "paternity and legitimacy are related, but nevertheless separate and distinct concepts."[173]

The Second District's "presumption of paternity" has, at best, a very recent and limited legal history.[174] On prior occasions and in other states, the presumption of paternity seems to have been used as the equivalent of the presumption of legitimacy[175] or as a presumption used in the context of scientific testing resulting in a high probability of paternity,[176] or in the context of a voluntary acknow-

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172. *See* Daniel v. Daniel, 681 So. 2d 849, 851 (Fla. 2d DCA 1996).

173. *Daniel*, 695 So. 2d at 1254.

174. The "presumption of paternity" concept was borrowed from *Prater v. Prater*, 491 So. 2d 1280, 1281 (Fla. 5th DCA 1986) (holding that a Florida court has no jurisdiction to determine paternity of a child in an ex parte dissolution case where one party lives outside of Florida and does not appear in the suit). It is not obvious that Judge Dauksch intended to create a new presumption in that case, and he may have merely used substitute words to describe the presumption of legitimacy.

The phrase "presumption of paternity" was also used in *Hall v. Hall*, 672 So. 2d 60, 62 (Fla. 1st DCA 1996). In *Hall*, a divorce proceeding, an adoptive father of an infant born in the Philippines claimed that he was also the biological father. *See id.* at 61 n.1. The First District Court of Appeal rejected the trial court's use of a "presumption of paternity" by remanding the case with orders to reinstate temporary, shared custody and visitation rights to the adoptive mother. *See id.* at 62. This was somewhat different from the presumption in *Daniel*.

175. California's irrebuttable presumption of paternity is clearly the same as the presumption of legitimacy. *See* Hadek, *supra* note 50, at 374-86 (asserting that California's "conclusive presumption of paternity . . . has been a mainstay in California law for well over a century" resulting from a "deep disdain for illegitimate children and an interest in preserving the peace and tranquility of the family"). Alabama has a statutory presumption of paternity that appears comparable to the common law presumption of legitimacy. *See* ALA. CODE § 27-17-1 (1975); *Ex parte* Presse, 554 So. 2d 406, 408 (Ala. 1989). The terms also seem equivalent in Illinois and Oregon. *See, e.g.*, *In re* Marriage of Klebs, 554 N.E.2d 298, 304 (Ill. App. Ct. 1990); *In re* Matter of the Marriage of A., 598 P.2d 1258 (Or. Ct. App. 1979). Also, the Uniform Parentage Act contains a presumption of parentage that appears to be comparable to the common law's presumption of legitimacy. *See* UNIF. PARENTAGE ACT § 9B, U.L.A. 287 (1973); *see also* POLLOCK AND MAITLAND, *supra* note 12, at 398.

176. Section 742.12, *Florida Statutes*, creates a presumption of paternity when an HLA test or other scientific test establishes a 95% or greater probability of paternity. *See* FLA. STAT. § 742.12(4) (1997). The phrase has been used in earlier cases discussing this statute. *See, e.g.*, Ferguson v. Williams, 566 So. 2d 9, 11 (Fla. 3d DCA 1990); Vidal v. Rivas, 556 So. 2d 1150, 1152 (Fla. 3d DCA 1990); Jones v. Crawford, 552 So. 2d 926, 927 (Fla. 1st DCA 1989); Schatz v. Wenaas, 510 So. 2d 1125, 1126 (Fla. 2d DCA 1987). This presumption is more typically an evidentiary presumption used in the context of a paternity action nam-

ledgement of paternity.[177] What the *Daniel* "presumption of paternity" is or how it effects decision making on parentage issues in Florida remains unclear.

Some states, such as Maine, attempt to restrict the concept of legitimacy so that it has different meanings for the law of inheritance and the law of paternity.[178] This restriction effectively allows for a presumption of paternity. Whether Florida could make such a distinction is questionable because the courts have used the presumption of legitimacy too often in the context of child support.[179] Nevertheless, Florida needs to decide what "paternity" and "legitimacy" mean and to clearly use these terms only for their intended purposes. Furthermore, the author would probably prefer to eliminate all usage of "legitimacy" in both paternity and probate actions because the term's moral and religious overtones interfere with policy-making in a pluralistic society. Legitimacy tends to stigmatize the child when it is the parents' behavior that society wishes to discourage. If we are to use judgmental words, they should be directed at the parents—not the innocent children.

If the primary policy behind paternity is to provide child support and the primary policy behind the presumption of legitimacy is to provide stable family units for children, then a presumption of paternity should be used to select the father who pays support when the presumption of legitimacy fails to establish a family. Because the child in *Daniel* had little or no prospect of a family unit that included either potential father, it is arguable that the duty to support the

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ing the putative biological father of a nonmarital child. It may also have use in the quasi-marital children context, but, clearly, it is not the presumption of paternity discussed in *Daniel*.

177. Section 742.10(1), *Florida Statutes*, allows for a voluntary acknowledgment of paternity that creates a rebuttable presumption of paternity. *See* FLA. STAT. § 742.10(1) (1997); *see also* Campo v. Tafur, 704 So. 2d 730, 733 n.1 (Fla. 4th DCA 1998) (noting that an admission of paternity, absent an affidavit, merely creates a rebuttable presumption of paternity); Womack v. Cook, 634 So. 2d 322, 323 (Fla. 5th DCA 1994) (Harris, C.J., dissenting) (opining that until the presumption of paternity is rebutted, the paternity action cannot proceed). Like the presumption for scientific testing, this is an evidentiary presumption for use in a typical paternity action. It is similar to the concept employed in *Daniel* because the presumption arises from a voluntary admission and not from any biological evidence.

178. *See, e.g.*, Denbow v. Harris, 583 A.2d 205, 207 n.1 (Me. 1990) (stating that the court has "long recognized the distinctions between the meanings of 'legitimacy' as used in the different contexts of inheritance and paternity").

179. Indeed, Florida's *leading* case on the presumption of legitimacy is a divorce case similar to *Daniel* involving a Type I quasi-marital child. *See* Eldridge v. Eldridge, 16 So. 2d 163 (Fla. 1944). The marital husband in *Eldridge* was allowed to challenge the presumption, but failed to overcome the difficult burden of proof, as the wife would not concede the issue. *See id.* at 163-64. In this way, the presumption of legitimacy simply turns into the "presumption of paternity" if the wife concedes that the marital father is not the biological father. Why a presumption of paternity applies when no one claims that a party is a biological father is unclear.

child should fall upon the biological father, at least when the marital father had such a brief involvement with the child. To that extent, the ruling in *Daniel* is defensible.

Because Florida does not limit the concept of legitimacy to inheritance issues, these two presumptions can result in two "legal" fathers. In theory, Mrs. Daniel's daughter could eventually have a legal father for legitimacy, Mr. Daniel, and another legal father who paid support, Mr. Staggers. The sad truth is that she is unlikely to ever have a "functional father." Even if Mrs. Daniel pursues a paternity action against Mr. Staggers and wins, Mr. Staggers is unlikely to provide any meaningful monetary support. Thus, in reaching their decisions, both the Second District and the Florida Supreme Court relied on paternity to locate a support father; however, both courts failed to locate any true support for this child.[180]

B. Daniel's *Other Problems*

Two final observations regarding *Daniel* should be made. First, the court announced a rule that would probably cause the *Privette* procedures to be inapplicable even in the actual *Privette* case. The *Daniel* court stated:

> Unlike the circumstances before us here, our decision in *Privette* addressed a case of contested paternity involving blood tests, and its application is limited to those instances where a child faces the threat of being declared illegitimate, and the "legal father" also faces the threat of losing parental rights which he seeks to maintain.[181]

In *Privette*, the legal father did *not* face the threat of losing the parental rights he sought to maintain. He was not a party to the action and could not lose those rights *in abstentia*. Even if he had been notified, he probably would not have wished to maintain these rights. If the rule announced in *Daniel* applies to paternity actions where the husband stipulates that he is not the biological father, it is arguable that *Privette* will rarely apply even in chapter 742 proceedings filed by married women against putative fathers. Simply put, the child may have no meaningful constitutional right to maintain legitimacy after *Daniel*.

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180. The impact of *Daniel* on a child's right to support and legitimacy is highlighted in *DeRico v. Wilson*, 714 So. 2d 623 (Fla. 5th DCA 1998), in which a Type II child, identified by name, is effectively declared illegitimate in the opinion. Her mother is ordered to repay child support that was previously provided by the marital father after he petitioned to determine paternity, but while he was still legally married to the mother!

181. Daniel v. Daniel, 695 So. 2d 1253, 1255 (Fla. 1997).

Second, *Daniel* permits typical parents of marital children to divest their children of support in a dissolution proceeding with no clear ability on the part of the trial judge to intercede on behalf of the children. Just because the Daniels were probably telling the truth does not mean that all married couples will tell the truth.[182] If the putative father is not required to be an actual party to the divorce, a married couple could stipulate that the husband is not the father of the marital children and, accordingly, he would be relieved of all support obligations. Furthermore, there would be no guardian ad litem appointed and no need for judicial review of the accuracy of the stipulation.[183] In many circumstances, adults might defraud the court to eliminate the husband's child support obligation, especially given the high number of cases in which parties are not represented by counsel in divorce.[184] At a minimum, courts confronted with a situation similar to *Daniel*, should require the parents and the child(ren) to undergo genetic testing.[185] This would support the stipulation that the marital father was not the biological father and, thereby, exclude the possibility of Mr. Daniel's paternity.

There is a certain upside-down perspective in *Daniel* and *Privette*. In *Daniel*, a divorce proceeding, the court acts as if the child was a nonmarital child and implicitly takes a quasi-criminal bastardy or paternity approach to the problem, examining the case from Mr. Daniel's perspective (as a charged defendant). In *Privette*, a paternity action, the court uses the presumption of legitimacy to examine the case from the "best interests" perspective of the child, as if the child were a marital child seeking support in a divorce proceeding! Neither perspective is particularly satisfying, and neither comes to terms with the fact that quasi-marital children are simply a new, third category of children that can no longer be analyzed using the existing common law tools.

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182. For a post-*Daniel* example of a case in which the wife did not take a consistent position on the paternity of her children, see *Gantt v. Gantt*, 716 So. 2d 846 (Fla. 4th DCA 1998).

183. Voluntary terminations of parental rights in chapter 39 proceedings require a judicial determination of the child's manifest best interests. *See* FLA. STAT. § 39.4612 (1997).

184. For example, the husband may threaten the wife to evade child support, and she may prefer to have him out of her life even if that means she will not receive child support. The wife may wish to be rid of her husband forever, and she may threaten to reveal tax fraud, for example, unless he relinquishes the child.

185. Genetic testing now includes methods other than HLA testing. *See* State Dep't of Revenue v. Aguirre, 705 So. 2d 990 (Fla. 3d DCA 1998). *See generally* Brim v. State, 695 So. 2d 268 (Fla. 1997) (discussing the admissibility of DNA testing in criminal cases).

VI. A STATUTORY PROPOSAL TO ADDRESS THE NEEDS OF QUASI-MARITAL CHILDREN

If one accepts the proposition that quasi-marital children are a sizable third category of children whose parentage cannot be adequately resolved under the common law in an era of genetic testing, then a statutory solution is necessary. This Article's Appendix presents a working draft of a proposed revision of chapter 742, *Florida Statutes,* designed to address the needs of quasi-marital children and their marital and biological fathers, as well as their mothers. This draft is intended as a proposal for discussion and is intentionally not in final form. Given the differing circumstances of the three types of children delineated previously, the solutions for parentage issues involving Type I,[186] Type II,[187] and Type III[188] quasi-marital children require separate statutory provisions.

A. Assumptions

The statutory proposal rests on many assumptions, which should be expressly stated. First, the presumption of legitimacy, which attempts to place children in stable permanent family units, should be promoted in most cases, even at the expense of biological accuracy. Second, the basic purpose of paternity, which attempts to provide paternal economic support for all children, should also be achieved whenever feasible. However, support from the biological father is not always the most sensible route for quasi-marital children if it conflicts with the goal of providing a family unit. Nevertheless, when the marital father is not likely to function well in either capacity, the child should have the option of receiving support from the biological father.

Third, *Privette*'s reasoning is correct when it prefers a procedure shifting legal fatherhood from the marital to the biological father. This approach is preferable to a *Daniel* style procedure, which eliminates the marital father's responsibilities without locating another legal father. *Privette*'s policy is reasonable, especially concerning Type II quasi-marital children and all older children.

Fourth, *Daniel* is correct in arguing that in some cases the marital father should be relieved of his obligations without shifting those ob-

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186. In the proposed statute, these children are referred to as children born within 40 weeks of marriage. See *supra* Part II.B.1. for a description of Type I quasi-marital children.

187. In the proposed statute, these children are referred to as children born after a permanent separation. For a description of Type II quasi-marital children, see *supra* Part II.B.2.

188. In the proposed statute, these children are referred to as children born after 40 weeks of marriage, but prior to a permanent separation. For a description of Type III quasi-marital children, see *supra* Part II.B.3.

ligations to the biological father. However, these exceptional cases involve quasi-marital children conceived before marriage or after the marriage has deteriorated, not children conceived from an adulterous relationship. Especially in a Type I situation, there is a strong policy argument that a husband and wife should be able to eliminate the husband's status as a legal father without obtaining a divorce. Under this assumption, family unity may be preserved, but the mother may be entitled to seek support from the biological father.

Fifth, in Type I and Type III situations, the marital couple should be encouraged to resolve the issue of paternity through a premarital agreement or a separation agreement. Sixth, the "best interests" framework is a reasonable one to determine whether to shift a legal father's obligations, but the factors considered in the analysis should be legislatively described in an effort to obtain more consistent rulings statewide.

Seventh, the statute of limitations in these cases should be relatively short, yet not so short as to force potential litigants to make rapid and possibly irrational decisions. Any change in legal parents after the first two years of a child's life should be treated as parental terminations or adoptions rather than as initial determinations of parentage. No special statute of limitations has been created, for the state in Title IV-D cases. Although an argument can be made for such a statute, the circumstances of these cases do not warrant any special rules.

Eighth, biological fathers should have the right to seek legal father status in most situations but should be expected to make timely and serious requests.[189] To this end, the proposed statute contains provisions designed to prevent spiteful claims or frivolous lawsuits. Existing case law on this point is correct: A stable family unit with a child conceived from an adulterous affair but born during the marriage should never be forced to accept the claim of a biological father.[190]

Finally, in an era where medical treatment is affected and often dictated by the patient's genetic background and many children live in adequate but nontraditional family structures, the public should be encouraged not to think in terms of the "stigma of illegitimacy." Although children need stable family units, the stigma tends to deny

189. Although the statute gives a right of action to a biological father, it gives no rights to the child. The Uniform Parentage Act provides for an action by a child. *See* UNIF. PARENTAGE ACT, § 4, 9B U.L.A. 287 (1973). Who would actually bring this action for a quasi-marital child is still unclear. The author is not convinced that such an action is warranted for quasi-marital children, even if it is warranted for nonmarital children.

190. *See* G.F.C. v. S.G., 686 So. 2d 1382, 1383 (Fla. 5th DCA 1997) (holding that a biological father may not pursue a paternity action for rights to a "Type II quasi-marital child" when the couple objects).

children adequate information about their true genetic background. Thus, although we should be conservative about preserving families for children, we should be more open about providing them with facts regarding their biological parents. A child may be entitled to know who her biological father is, even if he does not receive any of the rights or responsibilities of legal fatherhood. Likewise, the privacy rights of putative fathers should be respected, but not at the expense of children needing genetic information for valid medical reasons.

B. Basic Framework

The proposal in the Appendix contains only Part III of a revised chapter 742. Under the proposed statutory scheme, chapter 742 would have four parts: Part I would be a general part; Part II would consist of paternity and parentage statutes for nonmarital children; Part III would contain paternity and parentage statutes for quasi-marital children; and Part IV would deal with surrogacy.

This proposal is strongly influenced by California's experience under its statutory scheme, which provides for a conclusive presumption of legitimacy.[191] Section 7540 of the California Family Code, which initially referred to the "presumption of legitimacy," now provides the following: "Except as provided in [s]ection 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[192]

The exceptions in section 7541 allow for determinations based on scientific testing during the first two years of the child's life. The procedures for these exceptions are not explained in detail in the California statutes, and the proposed Florida statutory revision contains more specific exceptions and procedures. If the Florida Legislature were to decline a no-exception presumption of legitimacy, then any exceptions would need to be described with greater specificity than those in California's statutes.[193]

The biggest advantage of relying upon the California statute is that its constitutionality was upheld in *Michael H. v. Gerald P.*[194] There, the U.S. Supreme Court held that the statute's conclusive presumption of fatherhood was actually a substantive rule of law

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191. *See* CAL. FAM. CODE § 7540 (West 1997).

192. *Id.*

193. *See* Hadek, *supra* note 50, at 82-82 (stating that California's exceptions have effectively "eaten up the rule"); William P. Hoffman, Jr., *Recent Developments—California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754, 761-65 (1968) (discussing the conflicting goals of nuclear family preservation and individual rights in relation to California's section 7540).

194. 491 U.S. 110 (1989) (upholding CAL. EVID. CODE § 621 (West 1984) (repealed 1994)).

supported by social policy concerns.[195] The statute was found constitutional under the rational relation test despite a due process challenge.[196] Likewise, the basic provision in the proposed Florida statute would be substantive. Except as provided in sections 742.302 through 742.305, a husband shall be the legal father and shall have all of the rights and responsibilities of a legal (natural) guardian, pursuant to section 744.301, *Florida Statutes*, for all children conceived by or born to his wife during the term of their marriage.[197]

The vagueness of "cohabiting" in the California statute is eliminated, and the issues of "cohabitation" are addressed in sections dealing with Type I and Type III quasi-marital children. Impotency and sterility are not listed as exceptions in the initial section of the proposal. The retention of these provisions in the California statute is questionable, especially in an era of surrogacy. Under the Florida proposal, however, a husband would be able to challenge his status as legal father for these reasons, subject to the limitations in sections 742.302 to 742.305.

The proposal expressly gives the husband the status of legal guardian by referring to him as the "legal father."[198] The author contemplates that Part I of chapter 742 would contain a definition of "legal father," which would define the term as the man who is the father for purposes of section 744.301, the natural guardian statute, and who is shown as legal father on the child's birth certificate. Thus, in a final version of section 742.301 of the proposal, it would be sufficient to simply refer to the husband as the legal father.

It is worth emphasizing that "legal father" is not a presumptive category. Unlike the current common law, this statute establishes a legal father for virtually every child born to a marriage, either at birth or shortly thereafter. Thus, the unpredictable doctrine of fatherhood by estoppel, which allows a man to become the legal father based on his actions over time, should have little, if any, application under this statutory proposal. This is true because the basic provision in Part I of the proposal will apply to both marital and quasi-marital children.

C. A Simpler Statute Based on Other Assumptions

Before discussing the exceptions and limitations created in sections 742.302 through 742.305 of the proposal, note that the basic

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195. *See id.* at 119-20.
196. *See id.* at 131.
197. *See infra* Appendix, § 742.301.
198. *See infra* Appendix, § 742.301. There are two exceptions to this rule. If a prenuptial or separation agreement exists, the husband is not automatically the legal father at the child's birth.

provision, section 742.301, could serve as the entire statute. The longer proposal is based on the assumption that such a rigid rule, always making the husband the legal father, would not necessarily be in the best interests of children and that the exceptions in sections 742.302 through 742.305 will not create undue litigation. In a society with a high rate of divorce and a significant number of quasi-marital children, the author accepts *Privette*'s basic premise—a child's best interests may sometimes warrant procedures to identify the best functional father, or at least a support father, when it is highly unlikely that the husband will perform these functions.[199] Unquestionably, this assumption adds considerable complexity to the statutory proposal.

If the Legislature were to conclude that a husband should always be the legal father of a child born during the marriage and coerce that man to support all children of the marriage, the statute could be far simpler. Given that there is merit in simplified laws, this option should be debated. However, in light of our difficulties in obtaining compliance with child support orders and the value of a truly functional father, a more complex proposal is presented.

As a middle ground, the Legislature could choose to provide no right for either the husband or wife to shift legal fatherhood for Type I and II children. This would eliminate the provisions in sections 742.302 and 742.304 of the draft but retain the right for permanently separated couples to identify the biological father. Also, the right of the biological father to become the legal father could be retained under section 742.305.[200]

D. Addressing Quasi-Marital Children

1. Type I Quasi-Marital Children

The issues raised by Type I children[201] are resolved under section 742.302 of the proposal.[202] The proposed statute defines these children as born within forty weeks of marriage.[203] This period, of course, is based on the standard term of human gestation. A different time span could be specified in the statute, but gestation seems to be the easiest period to use. The time span could be further limited. For example, one might wish to exempt premature children whose estimated date of conception was subsequent to the date of the marriage;

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199. *See* Brashier, *supra* note 12, at 134-36 (concluding that an irrebuttable presumption that the husband is the legal father is not always in the child's best interest).

200. *See infra* Appendix, § 742.305.

201. Type I children are conceived prior to marriage but born after marriage.

202. *See infra* Appendix, § 742.302.

203. *See infra* Appendix, § 742.302.

however, the confusion created and the resulting costs would outweigh the further benefit of this complexity.

Two statutory approaches are provided for Type I children: private agreement and litigation. If the marital couple is aware of the pregnancy prior to the marriage or if they simply wish to protect against this contingency, they may enter into a prenuptial agreement allowing for a future determination of paternity for any child born during the first forty weeks of the marriage.[204] The agreement would allow the parties to obtain scientific testing without any court order. Within ninety days of the child's birth, the couple would either need to file a stipulation of paternity or an action to determine paternity.[205] "Paternity" is used in the proposal to describe the procedures normally used for nonmarital children under Part II of chapter 742. If no action is taken, the husband automatically becomes the legal father on the ninety-first day.[206] Thus, even if he is not the biological father, he can become the legal father simply by taking no action. Under this default rule, only the mother is a legal guardian of the child during the first ninety days.[207]

If testing determines that the husband is not the biological father, the paternity action will declare that he is not the legal father.[208] As long as the couple lives together, the husband will have an obligation to support the child under *Daniel* and *Albert v. Albert*;[209] however, the mother will have the right to file a paternity action against another man to obtain support. Thus, this statute allows the couple to remain married and provide a family unit for the child, while also allowing pursuit of a child support claim against another man. In essence, the husband becomes the stepfather and the mother seeks support from the biological father as she would from a prior husband. Whether the biological father would be entitled to visitation or other rights would be matters resolved in the paternity action under the provisions of Part II of chapter 742, which would consider both paternity and parentage issues that arise by virtue of a declaration of paternity.[210]

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204. *See infra* Appendix, § 742.302(1).

205. *See infra* Appendix, § 742.302(1)(b).

206. *See infra* Appendix, § 742.302(1)(b).

207. *See infra* Appendix, § 742.302(1)(c).

208. The couple, however, may choose not to file the paternity action after receiving the genetic testing. The couple may, however, allow the marital father to become the legal father by stipulation or by taking no action.

209. 415 So. 2d 818 (Fla. 2d DCA 1982) (holding that a husband could be ordered to support a child regardless of whether the child is his natural child, adopted child, or whether the husband contracted to support the child).

210. This assumes that, unlike the existing statutes, Part II would have specific provisions dealing with support and visitation similar to the provisions in chapter 61, *Florida Statutes*.

If the couple does not enter into an agreement, the husband becomes the child's legal father at birth.[211] Either the husband or the wife may file an action to eliminate the husband's status as legal father within one year or to shift that status to another man within two years.[212]

The action to eliminate the husband's status as legal father requires proof that he is not the biological father and that he was either unaware of his wife's pregnancy at the time of their marriage or that he thought he was the child's biological father. Thus, under the proposed statute, Mr. Daniel would not have been allowed to file such an action because he knew about the pregnancy. Because Mr. Daniel consulted an attorney, he would have likely resolved this situation through a written agreement. The knowledge limitation on an action to eliminate the status of legal father essentially expands the existing theory of fatherhood by estoppel. If the groom knows about the pregnancy at the time of the marriage and does not arrange for a private written agreement, he is estopped from denying that he is the child's legal father.[213] He will have the option to shift legal father status to the biological father, but *not* to leave the child unsupported.

The statutory proposal retains the *Privette* requirement that actions under Part III (the proposed statute) be filed under oath. Requiring fact-specific, sworn pleadings should ensure that suits are filed in good faith. While the statute does not retain the concept of "good faith" discussed in *Privette*,[214] the time limitations and other restrictions of this statute are assumed to be sufficient to protect against bad faith filings.

The proposal requires a "greater weight of the evidence" burden of proof in litigation involving children born in the first few months of the marriage because a clear and convincing standard, as required by *Privette*, is not probably constitutionally essential in Type I cases.[215] Given that scientific testing can now exclude the possibility of biological fatherhood at very high probability levels, it may be simpler to rely upon a clear and convincing standard for all final hearings.

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211. *See infra* Appendix, § 742.302(1)(b).

212. *See infra* Appendix, § 742.302(2)(a). The action to shift status is identical to an action for Type II children and will not be discussed further in the context of a Type I child.

213. *See infra* Appendix, § 742.302(2)(b).

214. Department of HRS v. Privette, 617 So. 2d 305, 308 (Fla. 1993).

215. *See infra* Appendix, § 742.302(2)(b)(2). The clear and convincing standard in *Privette* is primarily a modernized expression of the strength of the presumption of legitimacy. When a full-term child is born within 40 weeks of the marriage, it is obvious that the child was not conceived within the marriage. No obvious reason exists as to why constitutional due process should compel a high burden of proof when selecting a legal father under these circumstances. *See supra* note 71 and accompanying text.

Keep in mind, however, that genetic testing results will not always be available from all relevant adults at the final hearing. The greater weight burden is preferable because it is the standard burden of proof in a typical paternity action. Justifying a higher burden of proof for Type I and Type III children, under this proposal, is difficult. If the right to retain one's legitimacy in *Privette* has any meaning after *Daniel*, the child's claim to parentage rights and the responsibilities that flow from a marital father and a family should be preserved and protected.

If the court determines that the husband may be relieved of his status as legal father, that change is effective on the date of the judgment.[216] The mother, therefore, becomes the sole guardian.[217] In the case of a written agreement, the wife is then free to pursue a paternity action against another man. Indeed, the proposal encourages the initial lawsuit to name the putative father as a party so that the child can have support from the biological father as soon as possible. Again, this should encourage the husband and wife to provide a family unit for the child, while increasing the chances that the biological father will at least provide economic, if not emotional, support.

If the husband objects to the elimination of his legal father status in an action filed by the wife, the statutory proposal allows him to remain the legal father unless his rights are terminated in a chapter 39 proceeding[218] or unless a transfer of rights to the biological father is an option that is in the best interests of the child.[219] This provision essentially recognizes that fatherhood by estoppel may affect the mother as well as the father. Without a prior written agreement, however, she should not be allowed to terminate the husband's status, as compared to shifting the status to the biological father.[220] In such circumstances, the statute should expressly provide for a guardian ad litem.

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216. *See infra* Appendix, § 742.302(2)(c)(1).

217. *See infra* Appendix, § 742.302(2)(c)(1). Note that no guardian ad litem is required in this action. If the husband is entitled to be relieved of the status of legal father without shifting that status to another man based upon specific factual findings, there is little or no function for a guardian ad litem in such an action.

218. *See* FLA. STAT. § 39.4611 (1997).

219. *See infra* Appendix, § 742.302(2)(c)(2). This refinement addresses another concern raised by Professor Burke. Given that either the husband or wife can seek fatherhood by estoppel, this provision would estop the wife from eliminating a viable functional father when no other man is available to fill that slot. It seems unlikely that a mother would make this request in many cases, but it could occur in the context of a divorce.

220. The proposal may contain an estoppel that is too rigid. Since the mother may not have known that she needed a prenuptial agreement if she was only a few days pregnant, it is possible that "unfit" is too strong and that "best interests" should be the test for both transfer and elimination of paternal rights in these cases.

Two procedural provisions warrant comment. First, the statute prohibits reference to scientific testing in all initial complaints filed to resolve disputes involving quasi-marital children.[221] This prohibition is included because, in some cases, the mother and the biological father secretly obtain genetic testing without the consent of a husband who wanted to remain the legal father. Although this restriction may be more important in cases involving Type II children, it is placed in all provisions permitting lawsuits.[222]

Second, the proposal permits constructive service of the husband or wife.[223] Chapter 48, *Florida Statutes*, would need to be modified to allow for the service described in this proposal. Constructive service allows a court to adjudge a child's best interest, even if a parent is unavailable for service.[224] The proposal, however, intentionally makes no provision for constructive service on a putative father.[225] As a practical matter, the parent with custody of the child will almost always need to be served and participate in this action.[226] If parties are constructively served, genetic testing will be difficult or impossible. Thus, although lack of personal service will not bar the action, it will present significant problems in meeting burdens of proof.

2. Type III Quasi-Marital Children

The issues raised by Type III children[227] are resolved under section 742.303 of the proposal.[228] Like the provisions for Type I children, these cases can be controlled by a private separation agreement or resolved in litigation.[229] The husband can eliminate his status as

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221. *See infra* Appendix, § 742.302(2)(b)(1). This provision addresses procedural issues and, therefore, would probably require adoption by the supreme court as a rule of procedure. *See* FLA. CONST. art. V, § 2(a).

222. As an alternative, it might be sensible for the Florida Legislature to prohibit genetic testing of a child without the consent of both legal parents, if both exist, in the absence of a court order. This would not regulate out-of-state testing. Recently, in *Lefler v. Lefler*, 24 Fla. L. Weekly D114, D115 (Fla. 5th DCA Dec. 30, 1998), a father, suspicious of the paternity of his ex-wife's child, had blood tests performed during visitation with the child. The testing was conducted without the knowledge or consent of the child's mother. *See id*.

223. *See infra* Appendix, § 742.302(2)(e).

224. *See* Rich v. Rich, 214 So. 2d 777, 779 (Fla. 4th DCA 1968) (holding that constructive service on a nonresident parent is adequate for purposes of due process with regards to trying custody issues).

225. *See id*. at 779 (noting that child custody is *in rem* and must be filed where the children are located); Drucker v. Fernandez, 288 So. 2d 283, 283 (Fla. 3d DCA 1974) (indicating that no constructive service is authorized in paternity—apparently due to statutory omission).

226. *See infra* Appendix, § 742.302(2)(e).

227. Type III children are conceived and born after a married couple has permanently separated.

228. *See infra* Appendix, § 742.303.

229. *See infra* Appendix, § 742.303(1).

legal father in some instances, or he can shift the status to the biological father under provisions comparable to those for a Type II child.

Type III children are defined in the proposed statute as children born after a permanent separation.[230] For purposes of the separation agreement, the proposal includes children born six months (180 days) after the execution of that agreement.[231] Arguably, the statute could also include children born at any time after the execution of the agreement, but concern may arise as to whether agreements signed shortly before the child's delivery are made under duress. By treating late term pregnancies as Type II children, some risks of abuse are therefore eliminated.

Separation agreements are already contemplated in the statutes regulating divorce.[232] The proposed separation agreement would allow testing to determine the paternity of any child born to a permanently separated couple.[233] Such an agreement might help avoid divorce between a couple that was experiencing difficulties but was not certain their differences were irreconcilable.

The effect of a separation agreement is not identical to that of the prenuptial agreement. As in the case of a prenuptial agreement, the husband is not the legal father at the time of the child's birth unless he is subsequently determined as such.[234] The husband cannot automatically become the legal father after six months because he may not even be aware of the child's existence during the first six months of its life. Instead, the statute creates a modest civil penalty for failing to comply with the agreement and indicates that such failure is evidence of "neglect," which could allow for a dependency proceeding.[235] Hopefully, these provisions would give the mother an adequate incentive to take the steps necessary to resolve this paternity issue shortly after the child's birth.

It should be noted that the failure of the mother to act in this period effectively transforms the child into a nonmarital child. She still may file a paternity action against her husband or any other putative father, but presumably, after the six-month period, the birth certificate would issue without naming any father.

As an alternative, the statute could provide that the husband be the legal father for any child born during the first forty weeks of the

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230. *See infra* Appendix, § 742.303.

231. *See infra* Appendix, § 742.303(1).

232. *See* FLA. STAT. § 61.075(6) (1997) (providing that "[t]he cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement").

233. *See infra* Appendix, § 742.303(1)(a).

234. *See infra* Appendix, § 742.303(1)(c).

235. *See infra* Appendix, § 742.303(1)(b).

agreement, but not for children born thereafter. This would more closely align with the treatment of Type I children. One way or another, this statute would effectively resolve the legal father issue for many of these children in the first six months of their lives.

If no separation agreement exists, the husband or wife may file an action to terminate the husband's status as legal father.[236] Like a Type I action, an action to eliminate the status of legal father must be filed within one year of the child's birth, but an action to transfer the status to the biological father can be filed within two years.[237]

In such an action, the definition of "permanent separation" requires proof that the parties neither resided together nor engaged in intercourse for the thirty-day period prior to conception.[238] This period is admittedly somewhat arbitrary. It will be established by the testimony of the parties, which may not always be accurate. If the statute required a longer period of separation, fewer children would lose marital fathers as legal fathers and more children would be involved in *Privette* style cases to shift legal fathers. Thirty days has been proposed in this statute because it seems to be the shortest workable period.

The sworn allegations of the lawsuit and the procedures in the Type III lawsuit are similar to those for Type I children. There is no "knowledge of pregnancy" issue in a Type III case because concepts of fatherhood by estoppel seem inapplicable in a Type III case. Instead, the parties must prove separation to remove themselves from the Type II scenario.[239]

If the court determines that the husband may be relieved of his legal father status, the date of the judgment ends the husband's period as legal father and the mother becomes the sole guardian.[240] The mother is then free to file a paternity action against any other man. As with Type I proceedings, a guardian ad litem would serve no useful function in this lawsuit.

This action also allows for constructive service of process.[241] *Privette* demonstrates that constructive service on the husband in Type III cases may be necessary because his whereabouts may be completely unknown after a few years of separation.[242] Again, constructive service may lead to incomplete genetic testing.

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236. *See infra* Appendix, § 742.303(2).
237. *See infra* Appendix, § 742.303(2)(a).
238. *See infra* Appendix, § 742.303(2)(b).
239. *See infra* Appendix, § 742.303(2)(b).
240. *See infra* Appendix, § 742.303(2)(c).
241. *See infra* Appendix, § 742.303(2)(e).
242. *See* Department of HRS v. Privette, 617 So. 2d 305, 308 n.4 (Fla. 1993).

3. *Type II Quasi-Marital Children*

Issues involving Type II children,[243] the children born into an established, functioning marriage, are resolved under section 742.304 of the proposed statute.[244] Unlike the provisions for Type I and Type III children, section 742.304 makes no provision for private agreements and provides no option to eliminate a legal father for these children.[245] For these children, the statute honors the old presumption of legitimacy to the extent that the marital father will be the legal father unless it is in a child's best interests to shift that status to the biological father. No valid policy reason exists to create circumstances allowing married couples to eliminate a legal father for such a child through litigation even if the couple is in the midst of a divorce.[246] Such an option would encourage divorce and breakup of family units with little to be gained in the process.[247]

Section 742.304 largely codifies the procedures suggested in *Privette*[248] by allowing an action to be filed to shift the status of legal father from the marital father to the biological father. Normally, an action must be filed by the husband or wife within two years of the child's birth.[249] If the putative biological father is a willing participant, the action may be filed within five years.[250]

A guardian ad litem would serve a useful purpose in these proceedings. The statute does not automatically mandate a guardian, but requires the court to explain the reasons for dispensing with the services of a guardian.[251] To control the activities of the guardian, the

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243. Type II children are conceived when the mother is lawfully married and living with the husband.

244. *See infra* Appendix, § 742.304.

245. *See infra* Appendix, § 742.304.

246. This proposal assumes that these statutory provisions would be the *only* method to resolve paternity and parentage. Such an action might be consolidated with a divorce, but these issues would not be resolved within a dissolution proceeding. If probate statutes allowed for inheritance only from a legal father, there would be little, if any, need to resolve paternity issues in probate proceedings.

247. Admittedly, one can imagine cases that encourage such an elimination of status for the legal father of a Type II quasi-marital child. For example, if the wife delivered a child with severe birth defects and the child was obviously not the marital father's, the resulting medical bills could bankrupt the marital father. Some might argue that the marital father should be able to free himself of such a child, but such hard cases will likely be rare. Any exception would be hard to tailor so that it only applied in such extreme cases.

248. *See* Department of HRS v. Privette, 617 So. 2d 305, 308 (Fla. 1993) (requiring a showing of good faith and that the child's best interest will not be adversely affected before allowing someone to challenge the presumption of legitimacy of a child born in wedlock).

249. *See infra* Appendix, § 742.304(1).

250. Actions after five years would be possible if the mother married the biological father. Then, even if the child were a teenager, the marital father could permit a voluntary termination of his parental rights, and the biological father could adopt the child in a stepparent adoption. *See* FLA. STAT. § 63.042 (1997).

251. *See infra* Appendix, § 742.304(2)(b).

statute also states that the order appointing the guardian shall specify the scope and method of the guardian's investigation.[252] Thus, the guardian may be limited to standard discovery procedures or instructed to perform or not to perform certain interviews. This will protect privacy and also help to make the process more cost effective.

The statutory criteria for shifting fathers varies from *Privette* in two respects. First, rather than following *Privette* by alleging that a blood test is warranted because it would serve the child's best interests, even if it proved "illegitimacy,"[253] the statute requires a determination that the child's best interests would be served by a transfer of the status of legal father from the marital father to the biological father.[254] This change is largely, if not entirely, semantic and avoids the "stigma" approach encouraged by *Privette*.[255]

Second, the statute contains six factors and a seventh catch-all factor, which the trial court must consider in making a decision regarding a child's best interest.[256] These factors are borrowed, to a large extent, from the statutes regulating custody decisions in divorce.[257] Section 742.304(3)(a) emphasizes the family unit, a method incorporating the basic policy underlying the presumption of legitimacy. Section 742.304(3)(b) emphasizes support to incorporate the policies underlying the law of paternity.

The proposed statute expressly allows the court to emphasize economic support issues if neither father is likely to provide emotional support as a functional father within the family unit. This provision essentially overrules the line of cases that resulted in the *Daniel* decision.[258] If a couple with a quasi-marital child more than one year old is divorced or divorcing, this statute does not allow the marital father to evade a support obligation. This will discourage divorce as a means to avoid support for quasi-marital children.[259]

As mentioned earlier, the proposed statute uses a lower burden of proof for the paternity issue than for the transfer of parentage issue. As written, this proposal is still cumbersome, largely because it attempts to parallel the procedure announced in *Privette*. With all due respect to the supreme court, it is doubtful whether the clear and convincing standard of proof is constitutionally necessary or even

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252. *See infra* Appendix, § 742.304(2)(b).
253. *See Privette*, 617 So. 2d at 308.
254. *See infra* Appendix, § 742.304(2)(c).
255. *See Privette*, 617 So. 2d at 308.
256. *See infra* Appendix, § 742.304(3)(a)(1)-(7).
257. *See* FLA. STAT. § 61.13(3) (1997).
258. *See* Daniel v. Daniel, 695 So. 2d 1253 (Fla. 1997).
259. Logically, the marital father who is left supporting the child after a divorce might have some right of contribution from the biological father. Such a right, however, would be difficult to implement in the real world.

warranted in the discovery phase.[260] This discovery should be permitted based on a lesser burden of proof and persuasion, especially given the need for accurate genetic information for medical purposes. Thus, a statute in which the decision to obtain scientific testing was made by the greater weight of the evidence is preferable. The proposal places the two questionable uses of the clear and convincing standard in bracketed italics.[261] Maintaining the clear and convincing standard for the final shift of legal fatherhood is probably warranted and easily implemented.

This statute further permits the court to grant the marital father visitation if the status of legal father is shifted to the biological father or to grant similar visitation to the biological father if no shift occurs.[262] Visitation only occurs if it is in the child's best interests.[263] These provisions may be invoked rarely, but children have received similar visitation rights in other states.[264] Temporary visitation as a method to slowly transfer the child from one man to the other may occasionally be useful, especially when custody of a child is shifted from a marital father to a biological father. The Florida Legislature may wish to emphasize that such visitation is more the exception than the rule.

Finally, if the marital father retains legal father status at the end of the lawsuit, the statute gives the trial court discretion to retain jurisdiction to shift legal father status to the putative, biological father should the marital father die or become totally disabled.[265] Therefore, the child would have a "backup" father, as a variety of paternal life and disability insurance. It makes little sense for a child to be at risk or for taxpayers to support a child when a biological father is available to provide some support. This provision may be rarely used, but it would occasionally have value.

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260. *See supra* note 71.

261. *See infra* Appendix, § 742.304(2)(c).

262. *See infra* Appendix, § 742.304(4)(a).

263. *See infra* Appendix, § 742.304(4)(b).

264. *See, e.g.*, *In re* Marriage of Dureno, 854 P.2d 1352, 1355 (Colo. Ct. App. 1992) (visitation of a marital father of "Type II quasi-marital child"); Francis v. Francis, 654 N.E.2d 4, 7 (Ind. Ct. App. 1995) (visitation to a marital father of "Type II quasi-marital children"); Finnerty v. Boyett, 469 So. 2d 287, 296-97 (La. Ct. App. 1985) (possible visitation for a biological father of a "Type I quasi-marital child" despite a stable marriage); Seger v. Seger, 547 A.2d 424, 427 (Pa. Super. Ct. 1988) (visitation of a marital father of a "Type I quasi-marital child").

265. *See infra* Appendix, § 742.304(5)(c).

E. Biological Fathers

Putative biological fathers have no right of action under sections 742.302 to 742.304 of this proposal.[266] Their rights are separately provided in section 742.305 because their actions create additional issues.[267] Although most of the provisions are similar to a section 742.304 action, including the best interest analysis, there are several significant differences.

First, to avoid frivolous or spiteful suits, the putative father must obligate himself to child support prior to litigating the paternity and parentage issues.[268] Any man who really wants to be the legal father of a child ought to be willing to pay support for the child from the initiation of his lawsuit. The author suspects that this provision would cause these lawsuits to be relatively rare.

The statute of limitations uses a one-year period, rather than a two-year period, as the basic provision. It also establishes a two-year period of repose in the event that the petitioner did not or could not have known of the child's birth within the first year.[269] If the biological father discovers his claim between the first and second year, he must bring the action within ninety days of discovery. Arguably, it would be simpler to use a two-year limitations period. Given the rapidity with which infants bond with parents in a family setting, an action by an outsider should be filed in a manner that would allow the issues to be resolved, rather than initiated, within two years.

Second, a couple in a stable marriage can block such a lawsuit when it is filed concerning a Type II quasi-marital child.[270] This is consistent with existing law.[271] This provision does not apply to Type I or III children. In a Type III situation, a separation exists and the couple cannot claim to have a stable family unit. If they have recon-

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266. The only exception to this statement is the right of the biological father, in conjunction with the husband and wife, to file a section 742.304 action involving "Type II quasi-marital children," after the statute of limitations would normally expire. *See infra* Appendix, § 742.304 (1).

267. *See infra* Appendix, § 742.305.

268. *See infra* Appendix, § 742.305(2).

269. *See infra* Appendix, § 742.305(1).

270. *See infra* Appendix, § 742.305(4).

271. *See* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (finding, at the time of decision, no state cases awarding substantive parental rights to a biological father of a child born into wedlock); G.F.C. v. S.G., 686 So. 2d 1382, 1386 (Fla. 5th DCA 1997) (reading *Privette* to hold that the goal of paternity determination is to protect a child's legitimacy and the legal father's relationship with his child); K.S. v. R.S., 657 N.E.2d 157, 161 (Ind. Ct. App. 1995), *vacated*, 669 N.E.2d 399 (Ind. 1996) (asserting that no cause of action exists to determine paternity by a putative father when the mother conceived the child while married); Girard v. Wagenmaker, 470 N.W.2d 372, 380-81 (Mich. 1991) (holding that a putative father does not have standing to bring an action to determine the paternity of a child in wedlock).

ciled, the statute still allows the marital father to remain the legal father;[272] that outcome is simply not compulsory.

In a Type I situation, the biological father may have attempted unsuccessfully to marry the mother. The marriage to the marital father may have occurred to block his claim. This proposal does not allow a marriage to block the putative biological father's claim to a Type I child if he can prove that he offered to marry the mother or that she knowingly concealed the pregnancy from him. Again, the biological father may not prevail on the best interests test, but the scientific testing will take place. If the marital father prevails in such a lawsuit, this Type I scenario could be one in which visitation rights for a biological father might occasionally make sense.[273]

Finally, there is a risk that the husband and wife will not object to the biological father's claim when an objection would be in the child's best interests. This proposal requires service on the custodial parent and it gives the trial court discretion to treat the petition as contested even when it is not.[274] A default judgment will not be possible under this proposal.

The proposed statute is complex, but no more complex than dissolution statutes. The complexity is necessary because there are no simple solutions to these parental rights issues. The proposal is reasonably designed to give the maximum number of quasi-marital children an adequate home and a meaningful right to support. Thus, only in rare cases, when it is probably more sensible to treat the child as a nonmarital child, the proposal will relieve the marital father of his obligations as legal father without locating the biological father as a substitute. Instead, the proposal provides a workable forum for *Privette*-style transfers and gives a forum to a biological father, if he is willing to establish that his claim is factually accurate and his interests are sufficiently sincere to be backed by a voluntary support obligation at the inception of the lawsuit. This structure maintains the longstanding policies behind the presumption of legitimacy and paternity, while offering a new approach compatible with genetic testing.

VII. CONCLUSION

The children of our marriages are no longer adequately served by a legal system that gives them only presumptive fathers. These children need legal fathers with clearly designated rights and responsi-

272. *See infra* Appendix, § 742.305(4)(b).
273. *See infra* Appendix, § 742.305(7)(b).
274. *See infra* Appendix, § 742.305(3).

bilities. These legal fathers should be established at birth or as soon thereafter as is feasible.

We should recognize that the presumption of legitimacy primarily protected a child's need for a family unit. That need has little to do with biology. The judges who created this presumption never expected that medical science would undermine this presumption to protect families. Now that the presumption can be readily overcome, we must reestablish laws that give children families.

The common law has failed us in our effort to protect the children of families—especially quasi-marital children. Courts are now issuing result-oriented decisions that cannot be easily reconciled because the common law gives judges no fair alternatives. We need to reassess our social policies concerning children and families, using neutral terminology, to establish contemporary laws that maximize the number of children with functional family units and also maximize the number of children receiving financial support from some "father" when no family unit exists. A child losing his or her only legal father in a court proceeding should be the rare exception. A court should occasionally be allowed to shift the mantle of legal father from one man to another, but only with reliance on clear standards promoting the best interests of the child. This task is too complex for evolution by the case method of the common law and must be performed by the legislature.

APPENDIX

This proposal assumes that chapter 742 would be divided into three or four parts. Part I would contain definitions, general policy statements, and statutory provisions common to all parts, such as venue and the admissibility of scientific or genetic testing. Part II would be entitled "Determination of Parentage for Children Born Out of Wedlock" or "Determination of Parentage for Nonmarital Children." It would contain provisions comparable to the current law of paternity for nonmarital children, but it would clearly provide for a paternity determination as a matter of biology. This would be followed by a determination of child support obligations and visitation rights as a matter of parentage. Although the proposal refers to children born in wedlock, Part III would resolve issues involving quasi-marital children. Significantly, this part also establishes a statutory "legal father" for all marital children. If a Part IV were to be implemented, it should contain the current statutes on surrogacy.

This proposal makes a few assumptions. It assumes that the legislature would establish a few guardians ad litem as salaried employees in each circuit, and that chapter 49, concerning constructive service of process, would be amended as necessary.[275] Finally, the provisions governing birth certificates in chapter 382 would probably need to be slightly modified to accommodate this proposal.

CHAPTER 742: PROPOSED PART III

DETERMINATION OF PARENTAGE FOR CHILDREN BORN IN WEDLOCK

742.301 Husband as legal father.—Except as provided in ss. 742.302-.305, a husband shall be the legal father, and he shall have all of the rights and responsibilities of a legal (natural) guardian pursuant to s. 744.301, for all children conceived by or born to his wife during the term of their marriage.

742.302 Children born within 40 weeks from the date of marriage.—A husband's rights and responsibilities as legal father for a child born within 40 weeks from the date of the marriage may be eliminated without the establishment of another legal father under the following circumstances:

(1) Prior to marriage, the couple may enter into a written agreement providing that the husband will not be the legal father of any child born during the first forty weeks of the marriage unless he is

275. *See* FLA. STAT. § 49.011 (1997).

later determined to be the biological father under the procedures used to determine paternity of a nonmarital child.

(a) By signing such an agreement, the parties agree to permit scientific testing to be performed to determine paternity without the need of a petition pursuant to this chapter.

(b) Within 90 days of the child's date of birth, the husband and wife shall either file a stipulation of paternity pursuant to s. 742.10(1), or the husband shall file an action to determine paternity under the provisions of Part II of this section. Failure to file either the stipulation or the paternity action within ninety days shall act as a determination that the husband is the child's legal father.

(c) Unless and until the husband is determined to be the legal father, the mother will be the sole legal (natural) guardian pursuant to s. 744.301.

(2) Under the provisions of this subsection, if no written agreement is signed prior to the marriage, the husband or wife may file a petition to determine paternity and establish parentage of any child born during the first forty weeks of the marriage.

(a) The petition must be filed within one year of the child's birth. Both the husband and wife must be parties to the action, and the petition may include a putative biological father as a party. An action which is untimely under this section, but would be timely under s. 742.304, may be litigated pursuant to that section.

(b) The petition must allege under oath a reasonable factual basis to support the petitioner's claim that the husband is not the biological father of the child and that he either was unaware of his wife's pregnancy on the date of the marriage, or that he reasonably believed he was the biological father at the time of marriage.

1. The petition shall not allege that scientific testing has been performed or allege the results of such testing unless the tests were performed with the knowledge and consent of both the husband and wife.

2. If the court determines by the greater weight of the evidence that the sworn allegations, if true, would be sufficient to relieve the husband of his rights and responsibilities as legal father, it shall order scientific testing and determine whether the husband is the biological father. If the putative biological father is a party to the action, the court may order scientific testing of this party at the same time as the husband, wife, and child. The testing of the putative biological father may be delayed if one of the parties requests that his testing be delayed.

(c) If the court determines that the husband is not the biological father and that he either was unaware of his wife's pregnancy on the date of the marriage or that he reasonably believed he was the biological father at the time of marriage, the court:

1. Shall enter an order, on the husband's motion, relieving the husband of his rights and responsibilities as legal father. As a result of this order, the mother will be the sole legal (natural) guardian pursuant to section 744.301. If the putative biological father is a party to the action, the court may then proceed to determine paternity under the procedures of Part II of this chapter; or,

2. Shall enter an order, on the wife's motion, unless the husband objects, relieving the husband of his rights and responsibilities as legal father. If the husband objects, the court may not relieve the husband of his status as legal father unless his rights could be terminated under the grounds specified in s. 39.464, but the court may transfer that status to the biological father under the procedures of s. 742.304.

(d) If the court determines that the husband is not the biological father and that he was either aware of his wife's pregnancy on the date of the marriage or that he had no reasonable belief that he was the biological father at the time of the marriage, the court shall not relieve the husband of his status as legal father. However, the court may transfer the status of legal father to the biological father under the procedures of s. 742.304.

(e) Either the husband or wife may be served by constructive service of process for an action under this section, but personal jurisdiction over the custodial parent must be obtained by service under s. 48.031.

742.303 Children born after a permanent separation.—A husband's rights and responsibilities as legal father for a child conceived or born after a permanent separation, but prior to a judgment dissolving the marriage, may be eliminated without the establishment of another legal father under the following circumstances:

(1) If the husband and wife enter into a valid separation agreement, it may provide that the husband will not be the legal father of any child born more than 180 days after the date of the separation agreement unless he is later determined to be the biological father under the procedures used to determine paternity of a nonmarital child.

(a) By signing such an agreement, the parties agree to permit scientific testing to determine paternity without the need of a petition pursuant to this chapter. They further agree to provide each other with an adequate mailing address at all times during the term of the agreement.

(b) Within six months of the child's date of birth, the husband and wife shall either file a stipulation of paternity pursuant to s. 742.10(1), or either party shall file an action to determine paternity under the provisions of Part II. Failure to file either the stipulation

or the paternity action within six months shall be evidence of neglect, as defined in s. 39.01(36). Failure to act under this section, shall not prejudice any party's right to file a subsequent action to determine paternity pursuant to s. 742.302, but willful failure to comply with s. 742.303(1)(a) shall subject a party to a civil penalty not exceeding $1000 in any subsequent paternity proceeding.

(c) By virtue of such an agreement, unless and until the husband is determined to be the legal father, the mother is the sole legal (natural) guardian pursuant to s. 744.301.

(2) If no valid separation agreement is signed, the husband or wife may file a petition to determine paternity and establish parentage of any child born more than forty weeks after a permanent separation.

(a) The petition must be filed within 1 year of the child's birth. Both the husband and wife must be parties to the action, and the petition may include a putative biological father as a party. An action which is untimely under this section, but would be timely under s. 742.304, may be litigated pursuant to that section.

(b) The petition must be under oath and must allege a reasonable factual basis to support the petitioner's claim that the husband is not the biological father and that the parties had permanently separated prior to the child's conception. Permanent separation shall require proof that the parties had not resided together and had not engaged in sexual intercourse within 30 days of the estimated date of the child's conception.

1. The petition shall not allege that scientific testing has been performed or allege the results of such testing unless the tests were performed with the knowledge and consent of both the husband and wife.

2. If the court determines by the greater weight of the evidence that the sworn allegations, if true, would be sufficient to relieve the husband of his rights and responsibilities as legal father, it shall order scientific testing and determine whether the husband is the biological father. If the putative biological father is a party to the action, the court may order scientific testing of this party at the same time as the husband, wife, and child. The testing of the putative biological father may be delayed if one of the parties requests that his testing be delayed.

(c) If the court determines by the greater weight of the evidence that the husband is not the biological father and that the couple had permanently separated, the court shall enter an order relieving the husband of his rights and responsibilities as legal father, and the mother is thereafter the sole legal (natural) guardian pursuant to section 744.301. If the putative biological father is a party to the ac-

tion, the court may proceed to determine paternity under the procedures of Part II.

(d) If the court determines by the greater weight of the evidence that the husband is not the biological father and that the couple was not permanently separated at the time of conception, the court shall not relieve the husband of his status as legal father but may transfer that status to the biological father under the procedures of s. 742.304.

(e) The husband or wife may be served by constructive service of process for an action under this section, but personal jurisdiction over the custodial parent must be obtained by service under s. 48.031.

742.304 Children born more than 40 weeks from the date of marriage but prior to a permanent separation.—A husband's rights and responsibilities as legal father for a child born more than 40 weeks from the date of the marriage and prior to a permanent separation may not be eliminated except in a circuit court action which declares the biological father to be the child's legal father. The husband or wife may file a petition to determine paternity and establish parentage of any such child only if the petition requests that a putative biological father be declared the child's legal father.

(1) The petition must be filed within two years of the child's birth unless the husband, wife, and putative biological father all sign the petition, in which case it may be filed within five years of the child's birth.

(2) The petition must allege under oath a reasonable factual basis to support the petitioner's claim that the husband is not and that the putative biological father is the biological father, and that the best interests of the child would be served by transferring the status of legal father to the biological father. The petition must name the putative biological father as a respondent.

(a) The petition shall not allege that scientific testing has been performed or allege the results of such testing unless the tests were performed with the knowledge and consent of both the husband and wife.

(b) Prior to any scientific testing, the court shall appoint a guardian ad litem to represent the child, unless it enters an order stating specific reasons why a guardian is unnecessary. The scope and method of the guardian's investigation shall be specified in the order of appointment and the guardian shall have immunity pursuant to s. 61.405.

(c) If the court determines by the greater weight of the evidence that the sworn allegations of paternity are accurate, and [*by clear and convincing evidence*] that the best interests of the child would be

served by transferring the status of legal father to the putative biological father, it shall order scientific testing of the husband, wife, child, and putative biological father and determine the issue of paternity. The testing of the putative biological father may be delayed if one of the parties requests that his testing be delayed.

(3) If the court determines by the greater weight of the evidence that the putative biological father is the child's biological father, it shall then determine by clear and convincing evidence whether the child's best interests would be served by transferring the status of legal father to the biological father.

(a) In determining whether the child's best interests would be served by shifting the status of legal father to the biological father, the court shall consider the following factors comparing the benefit and detriment of selecting one man or the other as legal father:

1. The permanence and stability of the child's family unit, including the length of time the child has lived in a satisfactory environment and the desirability of maintaining continuity or creating stability;

2. The capacity and disposition of each man to provide the child either with statutory child support or with food, clothing, medical care or other remedial care recognized and permitted under the law of this state in lieu of medical care, and other material needs;

3. The love, affection, and other emotional ties existing between the child and each man;

4. The moral fitness of each man;

5. The mental and physical health of each man;

6. The home, school, and community record of the child; and

7. Any other fact considered by the court to be relevant.

(b) If it does not appear probable that either man will consistently participate as an active member of the child's family, either by residency in the home or by visitation, then the best interests analysis may place great emphasis upon the financial needs of the child and the ability of each man to provide adequate and consistent financial support.

(4) If the court determines that the husband shall be relieved of his status as legal father:

(a) It shall enter an order requiring the husband's name to be removed from the birth certificate, and the biological father's name to be substituted therein; and, unless not required by the circumstances, the court shall enter an order providing for a support obligation and visitation pursuant to the provisions of Part II.

(b) If such visitation is in the best interests of the child, the court may authorize that the husband receive temporary or permanent visitation rights.

(5) If the court determines that the husband shall remain as the legal father:

(a) It shall enter an order providing for a support obligation and visitation pursuant to the provisions of Part II, if required by the circumstances.

(b) It may authorize that the biological father receive temporary or permanent visitation rights, if such visitation is in the best interests of the child.

(c) It may reserve jurisdiction to enter an order shifting the status of legal father to the biological father, only in the event that the husband dies or becomes totally disabled prior to the child's majority and the child is in need of support.

(6) Either the husband or wife may be served by constructive service of process for an action under this section, but personal jurisdiction over the custodial parent must be obtained by service under s. 48.031. A putative biological father may not be served by constructive notice, and scientific testing may not be ordered until this party has been served and given an opportunity to respond.

742.305 Biological father's rights to petition to become legal father.—Any man who alleges under oath that he is the biological father may file a petition to determine paternity and establish parentage of any child conceived or born during the mother's marriage to another man.

(1) The petition must be filed either within one year of the child's birth, or within 90 days of when the petitioner knew or should have known that the child had been born, whichever period is longer. In no case shall a petition be filed more than two years from the child's birth.

(2) The petitioner must allege under oath a reasonable factual basis to support his claim that he is the biological father of the child. The petitioner must allege that he is willing and fit to assume all of the rights and responsibilities of a legal father. The petition shall be filed with a financial affidavit sufficient to permit the entry of a temporary child support order.

(a) If the court determines that the sworn allegations, if true, would be sufficient to declare the petitioner the child's biological father, the court shall issue summons. However, the court shall not resolve the issue of paternity or permit the petitioner to engage in any discovery until a temporary child support order is entered and the first month's payment has been paid to the depository as defined in s. 61.046(3). Child support paid under this subsection shall not be refunded in the event that the petitioner fails to establish that he is the biological father unless the husband and wife raise the defense contained in s. 742.305.

(b) The petition must name both the husband and wife as respondents and shall be dismissed unless the court obtains personal jurisdiction over at least one party who is a custodial parent of the child by service under s. 48.031.

(3) If neither the husband nor wife contests the petition, the court shall conduct a hearing to determine whether there is any reason that the court should treat the petition as contested. Unless the court decides to treat the petition as contested, it shall enter an order requiring scientific testing and shall proceed to determine whether the petitioner is the child's biological father.

(4) If either the husband or wife contests the petition or the court determines that the petition should be treated as contested, the court shall determine by the greater weight of the evidence whether the sworn allegations of paternity are accurate, and [*by clear and convincing evidence*] whether the best interests of the child would be served by transferring the status of legal father to the putative biological father. If so, it shall order scientific testing of the husband, wife, child, and putative biological father and determine the issue of paternity. At any party's request, the testing of the husband shall be delayed until the results of the initial tests of the other parties have been reviewed. If the court determines that the petitioner is not the biological father, no testing of the husband shall be required.

(a) Prior to this determination, the court shall appoint a guardian ad litem to represent the child unless it enters an order stating specific reasons why a guardian is unnecessary. The scope and method of the guardian's investigation shall be specified in the order of appointment and the guardian shall have immunity pursuant to s. 61.405.

(b) For any child born more than 40 weeks after the date of the marriage and prior to a permanent separation, proof by the greater weight of the evidence that the husband and wife have an adequate family relationship, no present intention to divorce, and a desire to raise the child as their own shall be sufficient to prevent scientific testing and to require the dismissal of the action.

(c) For any child born within 40 weeks of the date of the marriage, proof by clear and convincing evidence that the petitioner offered to marry the wife prior to the marriage to the husband or that she knowingly concealed the pregnancy from him shall be sufficient to authorize scientific testing and a determination of whether the petitioner is the biological father.

(5) If the court determines by the greater weight of the evidence that the petitioner is the child's biological father, it shall determine by clear and convincing evidence whether the child's best interests would be served by transferring the status of legal father to the bio-

logical father using the same procedures and factors as prescribed in 742.304(c).

(6) If the court determines that the husband shall be relieved of his status as legal father:

(a) It shall enter an order requiring the husband's name to be removed from the birth certificate and the biological father's name to be substituted therein; and, unless not required by the circumstances, the court shall enter an order providing for a support obligation and visitation pursuant to the provisions of Part II.

(b) It may authorize that the husband receive temporary or permanent visitation rights, if such visitation is in the best interests of the child.

(7) If the court determines that the husband shall remain as the legal father:

(a) It shall enter an order providing for a support obligation and visitation pursuant to the provisions of Part II, if required by the circumstances.

(b) It may authorize that the biological father receive temporary or permanent visitation rights, if such visitation is in the best interests of the child.

(c) It may reserve jurisdiction to enter an order shifting the status of legal father to the biological father, but the court may do so only in the event that the husband dies or becomes totally disabled prior to the child's majority and the child is in need of support.

THE CHANGED (AND CHANGING?) UNIFORM COMMERCIAL CODE*

LARRY T. GARVIN**

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* Adapted, with apologies, from the excellent ALI-ABA series. *See, e.g.*, THE EMERGED AND EMERGING NEW UNIFORM COMMERCIAL CODE 283 (ALI-ABA Course of Study, Dec. 9-11, 1993).

** Associate Professor, Florida State University College of Law; Visiting Associate Professor, Washington University School of Law. B.A., B.S., Michigan State University; M.S., University of Michigan; J.D., Yale Law School. My thanks to the tireless librarians at Florida State and Washington Universities, who unaccountably are still speaking to me. I should note that I am an Observer to the Uniform Commercial Code Article 2 Drafting Committee and a member of the Article 9 Study Committee of the Florida Bar, though nothing here should be taken to reflect anyone's views other than mine.

I. INTRODUCTION

The Uniform Commercial Code of today is not the Uniform Commercial Code of our youth, or, in any event, of those halcyon days before law school. By now, almost every article has been revised at least once, and the last holdouts—Articles 1 and 2—are even now being changed, and will reach final form in a year or so.[1] Indeed, we even have two new articles, covering leases of personalty and electronic funds transfers, and a new article on licensing may come forth in 2000.[2]

The last decade has proven especially active. Since 1990, most of the Code has been revised or written anew, including those parts now under change. State legislatures have been busy keeping up with the onslaught of revised articles, new articles, and conforming amendments; law professors have come out with many profitable new editions of casebooks; practitioners have attended countless slumbrous CLE sessions in which the new rules were more or less explained. If only through revision, commercial law is a growth industry.

Florida has taken part in this rather narcotic revolution, enacting, sooner or later, the revisions that the indefatigable National Conference of Commissioners on Uniform State Laws (NCCUSL) fling forth.[3] Still, Florida, whether a leader or a laggard, has retained its taste for uniformity and eventually has always rejoined the parade, with only occasional dirty glances from states that have marched along earlier.

The Florida Legislature's most recent foray into the U.C.C. was last session's enactment of two revisions: those of Article 2A, governing leases of personal property, and 8, governing the transfer of investment securities.[4] This foray provides the excuse, such as it is, for this

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1. Article 7, on warehouse receipts and bills of lading, will not be revised in the short run. An ABA task force recently examined Article 7, concluding that no substantial overhaul was in order. In addition, the task force thought changes in the corresponding federal statutes perhaps desirable, but also perhaps infeasible. Finally, there were uncertainties as to the path electronic commerce might take and thus whether revision was yet appropriate. Accordingly, the Permanent Editorial Board of the U.C.C. decided not to recommend revision of Article 7 at present. *See* Fred H. Miller, *Et Sic Ulterius—V*, UCC BULL., Feb. 1998, at 1, 7.

2. *See infra* Part IV.C.

3. Usually later. For the most recent set of revisions, for instance, Florida was the next-to-last state to operate under the old version of Article 2A, and one of only six to operate under the old Article 8. *See* Miller, *supra* note 1, at 3-4.

4. *See* Act effective Oct. 1, 1999, ch. 98-11, 1998 Fla. Laws 105 (codified at FLA. STAT. chs. 678, 680 (Supp. 1998)). Governor Chiles, presumably preferring not to take a public stand on so fraught an issue, allowed the bill to become law without his signature. *See id.* at 161.

In the enactment of revised Articles 2A and 8, the Legislature put in place one nonuniform amendment to Article 9. Section 9-105(1)(e) of the Official Text, defining deposit account, had excluded "an account evidenced by a certificate of deposit." U.C.C. § 9-105(1)(e)

Article (such as *it* is). Part II discusses Article 2A, while Part III discusses Article 8. These two parts explain how each revision changes the law in its field, noting both the improvements and the possible pitfalls of the revisions and, in an exercise of the usual professorial prerogative, showing how much better each would have been if only someone had asked me first.

In addition, Parts II and III will discuss briefly how each revision came about. Each exemplifies a sort of statutory pathology, whether of NCCUSL, the several states, or some other force. One wonders, I suppose, about an Article that needed significant revision almost within minutes of its proposal to the states, or of another which boldly charted a course that the world blithely ignored. From these one may draw morals about future attempts at statutory development.

Finally, Part IV will canvass briefly the work ahead. Despite its recent spate of enactments, Florida still has not enacted revised Article 5, on letters of credit, which was proposed to the states in 1995 and which has been adopted in thirty-two.[5] In addition, three more articles are on the way: revised Article 9, governing secured transactions, which was approved by NCCUSL and the American Law Institute (ALI) in 1998 and which has just been put in final form; revised Article 2, on sales of goods, which should be ready for approval in 1999 and proposal in 2000; and new Article 2B on licenses, which may be ready in 2000 or 2001. This last part will contain a few general assessments

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(1995). The Florida amendment revised the definition to exclude "an account evidenced by a transferrable certificate of deposit that is an instrument within this article." FLA. STAT. § 679.105(1)(e) (Supp. 1998). The effect of this is to place nontransferable certificates of deposit potentially within the scope of deposit accounts, which are not governed by Article 9. *See* U.C.C. § 9-104(*l*) (1995). If a nontransferable certificate of deposit is not governed by Article 9, then a security interest in it can be perfected only under the common law rule of giving notice to the depository bank. *See, e.g.*, Bank of Winter Park v. Resolution Trust Corp., 633 So. 2d 53, 55 (Fla. 5th DCA 1994).

It is hard to see why this amendment was put in place. A certificate of deposit, even if nontransferable, may still be an instrument, a security interest in which can be perfected by possession under Article 9. *See* U.C.C. § 9-305 (1995). This conclusion was easier to reach until the recent revision of Article 3, adopted in Florida, which narrowed the definition of negotiable instrument to exclude nontransferable certificates of deposit. *See id.* § 3-102(a). Even under the revised version, though, a number of courts have held that nontransferable certificates of deposit are instruments under the broader definition in Article 9. *See, e.g.*, Craft Prods., Inc. v. Hartford Fire Ins. Co., 670 N.E.2d 959, 961 (Ind. Ct. App. 1996); Belke v. M&I First Nat'l Bank, 525 N.W.2d 737, 738 (Wis. Ct. App. 1994). Indeed, an earlier decision of the Florida Supreme Court, made when Florida still had old Article 3, held the very same thing. *See* Citizens Nat'l Bank v. Bornstein, 374 So. 2d 6, 9-10 (Fla. 1979). If the amendment was intended to remove nontransferable certificates of deposit from Article 9, then it fails at the job; a better way to have done so would have been to redefine "instrument" within Article 9 to exclude these as well. Still, the amendment seems harmless, especially because a new Article 9 is on the way and will likely be enacted in Florida in the next few years. *See infra* Part IV.B. If this amendment was the price of gaining the support of certain parts of the banking industry for these U.C.C. revisions, then it was well worth it.

5. *See, e.g.*, Miller, *supra* note 1, at 4. Thirty-two states had enacted Revised Article 5 as of early 1998; others will likely have enacted it by the time this Article goes to press.

and thoroughly unreliable predictions about the fate, deserved or not, of each. In addition, Part V will suggest some changes in both Florida's treatment of uniform legislation and the treatment of uniform legislation generally. Now on with the festivities.

II. ARTICLE 2A

A. Background

The U.C.C., and uniform law generally, has had rather a troubled relation with the law of personal property leasing. In the early days B.L. (Before Llewellyn), the field was left almost entirely to the common law of the several states (and, before *Erie*,[6] to the general federal common law as well). Llewellyn, generally something of an imperialist for his commercial code, left leasing alone. This is not to say that the U.C.C. had no effect on lease law; a good many courts chose to apply the principles of Article 2 by analogy.[7] Still, others did not, and few enough did that leasing law remained variant.[8]

This might not have been troubling if leasing of personalty had remained either inconsequential or fundamentally local. If the former, uniformity would hardly be worth the effort.[9] If the latter, then codification might be in order, but uniformity might not; a model statute, rather than a uniform statute, might be as far as one would want to go. Neither proved true. Personal property leasing has burgeoned over the last couple of decades. By 1987, when Article 2A was first proposed, almost 100 billion dollars in equipment was added through leasing.[10] The current estimates for 1998 are over 180 billion, in each case around thirty percent of total business investment in equip-

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6. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

7. *See, e.g.*, W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 99-100 (Fla. 1970); Redfern Meats, Inc. v. Hertz Corp., 215 S.E.2d 10, 15-17 (Ga. Ct. App. 1975); Glenn Dick Equip. Co. v. Galey Constr., Inc., 541 P.2d 1184, 1188-89 (Idaho 1975); *see also, e.g.*, Amelia H. Boss, *Panacea or Nightmare? Leases in Article 2*, 64 B.U. L. REV. 39 (1984); William D. Hawkland, *The Impact of the Uniform Commercial Code on Equipment Leasing*, 1974 U. ILL. L.F. 446; Daniel E. Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971). This application was more or less authorized in the comments to the statute, though rather coyly. *See* U.C.C. § 1-102 cmt. 1 (1995) (stating that courts "have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act . . . . Nothing in this Act stands in the way of the continuance of such action by the courts.").

8. *See, e.g.*, DeKalb Agresearch, Inc. v. Abbott, 391 F. Supp. 152, 153-54 (N.D. Ala. 1974); Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc., 389 S.E.2d 293, 294-95 (N.C. Ct. App. 1990); W.R. Weaver Co. v. Burroughs Corp., 580 S.W.2d 76, 81 (Tex. Civ. App. 1979).

9. This evidently is why leasing was not codified when the U.C.C. was first drafted. *See* WILLIAM H. LAWRENCE & JOHN H. MINAN, THE LAW OF PERSONAL PROPERTY LEASING ¶ 1.01 (1993).

10. *See* U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1992, at 52-1 (1992).

ment.[11] In addition, leasing is very much a multi-state affair, as a visit to any airport will suggest. Codification was thus in order.

NCCUSL thus started drafting a Uniform Personal Property Leasing Act in 1981.[12] This model statute was approved by NCCUSL in 1985; immediately after, though, it was suggested that the Act be folded into the U.C.C, which took another two years.[13] We thus saw the first new article for the U.C.C. since its initial proposal: Article 2A on personal property leasing. At least one symposium, and a good many articles in a range of legal periodicals, heralded its advent.[14] A number of states quickly considered it, and a few adopted it posthaste.

Almost from the first, though, Article 2A proved troublesome, or perhaps the states did. A State Bar of California study recommended a good many nonuniform amendments to Article 2A.[15] The California Legislature passed Article 2A with quite a few of these and added some of its own.[16] Similarly, Massachusetts took many of the California changes, revised them, and added a few more.[17] Other jurisdictions, with or without encouragement from bar associations and law review commissions, followed along.[18] On the other hand, other jurisdictions, starting with Oklahoma, enacted the 1987 Official Text as is.[19] Florida adopted the original version of 2A in 1990, following California and Massachusetts in part and adding a few original variants.[20]

Even as Florida enacted the 1987 version, though, NCCUSL was hard at work amending the 1987 text to take account of these criticisms. NCCUSL was worried—and rightly so—that the California/Massachusetts approach would engulf the uniform version.[21] Ac-

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11. *See* U.S. DEP'T OF COMMERCE, U.S. INDUSTRY & TRADE OUTLOOK 1998, at 47-17 (1998). These totals exclude short-term equipment leases and consumer leases. *See id*.

12. *See, e.g.*, Amelia H. Boss, *The New [1990] Article 2A: Leases*, *in* THE EMERGED AND EMERGING NEW UNIFORM COMMERCIAL CODE 283, 283 (ALI-ABA Course of Study, Dec. 9-11, 1993).

13. *See id*.

14. The symposium is Symposium, *Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988). Many of the pieces in this symposium are cited to in this Article.

15. UNIFORM COMMERCIAL CODE COMMITTEE, STATE BAR OF CALIFORNIA, REPORT ON PROPOSED CALIFORNIA COMMERCIAL CODE DIVISION 10 (ARTICLE 2A) (1987), *reprinted in* Harry C. Sigman & Jeffrey S. Turner, *Preface to the California Report on Article 2A (With Some Thoughts About Participation in the Legislative Process)*, 39 ALA. L. REV. 975, 979-1049 (1988) [hereinafter *California Report*].

16. CAL. COM. CODE §§ 10101-10532 (West 1990).

17. *See, e.g.*, Daryl B. Robertson, *Report of the Commercial Code Committee of the Section of Business Law of the State Bar of Texas on UCC Article 2A*, 43 BAYLOR L. REV. 235, 237 (1991).

18. *See, e.g.*, Boss, *supra* note 12, at 283; Robertson, *supra* note 17, at 237-38.

19. *See* Act effective Nov. 1, 1988, ch. 86, 1988 Okla. Sess. Laws 1683 (current version at OKLA. STAT. ANN. tit. 12A, §§ 2A-101 to 2A-532 (West 1998)).

20. *See* Act effective Jan. 1, 1991, ch. 90-278, 1990 Fla. Laws 2114 (current version at FLA. STAT. ch. 680 (1997)).

21. *See, e.g.*, Fred H. Miller, *The Uniform Article 2A Amendments and the National Conference of Commissioners on Uniform State Laws After One Hundred Years*, 45 CONSUMER FIN. L.Q. REP. 193, 193 (1991).

cordingly, the Standby Committee on Article 2A consulted with those involved with the California and Massachusetts efforts, as well as others, with an eye toward preserving uniformity and accommodating the policy differences contained in the amendments.[22] As a result, NCCUSL put forth a set of amendments to some twenty-four sections of Article 2A, taking into account many of the changes proposed elsewhere and adding a few new ones. Had Florida waited one legislative session, it could have put in place the now-uniform version.[23] Still, here we are. Better late, etc.

What follows in this Part is a look at the principal changes to Florida's version of Article 2A made by the recent amendments. This is not the same as a comparison of the 1987 and 1990 versions of Article 2A. Florida's old version and the 1990 amendments have a common ancestor in the California/Massachusetts version, so many of the amendments did not change Florida law. Moreover, as will be discussed below, the recent amendments to Florida's Article 2A did not wipe out Florida's nonuniformity.[24] Rather, Florida moved from one nonuniform version to another, more uniform version. The comparison is the focus of what follows.[25]

B. New Article 2A

For the most part, the 1990 revisions to Article 2A left Article 2A intact. There were, however, some important revisions, particularly in the areas of finance leases, security interests in leasehold interests, and lease remedies. These will be dealt with in turn.

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22. *See id.* NCCUSL creates a Standby Committee whenever it sets forth a new statute. The Standby Committee watches over the statute and can recommend changes if the need arises. *See id.* at 193 & n.4.

23. To some extent, Florida already had. Insofar as the Florida adoption of the California/Massachusetts version merely anticipated the 1990 amendments, Florida's Article 2A has not changed in substance (though possibly in form). For example, the 1990 treatment of finance leases drew heavily on the California version and thus does not materially change Florida law. This Article will not discuss either unamended sections of Article 2A or, with a few exceptions, sections where Florida's nonuniform version agreed in substance with the 1990 amendments. For more on Florida's initial adoption of Article 2A, see James E. Foster & David G. Shields, *Personal Property Leasing in Florida: Moving 2A Uniform Treatment*, 18 FLA. ST. U. L. REV. 295 (1991).

24. *See infra* notes 151-159 and accompanying text.

25. This discussion has general application, though, because most of Florida's Article 2A is the same as the official 1990 version, just as most of its earlier version was the same as the official 1987 version.

One point of nomenclature and citation format. For ease in reference, this Article refers to the *Florida Statutes* only when looking at a nonuniform variant of Article 2A. Otherwise, references to the current version of Article 2A are to the 1995 Official Text, and references to the older version are to the 1987 Official Text (and are so designated in each footnote).

1. Finance Leases

Most leasing occurs when a lessor in possession of goods grants use of the goods to a lessee for consideration. At times, though, the lessor does not own the goods that the lessee wishes to rent. The lessee typically wishes to arrange for the goods directly with a supplier; the lessor essentially just finances the purchase of the goods, though it does take title plus a residuary interest in the goods themselves. This transaction is analogous to a purchase money security agreement: the lessor here is in the same position as the bank or other third-party creditor in the purchase money situation. Here, too, the lessor is usually a financial institution.

These transactions are finance leases. They involve three parties—the supplier, the finance lessor, and the finance lessee—and two contracts—the supply contract and the lease contract. Though Article 2A usually follows Article 2 closely, here there are strong Article 9 overlays. Perhaps in part for this reason, Article 2A has a number of special rules for finance leases that recognize the limited role of the finance lessor in the transaction. To be sure, as the Chief Reporter for Article 2A observed, special provisions really were not necessary; if the finance lessor wanted to limit its potential liability, it could do so using conventional disclaimers.[26] These consensual finance leases were common before Article 2A and were in no way impeded by its enactment.[27] Still, finance leases are important enough, and the finance leasing industry obdurate enough, that these provisions exist as safe harbors.[28]

The original finance lease provisions garnered some criticism, for the most part because their scope was, in the eyes of the finance leasing industry, unduly narrow. The original definition required that the finance lessee either receive a copy of the supply contract before signing the lease contract or approve the supply contract as a condition to the effectiveness of the lease contract.[29] Some finance lessors objected because they did not want to reveal the full supply contracts to their lessees. Accordingly, the definition was amended to allow more limited information to be transmitted.[30] Florida helped lead the way here; its

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26. *See* Edwin E. Huddleson, III, *Old Wine in New Bottles: UCC Article 2A-Leases*, 39 ALA. L. REV. 615, 661 & n.151 (1988). Huddleson thus characterized the finance lease provisions of Article 2A as "a sop to industry." *Id*. at 661.

27. *See, e.g.*, 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 13-3(a) (4th ed. 1995).

28. As of 1995, leaving aside short-term rentals, finance leases governed 87% of the cost of equipment subject to commercial leases. *See* U.S. DEP'T OF COMMERCE, U.S. INDUSTRY AND TRADE OUTLOOK 1998, at 47-16 (1998).

29. *See* U.C.C. § 2A-103(g)(iii) (1987).

30. *See* U.C.C. § 2A-103(g)(iii) (1995); *see also* Miller, *supra* note 21, at 193-94.

version of Article 2A has had substantially similar language since its initial enactment.[31] The change is thus purely stylistic.

There are other changes to finance lease provisions in the 1990 version of Article 2A, most of which are either issues of style or, like the definition of finance lease, are present already in Florida's version of Article 2A.[32] Two fall into neither category, and merit brief attention. First, the 1990 amendments clarified the treatment of "hell or high water" clauses in finance leases. These picturesquely named clauses provide that the lessee is obliged to perform under the lease, regardless of the lessor's non-performance, once the lessee has accepted the goods. These are standard in finance leases because the quality of the leased goods is the responsibility of the supplier, whose warranties extend through the lessor to the finance lessee.[33] If the finance lessee is dissatisfied, it may go after the supplier; it must, however, continue to pay the finance lessor. Hell or high water clauses were statutorily put in place for nonconsumer finance lessees in the 1987 version of Article 2A.[34] The 1990 amendment was intended to clarify that hell or high water clauses in other sorts of lease agreements, most notably consumer leases, might be attacked under other law (mainly unconscionability).[35] By its terms, though, the amendment applies to all lease agreements, including contractual finance leases, which leaves open an attack on their validity.[36] Second, the finance lessee, if not also a consumer lessee, may revoke its acceptance of the leased goods if the lessor defaults under the lease contract and that default substantially impairs the value of the goods to the lessee.[37] Hitherto, the statute was silent on whether the finance lessor's failure to comply with its duties under the lease agreement would allow the finance lessee to revoke. As it stands, unless the lease agreement provides otherwise,[38] the finance lessee may revoke only if the goods are nonconforming, the nonconformity substantially impairs their value to the lessee, and the fi-

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31. *Compare* FLA. STAT. § 680.1031(1)(g)(3)(c)-(d) (1991) *with* FLA. STAT. § 680.1031(1)(g)(3)(c)-(d) (1997).

32. Another example of the latter is U.C.C. § 2A-209, the amendments to which made clearer the extent to which the finance lessee retained rights it may have had under agreements between it and the supplier. Florida already had in place a nonuniform amendment that did this, so Florida law is not changed by the advent of uniformity. *See* FLA. STAT. § 680.209 (1997).

33. *See* U.C.C. § 2A-209 (1995).

34. *See* U.C.C. § 2A-407(1) (1987). This reflected the main body of caselaw under the common law of leases. *See, e.g.*, West Virginia v. Hassett (*In re* O.P.M. Leasing Servs., Inc.), 21 B.R. 993, 1006 (Bankr. S.D.N.Y. 1982); U.S. Roofing, Inc. v. Credit Alliance Corp., 279 Cal. Rptr. 533, 544-46 (Cal. Ct. App. 1991).

35. *See* U.C.C. § 2A-407(3) & cmt. 6 (1995); *see also id.* § 2A-108 (1995).

36. The provision states, in pertinent part, that "[t]his section does not affect the validity under any other law of a [hell or high water clause] in any lease contract . . . ." *Id.* § 2A-407(3); *see also, e.g.*, 2 WHITE & SUMMERS, *supra* note 27, at 504.

37. *See* U.C.C. § 2A-517(2) (1995).

38. *See id.* § 2A-517(3).

nance lessee's failure to detect the nonconformity was induced by the lessor's assurances.[39]

Because the adoption of the 1990 amendments swept away a Florida nonuniform amendment, one other section should be mentioned. Under both the 1987 and 1990 texts, finance lessees could not revoke their acceptances of leased goods if they knew of a nonconformity in the goods at the time of acceptance.[40] In contrast, Florida did not apply this blanket prohibition to consumer finance lessees where the supplier helped prepare the lease contract or helped the finance lessor negotiate the terms with the lessee.[41] This twist was sensible, given the greater rights elsewhere afforded the consumer finance lessee and the limits placed on even the consumer finance lessee's ability to revoke for minor nonconformities. One can easily imagine that a finance lessee might choose not to reject because, say, of an immediate need for the goods, or because of a lack of time to go through the rejection machinery, or because the lessee acted through an agent with power to accept, but no power to reject (as, for example, a spouse or older child). In any event, the nonuniform amendment is gone; a victory for uniformity, if not for merit.

2. Security Interests and Leaseholds

One might expect a commercial lessor to acquire its leased goods using borrowed funds. If the funds were advanced in order to purchase the goods, then the lender would take a purchase money security interest in the goods. Alternatively, or in addition, the lessor might pledge its assets, including leased goods, to a bank or other creditor as security for a line of credit. In either case, one might envisage a conflict if the lessor defaults. The secured creditor doubtless will wish to assert its rights under its security agreement, presumably including repossession under Article 9. On the other hand, the lessee has a leasehold interest, perhaps prepaid, but in any event contractual. Who prevails?

Under both versions of Article 2A, large classes of lessees would prevail. Like buyers in the ordinary course of business, lessees in the ordinary course of business take their leasehold rights free of any prior security interest, whatever the state of perfection or knowledge.[42] Even lessees not in the ordinary course would usually prevail under either version. The general rule provides that "a creditor of a lessor takes subject to the lease contract."[43]

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39. *See id.* § 2A-517(1)(b).
40. *See id.* § 2A-516(2).
41. *See* FLA. STAT. § 680.516(2) (1997).
42. Of course, the lessor retains a residual interest in the leased goods, and can repossess them and dispose of them at the end of the lease term.
43. U.C.C. § 2A-307(2).

There are exceptions, though. The 1987 and 1990 texts share one: if the creditor's lien attached to the goods before the lease contract became enforceable, then the lien creditor will prevail.[44] This does not help secured creditors, as the definition of "lien" excludes them,[45] but will help involuntary lien creditors—materialmen, mechanics, and the like, as well as the garden-variety judgment lien creditor.[46] In contrast, the exceptions for secured creditors were revised significantly, and bear attention.

Originally, secured creditors prevailed over lessees not in the ordinary course only if the security interest would have priority over a properly perfected security interest taking effect when the lease contract was made.[47] The lessee thus resembled the hypothetical lien creditor of the Bankruptcy Code, which sets the trustee's power to avoid other claims on assets of the estate.[48] This created some odd results. For example, as Professor Harris has pointed out, the 1987 text did not state which type of hypothetical lien creditor the lessee would be. If, for example, the lessee hypothetically held a purchase money security interest, then it would have a superpriority over earlier secured creditors.[49] The Official Comment to section 2A-307 stated that the lessee ought not be considered a purchase money secured creditor, but its rationales were not wholly convincing.[50] Apart from this statutory omission, though, the rule was rather arbitrary. The lessee would, by its operation, prevail against the holder of an unperfected security interest, even though a buyer often would not.[51] On the other hand, if the secured creditor filed before the lease contract took effect, but cre-

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44. *See id.* § 2A-307(2)(a).

45. *See id.* § 2A-103(1)(r).

46. Statutory lien creditors also take solace from section 2A-306, which, like section 9-310 for secured creditors, gives priority to liens taken by those who furnish services or materials for goods covered by a lease contract unless the law giving rise to the lien provides otherwise. This section was not changed in the 1990 amendments.

47. *See* U.C.C. § 2A-307(2)(b) (1987). This leaves aside section 2A-308, which allows a creditor, secured or otherwise, to treat a lease contract as void if either the lessor's continued possession of the goods or the lease itself would be fraudulent under other law. An exception is carved out for sale-leaseback arrangements, under which the seller retains possession under a lease contract between the buyer as lessor and the seller as lessee. As long as the buyer gave value and bought in good faith, such a transaction is not fraudulent, notwithstanding section 2-402.

48. *See* 11 U.S.C. § 544(a)(1) (1994); *see also* Steven L. Harris, *The Rights of Creditors Under Article 2A*, 39 ALA. L. REV. 803, 819 (1988).

49. *See* U.C.C. § 9-312(3) (1995).

50. *See* Harris, *supra* note 48, at 819-20 & n.62. Perhaps the best reason is analogy; the bankruptcy trustee is not considered a purchase money creditor either.

51. Holders of perfected security interests prevail over holders of unperfected security interests, even if the unperfected security interests arose before the perfected security interests. *See* U.C.C. §§ 9-301(1)(a), -312(5) (1995). On the other hand, buyers take free of unperfected security interests only if they are in ordinary course, *see id.* § 9-307(1), or if the buyer, though not in ordinary course, gave value and took delivery without knowledge of the security interest and before perfection. *See id.* § 9-301(1)(c). *See generally* Harris, *supra* note 48, at 820-21.

ated the security interest after, the secured creditor would prevail because perfected security interests in goods ordinarily derive priority from the time of filing or perfection, whichever is earlier.[52]

These results were, to a point, smoothed out by the 1990 amendments.[53] Now the lessor's secured creditor takes subject to the lease contract unless the lessee knew of the security interest when it gave value and took delivery (or, *a fortiori*, if it did not give value or did not take delivery), or if the creditor's security interest was perfected before the lease contract became enforceable.[54] The first situation is probably inconsequential, though it is analogous to the rights of the buyer not in ordinary course under Article 9.[55] Only the rare lessee will either give no value[56] or leave the leased goods with the lessor (apart from returns of goods for temporary storage or repair). It is possible that a lessee not in the ordinary course would know generally that the lessor's goods would probably be subject to a security interest, but the U.C.C. defines knowledge strictly. Knowledge includes actual knowledge only—not constructive knowledge, not possibility, and not standard practice.[57] Combining the relative infrequency of leases not in ordinary course and the stringency of the knowledge provision, very few leases should remain.

The second situation—perfection before the lease contract becomes enforceable—is more likely. Purchase money secured creditors ordinarily will either prefile (so perfection will occur when the debtor acquires rights in the goods) or file shortly after the debtor takes control of the goods.[58] The lessee would thus almost certainly enter into the lease contract after the secured creditor had perfected its security interest. This might not be true when an ordinary lender takes equipment as collateral, as the equipment may already be subject to a leasehold. It will, however, be true much of the time, given that commercial leasing firms probably have lines of credit secured by floating

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52. *See* U.C.C. § 9-312(5)(a) (1995).

53. These amendments derive largely from California's nonuniform enactment. *Compare* U.C.C. § 2A-307 (1995) *with California Report*, *supra* note 15, at 1016-24. Unfortunately, Florida chose to leave this out when it enacted much of the California text. Florida's adoption of the 1990 amendments thus changes Florida leasing law substantially.

54. *See* U.C.C. § 2A-307(2)(b), (c) (1995).

55. *See id.* § 9-301(1)(c).

56. Value includes promises of payment. *See id.* § 1-201(44). An executory lease contract thus gives value. Presumably a gratuitous bailment would not, but one would not expect to see these very often, neighborly loans of lawnmowers aside.

57. *See id.* § 1-201(25) (1995); *see also, e.g.*, Southland Corp. v. Emerald Oil Co., 789 F.2d 1441, 1445-46 (9th Cir. 1986) (holding, in the analogous context of section 9-301(1)(c), that there was no duty to make inquiries); Clark Oil & Ref. Co. v. Liddicoat, 223 N.W.2d 530, 535-36 (Wis. 1974) (same).

58. Most states have amended U.C.C. section 9-301(2) to allow 20 days to perfect purchase money security interests, the perfection to take effect retroactively. *See* U.C.C. § 9-301, 3A U.L.A. 14-15 (1992 & Supp. 1998) (listing 41 states that have adopted the 20-day standard).

liens in equipment. Still, this narrows the old rule because prefiled financing statements will not by themselves yield priority; only if there is actual perfection, which includes the taking of the security interest, will the secured creditor win.

Another scenario in which the 1990 amendments might affect the result arises when the lease contract antedates the lessor's acquisition of the goods. Even a prefiled financing statement will not give rise to a perfected security interest until the secured creditor's rights attach, which may not occur until the debtor acquires rights in the goods.[59] If the lease contract took effect before then, the 1990 amendments would hold that the lessee would prevail. In contrast, under the 1987 version, the lessee was treated as a hypothetical lien creditor as of the date of the lease contract. Since the secured creditor's security interest would derive its priority from the time of filing, the secured creditor would have prevailed. To be sure, this fact pattern requires that the lease contract become enforceable before the leased goods are even in the hands of the lessor, much less delivered to the lessee. Still, one can anticipatorily breach any contract, including a lease contract, so this may not be chimerical.[60]

Which rule makes more sense? Probably the 1990 flavor. Lessees, like buyers, acquire at least partial rights in the goods. Both buyers and lessees might reasonably assume that their sellers or lessors maintain their inventory subject to loans of various types. Nevertheless, financers not just expect, but desire, that the collateral be alienated, in order that the debtor may pay off the loans. In order to ease these transactions, ordinary course lessors and buyers receive formidable rights.

Buyers and lessees who take out of the ordinary course, however, more properly suspect that the goods may carry encumbrances. Furthermore, the financers are less likely to want the debtors to dispose of the goods. By definition, a disposition not in the ordinary course of business is not part of the seller's or lessor's normal business.[61] Typically, a seller may sell off some fixtures or equipment, or may lease equipment that was purchased for the lessor's own use. If so, the proceeds of the disposition will likely not be as high as might be true of ordinary course transactions. This is not to say that secured parties would always object; better to dispose of unneeded equipment or the like at low prices if it would otherwise become valueless. Still, such transactions are often associated with failing businesses, and failing businesses often will take desperate steps in order to avoid bank-

59. *See* U.C.C. § 9-203(1)(c) (1995).

60. *See id.* § 2A-402 (anticipatory repudiation); *cf.* U.C.C. § 2-610 (1995) (same; sales of goods); RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981) (same; common law).

61. *See* U.C.C. § 1-201(9) (1995) (buyers); *id.* § 2A-103(1)(o) (lessors).

ruptcy, even steps that their secured creditors would frown upon.[62] This may justify the harsher treatment of lessees and buyers out of the ordinary course.

But does this justify disparate treatment? The old rule subordinated lessees out of the ordinary course when the secured party had prefiled, presumably on the basis that the lessee had constructive notice of a security interest. Though a financing statement does not necessarily betoken a security agreement, it often does, and the lessee might thus be alerted of its need to search further. But why would a lessee, even out of the ordinary course, expect to search? The transience of leaseholds further undercuts the apparent need to search. Finally, the 1987 version's analogy to bankruptcy is peculiar, to say the least. Creditors may not, among other things, take or perfect security interests after the filing of a bankruptcy petition.[63] But no such rule prevents a creditor from taking a security interest in goods after a lease contract is signed.

Perhaps, in the end, the real virtue of the amendment is uniformity. Now buyers and lessees are treated in the same way. True, one can concoct odd hypotheticals in which a crafty creditor hoodwinks lessees into renting from the debtor/lessor, and then contrives to get superior rights. For the most part, these might best be left to professors in desperate search of exam questions. The 1990 amendments reject the false analogy to bankruptcy and adopt instead a truer analogy to Article 2. That should suffice.

3. Lease Remedies

Article 2A's remedial provisions were quite controversial when Article 2A was first put forth, drawing fire from, among others, the California Bar[64] and academic commentators.[65] They were thus redrafted extensively; though they remain imperfect, they have received at least the moderate endorsement of many.[66] Both the 1987 and 1990 versions

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62. After all, failing firms present a classic moral hazard problem. Secured creditors of failing firms logically wish to maximize the value of their collateral, which probably means avoiding desperate and risky maneuvers. Equity holders, on the other hand, will lose all in case of bankruptcy, so they have an incentive to take risks with the funds they have received through secured credit. *See, e.g.*, Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation*, 44 UCLA L. REV. 247, 285-86, 309-11 (1996).

63. *See* 11 U.S.C. § 362(a)(3)-(5) (1994).

64. *See California Report*, *supra* note 15, at 1030-46.

65. *See, e.g.*, Marion W. Benfield, Jr., *Lessor's Damages Under Article 2A After Default by the Lessee as to Accepted Goods*, 39 ALA. L. REV. 915 (1988); Michael J. Herbert, *A Draft Too Soon: Article 2A of the Uniform Commercial Code*, 93 COM. L.J. 413 (1988); Donald J. Rapson, *Deficiencies and Ambiguities in Lessors' Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute*, 39 ALA. L. REV. 875 (1988).

66. For example, Professor Herbert, who had excoriated the 1987 version. *Compare* Michael J. Herbert, *Getting Better All the Time: The Official (Revised) Remedy Provisions*

draw heavily on Article 2 concepts, and often language, which at times may yield obscure and odd results. But now for the changes.

(a) Entitlement to Remedies

An important area that underwent some change is default. This is dealt with in sections 2A-508 to 2A-517. One change reverses what looked like a departure from the Article 2 analogue. Section 2A-508(4), dealing with the lessee's remedies, states in both versions that the lessee may recover damages if the lessor breached a warranty. This hardly needed saying, given that section 2A-508(1) grants the lessee a right to a remedy if the lessor fails to comply with the lease agreement.

The comment, though, shifts interestingly. Originally, it provided that a lessor's breach of warranty might not result in default "unless the breach is material."[67] This appears to put in place the material breach rule familiar in the common law.[68] Article 2, in contrast, uses a perfect tender rule for rejection, though one subject to a good many exceptions.[69] The drafters stated no reason for this change. Perhaps they felt that an ongoing relation like a lease should not be subject to rescission for a minor defect, even if subject to a right of cure.[70] This may well be a valid point for long-term leases, but it deprives the lessee of a powerful bargaining tool in forcing the lessor to provide the promised goods. In any event, the 1990 comment states that a breach of warranty "may not rise to the level of a default by the lessor justifying revocation of acceptance."[71] This changes nothing; it merely adverts to the revocation rules of section 2A-517, based closely on Article 2, which limit the lessee's rights to revoke its acceptance of nonconforming goods unless, among other things, the value of the good is substantially impaired.[72]

Beyond this, the statute was amended to make clearer that the parties may define default as they like and may thus create their own rules about when they might claim remedies.[73]

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of the Uniform Commercial Code's Article 2A, 96 COM. L.J. 1 (1991) (favoring adoption), *with* Herbert, *supra* note 65 (favoring rejection or significant amendment before adoption).

67. U.C.C. § 2A-508 cmt. (1987).

68. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981); *see also, e.g.*, Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890-91 (N.Y. 1921) (Cardozo, J.).

69. *See* U.C.C. § 2-601 (1995). For interesting discussions of the perfect tender and material breach rules, see William H. Lawrence, *The Prematurely Reported Demise of the Perfect Tender Rule*, 35 U. KAN. L. REV. 557 (1987); George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960 (1978).

70. *See* U.C.C. § 2A-513 (1995).

71. *Id.* § 2A-508 cmt. 6.

72. *See id.* § 2A-517(1); *cf. id.* § 2-608(1) (sales of goods; analogous provision requiring substantial impairment for revocation).

73. *See id.* §§ 2A-508(1)(d), -523(1)(f), -523(3).

(b) Lessee's Damages

Assuming that the lessor has in some way defaulted on its obligations, then the lessee will likely be entitled to damages. How these are measured has proven vexing, whether under the 1987 version of Article 2A, Florida's old nonuniform version, or the recent amendments. Two sets of changes seem material: those to the lessee's restitutionary remedy, and those to the cover remedy.

i. Restitution

In the catalog of remedies available to the lessee, Article 2A once provided that the lessee could "recover so much of the rent and security as has been paid, but in the case of an installment lease contract the recovery is that which is just under the circumstances."[74] This apparently would allow the lessee to recover its full stream of payments, even if it had derived most of the value of the lease agreement. If, for example, the lessor under a five-year lease defaulted on its maintenance obligations under the lease in year three, the lessee probably could revoke its acceptance[75] and, under this section, recover its lease payments for the two or more years in which it had used the leased goods. Except for installment lease contracts,[76] the payments, if one takes the section literally, would not be offset by the value of the leased goods for the time of use. To be sure, the general rule of the U.C.C. limits damages to those necessary to put the breached-against party in the position it would have been in had the contract been performed in full.[77] Still, the narrow limitation of this principle to installment leases in this section might suggest that the lessee could gain through the lessor's breach.

This notion, though foreign to expectation, is not unknown at common law; restitution, as a good many famous cases have told us, is not limited by expectation.[78] The 1990 amendments, however, changed the text and comments to subordinate restitution more fully to expectation. The text now limits the lessee's recovery of its rent and security in all cases to that which is just.[79] Moreover, the comment clarifies the point by noting that the return of the lease payments may be reduced if the goods have been used while the lease payments were made.[80] As

74. U.C.C. § 2A-508(1)(b) (1987).

75. *See* U.C.C. § 2A-517(2) (1995).

76. Lease contracts under which separate lots of goods would be delivered and accepted separately. *See id.* § 2A-103(1)(i).

77. *See id.* § 1-106(1).

78. *See, e.g.*, United States v. Algernon Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973); Scaduto v. Orlando, 381 F.2d 587, 595-96 (2d Cir. 1967); *see also, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 373 cmt. d (1981).

79. *See* U.C.C. § 2A-508(1)(b) (1995).

80. *See id.* § 2A-508 cmt. 2.

has often been true over the last century: Expectation 1, Restitution 0.[81]

ii. Cover

Should the lessor breach, the lessee may wish to secure replacement goods and sue the lessor for the added cost, if any. Cover has long been a remedy available under Article 2, and Article 2A follows to some extent this statutory analogue.[82] This section was revised extensively in 1990, though, as we shall see, Florida had anticipated one of the amendments.

Cover is available when, on the lessor's breach, the lessee makes a substantially similar lease agreement for replacement goods in good faith and in a commercially reasonable manner.[83] Leaving aside for the moment just how one determines whether two leases are substantially similar,[84] what is the remedy? Besides the usual incidental and consequential damages, the lessee gets, put in the most general way, the difference between the cover price and the contract price, as in Article 2. How this difference is measured has changed with the drafts.

Originally, the lessee would receive the present value, as of the date of default, of the difference between the rent for the lease term of the new agreement and the total rent for the balance of the lease term under the old lease.[85] If a cover lease was longer than the original

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81. Restitution may be coming back, though. The ALI has started work on a *Restatement (Third) of Restitution* (though, oddly, there is no *Restatement (Second) of Restitution*). *See* Herbert P. Wilkins, *Foreward*, 26 HOFSTRA L. REV. 567, 570-71 (1998). The literature also shows a boom—well, a boomlet—of restitutionary scholarship. *See, e.g.*, HANOCH DAGAN, UNJUST ENRICHMENT (1997); LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION (4th ed. 1993); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995). Stay tuned for late-breaking developments.

82. *See* U.C.C. § 2A-518 (1995); *cf. id.* § 2-712.

83. *See id.* § 2A-518(2). If the lessee purchases goods as cover, it must proceed under the contract-market measure of § 2A-519. *See id.* § 2A-518 cmt. 2. This may be too narrow an approach. By definition, a lease may not encompass the whole economic life of the leased goods, so ordinarily purchase will give the lessee more than it had under the lease. *See id.* § 1-201(37)(1st a). If, however, the leased goods were new, and the lessee covered by buying used goods, the lessee might purchase goods with a useful life no greater than that under the breached lease agreement. The lessee might alternatively purchase new goods and then sell the goods as used at the end of the period of the breached lease. Finally, the lessee could simply retain the goods, with the remaining value deducted from the damages award. Under any of these scenarios, purchase would plausibly cover for a breached lease; Article 2A's failure to recognize this remains a problem, even after the 1990 amendments.

84. The term "substantially similar" goes largely undefined in the comments. *See* Herbert, *supra* note 65, at 445-48 (attacking comments as "verbose" and a "tautological mess"). In fairness, the comments were later revised, and now are somewhat clearer, though still a trifle vague.

85. *See* U.C.C. § 2A-518(2) (1987). This is not quite Florida's old text. Leaving aside differences of style, Florida measured present value from the commencement of the term of the cover lease, rather than from the date of default. *See* FLA. STAT. § 680.518(2) (1997). This change was adopted in the 1990 amendments—and a good thing, too, because using

lease, the whole of the cover period would be used to calculate damages.[86] The lessee might thus have received gratis the benefit of the goods for the additional period.[87] Now, however, damages are calculated using the rent under the cover lease for the period comparable to the unexpired term of the old lease.[88] This does not mean that the old and new leases must be identical; the new lease might begin and end earlier or later without thereby becoming incomparable.[89] It does, however, avoid giving the lessee a longer lease term than the lessee had originally bargained for.

Another change is a bit obscure, but helpful. The method of calculation has changed from the present value of the difference between the cover price and the contract price[90] to the difference between the present values of the cover price and the contract price.[91] This change makes no difference if the old and new leases have identical payment schedules. The 1990 amendments, however, opened up the possibility that the terms might not coincide exactly. If they did not, it is hard to see how one would calculate the present value of the difference. One cannot use simple subtraction, because the payments would occur at different times. One would, I suppose, have to discount the later payment to the earlier time, and then subtract—and then do another present value calculation. Rather than add this possibility for error, the test was sensibly reframed.[92]

One final question is whether section 2A-518 is mandatory for lessees who cover with an appropriate lease.[93] Florida originally enacted a nonuniform amendment that gave the lessee a choice of remedy; if it covered, it could choose either the cover remedy or the remedy for retained goods.[94] By adopting the 1990 amendments, Florida moved from freedom to constraint. Now, if the lessee covers with an appropriate lease, section 2A-518 provides the sole measure of damages.[95]

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the date of default left the lessee uncompensated for the value of money between the date of default and the date it had to pay for the leased goods.

86. If the cover lease term differed too greatly from the term of the breached lease, though, the two leases might not be substantially similar; the lessee would then resort to damages under section 2A-519 (a contract-market measure, which would take no account of cover prices or extended durations).

87. One assumes, though, that the usual duty to mitigate, as well as the general rule of section 1-106, would cause set-off to the extent that the lessee derived benefit from the extended lease term.

88. *See* U.C.C. § 2A-518(2) (1995).

89. *See id.* § 2A-518 cmt. 7. There is, however, a strong suggestion in the comment that the comparable periods, whenever they begin or end, must be the same length. *See id.*

90. *See* U.C.C. § 2A-518(2) (1987).

91. *See* U.C.C. § 2A-518(2) (1995).

92. The same change was made to all the other damages measures, whether for lessees or lessors. *See id.* §§ 2A-519(1), -527(2), -528(1).

93. A lessee may cover by purchase; if so, the cover falls outside section 2A-518, and the remedy must be set by section 2A-519. *See id.* § 2A-518(1), (3).

94. *See* FLA. STAT. §§ 680.518(3), .519(1) (1997).

95. *See* U.C.C. § 2A-518(3) & cmt. 2 (1995).

(c) Lessor's Damages

These sections may have drawn the most fire of any in old Article 2A. Two articles, often critical, in the leading symposium on Article 2A were devoted to these sections,[96] and other commentary was almost uniformly negative.[97] Moreover, these sections are among the most Janus-faced in Article 2A. The damages measures, and many of the procedures involved in declaring a default, look to Article 2. On the other hand (face?), the lessor's permitted actions in retaking its rights in the goods resemble those allowed under Article 9. The union of these different approaches is inherent in the law of leases, but can lead to some tensions—tensions not always resolved in the 1990 amendments. The major changes are discussed below.

i. Re-Lease

After the lessee breaches, the lessor may dispose of the goods. Assuming, for the moment, that the lessor is able to re-lease the goods, it may choose between this section and the next—or perhaps not, depending on how one reads the fruits of a careless legislative error. Free election between these remedies is not found in the official text of Article 2A under either the 1987 or 1990 versions. In these, if the lessor sells the goods, or leases them in a manner not substantially similar to the breached lease, then the lessor must use contract-market damages.[98] If, on the other hand, the lessor re-leases the goods under a lease agreement that is substantially similar to the one breached, then the lessor is entitled to damages based on the difference between the rent under the old contract and the rent under the new contract, as well as any unpaid rent under the old contract and any incidental damages.[99]

Florida, however, allowed election of remedies when it enacted its variation of the 1987 text.[100] When it amended Article 2A, the Legislature changed only those subsections of the statute that were altered from one official version to the other. Because the election of remedies language in section 2A-527, providing damages for re-lease, was not changed in the 1990 official amendments, it was left untouched here, so election of remedies appears to persist.[101] But the corresponding

96. *See* Benfield, *supra* note 65, at 915; Rapson, *supra* note 65, at 875.

97. *See, e.g.*, *California Report*, *supra* note 15, at 1036-46; Herbert, *supra* note 65, at 450-58; Homer Kripke, *Some Dissonant Notes About Article 2A*, 39 ALA. L. REV. 791, 795-97 (1988).

98. *See* U.C.C. § 2A-527(3) (1995). These damages must be reduced by the amount gained through the disposition. *See id.* § 2A-523 cmt. 11; LAWRENCE & MINAN, *supra* note 9, ¶ 15.03[6][b].

99. *See* U.C.C. § 2A-527(2) (1995).

100. *See* FLA. STAT. §§ 680.527(3), .528(1) (1997).

101. *See* Act effective Apr. 14, 1998, ch. 98-11, § 43, 1998 Fla. Laws 105, 158 (amending FLA STAT. § 680.527(1),(2) (1997)).

language in the section governing contract-market damages was deleted because it was placed in a section that the 1990 amendments changed.[102] There, it would seem that there is no election. So whether there is election of remedies depends on whether one starts one's analysis with section 2A-527 or section 2A-528. One hopes that this sloppiness will be mended shortly, perhaps when Florida comes back to the U.C.C.[103]

Three substantial changes were made here by the 1990 amendments, all of which mirror changes made elsewhere. First, the unpaid rent is now measured as of the date of the new lease agreement, rather than the date of default—a change from the 1987 official text, but not from Florida's formerly nonuniform variation of it.[104] Second, the measure no longer compares the total rent remaining under the old and new agreements, but looks only at the total rent for the comparable periods of the old and new leases.[105] Third, the measure is no longer based on the present value of the difference between the two rents, but the difference of the present value of the two rents, a change which makes easier the calculation of damages when the two lease terms do not match up perfectly.[106]

ii. Contract-Market Damages

This measure, perhaps applying when the conditions for re-lease damages are not met,[107] was changed in what are by now familiar ways. The unpaid rent is measured from the date of the new lease, rather than the date of default, and the measure is based on the difference of the present values of the contract rent and the market rent, rather than the present value of the difference between the contract rent and the market rent.[108] There is, however, one change of some modest interest. In the original Article 2A, the hypothetical market rent was measured at the place for tender.[109] The new version measures this rent at the place where the goods are located.[110]

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102. *See id.* § 44, 1998 Fla. Laws at 159 (amending FLA. STAT. § 680.525(2), (3) (1997)).

103. There are other nonuniform amendments that survived the recent legislation, many both substantive and regrettable. *See infra* notes 151-158 and accompanying text.

104. *See* U.C.C. § 2A-527(2) (1995); *see also supra* notes 85-88 and accompanying text.

105. *See id.*; *see also supra* notes 91-92 and accompanying text.

106. *See id.*; *see also supra* notes 91-92 and accompanying text.

107. Or, then again, perhaps not. *See supra* notes 98-99 and accompanying text.

108. *See* U.C.C. § 2A-528(1) (1995). The latter change seems immaterial, because the hypothetical lease period would appear to be identical to the actual lease period. One assumes it was put in place in case it is impossible to use the actual lease term to measure the hypothetical rent; in that case, the court may use a reasonable substitute, which might produce the sort of problem this change in formula addresses. *See id.* § 2A-507(2).

109. *See* U.C.C. § 2A-528(1)(b) (1987).

110. *See* U.C.C. § 2A-528(1)(ii) (1995).

iii. Lost-Volume Lessor

This remedy is the counterpart to that favorite from first-year Contracts, U.C.C. section 2-708(2). It gives the lessor the profit it would have made if the lessee had fully performed.[111] The one change in this section—rather an important one—changes the remedy from the full profit[112] to the profit reduced to present value.[113] Regrettably, the section was otherwise left as muddy as its Article 2 counterpart. For instance, the final clause of section 2-708(2), giving "due credit for payment or proceeds of resale," has almost universally been considered a drafting disaster.[114] Courts have come to realize that it applies only to components sellers—sellers whose buyers breach when the goods are incomplete, and who salvage something through sale or use of the incomplete goods.[115] Did the Article 2A drafters learn from this and craft a properly limited equivalent? No. It reads "due credit for payments or proceeds of disposition"—using the language of leases, but otherwise preserving the horrors of the old language.[116] This fidelity to Llewellyn is touching, but he can do without this sort of homage.[117]

Even more fundamentally, the section leaves entirely unclear just when it should be used. As in the original, we are told that the lost profit measure should be used when the contract-market measure will not put the lessor in as good a position as would performance.[118] The comment merely repeats the original, with some minor embellishment.[119] One imagines that the classic article by Professor Harris will be adapted for use here, but some statutory guidance would have been helpful.[120] And, as Professor Herbert has pointed out, the section is in

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111. *See id.* § 2A-528(2).

112. *See* U.C.C. § 2A-528(2) (1987).

113. *See* U.C.C. § 2A-528(2) (1995). The original comment, though not the statute itself, said that "the concept of present value should be given effect." U.C.C. § 2A-528 cmt. (1987). The diffident *should* is now a bossy *must*, and, in any case, is now statutory. *See* U.C.C. § 2A-528 cmt. 5 (1995). This change comes from the California version. *See* Herbert, *supra* note 65, at 455 n.231.

114. *See, e.g.*, Charles J. Goetz & Robert E. Scott, *Measuring Sellers' Damages: The Lost-Profits Puzzle*, 31 STAN. L. REV. 323, 326 (1979); Robert J. Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66, 83-87 (1965).

115. This appears to have been the intent of the drafters. Section 2-708(2) was amended in 1954 to add the critical phrase. The drafting committee explained that the new phrase was "to clarify the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture." EDITORIAL BOARD OF THE UNIFORM COMMERCIAL CODE, DECEMBER 1954 RECOMMENDATIONS 14 (1955).

116. *See* U.C.C. § 2A-528(2) (1995).

117. And no one can say that the drafters were not warned. Both Professor Herbert and the California Bar committee pointed out this problem. *See* Herbert, *supra* note 65, at 454-55; *California Report*, *supra* note 15, at 1040-41.

118. *See* U.C.C. § 2A-528(2) (1995); *cf. id.* § 2-708(2).

119. *See id.* § 2A-528 cmts. 4 & 5.

120. The Harris article outlined the classes of sellers that might take advantage of U.C.C. section 2-708(2): (1) lost volume sellers, who now have unsold units because of the

the wrong place. The lessor who will want to take advantage of it is one who has re-leased the goods; consequently, the lost-volume remedy should be in section 2A-527, not in section 2A-528.[121] Fortunately, courts construing Article 2 have managed to find section 2-708(2), which is similarly misplaced, so one assumes that they will find section 2A-528(2) as well.

iv. Action for the Rent

Section 2A-529, granting the lessor an action for unpaid rent, underwent a great deal of revision in the 1990 amendments. Fortunately for Florida, most of the major changes were already in its statute book, thanks to its adoption of California's nonuniform version. Perhaps the most important change in this section is one of these. The 1987 Urtext violated the usual rules of mitigation, because it did not provide that, if the lessor was able to dispose of the goods after a judgment, it could not keep both the full rent (as damages from the lessee) and the proceeds of the disposition.[122] This arose because the action for the rent was originally available whenever the lessee had accepted goods, at least according to the statute.[123] Presumably, a lessor that had repossessed the goods, but had not decided whether to dispose of them, would choose an action for the rent (with no apparent duty to mitigate) over a contract-market action (with a duty to mitigate).[124] The pre-Code cases suggested a need to mitigate before seeking an action for the rent, but these cases were not referred to in the comment, much less in the statute.[125] Quite a mess.

The 1990 amendments fixed the statute with two changes (and corresponding changes to the comments). First, the action for the rent

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breach and resulting resale; (2) jobbers, who maintain no inventory and thus have no opportunity for resale; and (3) components sellers, who do not complete the goods and consequently cannot resell them. *See* Harris, *supra* note 114, at 98. This leaves aside the large literature asking whether, in an efficient market, there is such a thing as a lost volume seller, or whether this measure of damages is appropriate if there is such a creature. *See, e.g.*, Goetz & Scott, *supra* note 114, at 326-27; Victor P. Goldberg, *An Economic Analysis of the Lost-Volume Retail Seller*, 57 S. CAL. L. REV. 283, 283-84 (1984).

121. *See* Herbert, *supra* note 65, at 454.

122. *See* U.C.C. § 2A-529(3) (1987). The original comment sought to prevent double recovery, by pointing out that, according to the statute, the lessor was obliged to hold the goods for the lessee. *See* U.C.C. § 2A-529 cmt. 3 (1995); *see also id.* § 2A-529(2) (providing this right). However, this obligation was subject to a critical limit: the lessor was entitled to dispose of the goods at any time until the damages were collected, though its damages would be limited to re-lease or contract-market if it did so during the remaining lease term. *See* U.C.C. § 2A-529(3) (1987). Thus, if the lessor did collect damages from the lessee, the lessor could not then re-lease the goods, but the lessor could, if it chose, do so after judgment (and the expiration of the lease term) and before the damages were collected and still claim the full damages.

123. *See* U.C.C. § 2A-529(1)(a) (1987).

124. *See* Rapson, *supra* note 65, at 902-04.

125. *See, e.g.*, United Chemicals, Inc. v. Welch, 460 So. 2d 540, 541-42 (Fla. 1st DCA 1984); *see generally* Benfield, *supra* note 65, at 940 & n.78.

under section 2A-529(1)(a) could be brought only when the lessee had accepted the goods and the lessor had not repossessed them or had them tendered back (or when the goods were damaged when the lessee bore the risk of loss).[126] This eliminated the free choice between the action for rent and the action for contract-market damages or re-lease damages. Second, the section permitting re-lease or other disposition now provided an express right of set-off to the extent that the damages available under section 2A-529 exceed those available under the other section.[127] Both of these helpful changes were found in the California version of the statute, and both were carried forward into Florida's original enactment.[128]

Similarly, the 1990 amendments codify another nonuniform change carried from California to Florida: the use of the date of entry of the judgment, rather than the date of default, to set the time until which unpaid rent could be recovered.[129] The remaining changes were mainly cosmetic.

v. Catch-All Damages

It is possible that none of these remedies would prove entirely satisfactory to the lessor. For the most part, they contemplate that the lessor will repossess all of the goods, which may be infeasible. Repossession might also be undesirable, should the dispute not go to the core of the lease agreement; the lessor may prefer to keep the lease alive and litigate the dispute. Furthermore, some of these remedies may compensate the lessor only in part. Finally, Article 2A does not make every default a basis for seeking remedies. The parties may, as has been noted, define default as they please, and may provide that the lessor is entitled to remedies for even trivial defaults.[130] If they do not, though, defaults not listed in the general section on the lessor's remedies, and not substantially impairing the value of the lease contract to the lessor, will not entitle the lessor to the remedies noted above.[131]

For each of these scenarios, the 1990 amendments to Article 2A provide a catch-all remedy. This entitles the lessor to "recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default."[132]

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126. *See* U.C.C. § 2A-529(1)(a) & cmt. 1 (1995).
127. *See id.* § 2A-529(3).
128. *See* FLA. STAT. § 680.529(1)(a) (1997).
129. *See* U.C.C. §§ 2A-529(1)(a)(i), -529(1)(b)(i) (1995); *cf.* FLA. STAT. §§ 680.529(1)(a)(1), .529(1)(b)(1) (1997).
130. *See* U.C.C. § 2A-523(3) (1995).
131. *See id.* § 2A-523(3)(a), (b).
132. *Id.* § 2A-523(2).

This remedy is obviously rather fluid, giving great deference to the ability of the courts to frame a remedy consistent with expectation.[133]

This section adds usefully to Article 2A. It makes clear that the lessor need not elect remedies, an approach otherwise disfavored in the U.C.C.[134] The section also provides a clear remedy for minor defaults; though these would not ordinarily be litigated by themselves, they might be litigated as part of a larger action based on more fundamental breaches of the lease agreement. It should be noted that this section does not allow the lessor to drive up its damages. If, for example, the lessee tenders back the leased goods and the lessor refuses to accept them, the lessor may not then seek under this section any damages that could have been avoided had the lessor accepted the goods and re-leased them.[135] This is implicit in the general need to mitigate, but bears repetition all the same.[136]

4. Other Changes

Of the remaining amendments, a good many were purely stylistic or formal, and need not be discussed here. Two, however, though not fitting into the categories above, are sufficiently weighty to warrant brief attention.

(a) Subordination

The parties to a lease may have various types of priority created by Article 2A. For instance, mechanic's liens and materialman's liens generally have priority over the interests of the lessor and lessee, un-

133. Which is the general damages measure under the U.C.C. *See id.* § 1-106(1).

134. *See, e.g., id.* §§ 2-703 cmt. 1, 9-501(1); *see also id.* § 2A-523 cmt. 1 (rejecting election of remedies).

135. *See* U.C.C. § 2A-523 drafting note (1990). These damages would be precluded under section 2A-529(1)(a) of the U.C.C., assuming that the lessor would have been able to release the goods. *See* U.C.C. § 2A-529 cmt. 1 (1995).

136. The 1990 amendments added a section on the lessor's residual interest in goods, simply providing that the lessor might, in addition to the remedies mentioned above, recover damages if the lessee's default caused damage to the lessor's residual interest in the goods. *See* U.C.C. § 2A-532 (1995). This section merely codified what has long been understood: the lessor, by definition, has some lingering property right in the leased goods, which the lessee may not impair (beyond whatever wear and tear is contemplated under the lease agreement, and any damage consistent with the lessee's duty of ordinary care under the bailment for hire). *See, e.g.*, Davis v. M.L.G. Corp., 712 P.2d 985, 987-88 (Colo. 1986); Stephens v. Thompson, 339 S.E.2d 784, 785 (Ga. Ct. App. 1986). The section conforms almost exactly to a Florida nonuniform amendment, drawn from the California Bar report, and thus does not change Florida law. *See* FLA. STAT. § 680.532 (1997); *see also California Report, supra* note 15, at 1045-46. Professors White and Summers find this section mysterious, perhaps because they have assumed that this right was so obvious that it could be taken for granted. *See* 2 WHITE & SUMMERS, *supra* note 27, § 14-3, at 42. Two grizzled veterans of Code wars probably should know better than to assume that anything in the Code is so obvious that it cannot be mucked up by the naive, foolish, or willful. In any event, here it is.

less the law creating the lien provides otherwise.[137] On the other hand, creditors of the lessee always, and of the lessor usually, take subject to the lease contract.[138] And, as in Article 9, the rights of lessors and lessees in fixtures depend in large part on the presence of fixture filings.[139] In Article 9, rights of these types may be subordinated.[140] As the comment to section 9-316 hints, the section may not itself have been necessary.[141] Given the ready alienability of claims outside of the U.C.C., it is logical to suppose that one can agree to take junior status, whether gratuitously or for a consideration. Certainly pre-U.C.C. law held as much.[142]

The first try at Article 2A omitted this right. Possibly it was omitted out of simple economy, if all concerned thought subordination sufficiently obvious. Still, most of the rights in Article 2A subject to subordination derive from Article 9. A court with too much time on its hands might thus apply *expressio unius est exclusio alterius* and conclude, one assumes wrongly, that no such right of subordination existed under old Article 2A. Happily, the 1990 amendments contain a section copied word for word from Article 9, with almost exactly the same comment.[143] Parties to a lease, as well as other parties with rights in a lease, may thus blithely subordinate away, secure in the knowledge that their transactions will not be invalidated.

(b) Right of Revocation

Under both Article 2 and Article 2A, the right of revocation is narrower than the right of rejection, in large part to avoid the strategic behavior that could result were the recipient of the goods able to revoke its acceptance well after it took delivery.[144] Under the 1987 text, the lessee's right to revoke was rather narrow, stemming entirely from the nonconformity of the goods leased.[145] This left out the possibility that the lessor might default under the lease contract, even though it supplied conforming goods. For example, a lessor might have a continuing service obligation. Its failure to comply might render the goods valueless as they break down, though they might have performed per-

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137. *See* U.C.C. § 2A-306 (1995). In Florida, the statutes creating these liens are generally found in chapter 713 of the *Florida Statutes*.

138. *See id.* § 2A-307.

139. *See id.* § 2A-309; *cf. id.* § 9-313 (fixtures).

140. *See id.* § 9-316.

141. *See id.* § 9-316 cmt. ("This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate his claim.").

142. *See, e.g.*, 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 37.1 (1965).

143. *See* U.C.C. § 2A-311 & cmt. (1995). The only change in the comment renders it gender-neutral.

144. *See, e.g.*, Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215 (1990).

145. *See* U.C.C. § 2A-517(1) (1987).

fectly when they were first delivered. The 1990 amendments corrected this oversight by providing that breach of the lease contract, like supplying non-conforming goods, can justify the lessee's revocation if the breach substantially impairs the value of the goods to the lessee.[146] Another, perhaps less necessary subsection was added, which provides that the lessee may revoke for other reasons if the lease contract so provides.[147] This may not have been necessary; default is left to the parties to define, so one would think, *a fortiori*, that they could define a lesser right than default. Still, the clarity does no harm, and may reduce lingering or contrived uncertainty.

C. Conclusion

Article 2A has improved. The 1990 amendments did much to remove the earlier uncertainties and perversities in remedies, in particular, and in other areas as well. Florida, of course, had taken a step toward the current version when it enacted its nonuniform version of Article 2A back in 1990. Now it has brought itself more or less into line with other states, and has at the same time gained the other improvements that the 1990 amendments brought. Uniformity and certainty are perhaps self-evident virtues in commercial law.[148] Unpredictable results and free-form standards can lead to risk-averse behavior and, as a result, inefficient operations.[149] Firms may decline opportunities to make money or take excessive precautions to reduce risk (or, in the case of damages, to prove the amount).[150] Uniformity promotes certainty, at least in the middle- to short-run, by promoting convergence on legal standards. Florida has, at little cost, bought its lessors and lessees certainty.

But not complete certainty. Yes, of course no statute can provide that. But there is a larger reason to make the comment about uncertainty: Florida still has a nonuniform version of Article 2A. The Legislature enacted NCCUSL's 1990 amendments, which covered about half of Article 2A's sections. For these, Florida has purely the uniform version. The other sections, though, remain as they were before this legislative session. In the main, Florida had enacted the uniform version here as well. In several sections, though, Florida had enacted

146. *See* U.C.C. § 2A-517(2) (1995).

147. *See id.* § 2A-517(3).

148. *Cf.* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . .") (citations omitted).

149. *See, e.g.*, Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 279-80 (1986); Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191, 194 (1996).

150. *See* Kaplow & Shavell, *supra* note 149, at 192.

nonuniform versions, untouched by the recent amendments. For these sections, then, Florida remains out of step with most of the nation.[151]

Many of these differences are immaterial. A few, though, are not. Almost all of these pertain to consumers, and often weaken the rights of consumers under Article 2A.[152] For example, the uniform provision on unconscionability provides in part that consumer leases induced by unconscionable conduct or as to which unconscionable collection prac-

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151. Florida's leasing law has one provision not contained within Article 2A, but affecting it greatly. When Article 2A was put in place, Florida added to its motor vehicle laws a provision stating that for motor vehicles and trailers, "a transaction does not create a security interest merely because it provides that the rental price is permitted or required to be adjusted under the agreement either upward or downward by reference to the amount realized upon sale or other disposition of the motor vehicle or trailer." FLA. STAT. § 319.271 (1997). This sort of statute has been enacted in a good many states, and a version of it appears in the Internal Revenue Code. *See* 26 U.S.C. § 7701(h) (1994); *see also, e.g.*, Corinne Cooper, *Identifying a True Lease Under UCC § 1-201(37), in* 1 EQUIPMENT LEASING § 4.08, at 4-81 n.89 (Jeffrey J. Wong ed., 1998) [hereinafter Cooper, *Lease*]. Its effect is to validate so-called terminal rent adjustment clauses (TRACs) as leases, thus excusing those who use them from complying with the filing requirements and procedural restrictions of Article 9.

TRACs are used when the parties anticipate that the lessor will sell the leased goods at the end of the lease term. The parties set a value for the residual interest in the goods. If the goods are sold or appraised for more than this value at the end of the lease, then the lessee gets the gain; if the goods are worth less, the lessee is liable for the difference. The question, then, is how much of the risk associated with this sale is retained by the lessor. At times, a clause of this sort merely protects the lessor against excessive mileage or wear and tear. It may be defensible as a true lease. Most of these clauses, though, effectively divest the lessors of any real residual interest in the leased goods. If the lessee insures the lessor against any downside market risk, and retains any upside gain, then the lessee effectively has taken the full risk of any market change. This sounds like a classic security interest, because the lessor has handed off its real residual right in the goods. It is guaranteed a certain amount—the lease payments, plus a lump-sum payment at sale. The lessee is thus, in essence, the economic owner of the goods. *See, e.g.*, Cooper, *Lease*, *supra*, § 4.08[1]; *see also, e.g.*, *In re* Zerkle Trucking Co., 132 B.R. 316 (Bankr. S.D. W. Va. 1991) (holding TRAC lease a disguised security interest).

Article 2A avoided this issue, in large part to prevent conflict with the TRAC leasing industry. *See* Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who is Saving the UCC?*, 26 LOY. L.A. L. REV. 563, 574-76 (1993) [hereinafter Cooper, *Madonnas*]. We thus see legislation, as in Florida, that validates them. It is hard to justify these statutes as a matter of principle, and especially hard to justify placing them apart from the rest of the relevant statutory scheme. *See* Cooper, *Madonnas*, *supra*, at 574-76 (noting that the location "despicably hides the ball"). One hopes that the legislature will clear out this anomaly, to use a polite term, when it next revises Article 2A.

152. One nonconsumer change is to the risk of loss section. The change shifts the risk of loss to the lessee when the loss resulted from the lessee's negligence. *See* FLA. STAT. § 680.219(1) (1997); *cf.* U.C.C. § 2A-219(1) (1995). This seems inconsequential. Though Article 2A does not say so in as many words, the Official Comment states that the parallel provisions in Article 2 that expressly allow the parties to allocate risk of loss contractually "are not incorporated as they are not necessary." *Id.* § 2A-219 cmt. One may infer from this that the parties are free to allocate risk by contract, the apparently firm rule of section 2A-219(1) notwithstanding. *See, e.g.*, LAWRENCE & MINAN, *supra* note 9, ¶ 13.02[5]; 2 WHITE & SUMMERS, *supra* note 27, at 462. If so, the lessor is likely to shift the risk to the lessee in its form contract. In any event, this provision may appropriately place the risk on the party better able to avoid it, which is not inconsistent with the conventional economic analysis of tort. *See, e.g.*, Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1057 (1972).

tices have been used may give rise to relief, and that a court finding unconscionability shall grant reasonable attorney's fees to the consumer lessee.[153] These provisions were, and are, omitted from Florida's Article 2A.[154] Similarly, the permissible choice of law provisions in leasing contracts have been expanded from those in the uniform version.[155] Another is section 2A-406(1)(b), which controls when delay or allocation by a lessor enables a lessee to modify the lease contract by accepting what is supplied, with an appropriate allowance for the deficiency. In the uniform version, this right extends to all lessees except nonconsumer finance lessees, who presumably look to the supplier for recourse.[156] Florida's version, as in a few other states,[157] bars all finance lessees from exercising the right to modify.[158]

If only in the interests of consistency, the Legislature should tidy up Article 2A to render it wholly uniform. Beyond the appeal of uniformity, though, most of the substantive amendments disrupt the care-

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153. *See* U.C.C. § 2A-108(2), (4) (1995). Subsection 4 also provides that the party against whom a claim of unconscionability is made may collect its fees if the lessee's claim proves groundless. This has been attacked as creating excessive uncertainty for consumer lessees, thus perhaps chilling unconscionability litigation. *See* Donald B. King, *Major Problems with Article 2A: Unfairness, "Cutting Off" Consumer Defenses, Unfiled Interests, and Uneven Adoption*, 43 MERCER L. REV. 869, 873-77 (1992). One could solve this problem, if problem it be, by enacting only section 2A-108(4)(a) without the reverse fee shifting. *See also infra* notes 343-352 and accompanying text (fee shifting in revised Article 5).

154. *See* FLA. STAT. § 680.1081 (1997).

155. The uniform version of Article 2A allows the parties to a consumer lease to choose only the law of the jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within thirty days after, or that in which the leased goods are to be used. *See* U.C.C. § 2A-106(1) (1995). Florida's version also allows the parties to choose the law of the jurisdiction where the goods will be used. *See* FLA. STAT. § 680.1061(1) (1997). While this is convenient for the lessor, the lessee, often a tourist, may find the law unfamiliar and irksome (especially in light of the attenuated consumer protections granted by Florida's Article 2A).

156. *See* U.C.C. § 2A-406 cmt. (1995).

157. Seven, as of 1997. *See* U.C.C. § 2A-406(1)(b), 1B U.L.A. 227 (Supp. 1998).

158. *See* FLA. STAT. § 680.406(1) (1997). A similar change was made in the section dealing with casualty to leased goods. *See id.* § 680.221(b); *cf.* U.C.C. § 2A-221(b) (1995).

It should be noted that not all of the changes that affect consumers do so for the worse. One, to a provision on rejection and revocation, excepts most consumer finance lessees from a bar on revocation when the lessee knows of a nonconformity when it accepts the goods. *See* FLA. STAT. § 680.516(2) (1997); *cf.* U.C.C. § 2A-516(2) (1995) (barring all finance lessees from revocation under those circumstances). Florida did not, however, make a corresponding amendment to the parallel provision in section 2A-517(1)(a), which creates some internal inconsistency. One assumes that the nonuniform enactment trumps the uniform language, thus giving consumer finance lessors an expanded revocation right. In the same vein, Florida removed the requirement of timely notice of default in the case of revocation for all consumer leases, which clears away one procedural hurdle otherwise faced by consumers. *See* FLA. STAT. § 680.516(6) (1997); *cf.* U.C.C. § 2A-516(3)(a) (1995) (requiring timely notice). Other states have chosen this nonuniform path. *See* U.C.C. § 2A-516, 1B U.L.A. 243-44 (Supp. 1998) (Alabama, Maryland, South Dakota). Finally, the Article 2A Statute of Frauds has been amended in Florida to require all consumer leases to be in writing, subject to a limited list of exceptions; the uniform version excuses leases with total payments of less than $1,000. *Compare* FLA. STAT. § 680.201(1)(a) (1997) *with* U.C.C. § 2A-201(1)(a) (1995).

ful balance of consumer and lessor rights contained in Article 2A. NCCUSL is even now revising Article 2A yet again, this time to take account of changes in draft Article 2 and new Article 9, as well as other criticisms that have been made over time. When these changes come forward, the Legislature should take the opportunity to clear out the remaining idiosyncrasies in Florida's Article 2A.[159]

One might also ask whether Article 2A is a whole loaf. There is much to be said to the contrary. One critique of Article 2A has been its limited treatment of consumer leases.[160] This is not a surprise; much of the force behind Article 2A's drafting came from commercial lessors, and most of the leasing industry engages in commercial leases, Hertz, Avis, and the like notwithstanding. Article 2A does contain some consumer protection provisions, though not many of overpowering consequence.[161] True, there are other statutes, state and federal, that give consumers additional rights.[162] The statutes do not, however, provide a systematic and coherent body of consumer protection law governing leases.

To remedy this, a NCCUSL drafting committee is hard at work on a Uniform Consumer Leasing Act. The first draft appeared in 1996, and the sixth appeared in October of 1998.[163] It is too early to comment on this project, but at present it seems to be providing a sensible body of consumer leasing law. Whether it will be widely enacted is a trickier question. If consumer protections had been worked into a more general uniform act, the leasing industry might be relatively willing to take the bitter with the sweet and swallow the whole act. As it is, the industry has the benefits of uniformity, and, should the statute be oversolicitous to consumers, can snipe at this consumer statute. One may thus wonder whether it will be enacted generally. This may well depend on the extent to which leasing industry concerns can be addressed—and to this extent, consumer advocates may be less enchanted with the statute. Floridians, along with the rest of the nation, will just have to wait.

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159. It could do so earlier, of course, perhaps either in a glitch bill or as part of the next U.C.C. amendments (presumably Articles 5 and 9). *See infra* Parts IV.A.-B.

160. *See, e.g.*, King, *supra* note 153, at 877-80.

161. For a somewhat jaundiced view of these provisions, see 2 WHITE & SUMMERS, *supra* note 27, § 13-4; for a more optimistic view, see Fred H. Miller, *Consumer Leases Under Uniform Commercial Code Article 2A*, 39 ALA. L. REV. 957, 959-64 (1988).

162. Perhaps the most important is the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e (1994), and the corresponding regulation, Regulation M, 12 C.F.R. § 213 (1998). The Uniform Consumer Credit Code also gives consumer lessees special rights, though it is not in force in most states.

163. The drafts are available at the NCCUSL Website, located at <http://www.law.upenn.edu/library/ulc/ulc.htm> (visited Jan. 28, 1999).

III. ARTICLE 8

Article 8 of the U.C.C. deals with investment securities—not the more glamorous bits of securities regulation of the sort that have made certain shady operators guests of the federal government from time to time, but the bits that control how we own and transfer securities.[164] One can understand that a statute originally written in the 1940s and 1950s might need some revision, given the radical changes in financial markets since that time. Indeed, some of the revisions to Article 8 deal precisely with the advent of new technology, and will be dealt with below.[165] But Article 8 has already been revised since the Age of Llewellyn, as recently as 1977. Why the need for a new Article 8?

The reason requires a bit of history; but, as Holmes didn't quite say, a page of history is worth a volume of illogic. Once upon a time, when Karl Llewellyn bestrode the earth, stockbrokers moved stock certificates from place to place when they sold shares for their customers. This meant a good deal of paperwork and some careful record-keeping, but share volume was none too high. In 1964, at the height of enactment of the U.C.C., daily volume on the New York Stock Exchange averaged 4.89 million shares.[166] Then came a boom in stock trading, as conglomerates sprouted and the economy, stimulated by the guns-and-butter policies of the Johnson administration, took off. By 1968 share volume had almost tripled from that of only a few years before.[167] The increased trading volume might have gratified the brokers in the front office, but wrought havoc on the increasingly desperate clerks in the back office. Brokerage houses, unwilling to devote more resources to mundane tasks like processing trades, fell further and further behind—so much so that, despite midnight shifts of workers and seven-day workweeks, stock exchanges shortened trading days in late 1967 and early 1968, and even closed on Wednesdays in much of 1968.[168] Something had to be done.

Perhaps obviously, some firms bought the relatively newfangled computers to help out; others failed to keep up and shut their

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164. Indeed, the new Article 8 no longer covers those bits of contract law on the sale of securities which old Article 8 had covered. Thus, for instance, the old provisions on performance and remedies have been deleted on the theory that a statute should either regulate contracts comprehensively or not at all. *See* U.C.C. art. 8 pref. note IV.B.8. (1995); *cf.* U.C.C. § 8-107 (1977) (remedies); *id.* § 8-314 (breach).

165. *See infra* Part III.A.

166. *See* VI LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2899 (1989).

167. *See id.*

168. *See id.* at 2899-900.

doors.[169] More systematic solutions took shape, prodded by legislative and regulatory action that promoted such things as uncertificated or book-entry stocks and centralized clearing corporations.[170] As these took shape, NCCUSL started work on a revision of Article 8 that would, it was hoped, provide a legal structure for a more efficient system of transferring securities.

The process begat the 1977 version of Article 8. After surveying the changing world of securities transfers, the drafting committee concluded that uncertificated stocks would shortly predominate.[171] Issuers would no longer send out nicely engraved certificates; rather, they would simply record ownership and transfer electronically or otherwise, as they were told to do so by their shareholders or the shareholders' agents. The committee, however, was aware that actual stock certificates would continue to exist and even continue to be created. Accordingly, the 1977 version of Article 8 provided parallel rules for both certificated and uncertificated securities.[172] All told, it was a sensible resolution of a knotty and potentially disastrous problem, and one much heralded in the literature.[173] Except for one little detail—it didn't work.

The problem with the 1977 version of Article 8 became obvious quickly, and, using the perfect hindsight vouchsafed law professors, was evident even as that version came forth and was enacted. That problem? Uncertificated securities never really arose, save for mutual funds and United States Government securities.[174] Why is hard

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169. *See id.* at 2902-07; *see also* Emily I. Osiecki, Comment, Alabama By-Products Corp. v. Cede & Co.: *Shareholder Protection Through Strict Statutory Construction*, 22 DEL. J. CORP. L. 221, 225 (1997).

170. *See* Osiecki, *supra* note 169, at 224-25.

171. The literature of the time was rife with calls for uncertificated securities. *See, e.g.*, Egon Guttman, *Toward the Uncertificated Security: A Congressional Lead for the States to Follow*, 37 WASH. & LEE L. REV. 717 (1980); Thomas H. Jolls, *Can We Do Without Stock Certificates? A Look at the Future*, 23 BUS. LAW. 909 (1968); Richard B. Smith, *A Piece of Paper*, 25 BUS. LAW. 923 (1970); Richard B. Smith, "*A Piece of Paper Revisited*," 26 BUS. LAW. 1769 (1971).

172. For proper analyses of this version of Article 8, see, EGON GUTTMAN, MODERN SECURITIES TRANSFERS (3d ed. 1987); 7 WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES, ARTICLE 8: INVESTMENT SECURITIES (1986).

173. Including in this esteemed periodical. *See* Paul B. Rasor, *A Critical Look at Secured Transactions Under Revised UCC Article 8*, 14 FLA. ST. U. L. REV. 859, 865-67 (1987); *see also, e.g.*, Martin J. Aronstein et al., *Article 8 Is Ready*, 93 HARV. L. REV. 889 (1980).

174. *See* James Steven Rogers, *Policy Perspectives on Revised U.C.C. Article 8*, 43 UCLA L. REV. 1431, 1443 (1996). Indeed, a good many states continued to require that share certificates be issued by their corporations, including New Jersey and, for quite a while, Pennsylvania, both corporate havens. *See* GUTTMAN, *supra* note 172, ¶ 1.04[2]. Even many of the states that allowed their corporations to issue uncertificated securities still allowed shareholders to demand stock certificates. *See id.*

The principal exception for publicly-held corporations is the dividend reinvestment plan, under which the issuer automatically uses dividends to purchase more shares, often fractional, of the issuer's stock. If a broker holds the shares in street name—that is, the bro-

to explain. Possibly the issuers decided that they would not want to invalidate existing stock certificates or convert the old records into new. Possibly all concerned were a little uneasy about a brand-new set of rules, preferring to adhere as closely as possible to rules familiar from certificated days. Possibly the immediate solution to the paperwork crunch of the late 1960s was successful enough that brokers and issuers alike decided to stay with it, whether because of inertia or because of the preference for certainty.[175] In any event, the world of securities developed a very different model, one in which certificates were still issued but never moved.[176]

The key to this system is the use of a common depository for shares. The Depository Trust Company (DTC), a New York company, holds about three-quarters of shares in publicly traded companies, with its nominee, Cede & Co., as the nominal shareholder of record. Brokerages and banks created DTC to allow them to deposit certificates centrally (so-called "jumbo certificates," often representing tens or hundreds of thousands of shares) and leave them at rest. When a customer of one of DTC's participants buys or sells shares, appropriate changes are made on the books of the participants.[177] At the end of each day, the transactions are netted out,[178] so that only the net changes for each participant need be recorded by DTC. Each broker makes similar book entries. Thus, if one customer of a broker buys one hundred shares of a certain stock, and another sells one hundred shares, the brokerage need not report anything to NSCC. The clear-

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ker's name—this is no different from any other indirect system of holding. If, however, the shares are held in the customer's name, but the issuer has its own reinvestment plan, then the issuer will usually reinvest the dividends and hold the shares as a book entry rather than issue new certificates with each reinvestment. *See* Martin J. Aronstein, *Security Interests in Securities: How Code Revision Reflects Modern Security-Holding Practices*, 10 UCC L.J. 289, 292-93 (1978).

175. In contrast, mutual funds, though dating back a good many years (at least as closed-end funds), did not become very important until the 1960s. Accordingly, there was less accumulated practice to dislodge, and the industry could adopt more readily a new method of dealing with securities. The government's move toward uncertificated securities may be explained, at least in part, by its unitary structure. Though a single corporation might choose not to rely on uncertificated securities, given dominant industry practice to the contrary, the federal government need not worry about losing out to rival governments or to any resulting reluctance on the part of investors to purchase its securities. For more on federal uncertificated securities, see Guttman, *supra* note 171.

176. The description that follows is drawn from a number of sources. *See, e.g.*, U.C.C. art. 8 intro. (1995); JOHN F. DOLAN, COMMERCIAL LAW: ESSENTIAL TERMS AND TRANSACTIONS § 14.4 (2d ed. 1997); Charles W. Mooney, Jr., *Property, Credit, and Regulation Meet Information Technology: Clearance and Settlement in the Securities Markets*, LAW & CONTEMP. PROBS., Summer 1992, at 131, 136-38.

177. Some small brokerages and financial intermediaries may not be members of DTC. In that case, they generally contract with members to handle their clearance tasks. *See* Jeanne L. Schroeder, *Is Article 8 Really Ready This Time? The Radical Reform of Secured Lending on Wall Street*, 1994 COLUM. BUS. L. REV. 291, 327-28.

178. The transactions are netted out by the National Securities Clearing Corporation (NSCC), another creation of brokerages and banks.

ing agent and DTC's books will show no change. Only the brokerage's own books will reflect the sale and purchase.

Revised Article 8 made some acknowledgment of this indirect holding system, but very little.[179] For the most part, it treated all dealings in certificated securities alike, which proved increasingly troublesome as this method of share disposition took hold. The greatest problems, at least conceptually, arose because of the 1977 revision's use of property models when dealing with securities held by an intermediary. Much has been written about the confusion this yielded, particularly in such areas as tracing rules and the creation of security interests.[180] Moreover, the 1977 revision of Article 8 made no great changes in the substance or scope of the statute. For the most part, it merely accommodated the new and, it was hoped, soon predominant method of share transfer. New tools of trafficking in securities arose, which fit imperfectly within the old rules. Finally, the stock market difficulties of October 1987 brought about studies that suggested that legal uncertainties about clearance and settlement might contribute to fears that institutions might not be able to meet their obligations, and thus to increased market volatility.[181]

By 1988, an American Bar Association committee was hard at work proposing alterations to Article 8 and encouraging NCCUSL to form a drafting committee.[182] NCCUSL responded by assembling a drafting committee in 1991; this committee—one of NCCUSL's stronger assemblages, with Professor James Steven Rogers as reporter and Professor Curtis R. Reitz as chair—completed its work in 1994. Its fruits are now the law of almost every state, including, at last, Florida.

To do justice to new Article 8 would exceed the patience of even those few readers who have made it this far, not to mention the page budget that this periodical could allow.[183] A few issues, though, bear

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179. *See* U.C.C. § 8-313 (1995).

180. *See, e.g.*, Charles W. Mooney, Jr., *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 CARDOZO L. REV. 305 (1990); James Steven Rogers, *Negotiability, Property, and Identity*, 12 CARDOZO L. REV. 471 (1990); Schroeder, *supra* note 177.

181. *See, e.g.*, Rogers, *supra* note 174, at 1437-38, 1445-46.

182. *See* Charles W. Mooney, Jr., et al., *An Introduction to the Revised U.C.C. Article 8 and Review of Other Recent Developments with Investment Securities*, 49 BUS. LAW. 1891, 1892 & n.3 (1994).

183. I take solace that two leading scholarly commentators on Article 8 have recently made similar laments—and then gone on to write very lengthy articles that did not cover the whole terrain. *See* Rogers, *supra* note 174, at 1433 n.2 (disclaiming comprehensive coverage in an article of 113 pages); Schroeder, *supra* note 177, at 301 (same disclaimer in an article of 212 pages). The best overviews of new Article 8 are EGON GUTTMAN, MODERN SECURITIES TRANSFERS (3d ed. Supp. 1998), 7A WILLIAM D. HAWKLAND & JAMES S. ROGERS, UNIFORM COMMERCIAL CODE SERIES, REVISED ARTICLE 8: INVESTMENT SECURITIES (1996), and Bryn R. Vaaler, *Revised Article 8 of the Mississippi UCC: Dealing Directly with Indirect Holding*, 66 MISS. L.J. 249 (1996).

attention, whether because they are potentially important to a wide range of practitioners or because they are at the core of the new statute. This Article will thus touch on virtual commerce, risks of wrongdoing by intermediaries, and security interests in investment securities.[184]

A. The Virtual Stock Certificate

Electronic commerce has become ever more important, as everything from funds transfers to airline tickets and antiques are handled over the wires. The U.C.C. adjusted to this to some degree when Article 4A, on electronic funds transfers, was added in 1989.[185] The current U.C.C. revisions also take electronic commerce into account, at least to some extent.[186] Indeed, there is a larger NCCUSL project to draft a Uniform Electronic Transactions Act, which would regulate the manner in which electronic contracts might be formed.[187]

Revised Article 8 takes these developments into account in a range of sections. One of obvious interest is its deletion of the Statute of Frauds, on the theory that electronic transactions rendered the

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184. This is not to say that new Article 8 makes no other significant changes. For example, until these revisions, the issuer would have been liable to a former owner of securities for wrongful registration if the issuer had received written notice of an adverse claim far enough ahead of the presentation of the security for registration that it could act appropriately. *See* U.C.C. § 8-403(1) (1977). Once the issuer had received notice, it would have been under a duty to inquire about the merits of the claim, an inquiry potentially satisfied by notice to the adverse claimant that registration would proceed in 30 days unless the issuer received either an appropriate court order or a bond. *See id.* § 8-403(2). This honored a long line of American cases but imposed significant burdens on transfers by fiduciaries. *See, e.g.*, Lowry v. Commercial & Farmers' Bank, 15 F. Cas. 1040 (C.C.D. Md. 1848) (No. 8581). Various fiduciary statutes, consistent with this principle, excused issuers from liability, save in the presence of notice. *See, e.g.*, Vaaler, *supra* note 183, at 292-93. Revised Article 8, following in its tendency to increase the negotiability of interests in securities, entirely eliminated issuer liability, whether or not notice had been given of adverse claims, unless the issuer had been served with an injunction or similar order or the issuer colluded with the wrongdoer. *See* U.C.C. § 8-404(a) (1995).

185. Federal law had adjusted somewhat earlier, with the enactment of the Electronic Funds Transfer Act (EFTA), covering consumer transactions, in 1978. *See* 15 U.S.C. §§ 1693, 1693a-1693r (1994). Transactions governed in part by the EFTA do not fall within Article 4A. *See* U.C.C. § 4A-108 (1995). In addition, a number of Federal Reserve regulations and operating circulars of Federal Reserve Banks regulate electronic funds transfers; perhaps obviously, these prevail over Article 4A. *See id.* § 4A-107. Article 4A has been part of Florida law since 1991. *See* Act effective Jan. 1, 1992, ch. 91-70, 1991 Fla. Laws 515 (current version at FLA. STAT. §§ 670.101-.507 (1997)).

186. Thus, for example, the current draft of Article 2 no longer refers to "writings," but, rather, uses "records," a term that includes both traditional writings and information stored in an electronic medium. *See* U.C.C. § 2-102(26) (Draft Mar. 1, 1999) (defining "record"); *see also* U.C.C. § 2-201 (Draft Mar. 1, 1999) (Statute of Frauds; refers to "record," rather than "writing").

187. *See* UNIF. ELEC. TRANSACTIONS ACT (Draft Jan. 29, 1999). At least at present, the statute would defer to other bodies of law, including the U.C.C., should they have their own rules about electronic contracting. *See id.* § 103(c).

provision dated and even obstructionist.[188] A good deal of litigation had arisen under the old Statute of Frauds—more, perhaps, than under any other section of Article 8. This litigation typically involved informal transactions in securities of small firms, and often also involved an alleged promise that an employee would receive shares in the firm.[189] It may be too much to think, though, as one optimistic author did, that this heralded the virtual demise of the Statute of Frauds.[190] Article 2's revisers, after flirting with the deletion of the Statute of Frauds, have since restored it, albeit in weakened form.[191] The Statute is, perhaps, on a life support system, but its heart beats (feebly) on.[192]

More fundamentally, revised Article 8 recognizes—at last!—the indirect holding system and allows it to flourish without resort to general and variant principles of agency law. Until the 1994 revisions, only one section of Article 8 dealt with the depositary system described above, and that section was messy and complex.[193] Under the new rules, we have a new vocabulary—not merely the old and general use of "financial intermediary."[194] Consider the following scenario. Suppose that Moe has a brokerage account with Dewey, Cheatham & Howe, a securities firm that is a member of DTC and NSCC. Moe places an order to buy one hundred shares of Stooge Pictures with Shemp, his broker. Once the order is executed and the shares paid for, what do we have? To begin, Moe is not a purchaser; Moe does not own any specific shares, and Moe's name appears nowhere on the books of Stooge. Moe is, instead, an "entitlement

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188. *See* U.C.C. § 8-113 & cmt. (1995); *see also* U.C.C. art. 8 pref. note IV.B.7. (1995) (explaining reasons further); *cf.* U.C.C. § 8-319 (1977) (old Statute of Frauds).

189. *See* U.C.C. art. 8 pref. note B.7. (1995); *see also, e.g.*, Goldfinger v. Brown, 564 N.Y.S.2d 459, 460-61 (App. Div. 1991); Davenport v. Island Ford, Lincoln, Mercury, Inc., 465 S.E.2d 737, 738-39 (S.C. Ct. App. 1995); Beta Drilling, Inc. v. Durkee, 821 S.W.2d 739, 740 (Tex. Ct. App. 1992); GUTTMAN, *supra* note 172, ¶ 5.03[1][b].

190. *See* Douglas R. Heidenreich, *Article 8—Article 8?*, 22 WM. MITCHELL L. REV. 985, 991-92 (1996).

191. *See* U.C.C. § 2-201 (Draft Mar. 1, 1999).

192. Perhaps appropriately. With no Statute of Frauds, it is true that, say, a buyer could bring in oral evidence of a sales agreement that the seller sought to deny. It is just as true, though, that a seller could do the same with a buyer, which might reopen the door to the sort of fraud which the Statute of Frauds was designed to discourage. For the sale of goods, then, there might be something to be said for an asymmetric Statute of Frauds, which would bar only the seller to a consumer from asserting the existence of an oral contract over a certain amount. In contrast, many of the Statute of Frauds cases under Article 8 may well have involved statute-induced fraud, if, say, an employer sought to avoid an oral contract to sell stock to an employee. In the reverse set of circumstances—an employee either making up an offer to sell, or, more charitably, misinterpreting vague suggestions as firm contracts—presumably the plaintiff's burden of proof, along with the threat of suits in tort (and even criminal sanctions) will sufficiently prevent fraud. Hence Professor Guttman's comment that "[t]he continuation of such a formalistic anachronism is difficult to justify." GUTTMAN, *supra* note 172, ¶ 5.03[1][b], at 5-22.

193. *See* U.C.C. § 8-313 (1977).

194. *Id.* § 8-313(4).

holder."[195] Moe's agreement with Dewey is a "securities account,"[196] and the rights created under that account in the Stooge stock is a "security entitlement." Dewey, which maintains the securities account, is a "securities intermediary."[197] NSCC is a "clearing corporation."[198] The Stooge stock held by DTC in the name of Cede & Co. is a "security" (and, for that matter, a "financial asset," which includes the definition of "security"). The jumbo certificate held by DTC on behalf of Dewey and others is a "security certificate."

The vocabulary recognizes, as the 1977 flavor of Article 8 did not, that Moe does not own stock in Stooge Pictures. He instead has contractual rights created under his securities account. These give him a security entitlement that corresponds to one hundred shares of Stooge Pictures, because Dewey has indicated in its books that the one hundred shares—a financial asset—have been credited to Moe's account.[199] This security entitlement carries with it a good many rights and duties. For instance, Dewey must collect dividends or the like made by Stooge and must pay anything received to Moe (or hold it for him, as their securities account may provide).[200] If Moe wants to vote in shareholders' meetings, then Dewey must vote as Moe wishes, though Moe can allow Dewey to cast ballots for him.[201] Should Moe wish to sell his shares or place some other sort of order (for instance, a stop-loss order), then Dewey must comply.[202] Possibly Moe will decide that he prefers direct holding to indirect; if so, Dewey must, should the agreement creating the securities account provide as much, procure a stock certificate for Moe and have one hundred shares of Stooge placed directly in Moe's name, or in any other name that Moe may direct.[203]

Perhaps the most important rights go directly to what rests behind the security entitlement. Dewey must obtain and maintain financial assets that correspond to the aggregate claims of its entitlement holders.[204] Dewey, the securities intermediary, does not have a property interest in the financial assets held for its entitlement holders; rather, the entitlement holders have pro rata shares in the fi-

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195. U.C.C. § 8-102 (1995) contains this definition and the others in this illustration, except where noted.

196. *Id.* § 8-501(a).

197. If Dewey were not a member of DTC, but instead contracted with a DTC member to handle its dealings, both firms would be securities intermediaries. *See id.* § 8-102(a)(14)(ii) & cmt. 14. In addition, NSCC, which clears accounts for all DTC members, is itself a securities intermediary. *See id.*

198. But not DTC, which is merely a depositary. *See id.* § 8-102(a)(5) & cmt. 14.

199. *See id.* § 8-501(b)(1).

200. *See id.* § 8-505.

201. *See id.* § 8-506.

202. *See id.* § 8-507.

203. *See id.* § 8-508.

204. *See id.* § 8-504(a).

nancial assets held for them.[205] So far, so good for Moe; though Moe lacks the security of clutching the stock certificate to his bosom as he slumbers, or of knowing that his name is emblazoned upon the records of Stooge Pictures, he does have a property interest of some sort.[206] The question that Moe might think about, but probably does not, is just how far these rights will get him in case of a dispute. In particular, what if the shares underlying Moe's security entitlement are sold or given away without Moe's consent? This is the subject of the next Part.

B. The Rise of Negotiability

Before exploring the modest rights of the entitlement holder, we should look at the changed analogies that animated the change. Until the recent revision of Article 8, the law looked at rights in securities essentially as tangible property. Sitting behind each share, after all, is a collection of assets, usually tangible. The stock certificate, though itself only evidence of an ownership share in the underlying business, is also tangible. One may entertain a picture of certificates changing hands for money on the floor of the New York Stock Exchange, much in the way that goods change hands for money at the local five-and-dime.

If this is our image, then all sorts of rules spring forth. One in particular is of interest: the old property rule of *nemo dat*.[207] One may transfer all the rights one has, but no more. This shelter principle appears all over the U.C.C.[208] Thus, for instance, under Article 2 "[a] purchaser of goods acquires all title which his transferor had or had power to transfer."[209] As a corollary, a buyer of goods from a thief may never take good title, however honest the purchase may have seemed, and no purchaser down the chain of title may do any better.[210]

This principle seems to have influenced the drafters and initial revisers of Article 8. Consider the case of Moe. Let us say that Shemp, in desperate need of cash, forges Moe's name, sells the shares

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205. *See id.* § 8-503(a), (b).

206. This property interest becomes important if Dewey becomes insolvent, and Dewey's general creditors seek to seize the financial assets Dewey holds for its entitlement holders. Ordinarily, entitlement holders prevail over any creditors of the securities intermediary. *See id.* § 8-503(a). Ordinarily? Yes, but there is an important exception. One hates to hold the reader in suspense, but . . . . *See infra* notes 283-309 and accompanying text.

207. More fully, *nemo dat quod non habet* (one cannot give what one does not have).

208. *See* John F. Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U. L. REV. 811, 812-13 (1979).

209. U.C.C. § 2-403(1) (1995).

210. *See, e.g.*, Alamo Rent-a-Car, Inc. v. Williamson Cadillac Co., 613 So. 2d 517, 518-19 (Fla. 3d DCA 1993); Candela v. Port Motors Inc., 617 N.Y.S.2d 49, 50 (App. Div. 1994); Butler v. Buick Motor Co., 813 S.W.2d 454, 458 (Tenn. Ct. App. 1991).

credited to his account, and pockets the proceeds. Moe obviously has a claim against Shemp in tort, though this may not mean much if Shemp is insolvent. Can Moe get his stock back? Here we run into another concept familiar from personal property—tracing. Pursuing the analogy further, Moe's shares have disappeared into a blizzard of exchanges. It would be very difficult indeed to figure out where Moe's shares went. Under the 1977 version of Article 8, Moe would have owned a share in a "fungible bulk," the term of art applied to jumbo certificates and the like.[211] This recognizes, to a degree, that Moe has no certificate with his name on it nestled in some large vault. It also creates potential claims if Dewey has not been forthright. If, for instance, Dewey has not purchased all the shares that its customers have paid for, then Dewey's customers share pro rata in whatever bulk Dewey did acquire.[212]

Moe's immediate difficulty, then, may stem from an inability to trace the sale of the shares. Let us say, though, that he *did* own shares, and that we can trace them—improbable, true, but perhaps not impossible for thinly-traded shares. Under *nemo dat*, one would expect that Moe would win; after all, if Shemp acquired the shares through theft, then he could not pass good title to anyone.[213] Indeed, the hapless buyer—Larry—may well lose to Moe. The old rule started regrettably; Moe will lose to any bona fide purchaser.[214] If Larry bought through an indirect holding system, however, he would not be a bona fide purchaser unless the fungible bulk were held by a clearing corporation.[215] The distinction between fungible bulks held by clearing corporations and those held by other financial intermedi-

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211. *See* U.C.C. § 8-313(1)(d)(iii) (1977). The term is rooted in commodities. *See, e.g.*, U.C.C. § 2-501 cmt. 5 (1995).

212. *See id*. § 8-313(2). This avoids the use of especially messy tracing rules, which might depend on coordinating the actual and ostensible balances of shares. For more on tracing, see LIONEL D. SMITH, THE LAW OF TRACING (1997); LAUNDERING AND TRACING (Peter Birks ed., 1995).

The problem with stockbrokers (or, to use the new term for indirect holding, securities intermediaries) who might hold too little for their entitlement holders is not as great as it may have been. Federal statutes and regulations, most notably the Securities Investor Protection Act (SIPA), 15 U.S.C. §§ 78aaa to lll (1994), now protect customers against most shortfalls. *See* Michael E. Don & Josephine Wang, *Stockbroker Liquidations Under the Securities Investor Protection Act and Their Impact on Securities Transfers*, 12 CARDOZO L. REV. 509 (1990). This system of protection is not infallible, though, and might be strained or broken in a market crash; in addition, the changes in Article 8 may require some strengthening of this backup system. *See, e.g.*, David A. Kessler, Note, *Investor Casualties in the War for Market Efficiency*, 9 ADMIN. L. REV. 1307 (1996).

213. Shemp probably committed fraud, which nowadays is not thought to yield void title. The Article will deal with this shortly.

214. *See* U.C.C. § 8-302(1) (1977).

215. Section 8-302(1)(c) allows for bona fide purchase only when the purchaser's rights come through section 8-313(1)(c), -313 (d)(i), or -313(g). Section 8-313(1)(g), in turn, refers to entries made to the account of the purchaser or its designee on the books of a clearing corporation. We may assume that Larry's broker would serve as his designee.

aries probably was not deliberate, but remains puzzling and even mischievous.[216] Still, there it is; Moe may prevail over a downstream purchaser.

But *nemo dat* is not our only conveyancing principle, and this is not our only model. Indeed, this sort of property rule has long been hemmed in by another, more potent rule, even for tangible property: the good faith purchase rule. In brief, this rule provides that a good faith purchaser, typically for value, receives greater rights than the seller had.[217] Thus, for example, one who acquires goods by fraud has voidable title, rather than the void title acquired by a thief; though the defrauded party may replevy the goods from the defrauder, a good faith purchaser for value from the defrauder will take clear title, free from any claims of the victim of fraud.[218] This rule has a long and somewhat bumpy history. In general, though, with a few dips in the late nineteenth and early twentieth centuries, the trend, for better or worse, has been toward increasing the rights of the good faith purchaser for value.[219] This is also true outside of voidable title issues. Most of Article 3, governing negotiable instruments, is based on the premise that instruments of this sort must flow freely, giving their takers little reason to question the bona fides of each check; accordingly, we see that a holder in due course of a negotiable instrument is immune to almost every form of attack.[220] Coming a little closer to home, Article 2 allows a merchant to whom goods are entrusted to give clear title to a buyer in the ordinary course of business, as long as the merchant deals in goods of that kind.[221] If one thinks of the brokerage house as the entrustee and the customer as the entruster, then one can see rather a stern rule in the offing.[222]

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216. *See* Mooney, *supra* note 180, at 333-34 & n.95.

217. *See* Dolan, *supra* note 208, at 813-16.

218. *See* U.C.C § 2-403(1) (1995); *see also, e.g.*, Interstate Cigar Co. v. United States, 928 F.2d 221, 224 (7th Cir. 1991); Southeast Foods, Inc. v. Penguin Frozen Foods, 203 So. 2d 39, 43 (Fla. 3d DCA 1967); Jernigan v. Ham, 691 S.W.2d 553, 556 (Tenn. Ct. App. 1984).

219. *See, e.g.*, Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954). Professor Gilmore later regretted somewhat his enthusiasm for negotiability and the rights of the good faith purchaser, enthusiasm rendered tangible not merely in his article but in Article 9 of the U.C.C., for which he was the main drafter. *See generally* Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981) [hereinafter Gilmore, *Good Faith*].

220. *See* U.C.C. § 3-305(a)(1) (1995).

221. *See id.* § 2-403(2); *see also, e.g.*, Touch of Class Leasing v. Mercedes-Benz Credit of Canada, Inc., 591 A.2d 661, 667-71 (N.J. Super. Ct. App. Div. 1991); Thorn v. Adams, 865 P.2d 417, 420 (Or. App. Ct. 1993).

222. The entrustment analogy has been made by Schroeder, *supra* note 177, at 496.

Indeed, one can go further. Perhaps, as Professor Rogers has suggested, negotiability is not a very good analogy because it is based on the assumption that one owns a thing that is then negotiated. Investment securities are abstract rights—rights that may be represented by stock certificates, but rights all the same—and thus may not really be said to exist in

That is what we have in new Article 8. As before, the entitlement holder takes a pro rata share in all interests in that financial asset.[223] What if that asset is sold to one who acquires a security entitlement for value and without notice of any adverse claim? Then Moe would lose, even if he could somehow manage the job of tracing.[224] The rule applies no matter who the securities intermediary might be; whether clearing corporation or brokerage house no longer matters.[225] Nor is there any distinction between transfers of actual stock certificates or transfers through an indirect holding system.[226]

But we should go a little further. Suppose that the sale occurred, not because of fraud or theft by Shemp or by some outsider, but because of defalcation by Dewey itself. What then? Though at first blush it seems harsh, new Article 8 yields the same result; however the security or security entitlement was placed on the market, a purchaser with no notice of an adverse claim takes free of the entitlement holder's rights. This may cause the securities intermediary's entitlement holders to bump into each other. Another illustration may help. Let us say that Moe has a security entitlement for one hundred shares of Stooge Pictures, and that Dewey has faithfully entered this entitlement on its books and holds one hundred shares on the NSCC records. Now Curly comes along and enters an order for fifty shares of Stooge Pictures. Dewey takes his money and credits Curly's account with the position but purchases no more shares of Stooge. Then Dewey fails. One could use some tracing rule or other to figure out who owns what.[227] Rather than that, new Article 8 continues the policies of the old and allows the entitlement holders to share pro rata—here, giving Moe rights in just under sixty-seven shares and Curly rights in just over thirty-three.[228] Of course, there remains a claim against Dewey, for all the good that does.[229]

New Article 8 has thus embraced negotiability, giving purchasers of securities or securities entitlements even broader rights than they had under old Article 8. We have, however, one more class of transac-

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any sense that makes analogies drawn from the transfer of goods directly helpful. *See* Rogers, *supra* note 180, at 507-08.

223. *See* U.C.C. § 8-503(b) (1995).

224. *See id.* § 8-502 & cmt. 2.

225. *See id.*; *see also, e.g.*, Rogers, *supra* note 174, at 1469.

226. *See* U.C.C. § 8-303 (1995).

227. Such as first-in-time, last-in-time, or the like. *See supra* note 212.

228. *See* U.C.C. §§ 8-502 cmt. 4, 8-503(b) (1995).

229. Incidentally, what if Dewey *never* buys any shares? Technically, Moe may well have a security entitlement; though no financial asset actually existed, the presence of a financial asset is not essential if the other steps required to create a security entitlement took place. *See id.* § 8-501(c) & cmt. 3. Moe would then have a claim against Dewey for the value of this entitlement, as well as possible actions under state and federal law. This may, as before, be a hollow claim if Dewey lacks unencumbered assets, though some resources may be available under SIPA. *See* Schroeder, *supra* note 177, at 472-73.

tions to consider: security interests in securities or security entitlements. These transactions push negotiability to its edges—and beyond? We shall see.

C. Security Interests in . . . What?

Securities and security entitlements are potentially just the sort of assets in which a lender would want to stake a claim. Unlike, say, machine tools or kumquats, they do not wear out or decay; though they do fluctuate in value, whatever value they have may be readily realized. Two questions arise. First, how does revised Article 8 change the rules governing how one takes and perfects a security interest in securities or security entitlements? Second, what priority rules govern these security interests? In particular, do the claims of a security intermediary's secured creditors trump the securities entitlements of the intermediary's customers?

1. Securing Securities

Under the first iteration of Article 8, one went to Article 9 to determine whether a security interest in stock[230] existed and whether it was perfected. In general, just as with other security interests, the secured party would either have to take possession of the collateral or have the debtor sign a security agreement and give value in order to have a security interest in the stock.[231] Either filing or possession could perfect this security interest.[232] This was simple enough, but did not clearly deal with the indirect holding problem. The 1977 revision of Article 8 sought to solve the problem by pulling security interests in certificated securities back within Article 8, mainly in section 8-313—a section not unjustly called "the most opaque provision in the entire UCC."[233] To parse this closely would be both tedious and pointless.[234] In brief, a secured party could take a security interest in stock held in bulk by an intermediary only if the security were transferred to the secured party or its designee.[235] This security interest simultaneously attached and perfected the security interest; no addi-

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230. Though stock is a narrower term than securities, I shall use it here to avoid overrepetition of the word security.

231. *See* U.C.C. § 9-203(1) (1972).

232. *See id.* §§ 9-302(1), -305. Though certificated securities are not named in section 9-305, the definition of instrument includes them. *See* U.C.C. § 9-105(1)(i) (1995).

233. BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 7.17[4] (rev. ed. 1993).

234. Particularly because it has been parsed lucidly by others. *See, e.g.*, CLARK, *supra* note 233, ¶ 7.17[2][a]; Peter F. Coogan, *Security Interests in Investment Securities Under Revised Article 8 of the Uniform Commercial Code*, 92 HARV. L. REV. 1013 (1979); Mooney, *supra* note 180; Jeanne L. Schroeder & David Gray Carlson, *Security Interests Under Article 8 of the Uniform Commercial Code*, 12 CARDOZO L. REV. 557 (1990).

235. *See* U.C.C. § 8-321(1) (1977).

tional filing was needed.[236] In turn, transfer of an indirectly held security could be effected through any of four ways.[237] First, the financial intermediary could send the secured party a confirmation that the security interest existed and make a book entry to that effect.[238] Second, if the shares were held by a clearing corporation, the transfer would be effected if the clearing corporation made appropriate book entries.[239] Third, if the debtor had signed a security agreement describing the stock, transfer occurred when the intermediary received a notice of the security agreement signed by the debtor.[240] Fourth, and last, if the secured party was itself a financial intermediary in possession of the stock, the security interest was transferred when the debtor signed a security agreement.[241]

These rules—the third, in particular—have allowed secured parties to claim rights in stocks. Yet there were many difficulties. The use of transfer as the key concept was a bit odd, continuing as it did the idea of a thing to be transferred.[242] It may, however, have been inevitable, if one bears in mind that 1977's section 8-313 was intended to cover not just the taking of security interests, but also the means by which purchasers would take clear title, whether to certificated or uncertificated securities.[243] Still, it makes for an unwieldy bit of drafting—and one that has yielded error in a range of contexts.[244] Moreover, infelicitous drafting meant that a broker with rights in more than one fungible bulk might make no transfer at all to any secured parties of her customers, meaning that there would be no security interests extant in a very common set of circumstances.[245]

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236. *See id.* § 8-321(3)(a).

237. The intermediary could perfect as the secured party's intermediary, as long as the certificate was either indorsed to the secured party or had been issued to it. *See id.* § 8-313(1)(c). This is not holding in bulk, though, and more properly falls under the general head of agency law.

In addition, the security interest would be perfected for 21 days if the security interest were taken under a security agreement and transfer had not yet been effected. *See id.* § 8-321(2). This is analogous to the rights under Article 9 for the holder of a security interest in instruments, certificated securities, or negotiable documents. *See* U.C.C. § 9-304(4) (1995).

238. *See* U.C.C. § 8-313(1)(d)(ii) (1977).

239. *See id.* § 8-313(1)(g).

240. *See id.* § 8-313(1)(h).

241. *See id.* § 8-313(1)(i).

242. On the other hand, it beats "delivery," for there is no delivery in the indirect holding system. *See* Aronstein, *supra* note 174, at 301-02.

243. *See* U.C.C. art. 8 pref. note IV.B.2. (1995).

244. *See, e.g.*, Schroeder & Carlson, *supra* note 234, at 588-98.

245. *See* Mooney, *supra* note 180, at 334-36; Schroeder & Carlson, *supra* note 234, at 602-04. Happily, the matter seems never to have been litigated to a reported judgment, though one cannot be sure whether this provision might have had some subterranean effect.

New Article 8 has come to the rescue, in part by selflessly returning security interests in investment securities to Article 9.[246] The new key is not transfer, but control. A secured party with control has both attached[247] and perfected[248] its security interest in the investment property, and thus has exalted rights. Indeed, control can even prevail over the Article 9 equivalent of the Statute of Frauds; one need not have a written security agreement to have a security interest if one has control of the investment property.[249] How one gains control, and what rights one acquires, are thus at the core of what follows.

Put generally, control entails taking whatever steps are necessary for the secured party to have the investment property sold without any further action by the owner.[250] The relevant actions will vary with the type of investment property. For example, taking control of certificated securities requires taking delivery of the certificates, either properly indorsed or registered in the secured party's name.[251] In turn, delivery is either to the secured party itself or to its agent, or to a securities intermediary who acts on behalf of the secured party (if the certificate is properly indorsed to the secured party).[252] The secured party thus need not have physical possession of the certificate, as long as the secured party is the registered holder of the security on the issuer's books and the holder is not a securities intermediary. Revised Article 8 thus includes the classic forms of pledges available even before the U.C.C., as well as a means involving a shift in registration.

More significant are the control provisions for securities entitlements. Here a secured party gains control either if it becomes the entitlement holder or if the securities intermediary agrees that it will obey entitlement orders from the secured party without gaining the assent of the entitlement holder.[253] The first system is straightforward, if perhaps not usual; if the secured party becomes the "owner," bearing in mind the difficulties with using conventional language of ownership, then it will have control.[254] More consistent with physical analogies to securities entitlements is the other method, which envi-

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246. *See* U.C.C. art. 8 pref. note IV.B.2. (1995).

247. *See id.* § 9-203(1)(a).

248. *See id.* § 9-115(4).

249. *See id.* § 9-203(1).

250. *See id.* § 8-106 cmt. 1; *see also id.* § 9-115(1)(e) & cmt. 2 (showing relation of control to taking of security interest).

251. *See id.* § 8-106(b).

252. *See id.* § 8-301(a).

253. *See id.* § 8-106(d). Much the same system applies for security interests in uncertificated securities. *See id.* § 8-106(c) & cmt. 4.

254. These rules cover all forms of control, including purchase, so the scenario is not very *outré*, except perhaps for secured credit. Even then, one may see sales, as the common "repo" transaction suggests. *See infra* notes 265-269 and accompanying text.

sions a contract among the entitlement holder, the securities intermediary, and the secured party. The entitlement holder need not give up its own right to dispose of the entitlement; as long as the secured party is able to do so, the definition is satisfied.[255] For that matter, granting control rights to one secured party is perfectly consistent with granting control rights to other secured parties.[256] Finally, for the sake of completeness, one may grant and take a security interest in a securities account by taking control over all securities entitlements in that account or by taking control under a three-party agreement.[257]

One or two more rules on attachment and perfection under revised Article 8 may be helpful before we turn to priorities. One may, as noted, perfect a security interest in investment property by taking control. One may also do so in the more conventional manner of filing a financing statement in the appropriate office; conventional, that is, for most other types of security, but remarkable for investment securities.[258] How one perfects, however, may affect one's priority against other secured creditors.[259] The new rules also codify the old common law broker's lien. If a customer of a financial intermediary buys a financial asset, but has not yet paid for it when the asset is credited to the customer's account, the securities intermediary retains an automatically perfected security interest in the resulting securities entitlement securing the customer's obligation to pay.[260]

Finally, two special methods of securities transactions are handled specially under revised Article 8. First, those who lend to stockbrokers and the like secure their loans principally by taking security interests in the security entitlements of their debtors. These can be handled through a so-called "hard pledge," under which the securities are actually transferred on the clearing corporation's books; these can be disposed of only with the lender's approval.[261] Less radically, the secured lender may be willing to leave the securities or security entitlements in the name of the debtor, subject to an agreement that the securities or entitlements will be transferred to the se-

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255. *See* U.C.C. § 8-106(f) & cmts. 4 & 7 (1995). Indeed, example 3 to comment 4 does exactly that.

256. *See id.* Creating junior security interests or disposing of the entitlement may cause a default under the security agreement, but that is not the concern of the law that allows the security interests to be created and perfected.

257. *See id.* § 9-115(1)(e) & cmt. 4. To be truly complete, I should mention that commodities contracts and accounts are also covered by these sections, even though they are not securities for the purposes of Article 8. *See, e.g.*, Vaaler, *supra* note 183, at 314-15.

258. *See* U.C.C. § 9-115(4)(b) (1995). If, however, the debtor is a securities intermediary, the financing statement is irrelevant; the security interest is perfected when it attaches. *See id.* § 9-115(4)(c).

259. *See infra* notes 290-294 and accompanying text.

260. *See* U.C.C. § 9-116(1) & cmt. 2 (1995).

261. *Id.* § 9-115 cmt. 6.

cured creditor on demand—an "agreement to pledge."[262] The hard pledge gives the lender control, and thus a perfected security interest, with no need to file. The agreement to pledge, on the other hand, gives a security interest, but no control; the lender may not sell the securities or security entitlements without the broker/debtor's approval. Under the 1977 version of Article 8, the lender under an agreement to pledge could gain only temporary perfection and thus had to roll over the loans every twenty-one days (not a real problem, because the loans seldom last that long).[263] Revised Article 8 is kinder to this sort of lender; it falls under the automatic perfection rule, and thus does not have to roll over the loan.[264]

One more type of lending before we go on to the new priorities rules: repo lending. This type of transaction became notorious in 1994 when Orange County, California, was forced into bankruptcy by incautious trading in repos, and many major corporations showed great and surprising losses.[265] What is this financing method? Briefly, a firm simultaneously sells securities and agrees to buy equivalent securities back at some specified time and price.[266] The price difference is, in effect, the interest rate charged by the repo lender for the use of the purchase price.

Repo agreements caused a great deal of dispute during the drafting of revised Article 8, in part because it was far from clear whether they were security interests or simple sales. The characterization is complicated in part by the different types of repos. Some allow the repo seller to retain the underlying securities ("hold-in-custody" repos), while others require that the repo seller give control of the securities to the repo buyer ("delivered-out" repos).[267] These correspond roughly to agreements to pledge and hard-pledge loans, discussed above, and very possibly would receive the same overall treatment.[268] For our purposes, it is enough to note the problem and point out that

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262. *Id.*; *see also* Howard M. Darmstadter, *Revised Article 8 and the Agreement to Pledge*, 28 UCC L.J. 202, 205-06 (1995).

263. *See* Darmstadter, *supra* note 262, at 203-04.

264. *See* U.C.C. § 9-115(4)(c) & cmt. 6 (1995); *see also* Darmstadter, *supra* note 262, at 206-07. This kindness may be more apparent than real, though, because the lender under an agreement to pledge has lost some of its old priority. *See infra* notes 290-294 and accompanying text.

265. *See* Jeanne L. Schroeder, *Repo Madness: The Characterization of Repurchase Agreements Under the Bankruptcy Code and the U.C.C.*, 46 SYRACUSE L. REV. 999, 1000 (1996).

266. *See* Jeanne L. Schroeder, *Repo Redux: Repurchase Agreements Under the 1994 Revisions to the UCC*, 29 UCC L.J. 3, 4 (1996); *see also generally* MARCIA STIGUM, THE REPO AND REVERSE MARKETS (1989).

267. *See* U.C.C. art. 8 pref. note III.C.10 (1995).

268. The courts and commentators seem divided on the issue. *See, e.g.*, Schroeder, *supra* note 265; Schroeder, *supra* note 266; William F. Hegarty, IV, Note, *Lifting the Cloud of Uncertainty Over the Repo Market: Characterization of Repos as Separate Purchases and Sales of Securities*, 37 VAND. L. REV. 401 (1984).

revised Article 8 generally does not require that one characterize a transaction as one or the other.[269]

In sum, revised Article 8 cleans up the baroque world of attachment and perfection for all classes of security interests in investment securities, and particularly for security interests in security entitlements. As others have suggested, this removes earlier impediments to secured lending and very likely improves the availability of credit to a wide range of potential borrowers.[270] Before one can opine boldly about the benefits to credit markets and the like, though, one must look closely at the priority rules under revised Article 8, for changes in priorities will affect greatly the willingness of a lender to lend and the ability of a borrower to borrow.

2. The Insecurity of Securities Accounts; Priorities Under the New Article 8

Security interests have value because they can give priority to their holders over other creditors, should the debtor default, and because, relatedly, the creditors typically have easier, faster, and cheaper means of getting to their collateral as a result. We need not enter the murky debate about the efficiency of secured credit here, or this Article would never end.[271] For the moment, it is sufficient to suggest that there are at least some cases where secured credit may be efficient, even if they are at times overrated. The real question then becomes who takes priority over whom.

Under the 1977 version of Article 8, these questions were left to conventional Article 9 law.[272] Then and now, the general rule under Article 9 resolves disputes among holders of perfected security inter-

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269. This is unlike, say, the distinction between a sale and a lease, which has potentially huge consequences in a wide range of instances. *See* U.C.C. § 1-201(37) (1995); 4 WHITE & SUMMERS, *supra* note 27, § 30-3.

270. *See* George T. Morrison & John J. Donlon, *Pending Revisions to Articles 8 and 9 of the Florida UCC: An Opportunity for Florida to Merge onto the Information Superhighway*, FLA. B.J., Jan. 1998, at 45, 46.

271. For those inclined to take the plunge, here are some of the leading sources pro and contra: Symposium, *The Priority of Secured Debt*, 82 CORNELL L. REV. 1279 (1997); Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996); Garvin, *supra* note 62; Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021 (1994); Lynn LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887 (1994); Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997); Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425 (1997); Alan Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1 (1981); Paul M. Shupack, *Solving the Puzzle of Secured Transactions*, 41 RUTGERS L. REV. 1067 (1989); Elizabeth Warren, *An Article 9 Set-Aside for Unsecured Creditors*, 51 CONSUMER FIN. L. Q. REP. 323 (1997); James J. White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473 (1984).

272. *See* U.C.C. § 8-321(3) & cmt. 3 (1977).

ests by giving priority to the first to file or perfect.[273] There are a good many twists on this rule, particularly for holders of purchase money security interests—security interests that exist to enable the debtor to purchase the collateral—who generally receive superpriority over earlier holders of liens in after-acquired property ("floating liens").[274] In any event, security interests continue in the proceeds of the collateral, to the extent the proceeds were traceable.[275] Secured parties, however, did lose to buyers in the ordinary course of business,[276] and even to many non-ordinary-course buyers.[277] These rules had uncertain application under the 1977 version of Article 8, in large part because the methods of transfer under section 8-313 fit poorly with the main Article 9 approaches to the creation of security interests, even for conventionally certificated securities.[278]

(a) Priority Battles with a Customer as Debtor

The attendant uncertainty did little to encourage the use of investment securities as collateral, whether held directly or indirectly. Revised Article 8 sought to reduce confusion here, in part by setting up some special priority rules in Article 9. To get at these, it may be useful to go back to hypotheticals. We shall retain the Dewey firm, but this time use as our entitlement holder Laverne, who holds a security entitlement in one hundred shares of Shotz Brewing. Laverne's security entitlement is, as noted earlier, a property interest in the underlying financial assets.[279] A few uncontroversial results may be dealt with first, starting with priorities involving only one secured creditor. If Laverne seeks to borrow, using her security entitlement as collateral, the lender's perfected security interest will have all the attributes of an ordinary security interest. Thus, it will be safe against the claims of the trustee in bankruptcy as hypothetical lien creditor.[280] It will also give the secured creditor rights over all unsecured creditors who may wish to levy Laverne's assets.[281] None of this changed prior law.

If we add another secured creditor, we start to see changes. If two secured creditors, perhaps Lenny and Squiggy, take control of

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273. *See* U.C.C. § 9-312(5) (1995).
274. *See id.* §§ 9-109, -312(3), (4).
275. *See id.* § 9-306. This statement, like most of the others in this synopsis, is oversimplified, but may be useful to set up the new provisions on security interests in investment securities.
276. *See id.* § 9-307(1).
277. *See id.* § 9-307(2), (3).
278. *See, e.g.*, Coogan, *supra* note 234; Schroeder & Carlson, *supra* note 234, at 618-40.
279. *See supra* notes 196-206 and accompanying text.
280. *See* 11 U.S.C. § 544(a) (1994).
281. *See* U.C.C. § 9-301 cmt. 2 (1995).

Laverne's security entitlement,[282] then we would ordinarily expect the first to take control to prevail, following the general Article 9 analogy. Under the revised rule, however, Lenny and Squiggy will usually rank equally, presumably sharing the collateral pro rata.[283] This result seems odd, in that it undercuts the apparent primacy of the initial security interest. Furthermore, if both Lenny and Squiggy had filed financing statements to perfect their security interests, then the first to file would prevail.[284] One assumes that the first to take control will define default in the security agreement to include the granting of control to any other secured party, though this may do little good if Laverne becomes insolvent. But what if Lenny perfects by filing, and Squiggy then perfects by taking control? Under a first-to-file-or-perfect rule, Lenny would prevail (if we analogize taking control of a security entitlement to taking possession of goods). But under the new rule Squiggy would win: one who perfects by taking control prevails over one who perfects by filing.[285]

This needs some explanation, given that we ordinarily assume that later creditors with notice of a security interest can protect themselves. What about a later creditor here? The control agreement will not be found in the public records, so an untruthful borrower can do some mischief. The rationale rests on the fact only in the revision was filing made a proper means of perfecting a security interest in securities.[286] Accordingly, lenders may not yet have grown accustomed to searching the public records. As standard practice had been to perfect by other means, it seemed appropriate to the framers of revised Article 8 to give precedence to established practice. Furthermore, this approach is consistent both with practice and law for negotiable instruments and even for certain transactions within Article 9 for which there is a preferred means of perfection.[287] One may still ask whether this approach may prove a trap for the unwary. An inexperienced lender may be seduced by the general Article 9 method and assume that filing first will grant priority. Still, perhaps these battles among secured creditors—probably relatively sophisticated examples of this breed, given the type of security they are taking—should not evoke our sympathy; if they can't learn the rules of their trade, they should pick a new line of work.

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282. Recall that control need not be limited to one secured party. *See supra* note 256 and accompanying text.

283. *See* U.C.C. § 9-115(5)(b) (1995).

284. *See id.* §§ 9-115(5)(f), -312(5)(a). The purchase money superpriority rule does not apply here. *See id.* § 9-115(5)(f).

285. *See id.* § 9-115(5)(a) & cmt. 5. Examples one through three in the comment contain variations on this theme.

286. *See id.* § 9-115 cmt. 5.

287. *See* Rogers, *supra* note 174, at 1477-83.

These battles among secured creditors produce different results when one secured creditor is the debtor's financial intermediary. In these cases, the financial intermediary will always prevail, even if the other secured creditor takes control.[288] Once again, the first-in-time approach is not followed, though perhaps this result is not so odd. After all, the security entitlement exists on the broker's books, which might be analogized to perfection by possession.

(b) Priority Battles with the Securities Intermediary as Debtor

If the debtor is, say, a brokerage house, most of the rules discussed above will apply. This is true both for the routine rules about control and for other rules that apply to the debtor's financial intermediary, for a financial intermediary may itself have a financial intermediary. For example, a stockbroker not itself a member of DTC may contract with another broker to handle its accounts; that broker, in turn, has DTC as its intermediary. It should be noted, though, that if the debtor is a financial intermediary, filing a financing statement will neither perfect a security interest in its investment property nor affect the priority of the security interest, because such a security interest perfects automatically on attachment.[289]

These rules change the priorities for some of the specialized transactions discussed above. Consider, for starters, the hard pledge and the agreement to pledge.[290] The former is unexceptionable because the lender has control and thus has a perfected security interest with priority over a noncontrol security interest.[291] The trickier case is the agreement to pledge. Here there is no control; the lender under such an agreement thus will take equally with other noncontrol lenders with perfected security interests, but will lose to all holders of control security interests.[292] The advantages of lasting perfection for the lender under an agreement to pledge are thus countered by this somewhat pale priority.[293] Repo lenders have very similar problems under revised Article 8. If they actually require that the security entitlements be transferred, then they have control with all the resulting advantages; if not, then not.[294]

These rules may not be too surprising, given that we have recovered from whatever shock the basic rules induced when we went through them with Laverne as debtor. Nor should we worry much, if

288. *See* U.C.C. § 9-115(5)(c) (1995).
289. *See id.* § 9-115(4)(c).
290. *See supra* notes 261-264 and accompanying text.
291. *See* U.C.C. § 9-115 cmt. 6 (1995).
292. *See id.*
293. But the real problem is up ahead. *See infra* notes 301-09 and accompanying text.
294. There is much more to this analysis, but not for present purposes. *See, e.g.*, Schroeder, *supra* note 177.

at all, about any of the assumptions made about standard practice or appropriate analogies; these rules seem to comport with what sophisticated parties, who are pretty much the only ones who will care, will want, and so they are probably efficient. But what if one of the parties to a priority battle probably is not sophisticated? This may happen—indeed, probably will—if the battle is between an entitlement holder and a secured creditor of the securities intermediary, and it is here that we will end up.

(c) "WARNING: YOUR SECURITIES INTERMEDIARY MAY BE DANGEROUS TO YOUR WEALTH"[295]

Under the 1977 version of Article 8, the priority rules appeared to give the entitlement holder, as we would now put it, the rights of a purchaser, but perhaps not a bona fide purchaser.[296] This posed problems when the broker's secured creditor held rights in the broker's assets. Though the cases were unsettled, a parsing of the statute leads one to conclude that a secured creditor could prevail over a customer with an interest in a fungible bulk, depending on the timing of the secured loan and the transfer to the customer.[297] This emphasis on timing was thought peculiar; the customer would have no way to know about any transactions with a secured lender (who at that time could not perfect by filing) or another intermediary, whether before the customer acquired its interest or after.[298] A clearer rule would, if nothing else, give the customer certainty and allow her to plan.

Revised Article 8 does provide certainty—but, for the most part, the certainty of the grave. We can, however, start with some good news for the entitlement holder. If Shirley, the holder of a security interest in Dewey's securities and security entitlements, challenges Laverne, our entitlement holder, and Shirley's security interest is an agreement to pledge, then Laverne will win. Under section 8-511, an entitlement holder will prevail over a creditor of the securities intermediary when the creditor does not have control over the financial asset.[299] This changed then-current law in the entitlement holder's favor.[300] Otherwise, though, the news is not very good. If Shirley instead took control of the securities and security entitlements, then

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295. Mooney et al., *supra* note 182, at 1895 (quoting Martin J. Aronstein).

296. *See supra* notes 272-278 and accompanying text.

297. *See, e.g.*, Mooney, *supra* note 180, at 366-79.

298. *See id.* at 377.

299. *See* U.C.C. § 8-511(a), (b) (1995); *see also* Darmstadter, *supra* note 262, at 207-08.

300. *See* Darmstadter, *supra* note 262, at 208; Rogers, *supra* note 174, at 1523-26. Whether there will be any lasting benefit is less clear. If lenders under agreements to pledge respond by taking control, then the entitlement holder will lose anyway, and will have succeeded only in forcing the securities intermediary to pay more for its loan. *See* Mooney et al., *supra* note 182, at 1901.

she would prevail over Laverne, the customer.[301] Hence the title of this section: allowing a securities intermediary to act on one's behalf exposes one to the risk that the intermediary will become insolvent.

As Professor Rogers has observed, this provision has engendered a good deal of comment, much at least initially adverse.[302] Indeed, Professor Rogers, the Reporter for revised Article 8, was among those inclined at first to favor the rights of the customers.[303] His conversion, and perhaps that of others, stemmed in part from the apparent conservatism of the provision; though the customers would lose, they would very likely have lost under old Article 8. Perhaps more to the point, the rule is consistent with other provisions, such as section 8-503, which favors the transferee over the entitlement-holder wrongfully deprived of her entitlement.[304] Nor may the securities intermediary routinely grant these security interests. Indeed, revised Article 8 makes clear the implicit idea that one cannot pledge what one does not own.[305] In addition, a rule which protected entitlement holders over secured creditors or, for that matter, transferees, would greatly complicate repo financing, for it is far from clear even now whether repos are true sales or security interests.[306] One last point of the many that could be made: very often customers are perfectly willing to allow their brokers to borrow on their security entitlements. If, for instance, a customer buys on margin, the broker in effect lends the customer the added money needed to establish the entitlement, money that the broker will have to get somewhere. The broker is likely to borrow it, using its assets, including the security entitlement, as collateral. To draw a distinction between these transactions, which presumably are acceptable, and others would increase the cost of lending, and very possibly discourage the use of margin accounts.[307] The arguments are many and can only be touched on here.[308] It should be borne in mind that the major threat to an entitlement holder—that its security intermediary may wrongfully pledge its entitlement and then become insolvent—is dealt with by other law. SIPA should often provide the customer with the remedy she cannot get under revised Article 8.[309]

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301. *See* U.C.C. § 8-511(b) & cmt. 1 (1995).
302. *See* Rogers, *supra* note 174, at 1511-12.
303. *See id.*
304. *See supra* notes 223-226 and accompanying text.
305. *See* U.C.C. § 8-504(b) (1995).
306. *See* Rogers, *supra* note 174, at 1527-28.
307. *See* Rogers, *supra* note 174, at 1533-34. Much the same result may obtain when a customer sells short. *See id.* at 1528-29.
308. The curious may wish to consult U.C.C. § 8-511 cmts. 1 & 2 (1995); *see also* Rogers, *supra* note 174, at 1511-40; Schroeder, *supra* note 177, at 486-502.
309. Rights under SIPA are, however, limited, and could in extreme cases run out entirely. *See, e.g.*, Egon Guttman, *Mediating Industry and Investor Needs in the Redrafting of UCC Article 8*, 28 UCC L.J. 3, 13-18 (1996); Kessler, *supra* note 212.

D. Conclusion

Revised Article 8 is certainly a success, if adoptions and scholarly commentary are any guide. The commentary, strewn throughout the preceding footnotes, has almost all been laudatory, and the adoptions have been rapid and plentiful. Indeed, revised Article 8 has even been adopted as the federal law governing the perfection and priority of security interests in Treasury securities.[310] Even if the statute were at best an indifferent success, Florida would have been justified in adopting it for the sake of uniformity and the commercial advantages that attach to it. As it is, the statute clarifies much that was murky, especially with respect to the indirect holding system.

One may still ask whether the rules that place a good deal of the risk of intermediary failure on the customer had to be structured thus. Granting the considerable force of Professor Rogers' arguments in their favor, the rules could still have had, in essence, a consumer exception. It would not have to protect repo financers, margin customers, or the like, and it would not have to affect the rules that protect buyers of entitlements. Rather, revised Article 8 could have given individual entitlement holders priority over secured creditors of their intermediaries as to any entitlements pledged to the secured creditors. After all, the intermediary is not supposed to borrow on the basis of the entitlements held by others, and one may fairly assume that most of an intermediary's financial assets are held on behalf of its customers. Under these circumstances, why should a lender, presumably knowing these facts, be given priority in assets which it should know the intermediary may not pledge?[311] This problem is especially acute in light of the tendency of most people to undervalue remote risk and thus the probability that an intermediary might default.[312] Properly crafted, it would have been possible to avoid the

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310. *See* 31 C.F.R. § 357.10(c) (1997). For a vigorous critique of the earlier proposals and the earlier law, see Charles W. Mooney, Jr., *Good Faith Transferees of U.S. Treasury Securities and Other Weird Ideas: Making Federal Commercial Law*, 26 LOY. L.A. L. REV. 715 (1993). On the appropriate means of complying with revised Article 8, see CLARK, *supra* note 233, ¶ 7.17[3] (Supp. 1998).

311. The lender could, of course, lend on the basis of any securities held by the intermediary on its own account, and separate arrangements could be effected to deal with margin accounts—which, in any case, have proved problematic enough in our history that very modest discouragement may not be amiss.

312. This may be caused by a good many factors, including excessive discounting of future events, over-optimism, cognitive dissonance, and the infrequency, and resulting underassessment, of this sort of risk. In the securities context, see Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627 (1996); Robert B. Thompson, *Securities Regulation in an Electronic Age: The Impact of Cognitive Psychology*, 75 WASH. U.L.Q. 779 (1997). On cognitive error more generally, see Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339 (1998); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

harms to which Professor Rogers and others allude, and give some added protection to those against whom the intermediary acted wrongfully.[313]

But here we are, and Article 8 will not be revised again any time soon. Perhaps, as has been observed, the great clarity of revised Article 8 will bring home to investors their relative vulnerability and lead to strengthening of consumer protections in other legislation.[314] Even as it is, though, revised Article 8 vastly improves the law of investment securities; any regrets are about missed opportunities, of which there are very few, rather than errors made. Taken as a whole, the statute is a great success; NCCUSL should be proud of fostering it, and Florida should be proud to have enacted it.

IV. THE GHOST OF U.C.C. YET TO COME

Thanks to the last legislative session, Florida's U.C.C. is almost current. The Legislature has adopted revisions that, though not perfect, both improve the law and increase uniformity. It is thus time to blow the dust off of the crystal ball and look at impending U.C.C. revisions, both for already-approved changes to the Code and for changes that are in the works. These follow, in the likely order of submission.

A. Article 5

This section of the U.C.C. governs letters of credit. It had gone unrevised since its initial enactment, a few conforming amendments occasioned by changes in other articles aside. Since the 1950s and 1960s, though, letter of credit practice has changed greatly. This is due in large part to shifts in international letter of credit law. To illustrate, the International Chamber of Commerce has adopted the Uniform Customs and Practice for Documentary Credits (UCP), a codification of trade practice that, by contract, governs most international letters of credit. The UCP has changed over the years, with the most recent iteration in 1993.[315] In addition, the United Nations Commission on International Trade Law (UNCITRAL) has prepared the United Nations Convention on International Guarantees and Stand-by Letters of Credit, which has been adopted by the General Assembly of the United Nations and which awaits ratification.[316] Given the large percentage of letters of credit that occur internation-

313. As others have suggested. *See, e.g.*, Francis J. Facciolo, *Proposed Article 8: Why it Should Not Be Adopted in Its Current Form*, UCC BULL., Apr. 1997, at 1, 5.

314. *See* Mooney et al., *supra* note 182, at 1895.

315. *See* INTERNATIONAL CHAMBER OF COMMERCE, ICC PUBLICATION NO. 500 (1993).

316. *See* JOHN F. DOLAN, THE LAW OF LETTERS OF CREDIT ¶ 4.01[4] (rev. ed. 1996 & Supp. 1998).

ally, banks issuing letters of credit would much prefer international and domestic law to coincide. To an extent, they did before; the area has evolved over many centuries, and modern changes have tended not to depart far from this historic base. Furthermore, several states, most notably New York, put in place a nonuniform amendment to Article 5 that expressly allowed parties to contract out of Article 5 and into the UCP, or to apply the UCP through trade usage or the like.[317] Still, divergence in practice could create traps for the unwary or incautious, and thus might be avoided.

Ordinary domestic practice has also changed. One significant change is the increasing use of electronic payment systems, including letters of credit, which were not even contemplated some forty years ago when Article 5 was first drafted. Some specialized types of letters of credit, most notably standby letters of credit, have been developed as well, and fit imperfectly in the old statutory regime.[318] Finally, Article 5 was the first attempt to codify this old and often idiosyncratic field. Excellent as the original project was, some drafting anomalies and oversights cropped up over the years, and were dealt with in varying ways and with varying degrees of success by courts and legislatures.

Accordingly, an American Bar Association Task Force on Article 5 studied the matter and recommended substantial revision.[319] A Drafting Committee, with Professor James White (of the classic White and Summers treatise) as reporter, began work in 1990, and a final draft was approved in 1995. This has been adopted, with very few nonuniform amendments, by thirty-two states.[320]

It would be hard to do justice to the revision in the limited space one can justify, especially in light of the technical challenges of the field.[321] In brief, the revision seeks both to align letter of credit law more closely with good commercial practice and modernize letter of

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317. The states were Alabama, Arizona, Missouri, and New York. *See id.* ¶ 4.05. Since then, all save New York have enacted revised Article 5. *See* U.C.C. art. 5, 2B U.L.A. 127-29 (Supp. 1998).

318. In part to bring order to this important area, the International Chamber of Commerce recently codified international standby practices. *See* Robert S. Rendell, *Stand By for New Set of Rules on Letters of Credit*, NAT'L L.J., Nov. 2, 1998, at B8. These obviously are not referred to in new Article 5, but presumably will be treated in much the same manner as the UCP. *See infra* notes 322-323 and accompanying text.

319. *See generally An Examination of U.C.C. Article 5*, 45 BUS. LAW. 1521 (1990).

320. *See* U.C.C. art. 5, 2B U.L.A. 127-29 (Supp. 1998).

321. For more thorough summaries of the Article 5 revisions, see James G. Barnes & James E. Byrne, *Revision of U.C.C. Article 5*, 50 BUS. LAW. 1449 (1995); Dellas W. Lee, *Letters of Credit: What Does Revised Article 5 Have to Offer to Issuers, Applicants, and Beneficiaries?*, 30 UCC L.J. 234 (1996); Milton R. Schroeder, *The 1995 Revisions to UCC Article 5, Letters of Credit*, 29 UCC L.J. 331 (1997); B. Lynn Kremers, Note, *Letters of Credit: Should Revised Article 5 of the Uniform Commercial Code be Adopted in Missouri*, 65 UMKC L. REV. 567 (1997); James J. White, *Trade Without Tears, or Around Letters of Credit in 17 Sections*, UCC BULL., Dec. 1995, at 1.

credit law. The former is accomplished in part by section 5-116(c), which provides that the parties may incorporate the UCP or other rules of custom or practice by reference, save where Article 5 declares itself nonvariable.[322] Parties to letter of credit transactions, generally a sophisticated lot, can thus use whatever rules are common to a contracting community, without fear that Article 5 will interfere.[323] To bring about modernity, revised Article 5 makes a good many changes. Some resolve splits in the cases; some bring U.S. law into line with general commercial norms; some change law, typically in a manner that increases commercial efficiency.[324] Perhaps an example of each is in order.

One important split resolved by revised Article 5 deals with the burden placed on beneficiaries to comply with the terms of the credit when they present the letter of credit to the issuer for honor. Problems here arise when a beneficiary provides documents that do not quite comply. For example, a beneficiary might be obliged to submit a draft that, among other things, gave the number of the credit and stated that it was drawn under the credit. What if the draft did not do so? If the issuer could refuse payment, then the beneficiary would be unpaid. This might not be a problem if the applicant were still solvent, but it might leave the beneficiary without recourse if the applicant were no longer solvent. On the other hand, one may ask whether it is appropriate to require issuers to decide whether to honor a letter in other than a relatively clear, mechanical way. To do so would likely drive up the cost of letters of credit and impair their primary use as an efficient means of ensuring prompt and certain payment.[325] Old Article 5 was vague on this issue, leading to a meas-

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322. *See* U.C.C. § 5-116(c) (1995). The nonvariable provisions, listed in section 5-103(c), go to the expiration of letters of credit, the assignability of proceeds of letters of credit, and certain definitions. In addition, the ability of the parties to vary the subrogation right is somewhat limited under section 5-117(d), and Article 5 is generally subject to section 1-102(3), which provides a good-faith limit on variation. On variability, see, e.g., Clark A. Remington, *Llewellyn, Antiformalism and the Fear of Transcendental Nonsense: Codifying the Variability Rule in the Law of Sales*, 44 WAYNE L. REV. 29, 60-100 (1998).

323. Article 5 thus recognizes the importance of extralegal norms in commercial behavior and gives legal force to these norms generated outside of law. Put positively, Article 5 thereby gives effect to relational contract; though the rules that govern actual behavior may have developed outside of commercial law, the law will nevertheless recognize these rules. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996). Less positively, perhaps, Article 5 provides little basis for attacking standard commercial practice as unfair, inefficient, or misguided. This may not matter much in the law of letters of credit, though the same cannot be said of, say, the law of sales.

324. Some also codify nonuniform Florida law. For example, at present Article 5 is silent about whether letters of credit are irrevocable. Florida's version of Article 5 contains a nonuniform amendment that creates a default rule of irrevocability. *See* FLA. STAT. § 675.103(a) (1997). This concept is found in revised Article 5. *See* U.C.C. § 5-106(a) (1995).

325. On the functions of letters of credit, see, e.g., DOLAN, *supra* note 316, ¶ 3.07 (rev. ed. 1996).

ure of disagreement in the cases.[326] Most courts, including Florida's, have chosen the latter virtue over the former and employed a rule of strict compliance.[327] Though immaterial variations would not allow an issuer to refuse payment, anything else—even substantial compliance—would. A few jurisdictions, including that faced with the facts above, have instead chosen a substantial compliance rule, which deals more loosely with inaccuracies at the cost of certainty.[328]

Revised Article 5 has chosen the strict compliance rule, putting it squarely in the blackletter.[329] This does not, as the comments make clear, require "slavish conformity to the terms of the letter of credit."[330] Beyond typographical errors and the like, more substantial mistakes may also be excused under something very much like estoppel, though waiver seems no longer a valid basis for a claim.[331] The rule, though firm, is thus not quite as harsh as it could be. It also should be remembered that the parties involved are typically rather sophisticated, so the ameliorations more appropriate in other contexts may not be needed, or wanted, here.

A modest example of a change that conforms American law to general commercial practice is section 5-108(i)(1) on the issuer's right to reimbursement.[332] Under old Article 5, the issuer was entitled to immediate reimbursement in "effectively available funds" not later than the day before the acceptance under the letter matured.[333] As the ABA Study Committee pointed out, this contradicted normal business practice, which is to reimburse immediately as of the day the acceptance matured.[334] Indeed, it would be odd for the agreement giving rise to the letter of credit to provide otherwise.[335] Accordingly, revised Article 5 provides that reimbursement must be in "immediately available funds not later than the date of its payment of

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326. The relevant provision says merely that "[a]n issuer must honor a draft . . . which complies with the terms of the relevant credit . . . ." U.C.C. § 5-114(1) (1968).

327. *See, e.g.*, American Nat'l Bank v. Cashman Bros. Marine Contracting, 550 So. 2d 98, 100-02 (Fla. 1st DCA 1989); Fidelity Nat'l Bank v. Dade County, 371 So. 2d 545, 546-47 (Fla. 3d DCA 1979). On the general rule, see DOLAN, *supra* note 316, ¶ 6.04.

328. *See* First Nat'l Bank v. Wynne, 256 S.E.2d 383, 385-86 (Ga. Ct. App. 1979); *see also, e.g.*, Banco Espanol de Credito v. State St. Bank & Trust Co., 385 F.2d 230, 234-37 (1st Cir. 1967).

329. *See* U.C.C. § 5-108(a) (1995).

330. *Id.* § 5-108 cmt. 1.

331. *See id.* § 5-108(c) & cmt. 3. Waiver is addressed most clearly in section 5-108 cmt. 7.

332. *See id.* § 5-108(i). As noted earlier, the revision's general deference to commercial practice, especially as found within the UCP, is an important move toward uniformity. *See supra* notes 322-323 and accompanying text.

333. U.C.C. § 5-114(3) (1968).

334. *See An Examination of U.C.C. Article 5*, *supra* note 319, at 1625.

335. *See* 3 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 26-7, at 160 (4th ed. 1995).

funds."[336] The U.C.C. thus has put in place a majoritarian default rule, obviating the need to contract around its predecessor.[337]

The final example, demonstrating a change that furthers freedom of contract, is the changed treatment of the duty of care owed by an issuer to an applicant. Old Article 5 provides that an issuer has a duty to an applicant to examine documents with care.[338] This duty may be defined by the parties, but may not be waived.[339] In revised Article 5, the duty of care is gone.[340] Though this section requires nonpayment if the documents do not comply, this requirement is subject to the agreement of the parties.[341] The only limit to the elimination of this potential liability is procedural: section 5-103(c) does not allow sweeping disclaimers in boilerplate, but rather requires more narrowly tailored, explicit disclaimers.[342]

In general, the revision has been accepted. However, new Article 5 has been criticized on the grounds that its fee-shifting provision may dissuade small firms from bringing suit against large banks.[343] Indeed, Alabama and New Jersey have enacted nonuniform versions of the relevant section to avoid mandatory fee-shifting.[344] This section, 5-111(e), in essence adopts the English approach to attorney's fees by granting reasonable fees and costs to the prevailing party.[345] Perhaps ironically, the provision was intended to improve the position of beneficiaries of letters of credit, who might otherwise be unable to bring suits alleging wrongful dishonor.[346] The New Jersey Law Revi-

336. U.C.C. § 5-108(i)(1) (1995).

337. A majoritarian default rule is a rule that supplies what most contracting parties would choose if they could negotiate costlessly and with perfect information. Such a rule can be efficient because it lowers transaction costs: fewer contracts will have to provide alternative terms. In addition, a majoritarian default rule can provide a sensible result where the costs of contracting around the default would exceed the benefit derived from the departure. In those cases, the parties will not depart from the default rule; making the default rule anything other than their preferred result would thus yield an unwanted contract term. *See* Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, 12 (1993); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 613-17 (1998).

338. *See* U.C.C. § 5-109(2) (1962).

339. *See* U.C.C. § 1-102(3) (1995).

340. *See id.* § 5-108.

341. *See id.*

342. *See id.* § 5-103(c) & cmt. 2.

343. *See* Margaret L. Moses, *The Impact of Revised Article 5 on Small and Mid-Sized Exporters*, 29 UCC L.J. 390, 407 (1997). The provision, U.C.C. § 5-111(e) (1995), states that "[r]easonable attorney's fees and other expenses of litigation *must* be awarded to the prevailing party in an action in which a remedy is sought under this article." (emphasis added).

344. *See* ALA. CODE § 7-5-111(e) (1997) (making fee-shifting discretionary); N.J. STAT. ANN. § 12A:5-111(e) (Supp. 1998) (same).

345. *See* U.C.C. § 5-111(e) (1995).

346. *See id.* § 5-111 cmt. 1; *see also* Fred H. Miller, *Realism Not Idealism in Uniform Laws: Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 723 (1998).

sion Commission, despite the entreaties of Professor Fred Miller, NCCUSL's Executive Director, and Carlyle Ring, Chair of the Article 5 Drafting Committee, concluded instead that attorney's fees should be made available, but not required, necessitating a change from "must" to "may" in the statute.[347]

The point is a good one, though not perhaps this amendment. Symmetric two-way fee-shifting statutes are very rare in American law, and with good reason; though they reduce the number of frivolous suits, they also reduce the number of meritorious suits. The latter effect is probably greater than the former, given the relative risk-aversion of plaintiffs and defendants.[348] In any event, genuinely frivolous litigation can be dealt with by existing powers of the courts. True, under the fee-shifting rule rejected by New Jersey, beneficiaries of letters of credit may more easily sue issuers for wrongful dishonor—a claim especially important given the unavailability of consequential damages.[349] The problem of unavoidable consequential damages is attenuated, though, by the lack of duty to mitigate on the part of the beneficiary.[350] Little harm to uniformity would be done were section 5-111(e) either omitted, made optional (as in New Jersey), or, preferably, remodeled in the manner of Article 2A.[351] Much, however, would be done to bring revised Article 5 within the broader scope of American commercial law.[352]

With that exception—altering the fee-shifting provision to model that in Article 2A—Florida should enact revised Article 5.[353] Most let-

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347. NEW JERSEY LAW REVISION COMMISSION, FINAL REPORT: UNIFORM COMMERCIAL CODE REVISED ARTICLE 5—LETTERS OF CREDIT 7-8, 10 (1996) [hereinafter NEW JERSEY REPORT], *available at* <http://www.lawrev.state.nj.us> (visited Jan. 9, 1999).

348. *See, e.g.*, Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 368-73, 379 (1991).

349. *See* U.C.C. § 5-111(a) (1995).

350. *See id.* § 5-111 cmt. 1. One imagines that the beneficiary will still tend to mitigate. First, its action against the issuer may be combined with other actions for breach, for which a duty to mitigate would still apply. Second, it may seek to limit its (unrecoverable) consequential damages and, in so doing, may also mitigate its direct damages. By implication, the applicant still has a duty to mitigate.

351. Article 2A's unconscionability provision grants consumer lessees reasonable attorney's fees if the court finds unconscionability but gives the lessor reasonable attorney's fees only if the lessee knew the action to be groundless. *See id.* § 2A-108(4). This provision is modeled on the corresponding provision in the Uniform Consumer Credit Code. *See* UNIF. CONS. CRED. CODE § 5.108(6) (1974). It also resembles greatly the asymmetric fee-shifting system used under some federal civil rights statutes, including 42 U.S.C. § 1988. *See, e.g.*, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); *see generally* 1 ROBERT L. ROSSI, ATTORNEYS' FEES §§ 10:17 to 10:22 (1995) (collecting authority).

352. It should be added that Professor Miller, though understandably against this nonuniform amendment, does not see it as a major threat to uniformity. *See* Miller, *supra* note 346, at 723.

353. New Jersey has enacted another nonuniform amendment to revised Article 5, which specifies that whether the issuer observes the standard practice of financial institutions regularly issuing letters of credit is a question for the court, rather than the jury.

ters of credit that Florida firms receive domestically are now issued under revised Article 5; so Florida lawyers must of necessity become at least noddingly familiar with it. This is not a statute with massive consumer effects, in which one properly looks at the costs that change will have on various classes of those affected. Letters of credit exist to facilitate commerce; the more uniform the rules governing them, the lower the cost of commerce, and the greater the ease with which commerce can occur. Revised Article 5, in its deference to UCP and other sources of letter of credit practice, is sufficiently flexible to effect the efficient use of letters of credit for quite a long time.

B. Article 9

In 1998 both the ALI and NCCUSL approved the final text of revised Article 9, governing secured transactions. The reporters have just completed the comments, and the whole package has already been introduced in some legislatures. This will be the third version of Article 9. After the original enactment, Article 9 was revised in 1978. Since then, a few relatively minor changes have come about. In essence, though, Article 9 has remained static for some twenty years, and largely so since the framing of the U.C.C.

New Article 9 has not yet been enacted—not surprising, given its recency. Its recency and scope also preclude any thorough treatment of its many nuances. Analysis of these will cause the death of many trees—no, forests—for years to come. Still, a few comments and predictions may be appropriate. I predict that in relatively short order it will replace the current version of Article 9 everywhere. The growth of interstate banking and multistate firms has made all the more important a uniform law on the taking of security interests. Once a handful of states adopt the new Article 9, there will be a strong push for all the others to do so.

But will the first handful enact the new statute? Will Florida? If history repeats itself, Florida will not pioneer in the enactment of Ar-

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Compare U.C.C. § 5-108(e) (1995) *with* N.J. STAT. ANN. § 12A:5-108(e) (Supp. 1998). The problem raised here is whether the provision leaves an issue of fact for the judge, which might limit unconstitutionally the right to a jury trial. *See* Moses, *supra* note 343, at 391-407. *But see generally* James E. Byrne, *Revised UCC Section 5-108(e): A Constitutional Nudge to Courts*, 29 UCC L.J. 419 (1997) (suggesting that section 5-108(e) is constitutional). The difficulty here is the sweeping language of the statute. As Professor Miller has noted, the intent was merely to leave to the court the determination of what standard practice is, not to take from the finder of fact any disputed fact questions as to whether the issuer complied with that standard. *See* NEW JERSEY REPORT, *supra* note 347, at 6. New Jersey's amendment clarifies this meaning, though at some cost to uniformity. This amendment may not be too consequential; presumably a constitutional challenge would result at most in a limiting interpretation of this section, and the amendment seems only to carry out what Professor Miller has suggested was the drafters' intent. It is hard to say, as has been suggested, that this is a fundamental departure from nonuniformity. *See* Miller, *supra* note 346, at 723.

ticle 9, but will happily follow others. One may confidently expect other states to lead the way. Naturally, there is some pressure placed on legislatures to enact revised versions of uniform statutes. Those states with law reform commissions have a built-in lobby, and very often the organized bar will act vigorously to push for uniform legislation. In addition, the commissioners themselves often lead the way in the legislatures. Though NCCUSL puts out more uniform legislation than a commissioner can handle at one time, a statute as important as the U.C.C. will naturally tend to take priority. These suggest a certain tendency to move revised Article 9 ahead, though perhaps not enough to overcome legislative inertia.

The critical force probably will come from the interest groups most favored by the revision. As with revised Article 5, larger banks are likely to push for the enactment of new Article 9. In part, this stems from the added clarity that the revision provides (though at times at the cost of pithiness; the text and the comments of proposed Article 9 are much longer than its predecessor).[354] Certainty, like uniformity, has great value to repeat actors in a market. The costs of moving to a new statute are not, however, borne equally by those who use it. This problem stems both from the fact of change and from the increased detail and precision of the new statute—in many ways, a move from rules to standards. As Louis Kaplow has observed, rules impose costs ex ante, while standards impose costs ex post.[355] Most of the costs ex ante ordinarily stem from the promulgation of the rules. Sometimes, however, the costs ex ante may be of the sort here—the costs of reworking one's way of doing business. Large banks and frequent credit users may find the added certainty of the new Article 9 attractive, as their transition costs can be spread over a good many transactions. Small banks and relatively infrequent credit users may, however, find the changes less pleasing. Just like their more active competitors, they will have to change their forms and, in a good many instances, their methods of doing business, but they will have fewer transactions over which to spread their costs.[356] At least in the short run, the change to new Article 9 may thus make smaller creditors less competitive.

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354. To illustrate, compare the provisions on the priorities of purchase money security interests. *Compare* U.C.C. § 9-324 (1998) *with* U.C.C. § 9-312(3), (4) (1995).

355. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 585-86 (1992).

356. Alternatively, they may choose a sort of rational ignorance; if they conclude that the costs of revising their business practices exceed the likely value of the revisions, they may choose to remain ignorant. *See id.* at 571-77, 596-99. Apart from the direct costs of legal nonconformity, though, knowing that one may be afoul of the law may lead to excessive risk-aversion and thus a loss of potential gain. *See* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 299 (1986).

Even more important, though, is the tendency of revised Article 9 to favor secured lenders over trade creditors and other unsecured creditors. The original U.C.C. moved far in that direction, in part by unifying a messy and complex field of law, in part by abrogating the pre-Code rights of unsecured creditors, and in part by making possible the ready use of floating liens and blanket liens.[357] The new Article 9 pushes further that way. It expands the possible scope of security interests to include, among other things, deposit accounts, payment intangibles, commercial tort claims, health care receivables, and most consignments.[358] It eases perfection rules.[359] It lowers filing costs by doing away with most occasions for multiple filings.[360] It clarifies the rules about filing locations, thus reducing the number of multistate filings.[361]

Just as important are the things it does not do. It makes only modest improvements in the lot of the consumer-debtor, rolling back some helpful changes in earlier drafts.[362] Though a good many commentators of a wide range of political stances have urged that involuntary tort claimants be given enhanced priority, this was not done.[363] The Article 9 committee also lobbied for the reversal of a

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357. The main drafter of Article 9, Grant Gilmore, later regretted that change. *See* Gilmore, *Good Faith*, *supra* note 219, at 627. For an example of the loss in standing of unsecured creditors, see, e.g., Garvin, *supra* note 62.

358. *See* U.C.C. § 9-109 (1998).

359. For instance, by allowing perfection by filing for instruments. *Compare id.* § 9-312(a) (perfection may be by filing) *with* U.C.C. § 9-304(1) (1995) (perfection only by taking possession). Perfection by possession will still give greater security to the creditor, though. *See* U.C.C. § 9-330(d) (1998) (perfection by possession has priority over other forms of perfection).

360. *Compare* U.C.C. § 9-501 (1998) *with* U.C.C. § 9-401(1) (1995). This is likely to yield a measure of nonuniformity as states that have elected a dual filing system choose to retain part or all of it beyond the remnant left in the revision. Local filing officers, typically the clerks of the county courts, may well bemoan the lost revenue and urge such a change.

361. This may well be the greatest advance in clarity in the new Article 9. *Compare* U.C.C. §§ 9-301, -306 (1998) *with* U.C.C. § 9-103 (1995). Here, too, a state filing officer, usually the Secretary of State, may worry about the resulting shifts in filing patterns and agitate for nonuniform amendments, most likely consisting of the old rules.

362. *See* U.C.C. art. 9 pref. note at 29-33 (Annual Meeting Draft July 1998); *see also, e.g.*, Memorandum from the UCC Article 9 Drafting Committee to Commissioners (Apr. 1998) (outlining changes and rationales) (copy on file with *Florida State University Law Review*).

363. *See, e.g.*, Kenneth N. Klee, *Barbarians at the Trough: Riposte in Defense of the Warren Carve-Out Proposal*, 82 CORNELL L. REV. 1466 (1997); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991); LoPucki, *supra* note 271; Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. 1. *Cf.* Alan Schwartz, *A Theory of Loan Priorities*, 18 J. LEGAL STUD. 209 (1989) (granting many tort claimants some priority, but not complete). The coreporters of Article 9, not surprisingly, hold quite different views. *See* Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349 (1997).

proposed change in Article 2, which would have improved the status of a reclaiming seller; the Article 2 committee acceded.[364]

All this is to say that most financers of goods are quite likely to work hard for the enactment of revised Article 9. Though there are more debtors in the world than there are creditors, and though we are all potential tort claimants, the very diffuseness of these classes, coupled with the unlikelihood that any individual will care much about the result, makes it improbable that there will be much sustained opposition.[365] Perhaps more importantly, the statute, though, like all works of mortals, imperfect,[366] clarifies a good many areas left uncertain either by current Article 9 or by capricious judicial glosses. There are some risks of nonuniform amendments, particularly in the place of filing and remedies sections, but the statute will probably be adopted universally and all but uniformly.[367]

C. Articles 2 and 2B

Article 2, governing sales of goods, has not been revised since the initial wave of enactments, a few conforming amendments aside. Llewellyn's loose framework gave Article 2 a good deal of play in its joints; nevertheless, a study committee charged with evaluating the

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364. *See* U.C.C. § 2-816 cmt. (Draft May 16, 1997).

365. Consumer advocates did take part in the drafting of new Article 9 and had a role in the truncation of consumer provisions near the end of the drafting process. More to the point, consumer groups could choose to lobby for nonuniform amendments, or, if sufficiently peeved, for nonadoption. This is unlikely to happen. Despite the late rollbacks, there remain some advances for consumers in new Article 9. Many consumer advocates may well take their half-loaf. In addition, as part of the late compromise, consumer advocates agreed not to oppose new Article 9 in the legislatures. *See* U.C.C. art. 9 pref. note at 30 (Annual Meeting Draft July 1998). Though not all consumer groups were represented in the late bargaining, the most active generally were, which will blunt any sustained attack on that front.

366. Excepting, of course, Gilbert and Sullivan's *Iolanthe*.

367. There is one nonuniform enactment that Florida should consider, whatever the outcome of these other issues. The Florida version of section 9-312(4), which gives the holder of a purchase money security interest a superpriority if it perfects its security interest within a limited time after the debtor takes possession, contains an extra sentence: "Failure to so perfect shall cause the priority of the purchase money security interest to be determined under subsection (5)." FLA. STAT. § 679.312(4) (1997). This added sentence is surplusage if one reads the following section: "In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section) . . ." U.C.C. § 9-312(5) (1995). Florida enacted this to reverse *International Harvester Credit Corp. v. American National Bank*, 296 So. 2d 32 (Fla. 1974), which did violence to Article 9 by giving the holder of the purchase money security interest its superpriority even though it did not comply with section 9-312(4). The leading treatise on Article 9 has termed this "The World's Worst UCC Decision" and "probably the low point in judicial construction of Article 9." CLARK, *supra* note 233, ¶ 3.09[4][d]. Florida's nonuniform amendment was designed to overturn *International Harvester Credit*, restoring the statute to its otherwise universal meaning. As *International Harvester Credit* remains in the Southern Reporter, it may be prudent to carry forward the nonuniform language in order to remind future generations of that decision's fatuity.

state of sales law concluded that there were enough difficulties to warrant review.[368] A drafting committee was thus empanelled in 1991 and, with occasional intervals for rest and refreshment, has been at work ever since.

In the course of the revisions, it was proposed that software and other licensing transactions be brought within Article 2. The law here had not been codified; some courts applied Article 2 by analogy, others applied Article 2 directly, and still others used the common law.[369] Article 2, however, fits licensing imperfectly. After an attempt to use a hub-and-spoke method to bring together the laws of sales, leases, and licensing, it was decided to split licensing off on its own.[370] A new drafting committee was thus put in place, and Article 2B began to take life.

Both Articles are still works in progress. At present, it is anticipated that Article Two will go to the states in early 2000, while Article 2B should be ready a year later. Commenting on either in any detail would thus court instant obsolescence. One can, however, predict safely that both will prove controversial; it is even possible that one or both will be interred in a uniform graveyard. Interestingly, the nature of the opposition to each is quite different. The present opposition to Article 2 is led by various industry groups, most of which decry the slightly expanded warranty coverage in draft Article 2. They also worry about other consumer provisions, most notably the shifting provisions about assent and contract formation generally.[371] This is not, however, to say that consumer advocates are delighted with the progress of Article 2. In fact, most of the changes are fairly mod-

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368. *See generally* PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT (1990).

369. *See* PETER A. ALCES & HAROLD F. SEE, THE COMMERCIAL LAW OF INTELLECTUAL PROPERTY ch. 9 (1994).

370. *See* UNIFORM COMMERCIAL CODE REVISED ARTICLE 2B—PREFACE 3-4 (Draft Dec. 1, 1995), *available at* <http://www.law.uh.edu/ucc2b/1201/pref1201.html> (visited Dec. 22, 1998).

371. *See, e.g.*, Letter from R. Bruce Josten, Executive Vice President, Government Affairs, Chamber of Commerce of the United States of America, to Members of the Uniform Commercial Code Article 2 Drafting Committee (Mar. 6, 1998) [hereinafter Josten Letter] (complaining about formation and warranties sections); Memorandum from Jeffrey S. Edelstein & Debra Freeman, Attorneys, Hall Dickler Kent Friedman & Wood, to Members of the Uniform Commercial Code Article 2 Drafting Committee (Mar. 2, 1998) [hereinafter Edelstein & Freeman Letter] (letter from advertising trade associations, complaining about treatment of warranties created by advertising); Letter from Andrew D. Koblenz, Senior Attorney, American Automobile Manufacturers Association, to Members of the Uniform Commercial Code Article 2 Drafting Committee (Jan. 26, 1998) (complaining mainly about formation and warranties sections) (copies on file with *Florida State University Law Review*).

est, and a good many, if they favor any side, favor industry.[372] An outsider might have trouble understanding the fuss; none of the changes proposed in the present draft of Article 2 could be called revolutionary, and most simply recognize existing cases or extend slightly principles that have long been present in contract and commercial law. Furthermore, as is often entirely justifiable, the Article 2 drafting committee has often revised the draft to take account of industry objections, whether on substantive grounds or out of real concerns about the prospects for enactment. On the merits, then, industry has little cause for complaint and should have still less by the end of the process.[373]

Two illustrations may be in order, one on contract formation and the other on warranties. A number of critics of draft Article 2 have pointed to what they term "significant changes" to the parol evidence rule.[374] When one actually compares the parol evidence rule in draft Article 2 with that in the current version, though, one finds precious little change. The main changes in the draft are (1) elevating language about whether terms "would certainly have been included" in the record from comment to blackletter[375] and (2) clarifying that terms in a record may be explained from the surrounding circumstances.[376] The latter may appear to expand the parol evidence rule; in fact, though, it merely brings it more formally in line with the more modern approach espoused by Arthur Corbin and found, among other places, in the *Restatement (Second) of Contracts*.[377] Indeed, as a number of courts and commentators have observed, the Article 2 parol evidence rule was itself substantially a rejection of the old four-corners approach to parol evidence.[378] The change in the draft=s pa-

372. *See, e.g.*, Letter from Gail Hillebrand, Senior Attorney, Consumers Union of U.S., Inc., to Uniform Law Commissioners (July 1997) (applauding balance in draft and noting the provisions that favor sellers and that favor buyers).

373. Enactability is an obvious and important issue for any uniform statute because there is always the concern that nonuniform amendments may degrade the uniformity of a statute, or that incomplete enactment will lead to divergent rules. *See, e.g.*, Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187, 214-15 (1997).

374. Letter From Charles R. Keeton, Counsel, General Electric Company, to Members of the Uniform Commercial Code Article 2 Drafting Committee 2 (Feb. 5, 1998); *see also, e.g.* Letter From American Gas Association to Members of the Article 2 Drafting Committee, National Conference of Commissioners on Uniform State Laws 3 (Mar. 6-8, 1998); Josten Letter, *supra* note 371, at 2.

375. *Compare* U.C.C. ' 2-202(a)(1)(B) (Draft Mar. 1, 1999) *with* U.C.C. ' 2-202 cmt. 3 (1995).

376. *See* U.C.C. ' 2-202(b) (Draft Mar. 1, 1999).

377. *See* RESTATEMENT (SECOND) OF CONTRACTS ' 212 & cmt. b (1979); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 189-90 (1965).

378. *See, e.g.*, Barbara Oil Co. v. Kansas Gas Supply Corp., 827 P.2d 24, 35 (Kan. 1992); Herman Oil, Inc. v. Peterman, 518 N.W.2d 184, 188 (N.D. 1994); Sundlun v. Shoe-

rol evidence rule is thus quite modest, and perfectly consistent with modern legal doctrine.[379]

The other illustration is the draft=s treatment of advertising warranties. Article 2 has hitherto been silent about whether a manufacturer could, through its mass-market advertising, create an express warranty enforceable by remote buyers. The draft expressly states that a manufacturer may, in essentially the same way that it creates any other express warranty.[380] This move has been attacked by many in industry.[381] One wonders why. Though it is true that current Article 2 does not specifically validate this sort of express warranty, in comments it clearly holds open the possibility that courts may wish to recognize that such a warranty exists.[382] Almost without exception, courts that have reached this issue have done so.[383] In fact, only one part of the draft treatment of advertising warranties diverges from the path of current law B its elimination of consequential damages for lost profits, even for those who make it past the usual foreseeability test.[384] Manufacturers may resist this codification of current case law, but the real long-term effect of this draft provision is in their favor. Again, the objections from industry seem ill-founded.

Article 2 has drawn some fire, but its life has been placid when compared with that of Article 2B. Almost from the start, Article 2B has drawn formidable opposition from a wide range of entities. Consumer groups have consistently opposed it, often calling of late for the abandonment of the project.[385] So, too, have many groups of soft-

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maker, 617 A.2d 1330, 1334 (Pa. Super. Ct. 1992); II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS ' 7.3, at 216 (2d ed. 1998).

379. Though it should be noted that some jurisdictions still use something like the four-corners approach to parol evidence under the common law. *See, e.g.*, Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1148-59 (1995).

380. *See* U.C.C. ' 2-408(c) (Draft Mar. 1, 1999).

381. *See, e.g.*, Edelstein & Freeman Letter, *supra* note 371, at 2; Josten Letter, *supra* note 371, at 4.

382. *See* U.C.C. ' ' 2-313 cmt. 2, -318 cmt. 3 (1995).

383. *See, e.g.*, Ferguson v. Sturm, Ruger & Co., 524 F. Supp. 1042, 1046-47 (D. Conn. 1981); Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp., 514 N.E.2d 1299, 1302-04 (Ind. Ct. App. 1987); Spring Motors Distribs., Inc. v. Ford Motor Co., 489 A.2d 660, 674-77 (N.J. 1985); Inglis v. American Motors Corp., 209 N.E.2d 583, 586-88 (Ohio 1965).

384. *See* U.C.C. ' 2-408(f)(3) (Draft Mar. 1, 1999).

385. *See, e.g.*, Letter from Steve Brobeck et al., Consumer Federation of America, to Charles Alan Wright & Gene N. Lebrun, Presidents, ALI (Nov. 10, 1998) (letter from Consumer Federation of America, Consumer Project on Technology, National Consumers League, and U.S. Public Interest Research Group); Letter from Gail Hillebrand to Uniform Law Commissioners (June 24, 1998) (letter from Consumers Union). The letters and other items referred to in this note and those that follow may be found on *The 2BGuide*, the preeminent website on proposed Article 2B, at <http://www.2Bguide.com> (visited Nov. 18, 1998).

ware customers, including a good many industry groups.[386] Many groups of computing professionals have also opposed the statute,[387] as have certain industries affected at its edges.[388] Libraries and other custodians and providers of information have expressed dismay.[389] Finally, the Federal Trade Commission (FTC) recently wrote comments that call into question many important provisions in Article 2B.[390]

With all these opponents, they must be doing something right. Certainly that has been the view of the software industry, which has consistently supported Article 2B.[391] This, again, is understandable. The law governing licenses of computer software is far from determined, and major splits exist among courts on a great many important issues.[392] At some point, uniformity is highly desirable. One might ask whether it would be better to let common law courts build

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386. *See, e.g.*, Letter from Gordon Pence to UCC Article 2B Drafting Committee (Oct. 12, 1998) (letter from Caterpillar, Inc.); Letter from John Stevenson to Carlyle C. Ring, Jr., Chair, NCCUSL Article 2B Drafting Committee (Oct. 8, 1998) (letter from SIM).

387. *See, e.g.*, Letter from John R. Reinert, President, IEEE-USA, to Carlyle C. Ring, Jr., Chair, & Raymond T. Nimmer, Reporter, NCCUSL Article 2B Drafting Committee (Oct. 9, 1998).

388. *See, e.g.*, Letter from Jack Valenti, Director, Motion Picture Association of America, et al., to Carlyle C. Ring, Jr. Chair, NCCUSL Article 2B Drafting Committee & Geoffrey Hazard, Jr., Director, ALI (Sept. 10, 1998) (letter from Motion Picture Association of America, Recording Industry Association of America, Newspaper Association of America, National Association of Broadcasters, National Cable Television Association, and Magazine Publishers of America).

389. *See, e.g.*, Letter from National Writers Union (UAW Local 1981) to Carlyle C. Ring, Jr., Chair, NCCUSL Article 2B Drafting Committee, et al. (Oct. 9, 1998); Letter from Robert Oakley, Washington Affairs Representative, American Association of Law Libraries, et al. to Charles Alan Wright, President, ALI (Oct. 8, 1998) (letter from American Association of Law Libraries, American Library Association, Association of Research Libraries, and Special Libraries Association).

390. *See* Letter from Joan Z. Bernstein, Director, Division of Financial Practices, Bureau of Consumer Protection, et al. to Carlyle C. Ring, Jr., Chair, NCCUSL Article 2B Drafting Committee, & Geoffrey Hazard, Jr., Director, ALI (Oct. 30, 1998) (letter from Bureau of Consumer Protection, Bureau of Competition, and Federal Trade Commission).

391. *See, e.g.*, Memorandum from Business Software Alliance to Article 2B Drafting Committee (Oct. 10, 1998); Memorandum from Information Industry Association to Article 2B Drafting Committee (Oct. 8, 1998).

392. One illustration comes in contract formation. Many software manufacturers use shrink-wrap licenses—licenses, the terms of which are located within the packages and that provide that assent occurs on the use of the software. If the buyer does not learn the terms of the license until she has paid for the software, are the license terms part of the sales contract? Federal circuit courts have split on the issue. *Compare* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 102 (3d Cir. 1991) (not enforceable), *with* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) (Easterbrook, J.) (enforceable). Parenthetically, draft Article 2B generally validates shrink-wrap licenses even though they appear somewhat inconsistent with traditional rules of contract formation and, for that matter, the principles of federal warranty law. *See* U.C.C. §§ 2B-207, -208 (Draft Feb. 1, 1999); *see also, e.g.*, Magnuson-Moss Warranty Act § 102(b)(1)(A), 15 U.S.C. § 2302(b)(1)(A) (1994) (presale availability of warranty terms); Zachary M. Harrison, Note, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907 (1998).

up a body of case law before presuming to codify, but the need is present. Where there is need, though, there is danger; if the law is frozen incorrectly, it may alter greatly the continued development of an important industry.[393]

Article 2B continues to shift in order to address objections. At the November 1998 meeting of the drafting committee, for example, the scope of Article 2B was limited to computer information transactions, thus addressing in part the objections of many in print and other media who do not want to fall under Article 2B.[394] The drafting committee also endorsed a provision allowing public policy to override contractual terms. Thus, for example, it would be possible for contractual restrictions on fair use, reverse engineering, and the like to be rendered unenforceable.[395] More changes may be in store.[396]

It remains too early to tell whether Article 2B will even be proposed by NCCUSL and ALI, much less whether it will be enacted anywhere. Three comments can safely be made, though. First, if the

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393. This cuts both ways. A statute that placed excessive restrictions on software licensors might well stunt the growth of that industry. On the other hand, a statute that tilts too far in their favor might dissuade customers from licensing software from American firms, thus providing an obstacle to growth.

394. *See* Carlyle C. Ring, Jr., Summary of Actions at Article 2B Meeting, Nov. 13-15, 1998 at 1 (n.d.), *available at* <http://www. 2Bguide.com/docs/cr1198sum.html> (visited Jan. 9, 1999); *cf.* Letter from Jack Valenti et al., *supra* note 388. This change has not mollified those groups. Though they have escaped coverage as licensors, they are still covered as licensees. Furthermore, just as happened with Article 2, courts might apply Article 2B by analogy to other licensing transactions. They have thus renewed their objections. *See* Letter from Jack Valenti, President and CEO, Motion Picture Association of America et al. to Gene N. LeBrun, President, NCCUSL et al. (Dec. 7, 1998)).

395. *See* Ring, *supra* note 394, at 1; *see also, e.g.*, Charles R. McManis, *The Privatization (or "Shrink-Wrapping") of American Copyright Law*, 87 CAL. L. REV. 173 (1999) (assailing the use of such terms).

396. One may, however, doubt that enough changes will occur to palliate the objectors, or that the remainder of the process will be at all smooth. Even before the ALI decided to delay considering Article 2B, acrimony plagued the drafting. A random selection of the comments in *The 2B Guide* illustrates this. More disturbingly, the acrimony appears in official statements made by the drafters. *See, e.g.*, U.C.C. art. 2B pref. 20 (Draft Aug. 1, 1998) ("In the political process that surrounds any new law, many public statements have been made about the effect of Article 2B on consumer protection. Most are political efforts to mislead."). There have even been more or less polite intimations that some on the drafting committee have improperly communicated the views of others. *See* Letter from Gail Hillebrand, Senior Attorney, Consumers Union, to Gene Lebrun, President, NCCUSL, & Carlyle C. Ring, Jr., Chair, NCCUSL Article 2B Drafting Committee (May 11, 1998) (protesting use of Consumers Union's name with an implicit endorsement of Article 2B), *available at* <http://forums.infoworld.com/threads/get.cgi?56678> (visited Jan. 28, 1999). The amount of criticism itself would make bridging the gaps difficult; the tone suggests that it may be impossible. Moreover, it is hard to explain NCCUSL's decision not to change its schedule, even in light of the ALI's decision to delay consideration of Article 2B by a year. *See* Press Release from National Conference of Commissioners on Uniform State Laws (Jan. 9, 1999), *available at* <http://www.2bguide.com/docs/199prel.html> (visited Jan. 28, 1999). Possibly NCCUSL thinks the remaining problems can be dealt with by with a bit of polish on the current draft. *See id.* It may also be that NCCUSL has in mind proceeding ahead, even if ALI ultimately tables the draft or gives firm objections after NCCUSL has approved it. In any event, the prospects are uninviting.

FTC is not satisfied with the progress of Article 2B, it may render large parts of the project moot. As it has in other contexts, the FTC can issue regulations that preempt state law. The drafting committee, ALI, and NCCUSL would thus do well to ensure that the FTC's comments are heeded, at least in substantial part, if they want a real statute to emerge. Second, if Article 2B is proposed, then it may well become the law that governs a great many of our licensing transactions. It is not unlikely that 2B would be enacted in a few states with a heavy concentration of software licensors—Washington comes to mind. Article 2B's choice of law provision is quite broad, allowing the parties—really, the licensor—to designate the law of any jurisdiction, though the choice is limited somewhat in consumer transactions.[397] Accordingly, subject only to the limits imposed by the Full Faith and Credit Clause or similar policies regarding the recognition of one state's laws by another (in particular, looking to the enforceability of choice-of-law rules), it would then be possible for software manufacturers to operate under Article 2B, or some nonuniform variant, much as certain states of incorporation have become popular because, in part, of their relaxed corporation laws. What Florida, or any other state, does might thus largely be moot.[398] Third, if Article 2B is killed off, its spectre may haunt the killers. Now that a complete text is at hand, the software industry could seek its enactment state by state (perhaps first removing some of the consumer provisions).[399] In any event, the issue is not yet ripe, though the next several months should be critical.

V. A FEW WORDS ON UNIFORM LAW-MAKING

As one surveys the somewhat leisurely maelstrom that is commercial law today, and surveys as well the problems that attend enactment, one may sympathize with the politico who, responding to

397. *See* U.C.C. § 2B-107 (Draft Feb. 1, 1999).

398. Furthermore, should one state in a region adopt Article 2B, other states will be under pressure to do so, lest they lose software publishers to the neighboring state. Thus, if Washington adopts 2B, California may follow. This, in turn, might lead competitive states to act similarly. If Article 2B is approved, then, its opponents may need to fight hard in the states in which it is first proposed, and its friends may want to pick early states with care and concentrate on them.

399. Something along these lines has already started. Though NCCUSL has not yet finished with Article 2B, and though the drafts have undergone, and are likely to undergo, significant changes, legislators in Connecticut and Virginia filed bills to put in place the then-current version of Article 2B. Interview with Gail Hillebrand, Senior Attorney, Consumers Union, in Los Angeles, Cal. (Feb. 6, 1999). Remarkably, when NCCUSL was informed of these premature attempts to enact Article 2B, it did not attempt to stop, or at least slow, legislative action. *Id*. Though it appears that these attempts have been abortive, they do presage similar attempts, especially if NCCUSL, as expected, approves a draft in July 1999 (though before ALI has reviewed it in May 2000). Should this happen, and should NCCUSL not act vigorously to hold back the legislatures, one may ask about the future of ALI-NCCUSL collaboration.

the advent of the *Erie* doctrine and the growth of the commerce powers, filed a bill to put sales law under the federal wing—and thus inspired NCCUSL to take steps toward a Uniform Commercial Code.[400] Life might well be easier, if not necessarily better, had commercial law become a federal creature. Still, here we are, with a uniform law that must be made uniform by the actions of some fifty jurisdictions. The survey above may suggest that not everything runs smoothly. Sometimes, as with Article 2A, a statute is launched, only to be recalled quickly as problems are pointed out. Sometimes, as with Article 8, a statute, though carefully devised, mispredicts the future and thus leaves ungoverned many of the transactions it was designed to govern. Sometimes, as with Article 2B, a well-intentioned project draws a barrage of criticism that may imperil the result. And the U.C.C. is a success story; many uniform statutes issued by NCCUSL are adopted by few states, and some by none.[401]

Furthermore, even if a good product is offered to the states, they may well put in place nonuniform amendments, whether to placate this or that interest group or to deal with some cherished idiosyncrasy in local law.[402] Nor is the process of enactment always a model of legislative deliberation, unless one's model is drawn from Bismarck's famous dictum. Busy legislatures generally give little attention to routine uniform statutes, save when an affected group takes an interest, and may have to rely heavily on advocacy, rather than dispassionate counsel, when deciding what to do. In closing, then, I offer a few diffident suggestions on the law reform process, from drafting through enactment.

1. Use New Forms of Communication to Improve Deliberation

This requires a bit of background for those unfamiliar with the drafting process. At present, drafting committees meet infrequently—say, no more than four or five times a year for somewhere between three and . . . well, however many years Article 2 ultimately takes. Attending these meetings can be costly, which limits the ability of some potentially interested parties to take an active role. Though interested parties can submit proposals to the reporters or committee between meetings, proposals are discussed and voted on only at meetings. As a result, a good deal of a typical meeting is spent hearing people recite relatively familiar arguments and devise ways to formulate proposals for voting. Even when proposals are

400. *See* Garvin, *supra* note 62, at 264-66.

401. *See, e.g.*, Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State* Laws, 25 J. LEGAL STUD. 131 (1996).

402. *See supra* note 151. For that matter, these amendments may prove ineffective, thus doing nothing more than sowing confusion in the minds of future readers. *See supra* note 4 (nonuniform amendment to deposit account definition).

made in principle, to avoid drafting on the floor, the ultimate product will be voted on only later, after the reporters have framed the statute.

At least in my experience, the result is not always satisfactory. Written submissions unaccompanied by the physical presence of their authors are frequently left aside, and a good deal of wheel reinvention goes on. These meetings are held when the people involved are away from their files and offices and thus cannot easily check whether statements made are perfectly accurate or whether one person's rendition of an earlier compromise is entirely correct. The press of time often prevents one from tabling matters until the full truth can come out. In principle, one can go back to correct errors, but inertia and other business sometimes preclude this.

One can only speculate, but it is likely that some past problems have come about because of this method of drafting. Potentially affected parties are often silent or at least muted; on the other hand, parties that can afford to be present throughout may have undue sway. Much time is also lost in devising language on the spot, or in debating recollections, time that could better be spent on the merits.

The present drafting method may have made sense in earlier days, when gathering around a table was the only way to hash out statutory language. Nowadays, though, one could use computer bulletin boards and e-mail lists to carry out much of the work between meetings. Members of the drafting committee and other interested parties could post and debate proposals at leisure, with full reference materials at hand and no limits, save one's own endurance, on crafting one's views. Ideally, proposals could thus be framed and, to a large extent, completed between meetings, leaving actual meetings to settle on policy issues and pass on work completed between meetings.

How might this avoid past difficulties? First, it would open up the process to more participants, especially the relatively impecunious. This might head off some nonuniform amendments inserted when those unable to take an active role in drafting nationally take an active role locally. Second, it could shorten the drafting process by leaving less to do at meetings (and thus requiring fewer of them). Though errors are found and corrected over time, complex statutes may also become Byzantine with endless layers of redrafting and patching. It is hard to remember why one took a decision three or five years ago, so one may reverse it without regard to the sound principles it had captured. Third, it should improve the quality of the participation. This is not to say that drafting committee meetings are intellectual slums. To the contrary: those I have attended have been marvelously educative and have featured discussion at as high a level as one can contemplate. But a good deal of what is said is frank

advocacy and thus may not present the truth fully or, at times, fairly. A less concentrated process of deliberation makes it harder to slide dubious assertions past a committee, many, if not most, members of which are generalists. Others can more plausibly rebut assertions or do the research rebuttal may require. Fourth, it should save money; if fewer meetings are required, then NCCUSL has lower costs. It thus could take on more drafting projects, or devote more resources to those it has.[403]

NCCUSL has already taken steps in this direction by placing drafts of its works in progress at a website.[404] It might be worth trying this with a new project to see whether the cost and bother would be worth it.[405]

2. Make Complete Drafts Available Before the Blackletter Is Approved

Ordinarily, draft articles of the U.C.C. are approved before the comments are complete, or even before they are written. The version passed on by ALI/NCCUSL contains the proposed statutory text, perhaps with introductory comments and some reporter's notes tucked within. This contrasts with the usual ALI process for approving Restatements of the Law, in which both the blackletter and the comments are made available in draft form when the members of the ALI review the Restatement.

One can see why the U.C.C. drafts over the last decade or more have proceeded in this way. It is time-consuming to prepare comments, and reporters have plenty on their hands without the need to write and rewrite comments as the statute changes. Furthermore, the drafting process tends to run on longer than expected. By the time the statutory text is more or less final, no one wants to wait until the comments can also be made ready. As ALI and NCCUSL meet only once a year (in May and July, respectively), delay caused by drafting comments can put back a statute by up to nine months.

Still, the experiment might be tried. First, it is common to resolve disputes among drafting committee members by assuring one side or

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403. Most importantly, by commissioning empirical work or by hiring outside experts to prepare background papers in unfamiliar or relatively unstudied areas. Others have pointed to the lack of empirical work in so fact-driven an area as a deficiency in the drafting process. *See, e.g.*, Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 770-73 (1993).

404. The URL is <http://www.law.upenn.edu/library/ulc> (visited Jan. 9, 1999).

405. A modest reform along these lines would be to hold drafting committee meetings in law schools. The committee members and observers would then have ready access to law libraries, and thus could check the accuracy of statements made during meetings and do research on matters otherwise unanticipated. Law students might also be available to assist. I am indebted to David Frisch for this observation.

the other, or perhaps both, that the problem will be dealt with in the comments. This is also a way to handle principles which are difficult to draft precisely and briefly, but that should go somewhere. It is thus difficult to assess the success with which the reporters have handled this delegation until the comments are out. Leaving aside the potential fallibility of reporters who are asked to put things into comments over many years, it is possible that problems with conflicting comments, or conflicting memories of what the comments should have said, may emerge only after the draft has been approved and the comments written—and then it is too late to open up the process.[406] This may lead to nonuniform amendments in the states as frustrated commissioners and observers seek to get their ideas recognized somewhere.

Second, it is hard for those not active in the drafting of a statute to get a clear sense of what is behind shifts in statutory language without comments. True, the drafts typically contain redlined text, and often the reporters will note why a change was made. If, however, something was dropped from the statute because it would be dealt with in the comments, an outside observer will not realize why. Making the comments available earlier might thus lead to more informed submissions to ALI and NCCUSL in the later stages of approving a draft.

Third, preparing the comments before, rather than after, the statute is approved should help reduce the sort of problem that plagued Article 2A. When objections came in after the blackletter was approved, the reporter responded by rewriting the comments. This at times left the text and comments at odds, as others have observed.[407] Better to have the two fit together, and have both text and comments approved at once.

Fourth, having a more complete version available may forestall some of the late interventions found, for instance, in Article 2A. It has been pointed out that state law revision commissions tend not to get involved with a draft statute until very late in the process. If a full version were available for a reasonable time before approval, state law revision commissions and bar committees might be more inclined to review the product and make suggestions before the statute is approved. This would probably cut down the number of nonuniform enactments, and perhaps remove the need to recall an article (as happened recently with Article 2A, and happened with the whole U.C.C. in the 1950s).[408]

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406. The comments are made available for inspection before they are made final, but there is no opportunity for discussion.

407. *See, e.g.*, Rapson, *supra* note 65.

408. After Pennsylvania enacted the U.C.C., the New York Law Revision Commission issued a report that, though generally favorable, found a good many spots where the

Fifth, and perhaps most important, the comments are quite important. They do not control the text, though there are plenty of spots in the Code where the text is ambiguous or at least very difficult to understand without the comments. Still, they are at least the second resort, and often (alas?) the first, when one is faced with difficult or unfamiliar statutory language. And, as has been noted, they are often used to fill in the gaps, where the drafting committee either felt that the statute could not efficiently deal with the welter of cases that could arise or where what is called for is either a general principle or a series of illustrations. The comments can also be used to suggest answers to interstitial problems or to problems deliberately left outside the scope of the statute.

Given this, why are the comments not passed upon by the people who approve the statute proper? The lack of approval, beyond the reporters and the chair of the drafting committee, has been pointed to as a reason against the overuse of comments.[409] It does seem odd to allow a very small and perhaps unrepresentative group the chance to shift significantly the meaning of a statute. For purely instrumental reasons, this may not be a bad thing if one likes the reporter's views more than the views of the drafting committee.[410] But these instrumental reasons lack a certain legitimacy and may ultimately lower the value of the comments to potential users.[411]

It is hard to see why NCCUSL and ALI should promulgate the U.C.C.'s comments in a method so different from that used for the Restatements. Were the text and comments put together for deliberation and passage, the comments would carry even greater weight and might also benefit from more give-and-take. In any event, the process might be considered for one or another of the projects up-

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U.C.C. needed improvement. *See* WALTER P. ARMSTRONG, JR. A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 77 (1991). To avoid having nonuniform versions throughout the states, NCCUSL revised the U.C.C. significantly, bringing it closer to the New York approach. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 4 (3d student ed. 1988).

It is true that the whole Code was available by then, which would seem to undercut the point made above. Having the whole Code, text and comments alike, does not guarantee that the states will pass on it in advance. It makes early comment more likely, though, which would be a help.

409. *See* Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 447-58 (1997).

410. Mistrust of the reporter, on the other hand, may lead those worried about the comments either to fight harder for changes in the text, or to oppose the statute altogether. Some of those involved in the drafting of Article 2B have said as much to me, and one suspects that Article 2B, though extreme, is not unique.

411. *See* Alces & Frisch, *supra* note 409, at 447-58; *see also, e.g.*, Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993 (1995).

coming—perhaps revised Article 1, which should be finished in 2000 or so.[412]

3. *Use Law Revision Commissions to Study and Propose Legislation*

Most states have law revision commissions that evaluate and report on proposed uniform statutes, survey the state's statutes for anomalies and excrescencies, and propose new statutes to supersede those now obsolete or address new problems. Their work often improves the state's own laws and can guide legislators as they make sense of newly proposed enactments. Because these are nonpartisan, they can also help sift through the comments of the interest groups that praise or denounce proposed legislation. Finally, state law revision commissions have figured prominently in reshaping uniform statutes. The U.C.C. itself was overhauled as a result of the New York Law Revision Commission's thorough report on the first version; not until the new version was it enacted generally.[413] More recently, Article 2A's hasty recall was occasioned by reports from the California Bar and the Massachusetts Law Revision Commission.

State bars can do much in this vein, as Florida's has. Still, they can do only so much, given that bar study committees work with volunteer staffs. In addition, it is possible that the bar committees could become dominated by one or another faction, thus providing less than dispassionate analysis of a proposed statute.[414] There is much to be said for the relative independence of a freestanding group.

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412. It should be noted that the argument for may also be an argument against. The drafting process is already prone to manipulation by groups of those affected by the statutes. Threats of opposition are common currency and can yield some great changes in the draft statutes. In contrast, the comments are not always run by members of these groups and thus may be more nearly pristine. Because they generally are not voted on by the legislatures, they also are not amended by them and so will remain impervious to attack.

One may thus prefer the comments to be drafted after approval so that they may moderate some of the influences brought to bear on the statute. The potential opponents will still be watching, though, and the comments will be out before virtually every legislature passes on the proposed statute. If the comments move greatly away from the understanding of an affected group, it may push for a nonuniform amendment to the statute or seek to bring the statute down.

Furthermore, the notion that the comments might be better, or at least more neutral, if drafted after approval requires that one have great faith in the reporter and committee chair. While I can think of no reporter or chair who is less than superbly able, it is fair to say that some may tilt one way or another on issues and that all, though able, are mortal. From time to time, there have been disputes over whether a reporter has faithfully captured the sense of NCCUSL or ALI in revising the statute after a request, or order, to do so. Leaving aside the details of these disputes, the fact that they arise suggests that a good many affected parties might be uneasy about approving a commentless statute.

413. *See, e.g., supra* note 412.

414. I should add that I know of no such domination in any such committee with which I have worked. I raise the issue as at least a theoretical problem (and perhaps an actual problem, if anecdotal evidence from outside of Florida is to be believed).

For whatever reason, Florida lacks a law revision commission. This may well have led to the present problems with Article 2A as to which Florida, despite its recent actions, *still* lacks uniformity for no apparent reason.[415] These commissions need not be costly. For example, New Jersey's, with a relatively small staff and budget, has done impressive work over the last decade or so.[416] Putting one in place would be well worth the cost, given the increased clarity and modernity that Florida's law would have.

VI. CONCLUSION

Commercial law in the United States has had waves of development. The first may have been early in the nineteenth century, when Joseph Story, among others, sought to provide a degree of consistency and logic to an often-confused field.[417] Much the same may be said of the latter part of the nineteenth century, during which American law adapted to some degree to the requirements of an industrial economy. The third wave was the advance of statutes promulgated by NCCUSL, most of which appeared in the early twentieth century.[418] After this came the drafting and adoption of the U.C.C., which occupied the 1940s through the mid-1960s. And now we have the last decade, in which almost every Article of the U.C.C. has been revised, and a new one written. A golden age for commercial law?

Perhaps not. It is easy to idealize the works of our seniors, especially because we have not been around to see the messy compromises that they made. Certainly the U.C.C. was no exception; indeed, it was attacked at its outset partly because it was thought to be a craven capitulation to the banking lobby.[419] More recently, a promising attempt to render payments law coherent was scuttled after a mass of objections, primarily from the banking industry.[420] Commercial law's history is rife with these difficulties.

Still, there is some reason for doubt. All of the periods above brought forth an efflorescence of secondary literature—all save our own, in which commercial law occupies an ever-decreasing part of the law reviews and the curriculum, to look at but one part of our profession. This may in part stem from the tendency of modern statutes to draft for all contingencies, rather than rely on the statement of general principles as guides to courts. The latter, not the former, was

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415. *See supra* notes 151-159 and accompanying text.

416. For more on the New Jersey Law Revision Commission, see its website at <http://www.lawrev.state.nj.us> (visited Jan. 9, 1999).

417. *See, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (Story, J.) (creating general federal common law for negotiable instruments).

418. *See, e.g.*, ARMSTRONG, *supra* note 408.

419. *See, e.g.*, Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952).

420. *See* Rubin, *supra* note 403, at 745-46.

Llewellyn's idea of a proper commercial code, and one leaves Llewellyn's framework at some peril.

This move may in part have arisen because of those most vigorous in pushing for change in commercial law—the relevant groups regulated. As noted earlier, large firms, and trade associations that give large firms great weight, tend to favor legal certainty, even in light of greater transition costs and, perhaps, some lack of flexibility.[421] The latter is a legitimate worry for all, but the use of form contracts and default, rather than mandatory, rules allows large firms to contract around rules they find inconvenient. Smaller groups affected may not share these views, but they will likely have less of a voice when critical decisions are made. Nor do consumers always share them; though often consumers would prefer clear, simple rules, they also want some measure of protection against over-reaching and market imperfections. In general, though, we have seen something of a move from standards to rules—or, to a point, from what Llewellyn called in another context the Grand Style to the Formal Style.[422]

All this is to say that this generation of commercial statutes does a great deal to clarify current problems in the cases and give effect to good modern business practice, but does rather less to mold general principles of law in a completely balanced way. This difficulty may be the latest iteration of what Professor Cooper has called the "struggle for control of the UCC" between, as she puts it, the madonnas and the whores—advocates for clarity, consistency, and elegance and interest-group representatives, respectively.[423] The problem is all the more acute because of the relatively great resources available to those who represent larger industry groups.[424] However conscientious and competent the members of the drafting committees are—and their standards are very high indeed—there is some effect to a steady barrage of criticism from one side or another on any significant issue. Moreover, a good deal of any drafting process is made with enactability in mind. Neither ALI nor NCCUSL wants to draft a pristine and unenacted statute. This is all the more dangerous for the U.C.C., which is already on the books; uniformity would be imperiled were some states to adopt a revised article and others not. Furthermore, there is very little innate pressure for the adoption of revised uniform laws. Bar associations and commissioners may push a bit, but determined opposition by an important group will often overcome their force. This leads to a strong desire to avoid annoying any group

421. *See supra* notes 354-56 and accompanying text.

422. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 36-39 (1960).

423. *See* Cooper, *Madonnas*, *supra* note 151, at 564.

424. *See, e.g.*, Rubin, *supra* note 403. Interestingly, much of the present strife over Article 2B may be caused by the relative balance of power between the software manufacturers, on the one hand, and the array of software licensees, information providers, and consumers on the other.

that can credibly threaten to oppose a statute energetically and effectively. While neither ALI nor NCCUSL would sell their good names to this or that piece of special-interest legislation, there are often areas for good-faith debate over important principles, and in those areas the pressure, and usually the result, is for the larger, more tenacious groups to prevail.[425]

One should not yield too readily to despair. The recent revisions that have been made have been useful, though, at times, somewhat inclined to favor the large groups that press their cases persistently, vigorously, and, it must be said, not implausibly. Elegance and consistency are by no means out the window; indeed, the recent revisions often show clean, lucid, and sensible resolutions of important problems. Perhaps some process reforms of the sort noted above will help rectify some of the imbalance that from time to time affects codification. In any case, we near the end of this generation of commercial law reform. Whether it is a model or a warning for the future remains to be seen.

425. On the problems posed by capture and enactability, see Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998).

BACK TO BASICS ON SCHOOL CONCURRENCY

DAVID L. POWELL*

I. INTRODUCTION

In recent years, Florida's burgeoning public school enrollment has led to overcrowded schools in urban areas. One response by state and local leaders has been to find additional means to finance classroom construction. Another has been to look for ways to economize on capital outlays for educational facilities. Although school overcrowding is in essence a brick-and-mortar fiscal issue, a third response has been to

* Shareholder, Hopping Green Sams & Smith, P.A., Tallahassee, Florida. B.J., University of Texas at Austin, 1974; M.S., Columbia University, 1975; J.D., Florida State University, 1986. In 1997 the author served as Chairman of the Public Schools Construction Study Commission, whose recommendations were the basis for the legislation which is the subject of this Article. The opinions and observations expressed by the author in this Article are drawn from that work. The author wishes to thank Keith Hetrick, Robert M. Rhodes, and Victoria L. Weber for reviewing and offering comments on a draft of this Article. All conclusions, and any errors or omissions, are the responsibility of the author.

search for a regulatory strategy directed at those who develop and build new neighborhoods where families reside.[1]

This third response prompted the Florida Legislature in 1998 to revisit the issues of how school districts plan for educational facilities in relation to expected land development and how Florida's integrated planning and growth management system can be used to coordinate the timing of new residential development and new public schools. Lawmakers enacted a complete state policy to coordinate residential development with the construction of new schools.[2] By doing so, the Legislature addressed the latest public policy challenge presented by Florida's rapid growth and development, and reaffirmed important basic policies of Florida's concurrency system for managing growth.

II. CONCURRENCY

The "teeth" of Florida's growth management system is the requirement that adequate public facilities be available on a timely basis to accommodate the impacts of development—the "concurrency" requirement.[3] As generally described by two commentators: "Concurrency is land use regulation which controls the timing of property development and population growth. Its purpose is to ensure that certain types of public facilities and services needed to serve new residents are constructed and made available contemporaneously with the impact of new development."[4]

Adequate public facilities requirements have been adopted in many locations around the country in recent years.[5] Henry Fagin laid the theoretical basis for this planning tool in an influential 1955 article in which he made the case that land development regulations should in-

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1. *See, e.g.*, Evan Perez, *As Suburbs Spread Westward, County's School Crunch Grows*, TALL. DEM., Apr. 11, 1997, at B9 (stating that Broward County school enrollment is growing by 10,000 each year).

2. *See* Act effective July 1, 1998, ch. 98-176, §§ 4-9, 1998 Fla. Laws 1556, 1559-67 (amending scattered sections of FLA. STAT. ch. 163 and ch. 235 (1997)); Act effective May 22, 1998, ch. 98-176, §§ 10-11, 1998 Fla. Laws 1556, 1567-68. Although most of the Act was effective on the date it became law, the sections dealing with school concurrency became effective on July 1, 1998. *See* Act effective July 1, 1998, ch. 98-176, §§ 4-9, 1998 Fla. Laws 1556, 1559-67. The 1998 Legislature also refined the state laws on school facility planning. *See id.* §§ 7-9, 1998 Fla. Laws at 1566-67 (amending FLA. STAT. §§ 235.185, .19, .193 (1997)). For a discussion of how the 1998 legislation altered prior school concurrency procedures, see *infra* Part III.

3. *See* Florida Dep't of Comm'y Aff., *The Evolution and Requirements of the CMS Rule*, TECHNICAL MEMO, Aug. 1991, at 4; *see also* FLA. STAT. § 163.3177(10)(h) (Supp. 1998); David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 291 (1993). The concurrency requirement takes its name from a provision enacted in 1986 declaring that "[i]t is the intent of the Legislature that public facilities and services needed to support development shall be available *concurrent with* the impacts of such development." FLA. STAT. § 163.3177(10)(h) (Supp. 1986) (emphasis added).

4. H. Glen Boggs, II & Robert C. Apgar, *Concurrency and Growth Management: A Lawyer's Primer*, 7 J. LAND USE & ENVTL. L. 1, 1 (1991).

5. *See* Douglas R. Porter, *The APF Epidemic*, URB. LAND, Nov. 1990, at 36, 36.

clude both spatial and temporal controls.[6] Fagin argued, "It is my belief that until the science of planning invents greatly improved methods for regulating the timing of urban development, many attempts at space coordination must continue to fail—master plans remaining unrealized, zoning ordinances ineffectual and rapidly obsolescing."[7] Fagin's theory of land use timing controls was put into practice some years later in a small town in New York named Ramapo, and his theory was validated in 1972 by the New York Court of Appeals in the landmark case of *Golden v. Planning Board of Ramapo*.[8]

Florida's concurrency requirement originated in two statutes enacted by the Legislature in 1985. The State Comprehensive Plan[9] provides general policy direction intended to achieve closer coordination in timing land development with the availability of infrastructure.[10] The Local Government Comprehensive Planning and Land Development Regulation Act[11] refines those broad principles into specific requirements related to capital improvements planning[12] and development permitting[13] by general-purpose local governments. The breadth and magnitude of Florida's concurrency requirement was viewed as a trailblazing policy for other states to emulate, but in hindsight, this bold experiment was perhaps less commendable because "the practical implications of this seemingly simple and politically seductive policy were not fully understood when it was enacted in 1985."[14]

During implementation of this new statewide policy, the Department of Community Affairs (DCA)[15] utilized case-by-case adjudication to translate those provisions into the nuts-and-bolts machinery of mandatory concurrency for potable water, sanitary sewer, drainage,

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6. *See* Henry Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROBS. 298, 298 (1955).

7. *Id.* at 298-99.

8. 285 N.E.2d 291, 305 (N.Y. 1972) (holding constitutionally valid the town's zoning amendment that imposed developmental growth restrictions until adequate municipal services were available).

9. *See* Act effective May 31, 1985, ch. 85-87, 1985 Fla. Laws 295 (current version at FLA. STAT. ch. 187 (1997)). The State Comprehensive Plan is required by statute to be reviewed biennially, although in practice it has not been.

10. *See* FLA. STAT. § 187.201(16)(a) (1997) (directing development to areas having environmentally friendly infrastructure), (18)(a) (stating the goal of planning and financing new public facilities in a "timely, orderly, and efficient manner"). The State Comprehensive Plan is the Legislature's enactment of 26 specific goals for the state with supporting policies. The plan is not regulatory, *see id.* § 187.101(2), and implementation of the policies requires separate legislative action unless otherwise provided by law, *see id.* § 187.101(1).

11. Ch. 85-55, 1985 Fla. Laws 207 (current version at FLA. STAT. ch. 163, Part II (1997 & Supp. 1998)).

12. *See* FLA. STAT. § 163.3177(3) (Supp. 1998).

13. *See id.* § 163.3202(2)(g).

14. Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects*, 6 J. LAND USE & ENVTL. L. 241, 243 (1991).

15. The DCA is the reviewing agency for local government comprehensive plans to ensure compliance with the state law. *See* FLA. STAT. § 163.3184 (Supp. 1998).

solid waste, parks and recreation, roads, and in certain jurisdictions, mass transit.[16] In the ensuing years, the basic principles necessary to establish a constitutionally sound concurrency system were established in the DCA's rules and later in statutory law. Foremost among these basic principles was that a concurrency system must be grounded on a financially feasible capital improvements plan to provide the needed public facilities at specified service levels in order to prevent a development moratorium.[17] Most agree that the basic principles of concurrency must be included when concurrency is extended to other types of public facilities.[18]

A. The Governmental Framework

Because the authority of the governmental actors is divided, school concurrency presents challenges not found in most forms of mandatory concurrency. Cities and counties have some of the powers and duties implicated by school concurrency, while school districts have others. School concurrency is, therefore, primarily a challenge in intergovernmental coordination.

1. Cities and Counties

Cities and counties have one set of powers essential in a school concurrency system: they plan for and regulate the development of land within the parameters of Florida's integrated planning and growth management system. This duty arises under the Local Government Comprehensive Planning and Land Development Regulation Act.[19] Each city and county is required to adopt and enforce a local comprehensive plan for its jurisdiction that establishes the future land uses and the densities and intensities of each use.[20] The comprehensive plan must be implemented through land development regulations that are consistent with the plan.[21] In addition, development permits issued pursuant to the land development regulations must be consistent with the plan.[22] Thus, a local comprehensive plan is more than a plan: it is an instrument for regulating land development, and residential land development is the heart of the school concurrency issue. Section 163.3180(1), *Florida Statutes*, provides that any local government may

16. *See* Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973, 1011 (1992).

17. *See* Boggs & Apgar, *supra* note 4, at 6.

18. *See, e.g.*, Powell, *supra* note 3, at 294.

19. *See* FLA. STAT. ch. 163, Part II (1997 & Supp. 1998).

20. *See* FLA. STAT. § 163.3177(6)(a) (Supp. 1998).

21. *See id.* § 163.3194(1)(b) (1997) (legal status of comprehensive plan); *see also id.* § 163.3202 (Supp. 1998) (land development regulations).

22. *See id.* § 163.3194(1)(a) (1997).

extend the concurrency requirement so that it applies to additional public facilities in its geographic jurisdiction.[23]

2. School Districts

School districts possess the other powers vital for a school concurrency system: they design, construct, and operate the public schools that serve new development within the confines of a statewide educational system.

Florida has a unified system of public education; the Legislature has declared that education is primarily a state responsibility.[24] The chief policymaker and coordinator for this state system is the State Board of Education.[25] The Commissioner of Education carries out a variety of duties as the chief educational officer of the state,[26] and the Department of Education is the administrative and supervisory agency for the system under the direction of the State Board of Education.[27] The Department's duties and powers are related to the planning and construction of educational facilities.[28]

Each countywide school district is part of the state system but has a certain degree of local autonomy.[29] Each school district is responsible for operating its schools in conformity with state rules and minimum standards.[30] Ultimate local authority rests with the district school board.[31] This local authority includes preparing and implementing "plans for the establishment, organization, and operation of the schools of the district," including the location of individual schools and the attendance zones that will be served by each school.[32] Each district school board is required to adopt a five-year capital building program, to be updated annually, based on a periodic state-supervised educational plant survey and projected available revenues.[33] In this way, the school districts exercise the other power that is at the heart of school

23. *See id.* § 163.3180 (Supp. 1998).

24. *See id.* § 229.011. (1997).

25. *See* FLA. CONST. art. IX, § 2 (organization and supervision authority of state board); *see also* FLA. STAT. § 229.053 (1997) (general powers of state board).

26. *See* FLA. STAT. § 229.512 (1997).

27. *See id.* § 229.75.

28. *See id.* § 235.014 (functions of the Department); *see also id.* § 235.19 (site planning and selection).

29. *See id.* § 228.041(2). In fact, school boards are considered state agencies for certain purposes. *See, e.g.*, FLA. STAT. § 120.52(1) (Supp. 1998) (including educational units among the Administrative Procedure Act agency definitions); Canney v. Board of Public Instruction, 278 So. 2d 260, 263-64 (Fla. 1973) (holding that school boards function as part of the legislative branch of state government).

30. *See* FLA. STAT. § 230.01 (1997).

31. *See* FLA. CONST. art. IX, § 4 (school board membership and duties); *see also* FLA. STAT. § 230.03(2) (1997) (statutory grant of control authority).

32. FLA. STAT. § 230.23(4) (1997).

33. *See id.* § 235.185 (Supp. 1998).

concurrency: they deliver the public school capacity that is essential to serve new residential development.

B. Prior Legislation

The Legislature addressed the unusual challenges posed by school concurrency several times in the years preceding the 1998 legislation. In each instance, the Legislature sought to establish statutory guidelines without prescribing a complete regimen for school concurrency because the subject was both complex and primarily one that had been left to local discretion.

1. The 1993 ELMS III Legislation

In 1992 concurrency in general and school concurrency in particular were addressed by the third Environmental Land Management Study Committee (ELMS III), a blue-ribbon commission established by Governor Chiles to review and propose improvements to the state's integrated planning and growth management system.[34] Most of ELMS III's recommendations were enacted into law in 1993.[35] These statutory changes included legislative confirmation of the basic framework for concurrency that had been developed by the DCA through case-by-case adjudication and formal rulemaking.[36]

ELMS III specifically considered whether to extend the concurrency requirement to include public schools as well as other forms of infrastructure. It recommended against enlarging the statewide concurrency requirement to include public schools[37] and against requiring local governments to adopt education elements in their local comprehensive plans.[38] ELMS III proposed that further study of school concurrency be undertaken on a local basis with state funds before school concurrency was imposed in Florida.[39]

Rather than a statewide regulatory response to growth pressures on public schools, ELMS III sought to address the need for better coordination of land development and educational facility construction as a challenge in intergovernmental coordination. ELMS III proposed a series of measures intended to bring about more coordinated planning by local governments and school districts. Foremost among them was a

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34. *See generally* ENVIRONMENTAL LAND MGMT. STUDY COMM., FINAL REPORT: BUILDING SUCCESSFUL COMMUNITIES (1992) (on file with Dep't of Comm'y Aff., Tallahasse, Fla.) [hereinafter ELMS III REPORT].

35. *Compare* Act effective July 1, 1993, ch. 93-206, 1993 Fla. Laws 1887 (codified in scattered sections of FLA. STAT. (1993)), *with* ELMS III REPORT, *supra* note 34. For an account of the concurrency provisions in the 1993 legislation, see Powell, *supra* note 3, at 293.

36. *See* Powell, *supra* note 3, at 293.

37. *See* ELMS III REPORT, *supra* note 34, at 66 (Recommendation 95).

38. *See id.* at 37 (Recommendation 40).

39. *See id.* at 67 (Recommendation 96).

proposal that each county, all the municipalities in that county, and that county's school district enter into a formal agreement—an interlocal agreement—to achieve closer coordination in planning for new development and new schools.[40]

The Legislature went further than recommended by ELMS III. It adopted the proposed intergovernmental coordination requirements, including the interlocal agreement requirement now codified at section 163.3177(6)(h)(2), *Florida Statutes*.[41] However, the Legislature also specifically provided that before school concurrency could be imposed by a local government, "it should first conduct a study to determine how the requirement would be met and shared by all affected parties."[42] This requirement was intended to promote a dialogue in the preplanning stage of local policy development to ensure that any foreseeable financial burdens would be equitably distributed.

2. The 1995 Educational Facilities Legislation

In 1995, with overcrowded schools becoming a more compelling issue in urban areas,[43] the Legislature enacted additional measures to ensure "the coordinated and cooperative provision of educational facilities."[44] These changes enlarged the collaborative planning measures enacted in the ELMS III legislation of 1993 and specified additional requirements for a local-option school concurrency system so it would be consistent with the basic policies regarding public facilities and services subject to the mandatory concurrency requirement.

First, the 1995 legislation required school districts to coordinate their information related to school facilities and development with information used by local governments in the comprehensive planning process, thus strengthening the 1993 mandate of section 163.3177(6)(h)(2), *Florida Statutes*, for common population projections.[45] Coordinated planning data and analysis helps ensure that school districts plan enough schools for the amount of development projected by local governments.

Second, the 1995 legislation required school districts to furnish each local government in its jurisdiction with an annual educational facilities report identifying projected needs for existing schools and a capital improvements plan showing planned facilities with assured funding for

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40. *See id.* at 38-39 (Recommendation 45).

41. *See* Act effective July 1, 1993, ch. 93-206, § 6, 1993 Fla. Laws 1887, 1893 (amending FLA. STAT. § 163.3177(6) (Supp. 1992)). For additional history and explanation of interlocal agreements, see *infra* Part III.C.1-2.

42. Act effective July 1, 1993, ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898, *repealed by* Act effective July 1, 1998, ch. 98-176, § 5, 1998 Fla. Laws 1556, 1561-66.

43. *See* Florida Dep't of Comm'y Aff., *Ask DCA: Planning for Public Schools*, COMMUNITY PLANNING, Dec. 1995, at 9-11.

44. Act effective June 16, 1995, ch. 95-341, § 13, 1995 Fla. Laws 3010, 3022.

45. *Compare* FLA. STAT. § 163.3177(6)(h)(2) (1993) *with* FLA. STAT. § 235.193 (1995).

construction over the next five years.[46] This information exchange would help local governments understand the school needs created by planned development as well as the financial ability of school districts to meet those needs.

Third, the 1995 legislation required local governments by October 1, 1996, to identify land use districts where schools would be allowed[47] and to direct school districts to build schools only on sites that are consistent with local land use designations.[48] Although the mandate to local governments was undermined by the lack of an enforcement mechanism to make the deadline meaningful, these complementary requirements together were to provide greater predictability for the siting of new schools to serve development.

Finally, the 1995 legislation required that each local planning agency establish guidance for a local government in formulating its comprehensive plan to provide "opportunities for involvement" by the school district.[49] This requirement promotes a dialogue between local planning and school officials to identify and resolve issues at the preplanning or planning stages.

Consistent with this emphasis on collaboration between local governments and school districts to meet Florida's need for new schools, the 1995 Legislature amended section 163.3180(1)(b), *Florida Statutes*, expressly to require local governments to satisfy the interlocal agreement requirement of section 163.3177(6)(h)(2), *Florida Statutes*, as a prerequisite to the imposition of school concurrency.[50]

The premise of this last change was that school concurrency should only be imposed in communities where there is both an adequate countywide planning basis for doing so, with all local jurisdictions adhering to coordinated population, enrollment, and school facility projections, and a political consensus supporting this regulatory requirement by all the local governments that must enforce it with the attendant risks of liability.

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46. *See* Act effective June 16, 1995, ch. 95-341, § 4, 1995 Fla. Laws 3010, 3016 (codified at FLA. STAT. § 235.194(2) (1995)).

47. *See id.* § 10, 1995 Fla. Laws at 3021 (amending FLA. STAT. § 163.3177(6)(a) (1993)).

48. *See id.* § 3, 1995 Fla. Laws at 3014 (amending FLA. STAT. § 235.193(3) (1993)).

49. *Id.* § 9, 1995 Fla. Laws at 3020 (amending FLA. STAT. § 163.3174(1) (1993)).

50. *See id.* § 12, 1995 Fla. Laws at 3022 (amending FLA. STAT. § 163.3180(1)(b)(2) (1993)).

In 1996 the Legislature rectified an apparent omission by amending section 163.3180(1)(b)(2) expressly to provide that a local government also must satisfy the coordination requirements of section 163.3177(6)(h)(1) as a prerequisite to imposition of school concurrency. *See* Act effective June 6, 1996, ch. 96-416, § 3, 1996 Fla. Laws 3186, 3191 (codified at FLA. STAT. § 163.3180(1)(b)(2) (Supp. 1996)).

C. Prelude to the 1998 Legislation

Several school-siting disputes in urban areas throughout the state, plus two developments during 1997 that were related to school concurrency, set the stage for the 1998 legislation. One was the protracted litigation over the efforts to establish a countywide school concurrency system in Broward County. The other was the Legislature's decision, in light of the gravity of the dispute over school concurrency in Broward County, to suspend the authority of local governments elsewhere to establish school concurrency systems while a policy review was conducted by a blue-ribbon commission.

1. The Broward County *Case*

Florida's school-age population boomed during the 1990s due to continued immigration of new residents from other states and the entry of the Baby Boom generation into their child-rearing years, a phenomenon sometimes called the "Baby Boom Echo." These trends have created pressures on school facilities throughout the state.[51] The first community to seek a regulatory response to this phenomenon was Broward County, a charter county with countywide land use authority vested in the Board of County Commissioners and a countywide planning council.[52]

In 1996 Broward County adopted amendments to its comprehensive plan to establish a new countywide school concurrency system.[53] These amendments included a new Public School Facilities Element, in addition to amendments to the Capital Improvements Element, the Inter-

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51. *See* Perez, *supra* note 1, at B9.

52. *See* City of Coconut Creek v. Broward County Bd. of County Comm'rs, 430 So. 2d (Fla. 4th DCA 1983) (holding that a county with a charter specifically vesting it with land use regulatory power had final land use authority in a conflict between county and municipalities); Kane Homes, Inc. v. City of N. Lauderdale, 418 So. 2d 451 (Fla. 4th DCA 1982) (upholding the city's decision to follow the direction of the county planning board to deny a developer's building permit).

53. *See* Economic Dev. Council of Broward County, Inc. v. Department of Comm'y Aff., DOAH Case Nos. 96-6138GM, 97-1875GM, at 2 (Admin. Comm'n Final Order entered Mar. 11, 1998) (on file with Clerk, Admin. Comm'n, Tallahassee, Fla.) [hereinafter Broward Final Order]. The Broward amendments were not the first attempt in Florida to make public schools subject to the concurrency requirement. An early effort in Monroe County failed. *See* Thomas G. Pelham, The Legal and Practical Implications and Difficulties of School Concurrency 6 (undated) (unpublished manuscript, on file with author).

In 1995 (prior to the enactment of the 1995 legislation), the City of Coral Springs attempted to implement school concurrency. The DCA found the Coral Springs plan not in compliance with state law because the city was unable to establish a cooperative interlocal agreement with the Broward County School Board and the plan did not include a financially feasible implementation method. *See* Florida Dep't of Comm'y Aff., *supra* note 43, at 10-11; *see also* text accompanying *infra* note 178. The city abandoned its unilateral efforts in 1997. *See* Ty Tagami, *Springs Bows to District Plan*, FT. LAUD. SUN SENT., July 29, 1997, at B1.

governmental Coordination Element, and the Broward County Land Use Plan.[54]

The DCA entered a notice of intent to find the Broward school concurrency amendments in compliance.[55] After a formal administrative hearing brought by third-party challengers, the administrative law judge entered a recommended order which concluded that the amendments were not in compliance on a variety of grounds.[56] Accepting most but not all legal conclusions recommended by the administrative law judge, the DCA acknowledged the error of its initial determination and recommended that the Administration Commission (the Governor and the Cabinet) find the amendments not in compliance.[57] On March 11, 1998, the Administration Commission did so, prescribing an extensive list of remedial actions that would be necessary to bring the amendments into compliance.[58]

As of this writing, the final order entered by the Administration Commission is on appeal at the First District Court of Appeal.[59] The issue on appeal is whether Broward County may impose school concurrency in its local comprehensive plan and, solely on the basis of a provision in its charter, bind all municipalities within the county without all the Broward municipalities executing the interlocal agreement between Broward County and the Broward School Board.[60]

The appellants, Economic Development Council of Broward County, Inc. and the Building Industry Association of South Florida, contend that sections 163.3177(6)(h)(2) and 163.3180(1)(b)(2), *Florida Statutes*, require the interlocal agreement to be signed by all municipalities in order for the agreement to be the basis for a school concurrency system. The appellees, the Broward County Board of County Commissioners, the Broward County School Board, and the

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54. *See* Broward Final Order, *supra* note 53, at 2.

55. *See id.*

56. *See id.* at 3; Economic Dev. Council of Broward County, Inc. v. Department of Comm'y Aff., DOAH Case Nos. 96-6138GM, 97-1875GM (Recommended Order entered Oct. 8, 1997) [hereinafter Broward Recommended Order]; *see also* Bill Hirschman, *Ruling Stuns School Officials*, FT. LAUD. SUN SENT., Oct. 10, 1997, at B4.

57. *See* Broward Recommended Order, *supra* note 56, at 3; *see also* Economic Dev. Council of Broward, Inc. v. Department of Comm'y Aff., DOAH Case Nos. 96-6138GM, 97-1875GM, at 23 (Department of Comm'y Aff.'s Determination of Non-Compliance and Recommendation to Admin. Comm'n, Nov. 21, 1997) (copy on file with author). For an account of the Broward school concurrency case by two lawyers who participated on behalf of the challengers through issuance of the DCA's recommendation, see Ronald L. Weaver & Mark D. Solov, *Current Developments in Public School Concurrency*, FLA. B.J., Feb. 1998, at 47.

58. *See* Broward Final Order, *supra* note 53, *passim*.

59. *See* Economic Dev. Council of Broward County, Inc. v. Florida Admin. Comm'n, No. 98-989 (Fla. 1st DCA filed July 17, 1998). The author filed a brief on behalf of the Association of Florida Community Developers, Inc., as amicus curiae in support of the appellants' position.

60. *See infra* Part III.C.

Department of Community Affairs for the Administration Commission, contend that the Broward charter provides the necessary authority, and due to the provisions of sections 163.3171(2) and 163.3174(1)(b), *Florida Statutes*, an interlocal agreement signed by all municipalities is not required as the basis for school concurrency.[61]

2. The Public Schools Construction Study Commission

In response to the controversy over the Broward County school concurrency case, as well as unrelated school siting disputes in Leon and Hillsborough counties, the 1997 Legislature initiated a policy review by a blue-ribbon commission. In the General Appropriations Act, the Legislature created the seventeen-member Public Schools Construction Study Commission (Schools Commission) and charged it to "study in detail and recommend appropriate reforms related to the planning, and siting, of public schools, and reforms related to school concurrency," with a final report due by January 1, 1998.[62] In conjunction with this policy review, the Legislature suspended the legal authority of local governments, other than in Broward County, to impose school concurrency until July 1, 1998.[63]

With respect to school concurrency, the Schools Commission initially confronted the issue of whether the state had a legitimate role in addressing how such a regulatory requirement was imposed and enforced by local governments. The Schools Commission concluded that the state has an interest in school concurrency because public education is a state responsibility.[64] In addition, the state has an interest in school concurrency due to the state's leadership role in the administration of the statewide planning and growth management system.[65]

Further, the Schools Commission concluded that the then-existing state policy on school concurrency was incomplete.[66] Unanswered ques-

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61. *See id.*

62. Act effective May 28, 1997, ch. 97-152, § 6, 1997 Fla. Laws 2508, 2825 (Specific Appropriation 1628). The Schools Commission was appointed by the Governor, the Senate President, and the Speaker of the House. *See id.* The members were David L. Brandon, Palm Harbor; J. Thomas Chandler, Orlando; Scott A. Glass, Ocoee; William G. Graham, Lake Clarke Shores; Calvin D. Harris, Clearwater; James Horne, Jacksonville; John Long, Land O'Lakes; Richard "Skeet" Jernigan, Fort Lauderdale; Patricia S. McKay, Tallahassee; Karen Marcus, West Palm Beach; Bob Moss, Fort Lauderdale; Myra Mueller, Boca Raton; Benton R. Murphey, Lutz; G. Steven Pfeiffer, Tallahassee; Linda S. Sparks, Jacksonville; and Robert T. Urban, Sanford. The Governor appointed the author to serve as chairman.

63. *See* Act effective May 30, 1997, ch. 97-265, § 13, 1997 Fla. Laws 4935, 4951. The suspension of local government authority to impose school concurrency was highly controversial. *See* John Kennedy & Cory Lancaster, *Halt Growth Till Schools Catch Up?*, ORLANDO SENT., Nov. 23, 1997, at B1.

64. *See* PUBLIC SCH. CONSTR. STUDY COMM'N, FINAL REPORT 18 (1997) (on file with Dep't of Comm'y Aff., Tallahassee, Fla.) [hereinafter SCHOOLS COMM'N REPORT].

65. *See id.*

66. *See id.* at 19.

tions about how school concurrency could be imposed and implemented at the local level and the standards against which a school concurrency system would be judged for purposes of determining whether it was in compliance with state law[67] created a lack of predictability for local governments, school boards, and private citizens, resulting in the prospect of increased conflict and litigation over local-option school concurrency.

For these reasons, the Schools Commission recommended extensive changes and additions to state law on school concurrency. As amended, these recommendations were contained in Committee Substitute for House Bill 4031 by Representative Ken Pruitt[68] and Committee Substitute for Senate Bill 2474 by Senator Tom Lee.[69] The Senate version of the bill was enacted into law and signed by Governor Chiles on May 22, 1998.[70]

III. SCHOOL CONCURRENCY

Since 1985 local governments have had authority to impose school concurrency on a local-option basis as part of their overall authority to plan for and regulate the development of land.[71] The 1998 legislation revisited the basic policies implicated by concurrency; it confirmed these policies in the context of school concurrency and elaborated on certain statutory requirements.

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67. Florida's comprehensive planning laws require provisions of a comprehensive plan to be found in compliance with state law in order to become legally effective. *See* FLA. STAT. § 163.3189(2)(a) (1997). The term "in compliance" is defined in section 163.3184(1)(b), *Florida Statutes*. *See id.* § 163.3184(1)(b) (Supp. 1998).

68. Repub., Port St. Lucie.

69. Repub., Brandon.

70. *See* Act effective May 22, 1998, ch. 98-176, 1998 Fla. Laws 1556.

71. Prior to 1985, local governments had purported authority to prohibit or limit residential development if adequate school facilities would not be available. Florida law provided that "[t]he local government is empowered to reject development plans when public school facilities made necessary by the proposed development are not available in the area which is proposed for development or are not planned to be constructed in such area *concurrently with* the development." FLA. STAT. § 235.193(4) (1983) (emphasis added). Arguably, this authority was limited by the constitutional restrictions on moratoria. *See* David M. Layman, *Concurrency and Moratoria*, FLA. B.J., Jan. 1997, at 49, 51-52 (noting that even a temporary moratorium may be an unconstitutional regulatory taking).

This statutory authority was tested when Manatee County denied approval of a preliminary plat partly on grounds of lack of school capacity. The county was reversed. While other considerations were plainly evident in the decision, the trial court held that this provision did not authorize denial of a plat that otherwise conformed to the county's subdivision regulations. *See* Southern Coop. Dev. Fund v. Driggers, 527 F. Supp. 927, 929 (M.D. Fla. 1981), *aff'd*, 696 F.2d 1347 (11th Cir. 1983).

Section 235.193, *Florida Statutes*, was amended in 1985 in conjunction with enactment of the Local Government Comprehensive Planning and Land Development Regulation Act. *See* ch. 85-55, § 25, 1985 Fla. Laws 207, 238-39. Subsection four was then repealed later in that session. *See* Educational Facilities Act, ch. 85-116, §§ 10, 26, 27, 1985 Fla. Laws 683, 693, 717. The meager legislative history sheds no light on the specific purpose of the repeal. Presumably it was undertaken in light of the nascent concurrency requirement.

A. Local Option

The threshold policy issue was whether the Legislature should continue to allow school concurrency to be imposed at local option within a framework of statewide requirements, mandated for statewide application, or be prohibited altogether. The Schools Commission received extensive testimony on this issue and recommended that the existing policy of local-option school concurrency be continued.[72] There were important policy and political reasons for this choice.

First, notwithstanding the reassertion of a state interest in physical growth and development issues since 1972, Florida has a strong tradition of home rule by local governments when it comes to land development regulation. In recent years, however, the Legislature has enacted an array of planning and regulatory programs in which local exercise of the police power for land development regulation is limited by a state role in certain decisions. This reassertion of the state's role in regulating land development began with the enactment of the Florida Environmental Land and Water Management Act of 1972[73] and continued with the enactment of the Florida State and Regional Planning Act of 1984[74] and the Local Government Comprehensive Planning and Land Development Regulation Act[75] in 1985.

Programs using shared state and local decision making inevitably create tensions on both the policy and implementation levels. Given the importance of land development decisions in a fast-growing state like Florida, however, these programs are the best method yet devised to reconcile the various competing interests affected by these issues. The continuation of local-option school concurrency within clearly defined state-set parameters fits well within this emerging tradition.

Second, continuation of the existing policy was the path of least political resistance in 1998. Strong opposition was evident from both the public and private sectors to any suggestion that school concurrency be mandated statewide. Local governments and school boards did not want lawmakers mandating a new regulatory program, particularly because no state financial support for implementation was likely to be forthcoming, and private interests opposed any new regulatory requirements on residential development.[76]

Local governments presented strong political opposition to any suggestion that school concurrency be prohibited altogether.[77] Local gov-

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72. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 17.

73. *See* ch. 72-317, 1972 Fla. Laws 1162 (current version at FLA. STAT. §§ 380.012-.10 (1997)).

74. *See* ch. 84-257, 1984 Fla. Laws 1166 (current version at FLA. STAT. ch. 187 (1997)).

75. *See* ch. 85-55, §§ 1-20, 1985 Fla. Laws 207, 210-35 (current version at FLA. STAT. ch. 163, Part II (1997 & Supp. 1998)).

76. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 17.

77. *See id.* The Florida Association of Counties, the Florida League of Cities, and the Florida School Boards Association made it a high priority to ensure that the temporary

ernments generally object to legislative limitations on their policy choices. In the case of school concurrency, this normal sensitivity was heightened by the temporary suspension of authority enacted by the Legislature in 1997 and the fact that a school concurrency system had already been adopted in Broward County and serious discussions regarding school concurrency were underway in Palm Beach County. When considered together, these factors strongly favored continuation of the current basic policy with some refinements. The Legislature agreed in the 1998 legislation.[78]

B. Countywide School Concurrency

At the same time that it continued the local-option policy, the 1998 Legislature expressly required that school concurrency be imposed only on a countywide basis.[79] The 1995 educational facilities legislation established this requirement by implication because it provided that the satisfaction of the intergovernmental coordination requirement of section 163.3177(6)(h)(2), *Florida Statutes*, was a prerequisite for imposing school concurrency.[80] This requirement included entry into an interlocal agreement by the county, all the municipalities within the county, and the school district to establish "joint processes for collaborative planning and decisionmaking on population projections and public school siting, the location and extension of pubic facilities subject to concurrency, and siting facilities with countywide significance."[81]

There were compelling reasons to make the statute expressly require that school concurrency be established countywide. The Florida Constitution requires "a uniform system of free public schools."[82] The Florida Supreme Court has eschewed a construction of this provision that would purport to achieve a rigid uniformity of public schools on a statewide basis;[83] it has opined that "there need not be uniformity of physical plant and curriculum from county to county because their re-

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suspension of local authority to impose school concurrency, enacted by the Legislature in 1997, would not be extended beyond July 1, 1998. *See* Kennedy & Lancaster, *supra* note 63, at B1.

78. *See* Act effective July 1, 1998, ch. 98-176, § 5(12), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12) (Supp. 1998)).

79. *See id.*

80. *See* Act effective June 16, 1995, ch. 95-341, § 3, 1995 Fla. Laws 3010, 3014, (amending FLA. STAT. § 235.193 (1993)); *id.* § 11, 1995 Fla. Laws at 3022.

81. FLA. STAT. § 163.3177(6)(h)(2) (1995).

82. FLA. CONST. art. IX, § 1.

83. Indeed, the Florida Supreme Court has sought to avoid giving a precise interpretation of the uniform public schools requirement, going so far as to sanction "'a broad degree of variation'" among the state's schools. Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406 (Fla. 1996) (quoting Florida Dep't of Educ. v. Glasser, 622 So. 2d 944, 950 (Fla. 1993) (Kogan, J., concurring)). In so doing, it has deferred to the legislative branch. *See* FLA. CONST. art. II, § 3 (requiring separation of powers); *Glasser*, 622 So. 2d at 947.

quirements differ."[84] Rather, the court reasoned that the mandate for uniform public schools is satisfied "when the constituent parts, although unequal in number, operate subject to a common plan or serve a common purpose."[85]

In dicta, the court suggested that the uniformity requirement may apply with more exacting precision to all public school facilities within a county. In *St. Johns County v. Northeast Florida Builders Ass'n*,[86] the court reviewed a countywide school impact fee imposed on new residential development by St. Johns County to finance new schools. The impact fee was implemented in unincorporated areas immediately upon adoption by the county and in a municipality upon that municipality entering into an interlocal agreement with the county.[87]

In a case of first impression, the court held that the impact fee must apply to "substantially all of the population of St. Johns County" in order to satisfy the second prong of the dual rational nexus test applicable to impact fees.[88] Such an action would ensure that the funds collected from the impact fee were expended to provide facilities to serve those who paid the fees and that municipal residents not subject to the fees would not receive a "windfall" facility at the expense of the other county residents. However, the court observed, "Even if the ordinance were amended to limit expenditures to schools serving areas subject to the impact fee, we are led to wonder why this would not implicate the requirement of a uniform system of public schools."[89] In this way, the court has suggested that the uniform public schools requirement may establish a standard to be applied to all public schools within a county.

An express requirement that school concurrency generally be imposed countywide will ensure that such a regulatory program, where established, will not lead to discrimination among pupils in settled, declining, or growing areas of a particular district in the provision of educational facilities. When read in conjunction with provisions relating to other key components of a school concurrency system, this policy provides enough flexibility to tailor a school concurrency system in any county while also safeguarding the right of all its children to equal edu-

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84. School Bd. of Escambia County v. State, 353 So. 2d 834, 838 (Fla. 1977).

85. *Id.*

86. 583 So. 2d 635 (Fla. 1991).

87. *See id.* at 637.

88. *Id.* at 639. The dual rational nexus test requires the local government imposing the impact fees to demonstrate: (1) a reasonable connection between the need for new facilities and the demand created by the proposed development; and (2) an assurance that impact fees collected from the proposed development will be used to finance facilities that will benefit the specific area. *See id.* at 637 (citing Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. 4th DCA 1983)). For the seminal Florida decision on the dual rational nexus test applicable to impact fees, see Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976).

89. *St. Johns County*, 583 So. 2d at 639 n.3.

cational opportunity. In this way, the 1998 legislation allows a workable school concurrency system that will meet constitutional muster.

Implementation of the requirement for countywide school concurrency also raises a number of practical issues. Some were addressed by the Schools Commission; others were answered by the Legislature after additional negotiations among the interested constituencies, such as local governments, school districts, developers, homebuilders, realtors, and other advocacy groups interested in growth management issues.

First, all public schools in the county must be included in the school concurrency system so that the total school capacity will be taken into account in determining whether level-of-service standards will be met.[90] This requirement presents obvious challenges for measuring levels of service and preparing the necessary public school capital facilities program to ensure the adopted level-of-service standard will be achieved and maintained throughout the planning period.

Second, residential development throughout the county, whether located in a municipality or in the unincorporated area, generally must be subject to school concurrency.[91] This requirement squarely presents the challenge of coordinating county and municipal planning and permitting programs, a challenge which the interlocal agreement requirement of section 163.3177(6)(h)(2), *Florida Statutes*, should meet.

Third, generally all local governments in the county must adopt the necessary comprehensive plan amendments to establish the school concurrency system and must execute and submit the interlocal agreement.[92] Both the plan amendments and the interlocal agreement must be submitted to the DCA for review and be found in compliance in order for the school concurrency system to become legally effective.[93]

C. Intergovernmental Coordination

With one modification, the 1998 legislation carries forward the requirement of section 163.3177(6)(h)(2), *Florida Statutes*, that a prerequisite for school concurrency is entry into an interlocal agreement by the county, the school district, and all municipalities in the county to set forth "collaborative planning and decisionmaking on population projections and public school siting," in addition to other issues.[94]

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90. *See* FLA. STAT. § 163.3177(12)(a) (Supp. 1998).

91. Municipalities in which residential development is expected to have a de minimis effect on the demand for public school facilities are exempted from this requirement. *See infra* Part III.C.3.

92. Again, the only exception is municipalities in which residential development is expected to have a de minimis effect on the demand for public school facilities. *See infra* Part III.C.3.

93. *See infra* Part III.C.4.

94. Act effective July 1, 1998, ch. 98-176, § 5(12)(g), 1998 Fla. Laws 1556, 1565 (codified at FLA. STAT. § 163.3180(12)(g) (Supp. 1998)).

This issue was one of the key disputes before the Schools Commission. Proponents of school concurrency argued that the interlocal agreement requirement meant one city could block implementation of countywide school concurrency by refusing to enter into the agreement. They sought to change the requirement in significant ways. Others, including municipalities and private interests, argued that the interlocal agreement requirement served a vital purpose and should not be watered-down or eliminated.[95]

1. Origins of the Interlocal Agreement Requirement

Particularly in the context of school concurrency, the issue of which governmental entities must be signatories to the interlocal agreement required by section 163.3177(6)(h)(2), *Florida Statutes*, cannot be divorced from the "substantial legislative policy reasons" for requiring such an agreement.[96]

The interlocal agreement requirement originated in the recommendations of ELMS III. In light of the controversy and litigation from implementation of the historic 1985 growth management legislation, ELMS III placed a high priority on conflict avoidance, particularly at the planning stages of development, and conflict resolution.[97] This emphasis was reflected in the recommendations concerning improved intergovernmental coordination generally and school planning in particular.[98]

After evaluating criticisms that the then-existing intergovernmental coordination elements were weak and ineffectual, ELMS III proposed that local governments and school boards enter into formal agreements to coordinate population projections and school site locations so they could jointly assess the effect of planned growth on the need for new schools.[99] As refined by the Legislature, the key step for effectuating this approach at the local level was a required agreement—executed by the county, all municipalities in the county, and the school district—to set forth "collaborative planning and decisionmaking."[100] This interlocal agreement was to ensure that the school district planned enough schools to serve new development projected in *all* local comprehensive plans in the county and that the local governments, in turn, would site the planned schools to serve those new residents.

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95. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 28; *see also infra* Part III.C.2.

96. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (noting that "it is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court").

97. *See* ELMS III Report, *supra* note 34, at 6-7.

98. *See supra* Part II.B.1.

99. *See* ELMS III REPORT, *supra* note 34, at 38-39 (Recommendation 45).

100. Act effective July 1, 1993, ch. 93-206, § 6(6)(h)(2), 1993 Fla. Laws 1887, 1893 (amending FLA. STAT. § 163.3177 (Supp. 1992)).

This legislative scheme recognized the constitutionally divided responsibilities between local governments and school districts. It also represented a judgment that the preferred way to meet the need for new schools caused by continued growth was not through a coercive regulatory regime, but through a collaborative plan-based approach. Thus, "all affected entities" were to be parties to the agreement and to sign it.[101]

2. The Requirement as a Basis for School Concurrency

The interlocal agreement addresses the essential tasks posed by school concurrency: to ensure that the school district plans for and builds enough schools to meet the needs of development projected by *all* local governments in the district and that the local governments site the planned schools to serve new residents.

In the context of school concurrency, the interlocal agreement is intended to be a bridge. On one side are plan policies on school concurrency and the "principles and guidelines" for intergovernmental coordination by local governments and the school district.[102] On the other side are the regulatory programs administered by local governments through their concurrency management systems[103] to enforce school concurrency—the regulatory requirement that new residential development be permitted only when the developer can show adequate school capacity will be available concurrent with the impacts of that development.

School concurrency proponents contended that the existing requirement gave each municipality a veto over whether school concurrency would be established in that county.[104] Because school overcrowding was most prevalent in large urban counties with many municipalities, the interlocal agreement requirement was politically unrealistic because one small city could block implementation of countywide school concurrency by refusing to enter into the required interlocal agreement. School concurrency proponents advocated several alternatives to establish school concurrency countywide without letting a single city block the effort.[105]

Other interests, including the Florida League of Cities and the Palm Beach County Municipal League, contended that the interlocal agree-

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101. *Id.*

102. *See* FLA. STAT. § 163.3177(6)(h)(1) (Supp. 1998).

103. For the minimum criteria for concurrency management systems to be found in compliance with state law, see FLA. ADMIN. CODE ANN. r. 9J-5.0055 (1998).

104. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 28. Even before the recent interest in school concurrency, commentators have remarked upon the political difficulties of getting a county and all its municipalities to agree on a common course of action in the field of growth management. *See, e.g.*, C. Allen Watts, *Beyond User Fees? Impact Fees for Schools and . . .*, FLA. B.J., Feb. 1992, at 56, 59-60.

105. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 28.

ment served the vital purpose of promoting coordination and expressing political support for the program. They placed a high value on ensuring that municipalities obligated to enforce school concurrency through their land development regulations—and thus obligated to incur potential liability for denial of a building permit on grounds of inadequate school capacity—had a voice in the establishment of such a program.[106] The Schools Commission arrived at a compromise that modified the interlocal agreement requirement by creating an exception.[107]

3. *The De Minimis Exception*

In order to help make school concurrency a more realistic option in urban counties with many municipalities without sacrificing the intended coordination and political benefits of the required interlocal agreement, the Schools Commission recommended that the interlocal agreement requirement be refined to allow exclusion of municipalities not expected to have a significant effect on demand for public school facilities.[108] It proposed specific criteria to determine which municipalities should fit within that exception.[109]

The Legislature agreed with this basic approach and refined the Commission's recommended criteria to provide the following:

> a. The municipality has issued development orders for fewer than 50 residential dwelling units during the preceding 5 years, or the municipality has generated fewer than 25 additional public school students during the preceding 5 years.
>
> b. The municipality has not annexed new land during the preceding 5 years in land use categories which permit residential uses that will affect school attendance rates.
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> c. The municipality has no public schools located within its boundaries.

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106. *See id.*

107. *See id.* (Recommendation 12). As part of the compromise, the Schools Commission did not take an official position on a key issue in the Broward County school concurrency litigation, namely, whether the interlocal agreement requirement of section 163.3180(1)(b)(2), *Florida Statutes*, applied to a charter county where the county charter purports to provide a legal basis for school concurrency without municipal consent through entry into the interlocal agreement. *See supra* Part II.C.1. Thus, the Schools Commission took no position on the merits of any individual school concurrency or siting dispute. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 5.

108. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 28 (Recommendation 12). This compromise was not well-received by some school concurrency proponents. *See* Larry Barszewski, *Cities May Get Say in School Crowding*, FT. LAUD. SUN SENT., Jan. 2, 1998, at B4 (quoting a Broward County school official as saying the compromise was "meaningless").

109. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 28 (Recommendation 12).

> d. At least 80 percent of the developable land within the boundaries of the municipality has been built upon.[110]

Any municipality that satisfies all four criteria is not required to sign the interlocal agreement as a prerequisite for school concurrency and therefore will not be in a position to block the establishment of school concurrency in its county. Nor will it be required to participate in the otherwise countywide school concurrency system. Because these criteria are narrow and tailored to exclude only those areas not having a significant impact on the demand for public school facilities, the de minimis exception can be reconciled with the uniform public schools requirement.

Any municipality that meets these criteria must determine in its periodic evaluation and appraisal report whether it continues to meet the criteria for not having a significant impact on the demand for public school facilities. In a county that has previously established school concurrency, a municipality that does not meet the criteria at the time of a subsequent evaluation and appraisal report is required to take two steps to begin enforcing school concurrency. First, it must adopt a public school facilities element with goals, objectives, and policies that are consistent with the comprehensive plans establishing school concurrency in other local governments within the county. Second, as required by section 163.3177(6)(h)(2), *Florida Statutes*, it must enter into the existing interlocal agreement.[111]

A municipality that fails to take these steps will be subject to automatic suspension of its right to amend its comprehensive plan as provided by section 163.3191, *Florida Statutes*, on the grounds that it has not completed the evaluation and appraisal report process.[112]

4. Minimum Criteria and Review

In addition to the issue of which governmental entities must be signatories to the required interlocal agreement, the 1998 legislation provides a much-needed description of the contents of an interlocal agreement for purposes of school concurrency. The statute also addresses the review procedure for such an agreement for purposes of school concurrency. Because neither the Legislature nor the DCA had ever addressed either issue, there were many unanswered practical questions about how the interlocal agreement requirement could be satisfied in the establishment of a school concurrency system.

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110. Act effective July 1, 1998, ch. 98-176, § 5(12), 1998 Fla. Laws 1556, 1564 (amending FLA. STAT. § 163.3180(12) (1997) and codified at FLA. STAT. § 163.3180(12)(f)(1) (Supp. 1998)).

111. *See* FLA. STAT. § 163.3180(12)(f)(2) (Supp. 1998).

112. *See id.*

The 1998 legislation requires that an interlocal agreement acknowledge the respective duties and powers of local governments and the school district.[113] It also sets forth eight specific planning issues that must be addressed in an interlocal agreement for purposes of school concurrency.[114]

Several procedural questions relating to the interlocal agreement are addressed in the legislation and reflect the agreement's importance in a school concurrency system. The 1998 legislation marks a noteworthy change in policy by requiring the interlocal agreement to be submitted to the DCA pursuant to section 163.3184, *Florida Statutes*, for a compliance review.[115] No such review was previously required because the agreement was intended to be a measure to implement the "principles and guidelines" for intergovernmental coordination set forth in local comprehensive plans.[116] The 1998 legislation also provides that "if the agreement is terminated or suspended, the application of school concurrency shall be terminated or suspended."[117]

These substantive and procedural provisions were not developed by the Schools Commission,[118] but were the outgrowth of a follow-up working group recommended by the Commission and convened by the DCA under the leadership of Assistant Secretary G. Steven Pfeiffer.[119]

D. Public School Facilities Element

The 1998 legislation also addressed bringing together the planning policies implicated by school concurrency—land use, capital facilities, and intergovernmental coordination—into a coherent body of policy in the local comprehensive plan.

Local governments have long had authority to adopt an optional public buildings and related facilities element in their local comprehen-

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113. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(g), 1998 Fla. Laws 1556, 1565 (amending FLA. STAT. § 163.3180(12)(g) (1997)).

114. *See id.* The following are the eight issues: (1) the establishment of coordination methods; (2) population growth projections; (3) siting criteria; (4) level-of-service standards; (5) capital facilities financial feasibility; (6) geographic scope of service areas; (7) implementation, monitoring, and evaluation procedures; and (8) amendment and termination provisions. *See id.*

115. *See id.* The 1998 legislation, however, does not address whether the interlocal agreement must be found in compliance, as defined in section 163.3184(1)(b), *Florida Statutes*, to be legally effective, or whether such a compliance determination regarding the interlocal agreement is necessary only for school concurrency to take effect.

116. FLA. STAT. § 163.3177(6)(h)(2) (Supp. 1998).

117. Act effective July 1, 1998, ch. 98-176, § 5(12)(g)(8), 1998 Fla. Laws 1556, 1566 (amending FLA. STAT. § 163.3180(12)(g)(8) (1997)).

118. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 27.

119. FLORIDA DEP'T OF COMM'Y AFF., PUBLIC SCHOOLS CONSTRUCTION WORKING GROUP, FINAL REPORT AND CONSENSUS TEXT (Mar. 9, 1998) (on file with DCA) [hereinafter PUBLIC SCHOOLS, FINAL REPORT].

sive plans that could address public educational facilities;[120] however, the DCA had never adopted minimum criteria for such optional elements.[121] This absence of official guidance on the contents of such elements has made it more difficult to craft optional components for local plans.

The Schools Commission recommended that a local government imposing school concurrency be required to adopt a public school facilities element in its local comprehensive plan as the policy basis for school concurrency.[122] To address the concern that local governments would have difficulty complying with such a mandate without the sort of minimum criteria that guide the preparation of and compliance determinations for mandatory plan elements, the Schools Commission recommended criteria for such elements when adopted as the basis for a school concurrency system.[123]

The Legislature imposed the requirement for a public school facilities element as the planning basis for school concurrency,[124] and it refined the suggested minimum criteria and enacted them into law.[125] It also required that DCA adopt a rule to expand upon those statutory criteria.[126] In this way, the Legislature intended to provide answers to questions that, if unaddressed, could provide the basis for litigation in future compliance proceedings over school concurrency systems.

The Legislature went beyond the Schools Commission's recommendations in another way. To address a practical question arising from its decision to require that school concurrency only be implemented on a countywide basis, the Legislature made clear that each local government enforcing school concurrency in a county must adopt a public school facilities element as part of its comprehensive plan and that all

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120. *See* FLA. STAT. § 163.3177(7)(f) (1975). The Schools Commission was influenced by the contemporaneous review and adoption of a public school facilities element by Orange County that addressed a range of land-use and educational facility issues but did not resort to school concurrency as a regulatory response to school overcrowding. Its principal purpose was to coordinate the activities of Orange County and the Orange County School Board to ensure that schools were the focal point for neighborhood development.

121. Much of what little guidance existed in the DCA rules was repealed in 1996 as part of Governor Chiles' campaign to eliminate agency rules. *See* FLA. ADMIN. CODE R. 9J-5.018 (1996) (repealed). The only remaining minimum criterion for optional elements is a requirement that an optional element be consistent with the mandatory elements of the adopted comprehensive plan. *See* FLA. ADMIN. CODE ANN. r. 9J-5.005(5) (1998).

122. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 20-21.

123. *See id.*

124. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(a), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(a) (Supp. 1998)).

125. *See id.* § 5(12)(a)-(f), 1998 Fla. Laws at 1562-64 (amending FLA. STAT. § 163.3180 (1997) and codified at FLA. STAT. § 163.3180(12)(a)-(f) (Supp. 1998)). The minimum criteria include: public schools facilities element, level-of-service standards, service areas, financial feasibility, an availability standard of three years, and intergovernmental coordination. *See id.*

126. *See id.* § 5(13), 1998 Fla. Laws at 1566 (codified at FLA. STAT. § 163.3180(13) (Supp. 1998)).

"local government public school facilities plan elements within a county must be consistent with each other" in order for the school concurrency system to become legally effective.[127]

The preexisting requirement for a preliminary feasibility study for school concurrency was repealed.[128] While the requirement had originally been intended as a mechanism for ensuring that the financial burdens of school concurrency would be equitably distributed, the Schools Commission determined that it had never been adequately described by statute or rule, resulting in confusion about the scope of, or methodology for, such a study.[129]

Equally significant, under the preexisting statute, any plan amendments adopted to implement school concurrency were not required to be based upon the study, and completion of the study did not alter the requirement that any subsequent plan amendments to impose school concurrency be supported by the best available data and that analysis "collected and applied in a professionally acceptable manner."[130] The Schools Commission recommended the repeal of the preliminary feasibility study requirement because it did not serve a useful purpose, and no public benefit was derived from a purposeless requirement.[131] The Legislature concurred and incorporated this recommendation in the 1998 legislation.[132]

E. Level-of-Service Standards

An essential component of any concurrency system is the level-of-service standard at which a public facility or service is expected to operate. A level of service is defined as "an indicator of the extent or degree of service provided by, or proposed to be provided by a facility based on and related to the operational characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility."[133]

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127. *Id.* § 5(12)(a), 1998 Fla. Laws at 1562 (codified at FLA. STAT. § 163.3180(12)(a) (Supp. 1998)).

128. *See id.* § 5(1), 1998 Fla. Laws at 1561 (repealing FLA. STAT. § 163.3180(1)(b) (1997)).

129. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 20; *see also* FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(b) (1998). This deficiency was cogently discussed by the administrative law judge in the *Broward County* hearing, and the prior failure to elucidate clear requirements for the preliminary study resulted in this prerequisite to school concurrency being rendered nugatory. *See* Broward Recommended Order, *supra* note 56, at 85-86, ¶ 254 (stating that "nothing requires that the 'study' be reduced to writing or contained in a single document").

130. FLA. ADMIN. CODE ANN. r. 9J-5.005(2)(a) (1998).

131. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 20.

132. *See* Act effective July 1, 1998, ch. 98-176, § 5(1), 1998 Fla. Laws 1556, 1561 (repealing FLA. STAT. § 163.3180(1)(b) (1997)).

133. FLA. ADMIN. CODE ANN. r. 9J-5.003(65) (1998). In light of this definition, the logical conclusion is that a level-of-service standard for public schools must be based upon the "capacity per unit of demand," which is the number of pupils to be served, rather than on

The 1998 legislation contains three provisions regarding level-of-service standards for purposes of school concurrency. Each must be considered in light of other legal considerations. First, local governments and school boards must jointly establish the level-of-service standards for purposes of school concurrency.[134] The Legislature decided in 1993 that a governmental entity may not establish a binding level-of-service standard for a facility it does not provide for, finance, operate, or regulate.[135] Accordingly, only the school board may establish level-of-service standards for school concurrency that will be binding on that school district because, ultimately, the school board must raise and spend the public moneys to construct and operate public schools. Each local government must adopt the level-of-service standards in its comprehensive plan in order to enforce them through its concurrency management system.[136]

Second, level-of-service standards must apply to all schools of the same type throughout the county.[137] This provision, like others in the 1998 legislation, is intended to ensure compliance with the constitutional requirement for a uniform system of public schools.[138] Elementary, middle, and high schools are examples of types of schools for level-of-service purposes. Other groupings may be permissible based on the educational mission of the particular schools involved, such as magnet schools or other special-purpose facilities.[139]

Third, local governments and school boards may utilize tiered level-of-service standards to allow time to address a public school backlog.[140] The express authorization for tiered level-of-service standards recognizes that in some rapidly growing counties there is a severe backlog of

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the basis of the school's performance as determined by the level of pupil achievement or some other qualitative measurement.

134. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(b)(1), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(b)(1) (Supp. 1998)).

135. *See* Act effective July 1, 1993, ch. 93-206, 1993 Fla. Laws 1887. This statutory requirement was recommended by ELMS III after its policy review determined that, for purposes of concurrency, some regional planning councils were attempting to impose their own preferred level-of-service standards on local governments through the consistency requirement in section 163.3184(1)(b), *Florida Statutes*. *See* ELMS III REPORT, *supra* note 34, at 70 (Recommendation 104).

136. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(b)(1), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(b)(1) (Supp. 1998)).

137. *See id.* § 5(12)(b)(2), 1998 Fla. Laws at 1562 (codified at FLA. STAT. § 163.3180(12)(b)(2) (Supp. 1998)). This statutory directive is consistent with the existing rule that provides for level-of-service standards to be "set for each individual facility *or facility type* and not on a systemwide basis." FLA. ADMIN. CODE ANN. r. 9J-5.005(3) (1998) (emphasis added).

138. *See* FLA. CONST. art. IX, § 1. For an earlier analysis reaching the same conclusion, see Watts, *supra* note 104, at 59-60.

139. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 23.

140. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(b)(3), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(b)(3) (Supp. 1998)); *see also* FLA. ADMIN. CODE ANN. r. 9J-5.0055(2) (1998) (data and analyses requirements).

public school needs, and that meeting those needs may take time to achieve an adequate and desirable level of service over the course of the planning period.[141]

As with mandatory concurrency for specified public facilities and services,[142] the Legislature had previously established a vague standard for determining whether locally set level-of-service standards for school concurrency are in compliance.[143] The 1998 legislation provides that level-of-service standards in a school concurrency system be "adequate and desirable"[144] and based upon data and analysis.[145] Within these broad guidelines, local governments and school boards have ample leeway to establish level-of-service standards that are best suited for their particular communities.

F. Service Areas

One flash point in the school concurrency policy debate was the extent to which the Legislature should limit the authority of local governments to establish service areas for purposes of applying a school concurrency requirement to proposed development. While the 1998 legislation requires that school concurrency be established on a districtwide basis, how a county, school district, and the municipalities agree to apply concurrency to proposed development determines the measuring point for whether adequate school capacity would be available based on the adopted level-of-service standard. Perhaps more than any other policy issue, this one brought into focus the conflict that can arise between educational and growth management objectives when a school concurrency system is established.

An essential ingredient in any concurrency system is a designation of the area within which the level of service will be measured when an application for a development permit is reviewed.[146] This delineation is also important in determining the financial feasibility of the capital improvements program adopted to deliver the facilities projected to be necessary to achieve and maintain the adopted level-of-service standard.

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141. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 23.

142. *See* FLA. STAT. § 163.3177(3)(a)(3) (1997).

143. *See id.* § 163.3184(1)(b) (Supp. 1998).

144. *Id.* § 163.3180(12)(b)(3). This standard is consistent with the requirement for school boards to establish "adequate educational facilities for all children without payment of tuition." FLA. STAT. § 230.23(4)(c) (1997). Given the judiciary's willingness to defer to legislative determinations regarding the "adequacy" of schools, *see* Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 405 (Fla. 1996), it also should be consistent with the constitutional mandate for the Legislature to make "adequate provision" for public schools. FLA. CONST. art. IX, § 1.

145. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(b)(1), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(b)(1) (Supp. 1998)).

146. *See id.* § 5(12)(c), 1998 Fla. Laws at 1562 (codified at FLA. STAT. § 163.3180(12)(c) (Supp. 1998)).

The Schools Commission's discussion on school concurrency service areas brought into focus two alternative approaches. One option involved a single countywide service area coextensive with the school board's geographic jurisdiction. The other option involved multiple service areas of less-than-countywide size.[147] The result of this debate was a compromise. The Legislature expressed its clear preference for countywide service areas but, consistent with the local-option nature of school concurrency, allowed local governments to establish less-than-countywide service areas so long as they satisfied certain statutory requirements.[148]

1. Countywide Service Areas

Local governments are encouraged "to apply school concurrency on a districtwide basis so that a concurrency determination for a specific development will be based upon the availability of school capacity districtwide."[149] This legislative preference was established for several reasons.

First, countywide service areas are most consistent with the uniform public schools requirement. Florida's school systems are organized and operated on a countywide basis.[150] This principle is reflected in the geographical jurisdiction of each of the sixty-seven school districts[151] and in the way political power is allocated within the district.[152] A school concurrency system with less-than-countywide service areas may carry a higher risk of not meeting that constitutional standard; certainly, it presents a challenge of proving compliance that would not exist with a countywide service area. In light of the dicta in *St. Johns County v. Northeast Florida Builders Ass'n*,[153] a countywide service area appears

147. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 24. The principal model for less-than-countywide service areas was the attendance zones set by a school board to determine the enrollment at each school. While by no means the only type of less-than-countywide service area, school attendance zones were the chief candidate in this category because they seemed logically linked to the purpose of school concurrency, namely preventing overcrowded schools, and because they were the basis for the Broward school concurrency system. *See* Broward Recommended Order, *supra* note 56, at 51, ¶ 141.

148. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(c), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(c) (Supp. 1998)).

149. *Id.* § 5(12)(c)(1), 1998 Fla. Laws at 1562 (codified at FLA. STAT. § 163.3180(12)(c)(1) (Supp. 1998)).

150. *See* FLA. CONST. art. IX, § 4(a) (defining county school districts); FLA. STAT. § 230.02 (1997) (scope of district system).

151. *See* FLA. STAT. § 230.01 (1997).

152. Generally school board members are nominated and elected by a countywide vote, *see id.* §§ 230.08, .10, even though each may be required to live in a specific residence area, *see id.* § 230.04. School board members may be chosen on the basis of single-member districts provided such a system is established by countywide vote. *See id.* §§ 230.105-.106. In any event, school board members are charged by law to "represent the entire district." *Id.* § 230.11.

153. 583 So.2d 635 (Fla. 1991).

to be the most legally prudent method for establishing a school concurrency system.[154]

Second, a countywide service area provides the best means for avoiding the conflict that can arise between educational and growth management objectives. Under Florida law, school boards must prepare and adopt "plans for the establishment, organization, and operation of the schools of the district."[155] These plans must "[p]rovide adequate educational facilities for all children without payment of tuition."[156] They are to include enrollment plans for individual schools and "may include school attendance areas" to determine which pupils attend specific schools.[157] The assignment of pupils to individual schools is one of the few clearly identified general powers for each school board.[158]

On the other hand, concurrency is intended to achieve maximum utilization of brick and mortar with both public and private interests alike wanting to maximize the utilization of capital facilities. Public interests want maximum utilization in order to minimize the need for additional capital outlay with the attendant political risks associated with raising those funds from taxpayers.[159] Private interests want maximum utilization because they do not want to be blocked from development through a concurrency-based moratorium due to inadequate infrastructure, especially when under-utilized capacity exists elsewhere in the system.

A countywide service area allows development permitting to be conditioned upon the availability of school capacity within the entire county without putting school boards under pressure to achieve maximum utilization of the capacity at each school in order to avoid a development moratorium.[160] It gives school officials a freer hand to draw school attendance area boundaries without regard to possible adverse effects on land development.

2. Less-Than-Countywide Service Areas

Notwithstanding the rationale for a countywide service area, the 1998 legislation allows local governments to establish less-than-countywide service areas for school concurrency so long as certain statutory requirements are met.[161] Service areas could be school atten-

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154. *See id.* at 639 (stating that the impact fee must apply to "substantially all" of the county population to be constitutional); *see also supra* Part III.B.

155. FLA. STAT. § 230.23(4) (1997).

156. *Id.* § 230.23(4)(c).

157. *Id.* § 230.23(4)(a).

158. *See id.* § 230.22(6).

159. The emphasis on maximum utilization also is reflected in general school law. *See id.* §§ 235.436-.4391.

160. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 24.

161. *See* FLA. STAT. § 163.3180(12)(c)(2) (Supp. 1998).

dance zones or larger areas (for example, the northern, southern, eastern, and western quadrants of a county) so long as the service areas, when taken together, generally are coterminous with the entire geographic area of the county. In choosing to recommend this option, the Schools Commission yielded to arguments that it may be a better choice in some jurisdictions.[162] The Legislature concurred and included the recommended option in the 1998 legislation.[163]

Less-than-countywide service areas may be more effective at preventing individual schools from becoming overcrowded.[164] This approach minimizes the disparities in school overcrowding within a school district. Other than the new statutory exception allowing school capacity in contiguous service areas to be taken into account when making a concurrency determination, unused capacity in another service area would not be considered when determining whether a school was overcrowded to the point of imposing a development moratorium. Less-than-countywide service areas may also prevent a countywide moratorium if the particular service area has inadequate capacity.

The 1998 legislation allows less-than-countywide service areas provided that certain requirements are met.[165] These guidelines were established to ensure compliance with both the uniform public schools requirement of the Florida Constitution and basic policies on comprehensive planning and concurrency. These measures also provide a practical compromise to any conflict between educational and growth management objectives.

First, the 1998 legislation requires that the standards for setting and changing less-than-countywide service area boundaries must be adopted as part of the comprehensive plan provisions establishing the system in the required public school facilities element. [166] Inclusion of these standards in the plan will create a basis for evaluating the initial service area boundaries and for evaluating subsequent changes to service area boundaries. In both instances, specific boundary lines will be evaluated against the adopted standards in light of the requirement that comprehensive plans be internally consistent.[167]

Second, the 1998 legislation requires local governments to identify and establish the specific boundaries for less-than-countywide service

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162. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 24.

163. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(c), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(c) (Supp. 1998)).

164. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 24.

165. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(c), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(c) (Supp. 1998)).

166. *See id.* § 5(12)(c)(2), 1998 Fla. Laws at 1563 (codified at FLA. STAT. § 163.3180(12)(c)(2) (Supp. 1998)).

167. *See* FLA. ADMIN. CODE ANN. r. 9J-5.005(5)(a) (1998).

areas in the comprehensive plan.[168] In keeping with the long-standing rule against self-amending comprehensive plans,[169] the service area boundaries may not be incorporated by reference so as to allow their future change without a subsequent plan amendment. Any subsequent changes to the service area boundaries must be adopted into the plan to be effective for school concurrency purposes, and therefore must independently satisfy all requirements to be in compliance. Therefore, service area boundary changes must be internally consistent with the rest of the plan, and to the extent that they alter the public school capital facilities program, they must be financially feasible.

Third, the local government must provide data and analysis that demonstrate that the less-than-countywide service areas utilize school capacity to the greatest extent possible.[170] This should preclude the establishment of a school concurrency system to block development as a method of inducing exactions from developers to pay for additional school capacity that otherwise should be provided by the general public.

The maximum-utilization requirement has enough flexibility for service area boundaries to be drawn in light of appropriate educational and safety considerations. The legislation provides that, when establishing less-than-countywide service areas, consideration can be given to the cost and convenience of transporting pupils and to the imperatives of "court-approved school desegregation plans."[171] The extent to which these or other considerations are the basis for service area boundaries that do not maximize school capacity is an issue to be judged against the basic requirement for appropriate data and analysis, gathered and applied in a professionally acceptable manner.

Fourth, the 1998 legislation includes a rule of application that mandates how less-than-countywide service areas are to be applied:

> Where school capacity is available on a districtwide basis but school concurrency is applied on a less than districtwide basis in the form of concurrency service areas, if the adopted level-of-service standard cannot be met in a particular service area as applied to an application for a development permit and if the needed capacity for the particular service area is available in one or more contiguous service areas, as adopted by the local government, then

168. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(c)(2), 1998 Fla. Laws 1556, 1563 (codified at FLA. STAT. § 163.3180(12)(c)(2) (Supp. 1998)).

169. *See* FLA. ADMIN. CODE ANN. r. 9J-5.005(8)(j) (1998).

170. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(c)(2), 1998 Fla. Laws 1556, 1563 (codified at FLA. STAT. § 163.3180(12)(c)(2) (Supp. 1998)).

171. *Id.* The phrase "court-approved desegregation plans" should be narrow enough to apply only in counties with a bona fide ongoing legal dispute about school desegregation that warrants court supervision. It should be broad enough to encompass desegregation plans developed and imposed by the court as well as those negotiated by interested parties without direct court supervision and established by judicial decree.

> the development order shall be issued and mitigation measures shall not be exacted.[172]

This provision provides more flexibility in the administration of a school concurrency system with less-than-countywide service areas. Its chief benefit is that it provides a justification for not forcing an immediate revision of school attendance zones—perhaps the most politically charged decision made by any local governmental entity—in order to reallocate surplus school capacity between neighboring attendance zones in order to prevent a development moratorium, but it does so in a way that does not penalize private interests who otherwise might be confronted by a moratorium.

G. Financial Feasibility

An indispensable ingredient of any concurrency system is a financially feasible plan to deliver the public facilities needed to achieve and maintain the adopted level-of-service standard throughout the planning period.[173] Accordingly, the facility provider, usually a local government, must have the financial wherewithal to implement its capital improvements plan. This basic policy of concurrency—the financial feasibility of the underlying capital improvements program—was foremost among the basic policies reaffirmed by the Schools Commission and the Legislature in 1998.[174] It ensures that the program to deliver the needed facilities is genuine, not illusory.

Financial feasibility became the touchstone for adequate public facilities ordinances partly as an outgrowth of the *Ramapo* decision. The New York Court of Appeals grounded its affirmance of the town's adequate public facilities ordinance on a capital facilities program which was designed to deliver "the capital improvements projected for maximum development" set forth in the town's comprehensive plan.[175] Primarily because of this planning foundation, the court held that the town's attempt "to phase residential development to the Town's ability to provide" infrastructure withstood constitutional muster.[176]

The desire for concurrency to be on sound constitutional footing gave definition to Florida's mandate from the beginning and provided the impetus for the financial feasibility standard for evaluating local capi-

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172. Act effective July 1, 1998, ch. 98-176, § 5(12)(c)(3), 1998 Fla. Laws 1556, 1563 (codified at FLA. STAT. § 163.3180(12)(c)(3) (Supp. 1998)).

173. *See* FLA. ADMIN. CODE ANN. r. 9J-5.0055(1)(b) (1998).

174. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(d), 1998 Fla. Laws 1556, 1563 (codified at FLA. STAT. § 163.3180(12)(d) (Supp. 1998)); SCHOOLS COMM'N REPORT, *supra* note 64, at 25.

175. Golden v. Planning Board of Ramapo, 285 N.E.2d 291, 294-95 (N.Y. 1972).

176. *Id.* at 295.

tal improvements programs.[177] One of the earliest pronouncements on concurrency posited:

> The local plan must contain a capital improvements element and a five-year capital improvement schedule which, in addition to meeting all of the other statutory rule requirements, is financially feasible. It cannot simply be a wish list of facilities that the local government puts forward without any real hope or expectation of being able to fund or implement during the five-year capital improvements program.[178]

While financial feasibility has never been defined per se,[179] these early policies are reflected in the minimum criteria that the DCA later adopted by rule for making compliance determinations of local comprehensive plans.[180] Local governments are required to satisfy these criteria for capital improvements programs that provide the basis for mandatory concurrency on potable water, sanitary sewer, drainage, solid waste, roads, parks and recreation and, where applicable, mass transit.[181]

In 1995 the Legislature sought to ensure that a school concurrency system would be based upon the same kind of predictable capital facilities program required for mandatory concurrency. The 1995 legislation required the following:

> Public school level-of-service standards *shall* be adopted as part of the capital improvements element in the local comprehensive plan, which *shall* contain a financially feasible public school capital facilities program established in conjunction with the school board that will provide educational facilities at an adequate level of

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177. An early description of the emerging concurrency requirement explained the importance of a strong planning basis for an adequate public facilities ordinance:

> The key to a successful approach to the concurrency requirement is having a sound plan for effectively eliminating existing deficits and providing infrastructure for new development within a reasonable period of time. A court which reviews a temporary deviation from the minimum level-of-service standard in the context of a very weak comprehensive plan which does not set forth an effective way of dealing with infrastructure is likely to find the concurrency requirement has not been satisfied. On the other hand, a court which considers a plan which, according to all the evidence, is a sound, well-thought-out comprehensive plan based on adequate data is likely to uphold any reasonable, good faith effort to achieve concurrency.

Letter from Thomas G. Pelham, Secretary, DCA, to Sen. Gwen Margolis 4 (Mar. 7, 1988) (on file with author).

178. *Id.* at 6.

179. *See* Broward Recommended Order, *supra* note 56, at 102, ¶ 312.

180. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 9J-5.016(1)(c); .016(2)(b), (c), (f); .016(3)(b)(3), (5); .016(3)(c)(1)(c), (f); .016(4)(a)(2) (1998).

181. *See* FLA. STAT. § 163.3177(3) (1997) (listing capital improvements element requirements); FLA. ADMIN. CODE ANN. r. 9J-5.016(1)(c) (1998) (detailing costs, data, and analysis requirement for the capital improvements element).

> service necessary to implement the adopted local government comprehensive plan.[182]

Despite this mandate, a question persisted as to whether a public school capital facilities program adopted to satisfy section 163.3180(1)(b)(1), *Florida Statutes*, must meet the same financial feasibility standards as are applied to capital improvements plans established for mandatory concurrency.[183] In order to prevent any erosion in the financial feasibility requirement that is integral to mandatory concurrency, the 1998 legislation answers that question in the affirmative.[184]

The 1998 legislation expressly requires that the financial feasibility of a public school capital facilities program be determined on the basis of the service areas selected by the school district and the local governments for purposes of implementing school concurrency.[185] In this way, local governments will be held to the same financial feasibility standard when making a compliance determination regarding a public school capital facilities program as developers are when they pull a building permit and must show that adequate school capacity will be available.[186]

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182. Act effective June 16, 1995, ch. 95-341, § 12, 1995 Fla. Laws 3010, 3022 (codified at FLA. STAT. § 163.3180(1)(b)(1) (1995) (emphasis added)).

183. *See* Broward Final Order, *supra* note 53, at 27-29, ¶¶ 29-31; Broward Recommended Order, *supra* note 56, at 100-04, ¶¶ 306-18.

One reason for the difficulty in applying the financial feasibility standard in the *Broward* hearing was that the DCA failed to object to Broward's school concurrency system on financial feasibility grounds during the initial review. *See* Memorandum from Mike McDaniel, DCA, to Steve Pfeiffer, DCA, and Charles Pattison, DCA 1 (Aug. 21, 1996) (on file with author). Therefore, the DCA could not base an ultimate compliance determination on Broward County's failure to base its school concurrency system on a financially feasible public school capital facilities program as required by section 163.3180(1)(b)(1), *Florida Statutes*. *See* FLA. STAT. § 163.3184(8)(a)(1) (Supp. 1998).

The lack of a financially feasible capital plan to provide adequate school capacity was a key reason for the noncompliance determination for the City of Cape Coral's school concurrency system. Even though Cape Coral's system was evaluated prior to the 1995 legislation, it was tested against the general financial feasibility requirement of rule 9J-5.0055(1)(b), *Florida Administrative Code*. *See* Memorandum from Mike McDaniel, DCA, to Jim Murley, DCA 4 (Dec. 1, 1995) (on file with author).

184. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(d)(2), 1995 Fla. Laws. 1556, 1564 (codified at FLA. STAT. § 163.3180(12)(d)(2) (Supp. 1998)).

185. *See id.* § 5(12)(d)(3), 1995 Fla. Laws at 1564 (codified at FLA. STAT. § 163.3180(12)(d)(3) (Supp. 1998)).

186. This requirement was added to expressly disapprove of the analysis offered by Broward County in the compliance proceeding over that county's school concurrency system. Broward sought to demonstrate the financial feasibility of its public school capital facilities program by reference to all school capacity accumulated on a districtwide basis even though the concurrency requirement would be enforced against developers on the basis of the capacity in individual school attendance zones. *See* Broward Recommended Order, *supra* note 56, at 103-04, ¶¶ 314-18. Thus, capacity that the local governments were allowed to count toward meeting the financial feasibility requirement of the capital facilities program in the initial compliance determination would not necessarily be counted when a developer actually sought development approval in a specific service area.

H. Availability Standards

Because concurrency is, at bottom, a timing mechanism, any concurrency system must specify when the public facility in question must be available in order to be "concurrent with" the impacts of the permitted development.[187] For public facilities and services subject to Florida's mandatory concurrency requirement, state law establishes minimum availability standards based upon the particular interest protected by the police power that is addressed by the concurrency requirement for that particular type of facility.[188] Local governments are free to establish more stringent availability standards.

In the case of school concurrency, the Schools Commission recommended a statutory requirement that a local government could not set an availability standard any more stringent than three years from issuance of a final development permit.[189] The Legislature accepted this recommendation. Therefore, under the 1998 legislation, a local government may not deny a development permit for a residential development under a local-option school concurrency system if adequate school facilities will be in place or under actual construction within three years after permit issuance.[190] A more lenient availability standard—more than three years after permit issuance—is permissible.

This standard was grounded on the conclusion that school concurrency is an exercise of the police power for the public welfare, not to vindicate more compelling public health or safety interests.[191] This standard was based upon testimony to the Schools Commission from local school officials that the planning, design, permitting, and construction of a public school in Florida generally takes three to five years.[192]

The administrative law judge disapproved of this approach. *See id.* at 103-04, ¶¶ 314-18. So did the Administration Commission. *See* Broward Final Order, *supra* note 53, at 28-29, ¶ 31. On fairness grounds, the Schools Commission recommended that such sleight of hand be prohibited by law. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 25.

187. SCHOOLS COMM'N REPORT, *supra* note 64, at 26. Defining "availability" is another crucial task in establishing a concurrency system. Florida law describes a public facility as being "available" if it is "in use or under actual construction," thus striking a balance between certainty that the facility will be built and flexibility on precisely when it will be in place. FLA. STAT. § 163.3180(2) (Supp. 1998),

188. For example, potable water, sanitary sewer, drainage, and solid waste facilities are necessary for human habitation, and therefore it is consistent with the public health and safety to require that they be in place or under actual construction upon issuance of a certificate of occupancy. *See* FLA. STAT. § 163.3180(2)(a) (Supp. 1998). Roads, parks, and recreation facilities, being matters of public convenience rather than health and safety, are subject to more relaxed availability standards, which allow reliance on projects listed in a financially feasible capital improvements element to demonstrate concurrency. *See id.* § 163.3180(2)(b)-(c).

189. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 26.

190. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(e), 1995 Fla. Laws. 1556, 1564 (codified at FLA. STAT. § 163.3180(12)(e) (Supp. 1998)).

191. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 26.

192. *See id.*

While it was unusual for the Legislature to deny a local government the discretion to establish its own availability standard for local-option concurrency, the Legislature was justified because establishing a statewide limitation on availability standards protects landowners and developers from arbitrary availability standards being adopted as leverage to obtain exactions. It also eliminates a potentially contentious issue from local negotiations over establishment of school concurrency systems.

I. Transition Provisions

Three aspects of the 1998 legislation are noteworthy for purposes of implementing the new school concurrency requirements. One was the legislative directive for the DCA to adopt, by rule, minimum criteria for the review and compliance determination of a public school facilities element adopted for purposes of establishing a school concurrency system.[193] The DCA was required to adopt these minimum criteria by October 1, 1998.[194] Although the legislation did not expressly require it, the DCA began the rulemaking process with the consensus recommendations of the working group, which followed-up from the work of the Schools Commission.[195] This directive was unusual because it is a rare, if not unprecedented instance of the Legislature to require the DCA to establish minimum criteria for an optional comprehensive plan element.

A second implementation issue was whether the requirements of the 1998 legislation would apply to the Broward school concurrency system, which was in litigation when the legislation was enacted and as of this writing. On grounds of fairness, the Legislature provided that Broward "may implement its public school facilities element in accordance with the general law concerning public school facilities concurrency in effect when the final order was entered and in accord with the final order consistent with any appellate court decision."[196] This provision is consistent with the Legislature's decision in 1997 to exempt Broward from the temporary suspension of authority to impose school concurrency.[197]

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193. *See* Act effective July 1, 1998, ch. 98-176, § 5(13), 1995 Fla. Laws. 1556, 1566 (codified at FLA. STAT. § 163.3180(13) (Supp. 1998)).

194. The proposed rule (9J-5.025) was noticed for adoption on Aug. 28, 1998, and became effective by operation of law on Oct. 20, 1998. *See* 24 Fla. Admin. W. 4627 (Aug. 28, 1998). New rules to implement additional procedural requirements for school concurrency (9J-11) were noticed for adoption by the DCA on Nov. 6, 1998. *See* 24 Fla. Admin. W. 5965 (Nov. 6, 1998).

195. *See* PUBLIC SCHOOLS, FINAL REPORT, *supra* note 119; *see also* SCHOOLS COMM'N REPORT, *supra* note 64, at 29.

196. Act effective May 22, 1998, ch. 98-176, § 11, 1998 Fla. Laws 1556, 1568.

197. *See* Act effective May 30, 1997, ch. 97-265, § 13, 1997 Fla. Laws 4935, 4951.

Thus, the Broward school concurrency system may be implemented by adoption of the remedial amendments specified in the Administration Commission's final order. In addition, Broward County, the Broward School Board, and all municipalities in the county must enter into the interlocal agreement required by section 163.3180(1)(b)(2), *Florida Statutes*, if the final order is reversed on that issue on appeal. Finally, the Broward school concurrency system would have to be revised to conform to the 1998 legislation at the time of the county's next evaluation and appraisal report.[198]

A third implementation issue was not expressly addressed by the 1998 legislation. The 1997 Legislature's temporary suspension of local government authority to impose school concurrency in sixty-six of Florida's sixty-seven counties expired automatically on July 1, 1998.[199] The scheduled expiration of this prohibition was as essential to the passage of the 1998 legislation as the issues that were included in the measure because local governments insisted that, as part of the compromise worked out by the Schools Commission, their home rule authority in the field of growth management be restored to its prior scope. This insistence was based in part on a fear that the temporary suspension of their authority to impose school concurrency would be extended or that it would create a precedent for additional limitations on other governmental powers.[200]

IV. CONCLUSION

After five years of legislation that addressed only some pieces of the puzzle, the 1998 legislation contains a complete state policy on local-option school concurrency. It also reaffirms the basic concurrency policies hammered out more than a decade ago to serve as the foundation for Florida's bold experiment in growth management. The 1998 legislation is a "back-to-basics" approach.

Foremost among the basic policies revisited is the mandate that concurrency be grounded in a financially feasible capital improvements program designed to deliver the public facilities needed to achieve and maintain the adopted level-of-service standard throughout the planning period. Also significant is the requirement for an availability standard recognizing the length of time necessary to deliver the needed facilities and the particular prong of the police power to be served by a school concurrency requirement. Balancing growth management objectives against equally important educational considerations is a final hallmark of the 1998 legislation.

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198. *See* FLA. STAT. § 163.3191(2)(e) (1997), *amended and reworded by* Act effective Oct. 1, 1998, ch. 98-176, § 14(2)(f), 1998 Fla. Laws 1556, 1572 (codified at FLA. STAT. § 163.3191(2)(f) (Supp. 1998)).

199. *See* Act effective May 30, 1997, ch. 97-265, § 13, 1997 Fla. Laws 4935, 4951.

200. *See supra* note 77.

Now that Florida has a complete school concurrency policy that coordinates all levels of government, a remaining challenge is to find the money to pay for the facilities needed to educate Florida's children. With the constitutional limitations on exactions in the land development process, lawmakers, local governments, school districts, and parents cannot rely on a regulatory system for that. They will have to look to the same place they have always looked—to all of us.

JIMMY RYCE INVOLUNTARY CIVIL COMMITMENT FOR SEXUALLY VIOLENT PREDATORS' TREATMENT AND CARE ACT: REPLACING CRIMINAL JUSTICE WITH CIVIL COMMITMENT

MARI M. "MIKI" PRESLEY*

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I. INTRODUCTION

On September 11, 1995, a nine-year-old boy named Jimmy Ryce stepped off his school bus and disappeared. Months later, somebody noticed the child's backpack in a local ranch hand's trailer. The ranch hand, Juan Carlos Chavez, led authorities to Jimmy's body. Jimmy had been kidnapped, raped, murdered, and dismembered.[1] Juan Chavez was convicted of Jimmy's murder on September 12, 1998.[2]

The boy's parents, Don and Claudine Ryce, responded to their son's brutal murder by authoring and lobbying the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act (Jimmy Ryce Act).[3] Governor Lawton Chiles signed the Act into law on May 19, 1998,[4] and it became effective January 1, 1999.[5] The Act defines certain sex offenders—"sexually violent predators"—as having a mental abnormality and seeks to have these offenders involuntarily and indefinitely committed to an appropriate "secure facility" for treatment,[6] but only after the offenders have already served their criminal sentences in jail.[7] Moreover, it applies *only* to persons who have already been convicted of a sexually violent crime.[8]

Although the Florida Legislature passed the Jimmy Ryce Act unanimously, the Act is controversial to courts, academia, and civil rights activists because it raises constitutional concerns: civil rights violations under the Ex Post Facto and the Double Jeopardy Clauses of the United States Constitution and the denial of substantive due process rights. First, many argue that the new Florida law and the recently enacted sexual predator commitment statutes in other states are, in truth, only further punishment of despised criminals. These critics argue that the Jimmy Ryce Act is a thinly veiled effort to circumvent a disappointing criminal justice system by keeping these criminals locked up long past their expired jail sentences.[9] Such state action would violate the Ex Post Facto Clause (as to

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1. *See* Tom Bayles, *Committee Approves Sex Offender Bill; Predators Would Be Forced Into Treatment*, FLA. TIMES UNION, Mar. 13, 1998, at B4; Jay Weaver, *Measure Could Delay Release of Violent Predators*, FT. LAUD. SUN SENT., Apr. 21, 1998, at B6.

2. *See* Mike Schneider, *Chavez Convicted of Ryce Murder*, TALL. DEM., Sept. 19, 1998, at C5.

3. *See New Law Keeps Pedophiles Institutionalized After Prison*, FLA. TODAY, May 20, 1998, at B6.

4. *See* Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, ch. 98-64, § 24, 1998 Fla. Laws 445, 455 (codified at FLA. STAT. §§ 916.31-.49 (Supp. 1998)) (effective Jan. 1, 1999).

5. *See id.*

6. *See* FLA. STAT. § 916.37(2) (Supp. 1998).

7. *See id.* § 916.33(1).

8. *See id.* § 916.33(9).

9. *See* discussion *infra* Part III.

criminals convicted prior to the enactment) and the Double Jeopardy Clause.

The other constitutional dilemma is whether the commitment scheme violates substantive due process. Labeling sexually violent predators as mentally insane is controversial because there is no proof that predators have disturbed mental processes. Predators are evil, not mad.[10] Indeed, Claudine Ryce conceded that "[t]hese people are not insane."[11] The danger in allowing states to blur this distinction, critics argue, is that any number of behavioral patterns are unusual; thus, any number of behavioral patterns could be labeled "insane" by the state under legislation similar to the Jimmy Ryce Act. Accordingly, by employing commitment in lieu of criminal prosecution and by labeling behavior insane rather than criminal, the state could entirely circumvent the system of constitutional protections afforded to persons accused of crimes.

The Jimmy Ryce Act was patterned after a Kansas statute[12] that was found constitutional by the United States Supreme Court in the seminal case *Kansas v. Hendricks*.[13] Because the Jimmy Ryce Act is nearly identical to the Kansas statute, *Hendricks* presumably establishes the Act's constitutionality. Therefore, understanding *Hendricks* is essential to any debate concerning the constitutionality and policy of the involuntary civil commitment of sexual predators under the procedures established by the Jimmy Ryce Act.

In *Hendricks*, the Supreme Court determined that the Kansas law was a civil statute, not a criminal one, and therefore, certain constitutional protections, such as the Ex Post Facto and Double Jeopardy Clauses, were simply inapplicable.[14] The Court also found that the Kansas statute did not violate substantive due process requirements.[15] The Court examined the history of civil commitment and determined that the statute was, at heart, indistinguishable from other constitutionally permissible civil commitment statutes.[16] Since the Kansas statute conformed to the historical substantive due process requirements of involuntary civil commitment jurisprudence, it was constitutional.

In this Comment I argue that the Jimmy Ryce Act represents an unconstitutional blurring between civil commitment and criminal incarceration. The commitment procedures established by the Act are outlined in Part II. In Part III, I challenge the conclusion that the

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10. *See* discussion *infra* Part IV.B.

11. Dana Calvo, *New State Law Inspired by Jimmy Ryce Death; Some Sex Predators to Be Held Longer*, FT. LAUD. SUN SENT., May 20, 1998, at B8 (quoting Claudine Ryce).

12. *See* KAN. STAT. ANN. §§ 59-29a01 to 29a17 (1994).

13. 521 U.S. 346 (1997).

14. *See id.* at 361.

15. *See id.* at 356.

16. *See id.* at 356-58.

Jimmy Ryce Act is civil and not criminal, and in Part IV, I question whether this Act legitimately defines sexual predators as "mentally ill." In conclusion, I analyze the potential consequences of blurring the line between civil commitment and criminal incarceration.

II. THE JIMMY RYCE ACT PROCEDURE FOR COMMITMENT AND RELEASE

A. Commitment

The Florida Legislature passed the Jimmy Ryce Act on May 1, 1998.[17] The Act directs the Secretary of Children and Family Services to create a multidisciplinary team that will determine whether an inmate is a "sexually violent predator."[18] The only statutory guideline for the team's composition is that it must include "two licensed psychiatrists or psychologists, or one licensed psychiatrist and one licensed psychologist."[19] One hundred and eighty days prior to releasing an inmate convicted of a sexually violent crime,[20] the agency controlling the inmate must notify both the multidisciplinary team and

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17. *See* Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, ch. 98-64, 1998 Fla. Laws 445 (codified at FLA. STAT. §§ 916.31-.49 (Supp. 1998)).

18. FLA. STAT. § 916.33(3) (Supp. 1998).

19. *Id.*

20. A "sexually violent offense" is defined as the following:

> (a) Murder of a human being while engaged in sexual battery in violation of s. 782.04(1)(a)2;
>
> (b) Kidnapping of a child under the age of 16 and, in the course of that offense, committing:
>
> 1. Sexual battery; or
>
> 2. A lewd, lascivious, or indecent assault or act upon or in the presence of the child;
>
> (c) Committing the offense of false imprisonment upon a child under the age of 16 and, in the course of that offense committing:
>
> 1. Sexual battery; or
>
> 2. A lewd, lascivious or indecent assault or act upon or in the presence of the child;
>
> (d) Sexual battery in violation of s. 794.011;
>
> (e) Lewd, lascivious, or indecent assault or act upon or in presence of the child in violation of s. 800.04;
>
> (f) An attempt, criminal solicitation, or conspiracy, in violation of s. 777.04, of a sexually violent offense;
>
> (g) Any conviction for a felony offense in effect at any time before October 1, 1998, which is comparable to a sexually violent offense under paragraphs (a)-(f) or any federal conviction or conviction in another state for a felony offense that in this state would be a sexually violent offense; or
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> (h) Any criminal act that, either at the time of sentencing for the offense or subsequently during civil commitment proceedings under ss. 916.30-916.49, has been determined beyond a reasonable doubt to have been sexually motivated.

Id. § 916.32(8). The Act applies not only to persons convicted after its effective date, but also to persons already in custody when the Act took effect. *See id.* § 916.45.

the relevant state attorney of the inmate's impending release.[21] The team then determines whether the inmate is a "sexually violent predator."[22] A "sexually violent predator" is defined as "any person who: (a) Has been convicted of a sexually violent offense; and (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."[23]

Upon receipt of the team's report and recommendation, the state attorney may elect to file a petition requesting the inmate's commitment.[24] After the petition for commitment has been filed, the judge must determine if probable cause exists to believe the inmate is a "sexually violent predator" within the meaning of the Act. If so, the inmate must be taken into custody and held in "an appropriate secure facility" until resolution of the commitment proceedings.[25] The state attorney may petition for an adversarial probable cause hearing, and if one is granted, the respondent has a right to introduce evidence, be represented by counsel, cross-examine witnesses, and view and copy all reports and petitions in the file.[26] The respondent, however, is not entitled to petition the court for an adversarial hearing; only the state attorney has this right.[27]

The trial for commitment is in many respects similar to a criminal proceeding. It must occur within thirty days after the determination of probable cause, unless either party shows good cause for a continuance.[28] The respondent is entitled to counsel and may be appointed a public defender upon the requisite showing of indigence.[29] Also, the respondent has a right to demand a trial by jury.[30] A court or jury determination that the respondent is a sexually violent predator must be supported by clear and convincing evidence, and in the event of a jury trial, the decision must be unanimous.[31] If a unanimous verdict is not forthcoming, but a majority of the jurors would classify the respondent as a sexually violent predator, the state attorney may request a new trial.[32]

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21. *See id.* § 916.33(1)(a).
22. *Id.* § 916.33(3).
23. *Id.* § 916.32(9). The definition of "sexually violent predator" will be analyzed and discussed extensively in Part IV.
24. *See id.* § 916.34.
25. *Id.* § 916.35(4).
26. *See id.* § 916.35(1)-(2).
27. *See id.*
28. *See id.* § 916.36(1)-(2).
29. *See id.* § 916.36(3).
30. *See id.* § 916.36(5).
31. *See id.* § 916.37(1). The Kansas statute, found constitutional by the U.S. Supreme Court, requires a burden of proof beyond a reasonable doubt. *See* KAN. STAT. ANN. § 59-29a07(a) (1994); Kansas v. Hendricks, 521 U.S. 346, 353 (1997).
32. *See* FLA. STAT. § 916.37(1) (Supp. 1998).

Upon classification as a sexually violent predator, the respondent is committed to the care of the Department of Children and Family Services (Department).[33] The Department must maintain sexually violent predators in a secure facility segregated from civilly committed patients who were not committed under the Jimmy Ryce Act.[34]

B. Release

During commitment, the inmate must be examined at least once annually to determine whether the inmate's dangerous condition has changed.[35] The court must hold a limited probable cause hearing to determine whether probable cause exists "to believe that the person's condition has so changed that it is safe for the person to be at large and that the person will not engage in acts of sexual violence if discharged."[36] The inmate has a right to have counsel at the hearing but does not have a right to be present.[37]

A determination of probable cause warrants the court to set a trial.[38] At this stage in the proceedings, however, the inmate has no right to demand a jury trial. The inmate will remain committed if the state proves its burden "by clear and convincing evidence, that the person's mental condition remains such that it is not safe for the person to be at large and that, if released, the person is likely to engage in acts of sexual violence."[39] Although an inmate may petition the court for release at any time, if the petitioner has previously filed an unsuccessful petition, the court may deny the petition if the court deems that the petition does not contain facts warranting a probable cause hearing.[40]

III. DOUBLE JEOPARDY AND EX POST FACTO CLAUSES: IS THE COMMITMENT OF SEXUAL PREDATORS SUBSEQUENT TO THEIR JAIL SENTENCE A FUNDAMENTALLY CIVIL OR CRIMINAL PROCEEDING?

A. Kansas v. Hendricks

The crux of the majority opinion in *Kansas v. Hendricks*[41] was that the Kansas statute was civil, not criminal; therefore, the constitutional protections of the Ex Post Facto and Double Jeopardy Clauses

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33. *See id.* § 916.37(2).
34. *See id.* Although the Act does not specifically prescribe the treatment and care of the inmate, it broadly instructs that "long-term control, care, and treatment of a person committed under [the Act] . . . must conform to constitutional requirements." *Id.* § 916.42.
35. *See id.* § 916.38(1), (3).
36. *Id.* § 916.38(3).
37. *See id.*
38. *See id.*
39. *Id.* § 916.38(4).
40. *See id.* § 916.40.
41. 521 U.S. 346 (1997).

simply did not apply.[42] The Court based its conclusion on an uncritical evaluation of the statutory language, thereby evading the more difficult substantive constitutional issues.

The Supreme Court began its analysis by noting that the Kansas Legislature unambiguously categorized the statute as civil by virtue of the statute's physical placement in the Kansas Probate Code.[43] Accordingly, the Court stated it would not reject the Kansas Legislature's designation unless the party challenging the statute proved the statute to be so punitive as to negate the state's express intent.[44] The Court distinguished the civil commitment statute from criminal punishment because the statute, according to the Court, did not implicate the primary purposes of criminal punishment—deterrence and retribution.[45] The Court reasoned that the Kansas statute was not retributive because prior criminal conduct was only relevant in the commitment proceeding to the extent that it demonstrated a "mental abnormality" or proved the requisite level of dangerousness.[46] Similarly, the Court explained that the statute was not a deterrent because sexually violent predators were statutorily defined as persons who lack volitional control over their actions. Since it is axiomatic that unintentional behavior cannot be deterred, punishment of sexually violent predators, likewise, cannot be dictated by the deterrence rationale.[47] Finally, the Court observed that the confinement conditions called for by the Kansas statute were more akin to ordinary civil commitment than to criminal detention.[48]

The Court's reasoning fails in two respects. First, the Court reviewed the statute facially without examining the practical effect of the words employed. Second, the Court used unsatisfying semantic criteria (concededly established through Supreme Court precedent) to analyze the distinction between civil legislation and criminal legislation. By doing this, the Court not only failed to give appropriate weight to the practical effect of this statute, it failed to consider how to best accomplish the purposes of the Ex Post Facto and the Double Jeopardy Clauses.

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42. *See id.* at 361 (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)).
43. *See id.*
44. *See id.* The Florida Legislature similarly asserts a civil code intent for the Jimmy Ryce Act. *See* FLA. STAT. § 916.31 (Supp. 1998).
45. *See Hendricks*, 521 U.S. at 362.
46. *See id.*
47. *See id.*
48. *See id.* at 363.

B. The Practical Reality of the Jimmy Ryce Act

1. National Trend

The Jimmy Ryce Act was enacted in the context of a national movement to "get tough" on sex offenders. Although recent sexual predator commitment statutes have been labeled "civil," the legislative history indicates that these statutes are actually motivated by punitive intent. For example, one commentator noted that the debate in the Kansas Legislature over the enactment of a sexually violent predator civil commitment statute revealed the Legislature's lack of concern for treatment and its predominant interest in keeping sex offenders locked up indefinitely:

> Debate in the Kansas Legislature focused on confinement of sex offenders rather than treatment. Testifying before a legislative committee, state Attorney General Robert Stephan stated[,] "You have a rare opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence." Special Assistant Attorney General, now Attorney General Carla Stovall, stated[,] "We cannot open our prison doors and let these animals back into our communities." When the Department of Social and Rehabilitation Services informed the Kansas House Judiciary Committee that, due to ineffective treatment, a civil commitment for many sex offenders will amount to a life sentence, a member of the Task Force promoting the legislation responded[,] "So be it."[49]

Similarly, Minnesota recently responded to its own supreme court ruling that vacated the commitment of a sexually violent predator by holding a special legislative session to rewrite the law. During this session, "[Governor] Carlson's spokesman asserted that the governor wished to change the basis of commitment 'more toward penalty and away from the presumption of rehabilitation,' while his opponent for the gubernatorial nomination declared that the test for civil commitment should not be 'the psychological state of the perpetrator.'"[50] One United States Congressperson even promises to propose a national sexual predator commitment statute.[51]

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49. Hon. Tom Malone, *The Kansas Sexually Violent Predator Act—Post Hendricks*, J. KAN. B.A., Feb.-Mar. 1998, at 36, 37 (footnotes omitted).

50. Andrew Hammel, Comment, *The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts*, 32 HOUS. L. REV. 775, 789 (1995).

51. *See* Calvo, *supra* note 11, at B8 (Rep. Lincoln Diaz-Balart, Repub., Miami).

2. Legislative History in Florida

In concert with this national trend, the Florida Legislature passed the Jimmy Ryce Act in 1998.[52] The history of the Act suggests that the legislation could be a punitive response to a tragic crime.[53]

The Jimmy Ryce Act was part of a package of eleven bills filed in the House and eight bills in the Senate designed to toughen laws concerning sexual predators.[54] Several of the bills suggested methods to bolster community awareness, such as requiring state notification to all schools and day-care centers regarding a sexual offender's release into their area,[55] requiring sexual predators to bear automobile tags identifying them as such,[56] and lengthening the time they will be labeled as sexual predators after parole.[57] These efforts followed closely on the heels of a chemical castration statute enacted by the Florida Legislature in 1997[58] and tougher sentencing guidelines established by the Legislature in 1995.[59]

The impetus for the Jimmy Ryce Act in Florida may have stemmed in part from perceived weaknesses in the criminal justice system. One newspaper reporting on the Jimmy Ryce Act expressed the public frustration concerning plea bargains and light sentences in sex offender cases as follows:

> Only two of the 11 men listed as sexual predators in Broward County ever served time in prison.
>
> . . . .
>
> All four registered predators in Palm Beach County bypassed prison and went directly to probation, although all were charged with sex crimes against children.
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> Statewide, 75 percent of 577 sexual offenders found guilty since November 1995 received shorter sentences than called for in state

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52. *See* Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, ch. 98-64, 1998 Fla. Laws 445 (codified at FLA. STAT. §§ 916.31-.49 (Supp. 1998)).

53. *See supra* Part I. In this respect, the Jimmy Ryce Act follows a string of legislation inspired by tragic crimes. Examples include "Jenna's Law," ending parole for violent felons, "Megan's Law," regarding community notification of the location of sex offenders, and "Joan's Law," imposing life-without-parole on child murderers. *See* Dale Russakoff, *Out of Grief Comes a Legislative Force*, WASH. POST, June 15, 1998, at A1.

54. *See* Thomas B. Pfankuch, *Bills Would Prey on Sexual Predators*, FLA. TIMES UNION, Apr. 17, 1998, at B1.

55. *See* Fla. HB 3737 (1998). On May 28, 1999, House Bill 3737 became law without the Governor's signature. *See* Act effective July 1, 1998, ch. 98-267, 1998 Fla. Laws 2289 (amending FLA. STAT. § 775.21 (1997)).

56. *See* Fla. SB 310 (1998) (died in committee).

57. *See* Fla. SB 514 (1998) (vetoed by the Governor).

58. *See* Act effective Oct. 1, 1997, ch. 97-184, 1997 Fla. Laws 3455 (codified at FLA. STAT. § 794.0235 (1997)).

59. *See* Ardy Friedberg & Ty Tagami, *Experts: Toughen Up on Predators; Still, They Disagree on Notification and Treatment*, FT. LAUD. SUN SENT., Mar. 8, 1997, at A1.

> guidelines.
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> . . . .
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> . . . [E]ven designated predators are not likely to go to prison. Harried prosecutors with weak cases often settle for guilty pleas in exchange for lighter sentences.
>
> "They end up getting probation almost regardless of how serious their offense was, and putting them on a list is a pale substitute, and a lame one, for keeping them in prison," said John Morin, a Lauderhill psychologist who treats sex offenders.
>
> Of the 350 offenders he has treated over the past five years, only four went to trial, Morin said. The rest bargained their way out of potentially tougher sentences, which might have included prison.
>
> Although many predators were convicted before tougher sentencing guidelines were established by the Legislature in 1995, results since then suggest they still slip through the judicial system with light sentences.
>
> Of the 26 people convicted of sex offenses against minors in Broward since the new guidelines became effective, 23 were given lighter sentences than the guidelines specified, typically because of plea bargains.
>
> The situation is similar in Palm Beach County, where 32 of 36 such offenders were sentenced below the guidelines. In Dade, 44 of 46 got lighter sentences.[60]

Thus, part of the motivation for seeking redress through civil commitment may have been loss of faith in the state's criminal justice system. While understandable, this sentiment strictly undermines our system of jurisprudence. Constitutional protections afforded those who have been charged with crimes must not be so easily circumvented.

The lack of funding for the Jimmy Ryce Act further undermines the notion that Florida will use this program as a genuine attempt at treatment. Although the Department of Children and Family Services estimated the potential first-year cost of the program to be $60.6 million, less than $4 million was allocated.[61] After the first year, costs are expected to rise to over $100 million per year;[62] moreover, if each predator is committed for a "very long-term" as the Jimmy Ryce Act anticipates,[63] that figure will grow each year.[64] Proponents of the Act

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60. *Id.*

61. *See* Candace J. Samolinski, *Chiles Signs Sexual Predators Law*, TAMPA TRIB., May 20, 1998, at 1.

62. *See* Grace Frank, *Costs Hinder Jimmy Ryce Act*, TAMPA TRIB., Mar. 13, 1998, at 8.

63. FLA. STAT. § 916.31 (Supp. 1998) ("It is therefore the intent of the Legislature to create a civil commitment procedure for the long-term care and treatment of sexually violent predators.").

64. *See* Candace J. Samolinski, *When Predators Walk After Horrible Cases of Sexual Abuse, the Florida Legislature Considers Placing Released Convicts in Mental Institutions*, TAMPA TRIB., Mar. 1, 1998, at 1 [hereinafter Samolinski, *When Predators Walk*] (noting that, by the year 2000, the program could cost $158.6 million per year); *see also* Candace J.

deny that the Department's estimates are accurate;[65] however, figures indicate that the allotted amount is inadequate. Kansas, for example, spent $700,000 to treat fifteen men[66] while Washington spent $65,000 per predator.[67] Similarly, psychologists indicate that "[t]he average cost of private residential treatment is $50,000 to $60,000 a year for each patient."[68] About 8000 predators will be released in 1999 in Florida, roughly 600 of whom the Department expects to be committed.[69] Representative Alex Villalobos,[70] the Act's sponsor, estimated that only 60 offenders would be committed in the first year.[71] However, the Department warned against underestimating the figure, commenting that in "[s]tates like Wisconsin and Minnesota that have had the program in place have admitted they expected 10 to 12 people a year and have ended up with 50 or 60."[72] Although the range of reasonable cost estimates varies, it is safe to conclude that the Legislature funded the project with a minimal, even draconian amount. Because all of those committed must be housed and fed, the gross deficiency in the budget will presumably result in inadequate treatment.

3. Substantive Provisions of the Jimmy Ryce Act and the Kansas Sexually Violent Predator Act that Indicate Punitive Effect and Intent

(a) Practical Effect

Although the legislative history of the Jimmy Ryce Act reveals the punitive intent of the Florida Legislature, the Act's substantive provisions themselves provide the best evidence of the Act's punitive ef-

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Samolinski, *Kansas Law Used for Jimmy Ryce Act*, TAMPA TRIB., Mar. 26, 1998, at 1 [hereinafter Samolinski, *Kansas Law*] ("Operating costs are estimated at $60 million the first year and projected to climb to nearly $200 million over the next two years.").

65. *See, e.g.*, Samolinski, *When Predators Walk*, *supra* note 64, at 1 (noting that Sen. Alberto Gutman, Repub., Miami, "scoffed at the department's price estimates"); *see also* Jay Weaver, *Measure Could Delay Release of Violent Predators*, FT. LAUD. SUN SENT., Apr. 21, 1998, at B6 (stating that Rep. Alex Villalobos, Repub., Miami, estimated that each inmate would cost $30,000 per year, while the Department estimates the figure at $100,000 per year). Rep. Villalobos indicated he expected the number of persons committed in Florida to be half that of California, where only 80 sex offenders were committed last year. *See* Jackie Hallifax, *House Passes "Jimmy Ryce" Bill*, ASSOC. PRESS POL. SERV., Apr. 20, 1998, *available in* 1998 WL 7406260. However, the Department anticipates 600 commitments in the first year, and it notes that though California only committed 80 in the first two years, it has 330 inmates awaiting decisions. *See id.*

66. *See* Samolinski, *Kansas Law*, *supra* note 64, at 1.

67. *See* Samolinski, *When Predators Walk*, *supra* note 64, at 1.

68. Samolinski, *supra* note 61, at 1.

69. *See* Frank, *supra* note 62, at 8.

70. Repub., Miami.

71. *See* Calvo, *supra* note 11, at B8.

72. Samolinski, *When Predators Walk*, *supra* note 64, at 1 (quoting Brent Taylor, attorney for Dep't of Child. & Fam. Servs.).

fect and purpose. Both the Kansas and Florida statutes require that the respondent be found both to have a mental abnormality causing a predisposition to commit sexually violent crimes and to be "dangerous." Paradoxically, the only evidence from which to deduce these findings and, hence, to characterize the respondent's current condition, is the respondent's past criminal conduct. Since the commitment trial is held after the inmate has completed serving the original sentence, the conduct that was the basis of the conviction is the last record of the inmate's interaction with the outside community. Any rehabilitation occurring during the period of incarceration may be discredited because the inmate's incapacitation has foreclosed any opportunity to reoffend. The resulting practical effect of the statutory scheme is to permit the fact finder to use past conduct as the sole criteria for making these factual findings. Thus, the distinction between finding that the offender has a present mental abnormality or merely finding that he should be further punished for past behavior is blurred.

(b) Punitive Intent

The very title of the Act, "The Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act," intimates that, like ordinary civil commitment statutes, the Act focuses on treatment and care of mentally ill persons. The Jimmy Ryce Act explicitly requires the level of treatment and care that is constitutionally mandated,[73] and proponents of the bill touted the need for treatment of sexual predators.[74] However, several factors belie treatment as the primary motivation for the Jimmy Ryce Act. First, effective treatment is not medically available for sexual offenders.[75] The statute itself is inconsistent on this point because it requires treatment even though it asserts that sexually violent predators "are unamenable to existing mental illness treatment modalities."[76]

In determining the Kansas statute's constitutionality, the majority in *Hendricks* noted that the statute applied not only to persons convicted of a sexually violent crime, but also to those who had been absolved of criminal responsibility.[77] Accordingly, the Court reasoned

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73. *See* FLA. STAT. § 916.42 (Supp. 1998).

74. *See, e.g., Senate Oks Bill to Treat Sex Offenders: Inmates Would Undergo Therapy After Prison Terms*, FLA. TODAY, Apr. 25, 1998, at B8 ("We are going to take these people, after due process has been served, and put them in a facility where they can be treated." (quoting Sen. Ron Klein. Dem., Boca Raton)); Tom Bayles, *supra* note 1, at B4 ("In no way is this punishment although it gets them off the streets for treatment." (quoting Sen. Alberto Gutman, Repub., Miami)).

75. *See* discussion *infra* Part IV.B.

76. FLA. STAT. § 916.31 (Supp. 1998).

77. *See* Kansas v. Hendricks, 521 U.S. 346, 362 (1997).

that the motive for the commitment was not to punish past deeds.[78] Significantly, Florida's Jimmy Ryce Act requires a criminal conviction or acquittal by reason of insanity in defining a "sexually violent predator."[79] Consequently, the argument can be applied in the opposite manner. Under the Jimmy Ryce Act, a criminal conviction is an element necessary to be proven; whether a past conviction alone will be sufficient for a finding of "mental abnormality" following *Hendricks* remains to be seen.[80]

Another indication of punitive intent revealed in the substantive provisions of the Act is the absence of alternatives less restrictive than total and indefinite confinement. In the involuntary commitment of a nondangerous mentally ill patient, Florida law requires the state to prove that there are no adequate, less restrictive alternatives to total confinement.[81] Commitment is not constitutional if mentally ill patients can receive treatment and live in relative freedom without deteriorating to the point where they become a danger to themselves.[82]

Similarly, Florida law provides for less restrictive alternatives in the case of insanity acquittees. Under criminal rules of procedure, a court may order appropriate out-patient care in lieu of total confinement.[83] The Jimmy Ryce Act does not contain such a less restrictive alternative requirement, though it requires a finding that the person is "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."[84] It remains to be seen whether the courts will construe this language as requiring that no less restrictive alternative will adequately protect against future violations; nonetheless, the lack of provisions for other alternatives is evidence of the Legislature's punitive intent.

The similar lack of any provision for treatment or monitoring of an offender following release from commitment prompts the question whether the Legislature contemplated the offender's eventual release at all. Kansas officials warned the Florida Legislature that it needed to provide for the eventual release of the persons to be committed, including follow-up care and treatment.[85] The administrator of the country's first predator commitment program in Washington re-

78. *See id.*
79. *See* FLA. STAT. § 916.32(2), (9)(a) (Supp. 1998).
80. *See* discussion *supra* Part III.B.3.a.
81. *See In re* Smith, 342 So. 2d 491, 491 (Fla. 1977) (citing *In re* Beverly, 342 So. 2d 481 (Fla. 1977)) (reversing and remanding to determine if there was a "less restrictive alternative" to involuntary commitment for mental illness); Reigosa v. State, 362 So. 2d 714, 715 (Fla. 3d DCA 1978) (remanding to determine the possibility of "less restrictive alternatives" to involuntary commitment for mental illness).
82. *See Reigosa*, 362 So. 2d at 715.
83. *See* FLA. R. CRIM. P. 3.217(b).
84. FLA. STAT. § 916.32(9)(b) (Supp. 1998).
85. *See* Samolinski, *supra* note 61, at 1.

peated this warning, noting that Washington has very stringent after-release monitoring requirements.[86] Florida eschewed this advice, neglecting to provide follow-up treatment or commitment procedures for determining whether a less restrictive alternative would be adequate to care for the inmate and protect society.

In the context of insanity acquittees, Florida courts have found that although Florida statutes do not expressly permit conditional release of persons committed, such authority is inherently vested in the court by virtue of its continuing jurisdiction over the person committed.[87] One court noted:

> The alternative is to condemn all those who are not utterly free of an underlying mental illness to lifelong commitment in a mental hospital, regardless of the degree to which they can function and exercise control over themselves in society and regardless of the therapeutic effect of exposure to the outside world. In effect, denying the possibility of conditional release is "tantamount to an elaborate mask for preventive detention" of the mentally ill.[88]

Finally, the Jimmy Ryce Act calls for treatment and commitment only after the state has extracted a full measure of punishment in the state's prison system. As Justice Breyer noted in his dissent in *Hendricks*, any act that provides for treatment only after time has been served begins to look like punishment—a means to keep the criminal locked up—not a means to treat a sick mind.[89]

A related argument is that both of these recent sexual predator commitment statutes effectively create a controversial branch of mental illness that ostensibly justifies involuntary civil commitment.[90] This new branch is termed a "mental abnormality" and is defined as "a mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses."[91] If, as indicated by the majority opinion in *Hendricks*, this definition means that a sexually violent predator lacks volitional control over his or her actions, the Legislature would be expected to eschew criminal punishment altogether, opting instead for civil commitment in the first instance. In other words, if these legislatures truly endorse the controversial perspective that persons who commit sexually violent crimes suffer from a mental illness, and *that condition* makes them a danger to society, then it should not assess criminal culpability. In the normal course of action, those who commit

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86. *See* Samolinski, *When Predators Walk*, *supra* note 64, at 1.
87. *See, e.g.*, Hill v. State, 358 So. 2d 190, 205 (Fla. 1st DCA 1978).
88. *Id.*
89. *See* Kansas v. Hendricks, 521 U.S. 346, 381 (1997) (Breyer, J., dissenting).
90. *See* discussion *infra* Part IV.B.
91. FLA. STAT. § 916.32(5) (Supp. 1998).

crimes due to *mental illness* are not prosecuted; they are committed.[92]

C. *The* Hendricks *Court's Deference to Semantic Differences Between the Words Civil and Criminal and Its Failure to Give Effect to the Purposes of the Ex Post Facto and the Double Jeopardy Clauses*

1. *Precedents Defining a Statute as Civil or Criminal*

The methods historically employed by the Supreme Court to determine whether a statute is civil or criminal seem generally unhelpful in analyzing the sexually violent predator commitment schemes. Concededly, where a legislature expresses the intent that a statute be construed as a civil statute, the Court will not find contrary intent unless the statute is so punitive in purpose or practical effect as to negate the expressly declared intent of the legislature.[93] The Court has considered the following factors when deciding whether a statute is civil or criminal:

> [w]hether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .[94]

In *Hendricks*, the Court's application of these factors to the Kansas sexual predator commitment statute failed in two respects. First, the Court accepted the facial designation of the state action as "civil commitment" for purposes of analyzing these factors.[95] The Court seemed to assume arguendo that the statute called for civil commitment. Then, using the civil commitment paradigm created through historic precedent, the Court concluded that this statute was indistinguishable from ordinary civil commitment, so it was civil. For example, the *Hendricks* Court noted that civil commitment is not traditionally construed as punishment.[96] This analysis begs the question; the very point to be made is that these sexually violent predator commitment acts do not call for civil commitment in any legitimate sense. Presumably, being locked up in a cell indefinitely is punish-

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92. *See* discussion *infra* Part IV.

93. *See, e.g.*, *Hendricks*, 521 U.S. at 361; Allen v. Illinois, 478 U.S. 364, 368-69 (1986).

94. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted), *cited with approval in Hendricks*, 521 U.S. at 362.

95. *See Hendricks*, 521 U.S. at 361-62.

96. *See id.* at 363.

ment, regardless of whether the shingle over the institutional door reads "jail" or "hospital."

Similarly, by accepting the "civil commitment" classification, the Court found that no particular offense had been created to invoke commitment under the Kansas statute; yet the trial for the non-offense contained essentially criminal procedural safeguards.[97] Again facially construing the statute, the Court cited the lack of a scienter element as evidence of the Kansas Legislature's non-punitive purpose.[98] However, to the extent that the statute applied to persons who had been convicted of a prior sex offense requiring scienter, the Legislature effectively incorporated this scienter requirement. Because the Court accepted the civil commitment paradigm for its analysis, it failed to note that the statute, though arguably formalistically indistinguishable from civil commitment statutes, was similarly indistinguishable from continued criminal incarceration.

The primary purpose of the sexual predator commitment statutes is incapacitation,[99] which can be either civil or criminal.[100] The majority of the *Hendricks* Court denied that the Kansas statute served a general deterrent purpose because a sexually violent predator by definition could not control his or her behavior.[101] The dissent pointed out, however, that criminal incarceration not only serves a general deterrence purpose as a threat of punishment to would-be criminals, but it also serves as specific deterrence by incapacitating those who have committed crimes.[102] On occasions prior to *Hendricks*, the U.S. Supreme Court has observed: "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."[103]

As with criminal incarceration, civil commitment serves multiple purposes, only one of which is incapacitation. Civil commitment is traditionally justified under either the state's *parens patriae* power

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97. *See id.* at 370-71 (explaining the inapplicability to the Kansas statute of the successive prosecution "same elements" test enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932), and concluding the statute survives a Double Jeopardy Clause challenge).

98. *See id.* at 362.

99. *See, e.g.*, Calvo, *supra* note 11, at B8; *see also*, Samolinski, *When Predators Walk*, *supra* note 64, at 1 (citing the lack of a statutory monitoring plan to indicate confinement as the Jimmy Ryce Act's primary thrust).

100. *See, e.g.*, United States v. Ursery, 518 U.S. 267, 292 (1996) (holding that the purpose of deterrence may serve both civil and criminal goals).

101. *See Hendricks*, 521 U.S. at 362.

102. *See id.* at 380-81 (Breyer, J., dissenting).

103. United States v. Brown, 381 U.S. 437, 458 (1965).

or its police power.[104] According to its *parens patriae* role, the state is obligated to provide and care for individuals who, due to a mental condition, cannot provide for themselves.[105] The corollary doctrine of police power obligates the state to protect its citizens from dangerous, mentally ill persons.[106] When the state acts under its police power, it acts to incapacitate the mentally ill persons—a deterrent purpose. Thus, confinement on the basis of incapacitation serves both civil and criminal purposes.

The Court should look beyond semantic differences between common, historical uses of the words civil and criminal to determine the practical effect of the statute and to promote the purposes of the constitutional protections sought to be enforced. As noted above, the practical effects of the Jimmy Ryce Act prove it to be so punitive as to outweigh the Legislature's nominal civil designation. Moreover, analysis of the purposes of the Ex Post Facto and the Double Jeopardy Clauses reveals that the purposes of these provisions can be best served by treating the Jimmy Ryce Act as criminal punishment.

2. Purposes of the Ex Post Facto and Double Jeopardy Clauses

(a) Ex Post Facto Clause

The Federal Ex Post Facto Clause[107] prohibits states from enacting legislation that relates back to a prior act if the legislation does the following: (1) outlaws behavior which was innocent when the prior act was committed; (2) "aggravates" the crime, making it a greater crime than when it was committed; (3) increases the punishment for the offense; or (4) alters the rules of evidence unfavorably to the defendant making it easier to obtain a conviction.[108] However, the Ex Post Facto Clause only applies to "criminal statutes"[109] and serves two primary purposes: it promotes fairness by protecting an individual's expectations as to the probable outcome of his or her behavior, and it regulates the functioning of our government by preventing legislative abuses, thereby maintaining a system of law, not of men.[110]

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104. *See* KENT S. MILLER, MANAGING MADNESS: THE CASE AGAINST CIVIL COMMITMENT 16 (1976).

105. *See id.*

106. *See id.* at 16-18.

107. U.S. CONST. art. I, § 10, cl. 1.

108. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

109. *See id.* at 390-91; California Dept. of Corrections v. Morales, 514 U.S. 499, 504-05 (1995) (finding that although the Ex Post Facto Clause forbids retroactively increasing punishment for criminal acts, it does not forbid an amendment that decreases the frequency of parole suitability hearings available to a petitioner convicted prior to the amendment).

110. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 629-32 (1988).

(b) Double Jeopardy

The Double Jeopardy Clause provides that a person shall not be punished twice for the same offense.[111] This principle "has been declared by many jurists to be a part of the universal law of reason, justice, and conscience."[112] The rule against multiple punishments protects the individual by avoiding unnecessary harassment and social stigma, economizing time and money, and protecting "the interest in psychological security."[113] However, the prohibition serves an important institutional purpose as well. Having a fixed punishment is a hallmark of legitimate governance; a system that would permit the government to seek a second punishment merely because it was dissatisfied with the initial sentence imposed would be tyrannical. Thus, the Ex Post Facto and Double Jeopardy Clauses seek to protect both the individual and the adjudicative institution. The sexual predator commitment procedures at issue in *Hendricks* and those created by the Jimmy Ryce Act seek to circumvent the protections afforded the criminal justice system by our Constitution merely by labeling one pattern of behavior civilly insane rather than criminal. This abuse of process is the very systemic failure these clauses seek to prevent.

IV. SUBSTANTIVE DUE PROCESS

A. Substantive Due Process and Involuntary Civil Commitment

The U.S. Supreme Court has established two criteria to be met for involuntary commitment to satisfy the substantive due process requirements of the Federal Constitution: the person to be committed must be "mentally ill" and must be dangerous to himself or society.[114] In the civil context, these criteria must be established by some standard of proof beyond a preponderance of the evidence, though the criminal standard of beyond a reasonable doubt is not necessary.[115] Although the Court has never sought to impose any certain definition of mental illness upon state legislatures, it is clear that there are some limits upon the state's authority to categorize individuals as insane for commitment purposes. Even if a person has an antisocial personality and may pose a danger to society, that person cannot be committed unless he also has a mental illness.[116] This is because such

111. U.S. CONST. amend. V.

112. JAY A. SIGLER, *Preface to* DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY v (1969) (citing United States v. Keen, 27 F. Cas. 686 (C.C.D. Ind. 1839) (No. 15,510).

113. *Id.*

114. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 75-76 (1992).

115. *See* Addington v. Texas, 441 U.S. 418, 431-32 (1979).

116. *See Foucha*, 504 U.S. at 80.

a person is indistinguishable from most persons who commit crimes and are punished under our criminal justice system.[117]

Additionally, the state is constricted from punishing or committing persons solely for having "evil" thoughts. The state must prove the defendant is dangerous, that he or she presents a threat of actual harm to himself or others.[118] Where a person suffers from a mental illness, but poses no actual danger to himself or society, he may not be committed because this condition does not justify the massive invasion of the patient's personal liberty that indefinite commitment imposes.[119] Thus, while the state is not wholly free to categorize mentally ill people for commitment purposes, the state may constitutionally seek preventive detention of individuals who have some mental condition that causes them to be a danger to themselves or others. Sexual predator commitment statutes like the Jimmy Ryce Act facially require such a condition.

In *Hendricks,* the Supreme Court granted wide deference to the state legislature in defining mental illness, stating, "As we have explained regarding congressional enactments, when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'"[120] Though the Court did not expressly state the applicable standard of review, its language and analysis were consistent with a minimal rationality test.[121] Opponents of the sexual predator commitment statutes would argue that heightened scrutiny is appropriate, as it would permit the Court to reach beyond the statute's requirement of a mental abnormality to critically analyze the legislative intent and practical effect.

In substantive due process jurisprudence, the Supreme Court uses both minimal rationality review and strict scrutiny.[122] Federalist and separation of powers doctrines dictate that the Court give deference to the reasonable acts of state legislatures.[123] Accordingly, in most cases where state legislation is challenged as violative of substantive due process, the Court will subject the statute to a minimal rationality or rational basis review.[124] Under this extremely deferential and permissive test, "the government action is presumed to be constitutional, and [the] claimant has the burden of proving that the depriva-

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117. *See id.* at 82-83.
118. *See id.* at 75-76.
119. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).
120. Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997) (quoting Jones v. United States, 463 U.S. 354, 370 (1983)).
121. *See generally id.* at 359-60.
122. *See* James W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. MARSHALL L. REV. 95, 105 (1996).
123. *See generally id.* at 95-105.
124. *See id.* at 105.

tion is not even an arguably rational method for furthering any conceivable valid government interest."[125] The Court will not second-guess the state legislature by reviewing its motives or by requiring it to justify either its factual findings or the effectiveness of the statutory scheme in light of its stated objectives.[126]

Strict scrutiny is reserved for the rare instances where the legislation implicates a fundamental right.[127] When the Court adopts strict scrutiny, it requires the state to prove that the statute is narrowly tailored to further a compelling state interest.[128] Using this test, the Court rigorously analyzes the legislature's motive and intent, and subjects its findings to careful scrutiny to ensure that no less drastic measure exists to adequately protect the state's compelling interest.[129]

Although freedom from bodily restraint in the form of involuntary commitment would seem to be a rudimentary liberty interest, it is unclear whether the Supreme Court considers it a "fundamental right" triggering strict scrutiny under substantive due process jurisprudence. In *Hendricks*, the Court did not explicitly adopt any particular standard of review, but it appeared to apply a minimum rationality test. The Court acknowledged that "freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action,'" but it emphasized that this liberty interest is not absolute.[130]

The Court in *Hendricks* was willing to sacrifice this liberty interest so long as the involuntary commitment occurred "pursuant to proper procedures and evidentiary standards."[131] Moreover, the Court declared itself to be especially inclined to deference in light of the scientific uncertainties surrounding the nature of sexual predation.[132] The dissent appears to agree with the majority as to the requisite level of deference, stating that "the Constitution gives States a degree of leeway in making this kind of determination."[133] Echoing the majority as to deference in light of scientific uncertainty, the dissent stated, "The psychiatric debate . . . helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how states must write their laws within those bounds."[134] By apparently

125. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 643-44 (1992).

126. *See id.* at 644-45.

127. *See* Galloway, *supra* note 125, at 638-39.

128. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

129. *See* Galloway, *supra* note 125, at 638-39.

130. Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

131. *Id.* at 357.

132. *See id.* at 360 n.3.

133. *Id.* at 374 (Breyer, J., dissenting).

134. *Id.* at 375.

applying a reasonableness review, the Court in *Hendricks* implicitly rejected the notion of freedom from involuntary commitment as a fundamental right. The Court failed to acknowledge this result explicitly, and it offered no explanation as to why such a massive curtailment of individual liberty did not warrant strict scrutiny.

Supreme Court precedent on this point is inconsistent and unhelpful. For example, in *Foucha v. Louisiana*,[135] the Court struck down a state law allowing continued confinement of an insanity acquittee because he was no longer mentally ill. The Court noted the "'importance and fundamental nature' of the individual's right to liberty," stating that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . ."[136] Having noted the important interest at stake, however, the Court failed to adopt any recognized standard of review. Although the Court stated that "due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed,"[137] suggesting a rational relationship test, the Court invalidated the statute because it was not "sharply focused," nor "carefully limited,"[138] suggesting heightened scrutiny. Justice Thomas pointedly criticized the majority for this ambiguity and for its failure to state specifically what right was at issue and whether it was fundamental.[139]

Proponents of the sexual predator commitment statutes argue that deference to the state legislature is appropriate because the definition of mental illness has a normative component that is legitimately determined only by the state. Moreover, they claim the robust debate in the scientific community concerning the nature of sexual predation and its characterization as a "mental illness" is evidence that the legislature acted permissibly.[140] However, under these commitment acts, the person to be committed would be free but for these statutes. Thus, while a convicted felon may not have a fundamental right to freedom from bodily restraint prior to serving his or her sentence, persons involuntarily committed do. If freedom from indefinite involuntary commitment is not a fundamental right, what could be?

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135. 504 U.S. 71 (1992).

136. *Id.* at 80 (quoting Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

137. *Id.* at 79.

138. *Id.* at 81.

139. *See id.* at 116-17 (Thomas, J., dissenting) (concluding that rational basis review was appropriate). *See also generally The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 210 (1992) (discussing the Court's departure from the ordinary substantive due process two-tier framework).

140. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 373-74 (1997) (Breyer, J., dissenting).

B. "Mental Abnormality" as Satisfying the "Mental Illness" Requirement for Involuntary Commitment

The proposition that persons who commit sex related crimes are "mentally ill" is controversial in the scientific and legal communities. The Kansas and Florida statutes create a new category of "mental illness" for sexually violent predators. Both statutes describe a "sexually violent predator" as a person who suffers from a "mental abnormality," defined in both as a "mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses."[141] This new category has been criticized because it is circular and ambiguous, has no medical analog, and blurs the distinction between the criminal and the insane.

1. The Definition Is Circular and Ambiguous

Critics have condemned the definition of "mental abnormality" in recent sexual predator acts as a mere tautology.[142] A sexually violent predator must have a mental abnormality predisposing that person to commit sexually violent acts,[143] but mental abnormality is also defined by the propensity to commit violent acts.[144] Thus, the criminal behavior is the cause, the symptom, and the effect of the purported abnormality.[145] In its amicus brief filed with the Supreme Court in

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141. FLA. STAT. § 916.32(5), (9) (Supp. 1998); *accord* KAN. STAT. ANN. § 59-29a02(a), (b) (1997).

142. *See* Amicus Brief for the Washington State Psychiatric Assoc. in Support of Respondent at 16, Kansas v. Hendricks, 521 U.S. 346 (1997) (No. 95-1649) (citing Young v. Weston, 898 F. Supp. 744, 750 (W.D. Wash. 1995)) [hereinafter WSPA Brief].

143. *See* FLA. STAT. § 916.32(9) (Supp. 1998) (defining "sexually violent predator" as any person who "[h]as been convicted of a sexually violent offense" and who "*[s]uffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment*") (emphasis added).

144. *See id.* § 916.31 (defining "mental abnormality" as a "mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses").

145. *See* Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 U. KAN. L. REV. 887, 908 (1994). McCaffrey describes the circularity problem as follows:

> Another possible danger is that "'mental abnormality' will be established in a circular manner only by virtue of the sexual offending behavior itself. In that case, the abnormality is derived from the sexual behavior which in turn is used to establish the predisposition to other sexual behavior." It has also been argued that the term "'mental abnormality' has no clinically significant meaning and no recognized diagnostic use." . . . Thus, the "causative relationship that must be shown under the statute between the disorder and the criminal sexual behavior . . . is often a matter of speculation or meaningless circularity."

Id. (citations omitted); s*ee also* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1319-20 (1996) (noting the circularity problem but arguing that under such definitions, not all persons who have committed sexually violent crimes will be found to have mental illnesses); Hammel, *supra* note 50, at 796 (addressing the circularity in a similar Washington statute).

Hendricks, the Washington State Psychiatric Association (WSPA) described the circular effect of the definitions in these acts.[146] Since a personality disorder is merely a label attached to recognized patterns of behavior, the state can label some pattern of behavior a "personality disorder," then declare that disorder a mental illness worthy of commitment.[147] As the WSPA points out, however, this process is a chicken-and-egg problem of causation.[148]

Moreover, not only is the criminal misconduct the a priori manifestation of the "mental abnormality" under these acts, it also establishes the "dangerousness" element necessary to satisfy substantive due process for civil commitment. The Supreme Court has held that conviction for a crime may create a presumption of dangerousness.[149] Thus, the dangerousness element for sex offenders is established by virtue of having been convicted of a sex crime. If the two elements constituting the definition of mental abnormality collapse into one requirement—criminal behavior—then the criminal behavior ipso facto establishes the basis for commitment. This collapse into one previously proven requirement raises the specter of double jeopardy where the person to be committed already has served one criminal sentence for that prior behavior.

If one concedes that the definition calls for some *condition* that *causes* the criminal behavior, the problem of vagueness must still be addressed. The terms "mental abnormality" or "personality disorder" are so overinclusive as to include a whole range of people, from nicotine addicts to persons with rabid mental illnesses.[150] Indeed, though the acts are restricted to sex offenders, the same logic could uphold commitment of a variety of repeat offenders, such as bank robbers or drunk drivers.[151] The only limit for defining mental illness supplied by the *Hendricks* Court was that the Court's approval of the Kansas definition of mental illness apparently hinged on the fact that the statutory definition narrows the class of potentially eligible offenders to those who have a condition "that makes it difficult, if not impossible, for the person to control his dangerous behavior."[152] Additionally, Justice Kennedy warned in his concurring opinion that while the *Hendricks* case appeared to meet the constitutional requirements for mental illness, Supreme Court precedent would not uphold cases in

146. *See* WSPA Brief, *supra* note 142, at 17.
147. *See id.* at 17-18.
148. *See id.*
149. *See* Jones v. United States, 463 U.S. 354, 364-65 (1983).
150. *See Leading Case—Involuntary Commitment of Violent Sexual Predators*, 111 HARV. L. REV. 259, 267-68 (1997).
151. *See id.* at 268; *see also* Brian J. Pollock, Note, Kansas v. Hendricks: *A Workable Standard for "Mental Illness" or a Push Down the Slippery Slope Toward State Abuse of Civil Commitment?*, 40 ARIZ. L. REV. 319, 346-48 (1998).
152. Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

the future if "mental abnormality" proved to be "too imprecise a category to offer a solid basis for concluding that civil detention is justified."[153] Justice Kennedy offered no guiding principles for defining mental illness, apparently opting instead to leave that task to the crucible of future case-by-case development.[154]

2. The Definition Has No Scientific Analog

(a) Do Sexual Predators Suffer from a "Mental Illness?"

Another criticism of the new category of mental illness created in the sexual predator commitment acts is that the category is a purely legal creation, without a scientific, medical basis.[155] Ordinarily, psychiatrists speak of "mental illness" only when a person's cognitive or functioning process is distorted.[156] As one psychiatrist noted:

> [M]ental illness is different in that it affects the decision-making process of the organism, it affects his mind, disturbs his intellectual ability such as memory, concentration, abstract thinking and judgment, disturbs the process of logical thought, impairs verbal communication, affects the symbolic processes and alienates the victim from his environment and from himself.[157]

Abnormal behavior, such as criminal acts of sexual violence, do not indicate a "mental illness" unless the perpetrator's thought processes have been distorted by mental disease.[158] The American Psychiatric Association noted, "Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual . . . ."[159] A sex offender is not mentally ill because he has an "abnormal" desire and a willingness to act on it.[160] Instead, this "antisocial" behavior is characteristic of many types of offenders—it makes the perpetrator criminal, not insane.[161]

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153. *Id.* at 373 (Kennedy, J., concurring).

154. *See id.*

155. *See, e.g.*, James D. Reardon, *Sexual Predators: Mental Illness or Abnormality? A Psychiatrist's Perspective*, 15 U. PUGET SOUND L. REV. 849 (1992) (discussing that the Washington Legislature passed the Washington Sexually Violent Predators Act, which was drafted without the participation of a psychiatrist).

156. *See id.* at 852 ("A psychiatrist's definition of 'mental disorder' includes the loss of contact with reality, confusion, loss of reason, or hallucinations.").

157. MICHAEL ALFRED PESZKE, INVOLUNTARY TREATMENT OF THE MENTALLY ILL: THE PROBLEM OF AUTONOMY 55 (Ralph Slovenko ed., 1975).

158. *See id.*

159. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxii (4th ed. 1994).

160. *See* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161, 188 (1995).

161. *See, e.g.*, Reardon, *supra* note 155, at 851.

Critics of the sexually violent predator commitment acts argue that mental illness is not the cause of a predator's actions.[162] Instead, the sexual predator simply lacks the moral restraint to refrain from acting on sexual impulses.[163] One commentator criticized the mental disorder component of recent sexually violent predator acts, noting that nothing in the definitions of these acts indicated "anything other than desire to engage in criminal conduct and willingness to act on that desire."[164] Furthermore,

> [a]ny voluntary conduct suggests the presence of some motivation to engage in such conduct, but the mere presence of desire or impulse provides no suggestion of exculpatory or incapacitating significance. Those who are greedy experience a strong desire for wealth, but greed neither exculpates those who commit theft nor suggests that they suffer disorder that renders them unable to control their acquisitive conduct or incompetent for any legal purpose.[165]

Thus, the very categorization of sex offenders as "mentally ill" is at issue.

(b) Can Sexual Predators Be Treated?

The commitment of "sexual predators" has been criticized on the basis that no effective treatment exists.[166] These critics argue that because no treatment is known, commitment cannot help cure the offender and, hence, such commitment is merely incarceration.[167] Commitment under these conditions is only one step away from pure preventive detention.[168] However, proponents of the statutes rightly argue that the state is only required to attempt a cure, not to succeed in curing the person committed.[169] The fact that no cure is known does not alter the fact that a disease exists, nor does it alter the state's authority to protect society.[170]

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162. *See* Schopp, *supra* note 160, at 188.
163. *See id.*
164. *Id.*
165. *Id.*
166. *See, e.g.*, Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 238-40 (1991).
167. *See, e.g.*, Beth Keiko Fujimoto, Comment, *Sexual Violence, Sanity and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders*, 15 U. PUGET SOUND L. REV. 879, 906-08 (1992).
168. *See* Foucha v. Louisiana, 504 U.S. 71, 83 (1992).
169. *See* Katherine P. Blakey, Note, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is an Appropriate Legal Compromise Between "Mad" and "Bad"—A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 227, 255-58 (1996).
170. *See id.*

On the other hand, psychiatrists argue that no treatment exists *because there is no "disease" to treat.* If sexual predators do not suffer from mental illness but, instead, have abnormal desires and make cruel moral decisions, "treating" them would be like "treating" a person for preferring to eat dog food rather than human food or for hating racial minorities.[171] Thus, while it can be conceded that commitment may be appropriate for mental illnesses even when effective treatment is unknown, commitment is inappropriate if the problem is inherently untreatable because it is not an illness.

3. The Definition of "Mental Abnormality" in Sexual Predator Commitment Acts Blurs the Distinction Between Criminal and Insane

(a) Treating Sexual Predators as Criminals

Some support the view that a sexual offender may suffer from an antisocial personality disorder that is indistinguishable from antisocial tendencies revealed in other types of offenders.[172] This school of thought denies that there is "mental illness" present in most sex offenders because the offender's thought processes and responses are not affected.[173] Following this school of thought, sex offenders should be punished only as criminals and only through the criminal justice system.[174] Under this view of sexual predation, commitment would be bald preventive detention, unknown to our system of jurisprudence, or punishment in violation of the double jeopardy provision of the U.S. Constitution.[175]

Defenders of the commitment acts point out that preventive detention is *always* a motive for civil commitment; indeed, it is constitutionally mandated in the "dangerousness" component of civil commitment.[176] Moreover, they argue that imposing longer criminal sentences or increasing the sentences for multiple offenses are also methods of preventive detention.[177] While these points may be conceded, the legitimacy of civil commitment is contingent upon the legitimacy of categorizing sexual predators as mentally ill.

The Jimmy Ryce Act facially requires a condition that assertedly satisfies the mental illness requirement; however, detractors claim the Act is mistaken as to the nature of sexual predation, that it is

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171. *See e.g.*, Schopp, *supra* note 160, at 188 (being greedy neither excuses theft nor indicates an inability to control greed-based urges).

172. *See, e.g.*, Reardon, *supra* note 155, at 850.

173. *See* discussion *supra* Part IV.B.2.

174. *See, e.g.*, Schopp, *supra* note 160, at 190-91.

175. *See* Reardon, *supra* note 155, at 850.

176. *See* discussion *supra* Part III.A.; Kansas v. Hendricks, 521 U.S. 346, 362 (1997).

177. *See* Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 719 (1992).

circular, or is merely a pretext for further incarceration.[178] Further, these detractors note that "truly" mentally ill sex offenders—whose mental processes are disturbed—would qualify for commitment under ordinary commitment statutes.[179] Other sex offenders, who are responsible moral agents, are more appropriately addressed through the criminal justice system.[180] Otherwise, the foundation of our criminal justice system—culpability—is undermined, and the primary function of the civil commitment system—therapeutic treatment—is distorted.[181]

(b) Treating Sexual Predators as Insane

The Jimmy Ryce Act assumes that sexual predators who are subject to the Act suffer from a bona fide mental illness and are susceptible to treatment.[182] Under the Act, sexual predators are defined by a lack of volitional control over their actions due to mental illness.[183] The Act's assumptions logically lead to the conclusion that such persons are incapable of criminal culpability as our system of jurisprudence understands it and, therefore, should be dealt with through civil commitment. Moral culpability requires the volitional behavior, which gives rise to the capability of choosing to act "recklessly, knowingly, or purposefully."[184] Implicit in our system of criminal justice is the notion that responsibility requires cognitive capacity and minimal self-control (volitional capacity).[185] Minnesota Supreme Court Justice Gardebring noted the incongruity in convicting a person of a crime that requires mens rea, yet later confining that person because he is mentally unable to control his actions: "I believe the state cannot have it both ways."[186]

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178. *See e.g.*, McCaffrey, *supra* note 145, at 908 (arguing that statutory terms are legal and not clinical terms and "mental abnormality" is defined in circular fashion).

179. *See id.* at 897. In *Foucha*, the court upheld the constitutionality of a Louisiana statute, which provided for the automatic civil commitment of criminal defendants acquitted by reason of insanity. *See* Foucha v. Louisiana, 504 U.S.71 (1992).

180. *See* Schopp, *supra* note 160, at 191.

181. *See id.* at 192.

182. The Florida Act is facially inconsistent because, in its findings, the Legislature concedes that sex offenders are "unamenable to existing mental illness treatment modalities." FLA. STAT. § 916.31 (Supp. 1998). Yet, under the Act, the offender is indefinitely committed for treatment. *See id.*

183. *See id.* § 916.32(9).

184. Blakey, *supra* note 169, at 229 (arguing that repeat sexual offenders who are "mad" are somewhat morally culpable, but less culpable than ordinary, completely sane persons).

185. *See* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 782 (1985).

186. *In re* Linehan, 518 N.W.2d 609, 615 (Minn. 1994) (Gardebring, J., dissenting) (reviewing Minnesota's sexual predator commitment statute). For a full discussion of *Linehan*, see Hammel, *supra* note 50, at 786-91.

Florida, however, does not recognize lack of volitional control as an insanity defense.[187] Florida follows the M'Naghten Rule, under which only those defendants who do not recognize right from wrong may be acquitted by reason of insanity.[188] This rule has been widely criticized for not recognizing lack of volitional control as a defense.[189] In fact, the American Law Institute changed its Model Penal Code to include lack of volitional control as part of the insanity defense because volitional control is necessary to establish criminal culpability.[190] Thus, Florida's new statutory scheme of committing offenders only after they have been punished is consistent with its long-standing rule that lack of volitional control does not diminish an offender's criminal culpability. The issue is whether the legislative judgment that a sexual predator is a responsible moral agent (and therefore criminally culpable) can be reconciled with the legislative judgment that the same offender suffers from a mental abnormality such that he or she should be separated from society by civil commitment.

(c) The Hybrid, "Bad-and-Mad" Approach

The sexual predator acts recently enacted in Florida, Kansas, and other states create a new category of mental illness—a "mental abnormality" that its proponents claim satisfies the "mental illness" component of civil commitment without diminishing the culpability

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187. *See, e.g.*, Hall v. State, 568 So. 2d 882, 885 (Fla. 1990); Mines v. State, 390 So. 2d 332, 337 (Fla. 1980); Wheeler v. State, 344 So. 2d 244, 245 (Fla. 1977). Florida statutes, however, recognize lack of volitional control as a mitigating factor to be considered before the imposition of a death sentence. *See* FLA. STAT. § 921.141(6)(b) (1997) (stating that one legitimate mitigating factor occurs when "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"); *see also id.* § 921.141(6)(f) (stating that another mitigating factor occurs when "[t]he capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired").

188. *See, e.g., Hall*, 568 So. 2d at 885; Gurganus v. State, 451 So. 2d 817, 820-21 (Fla. 1984); *Wheeler*, 344 So. 2d at 245; Campbell v. State, 227 So. 2d 873, 877 (Fla. 1969).

189. *See* Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility-State Cases*, 9 A.L.R. 4th 526, 529-30 (1981) (noting that the M'Naghten Rule has been widely criticized).

190. *See Wheeler*, 344 So. 2d at 245. The American Law Institute's Model Penal Code provides:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct *or to conform his conduct to the requirements of law*.
>
> (2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

MODEL PENAL CODE § 4.01 (1985) (emphasis added).

aspect of criminal jurisprudence.[191] Such statutory schemes attempt to justify first punishing the convicted sex offender and, afterwards, civilly committing him. A similar Minnesota statute provides for involuntary commitment of "sexual psychopathic personalities" in lieu of criminal confinement, but does not treat this condition as a defense to a criminal charge, as occurs with legal mental insanity.[192] In defending this Minnesota statute, one commentator noted:

> According to received doctrine, [a "sexual psychopath"] must be placed in one of two legal categories: "mad" or "bad." Under the "mad" approach, if [a "sexual psychopath"] were determined to be mentally ill and dangerous, the state could civilly commit him. Under the "bad" approach, if [a "sexual psychopath"] were convicted of a crime, the state could imprison him. Thus, the law sets up a paradigm of extremes: people who do terrible things to others are either sick or evil. The difficulty is that, in reality, mental illness and wickedness do not exist as two opposite conditions with nothing in between. Rather, "mad" and "bad" are the ends of a continuum upon which moral culpability varies according to the degree of madness or badness in any one individual. Some offenders are not easily classified as "mad" or "bad," because they are, to some degree, a little of both, that is, they are culpable for their conduct to some extent, but also to some extent inculpable due to the role that mental illness played in their conduct.[193]

Others have echoed this middling view of sexual predation, concluding that sex offenders are culpable because they know right from wrong, but are rightfully committed because they "may be less able than others to control their anti-social behavior."[194] Though these arguments are subjective conclusions concerning the nature of sexual predation and the relative culpability to be appropriately assigned in light of that perceived nature, these commentators argue that these are normative decisions that state legislatures are authorized to make.[195]

V. CONCLUSION

The Jimmy Ryce Act and other similar sexual predator commitment acts are legislative attempts to resolve the recurring abhorrence of sexual violence. Since the nature of sexual predation is unknown, and perhaps unknowable, the states are authorized to make normative judgments as to the culpability of these offenders. How-

191. *See, e.g.,* Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment,* 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 425-26 (1997).

192. *See* Blakey, *supra* note 169, at 240.

193. *Id.* at 28-29.

194. Teir & Coy, *supra* note 191, at 425-26.

195. *See id.*

ever, the Constitution imposes certain constrictions upon the state in punishing its citizens. The history and substance of the Act unfortunately reveal that the Act may be a punitive measure aimed at a particularly loathed class of criminals. Moreover, the Florida Legislature failed to articulate, and subsequent history has not revealed, a theory under which a sexually violent predator is culpable for an action, and at the same time, mentally incapable of volitional control. The Legislature's failure to define the scope of sex offenders' culpability undermines the moral foundation of our criminal justice system while similarly distorting the role of civil commitment. Nonetheless, the Act at least facially requires a legitimate mental abnormality. The challenge for the courts in the future will be to develop this definition on a case-by-case basis to truly limit the scope of the Act to persons with bona fide mental illnesses. The courts must fashion an interpretation of the Jimmy Ryce Act that will require some malfunction of the offender's mind so that he may not be committed solely due to his past acts for which he has already been punished. Moreover, to prevent substitution of the criminal justice system with civil commitment, the definition must insure that the malfunction is distinguishable from mere criminal behavior. In this manner, the courts will help insure that the criminal justice system will be neither skewed nor averted.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT V. CONSOLIDATED-TOMOKA LAND CO.: DEFINING AGENCY RULEMAKING AUTHORITY UNDER THE 1996 REVISIONS TO THE FLORIDA ADMINISTRATIVE PROCEDURE ACT

MARTHA C. MANN*

I. INTRODUCTION

In 1996 the passage of the much-anticipated amendments to Florida's Administrative Procedure Act (APA)[1] set the stage for a notable controversy surrounding the authority of state administrative agencies to promulgate rules. The amendments decidedly changed the prevailing standard for determining whether the Florida Legisla-

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* Law Clerk to the Honorable John E. Steele, U.S. District Court, Middle District of Florida. B.A., University of North Florida, 1991; M.A., University of North Florida, 1994; J.D., Florida State University College of Law, 1998. The author extends special thanks to Professor Jim Rossi for his support and encouragement of all students of Florida administrative law.

1. *See* Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147 (current version at FLA. STAT. ch. 120 (1997 & Supp. 1998)).

ture had properly delegated authority to administrative agencies. The revised APA rejected the long-applied standard that an administrative rule would be deemed valid if it was "reasonably related to the purposes of the enabling legislation and [was] not arbitrary or capricious."[2] The revised statute required more in that "[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute."[3]

The meaning of the phrase "particular powers and duties," however, was unclear. Neither the statute nor the legislative history defined the specificity required in an agency's delegated powers and duties in order for the Legislature to validly grant rulemaking authority. The First District Court of Appeal recently addressed this issue in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*,[4] in which a group of corporate and private landowners in the Tomoka River and Spruce Creek area challenged the St. Johns River Water Management District's (District) authority to create several proposed rules.[5] According to the District, the proposed rules were intended to do the following: (1) add the Tomoka River and Spruce Creek Hydrological Basins as new geographic areas of special concern and impose more stringent permitting standards and criteria for systems in those areas; and (2) set water recharge standards and establish riparian habitat protection zones.[6] The landowners argued, and an administrative law judge (ALJ) agreed, that the District had exceeded its rulemaking authority in violation of sections 120.52(8) and 120.536(1), *Florida Statutes*,[7] when it proposed these rules.[8] The landowners submitted that these rules went beyond the "particular powers and duties" delegated by the Legislature to the District.[9] The First District Court of Appeal, however, reversed

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2. *See* General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n, 446 So. 2d 1063, 1067 (Fla. 1984) (applying the "reasonably related" test and citing FLA. STAT. § 350.172(2) (1981)).

3. *See* Act effective Oct. 1, 1996, ch. 96-159, § 3(8), 1996 Fla. Laws 147, 150 (current version at FLA. STAT. § 120.52(8) (Supp. 1998); *id.* § 9, 1996 Fla. Laws at 159 (current version at § FLA. STAT. § 120.536(1) (1997)). The new standard for agency rulemaking authority can first be found in the definition of "invalid exercise of delegated legislative authority" in section 120.52(8). The same language is repeated in section 120.536, which restates the new standard for rulemaking authority and also provides for a "look back" mechanism to address existing rules that may not adhere to the new standard.

4. 717 So. 2d 72 (Fla. 1st DCA 1998).

5. *See id.* at 76-77.

6. *See id.* at 75.

7. FLA. STAT. §§ 120.52(8), .536(1) (Supp. 1996).

8. *See* Consolidated-Tomoka Land Co. v. St. Johns River Water Mgmt. Dist., DOAH Case No. 97-0870RP, at 59 (Final Order entered June 27, 1997) [hereinafter Final Order].

9. *Id.* at 43-44.

the decision of the ALJ, finding that the agency had acted within the authority delegated by the Legislature in proposing the rules at issue.[10] In the wake of the new restrictions imposed on administrative agencies by the revised APA, the ruling scored an important victory for both the agency and proponents of administrative discretion and expertise.

This Note will discuss the policy implications of the new rulemaking standard and the impact of the *Consolidated-Tomoka* opinion on future rule promulgation and challenges. The new rulemaking standard has already significantly impacted the role of administrative agencies in the implementation of laws. First, as demonstrated in *Consolidated-Tomoka*, the text of the new standard, though obviously a restraint on existing rulemaking authority, was facially unclear.[11] The decision of the First District Court in *Consolidated-Tomoka* should assist agencies and those subject to agency rules in their future understanding of what "particular powers and duties" agencies must be granted in order to make rules. Second, the new rulemaking standard has rekindled criticism of the issuance of final orders by ALJs rather than by the agency.[12] Where a rule challenge alleges an invalid exercise of delegated authority, should reviewing courts defer to the ALJ's interpretation of the agency's "particular powers and duties," or to the agency's interpretation? In some situations, deferring to the ALJ's interpretation would directly conflict with the notion of administrative expertise in interpreting statutes. Third, the "look back" provision contained in section 120.536(2), *Florida Statutes*, requiring a review of all agency rules promulgated prior to the revisions,[13] potentially violates the separation of powers doctrine where the statute allows the Legislature to veto the executive branch through the elimination of undesirable rules.[14] Finally, despite the court's decision in *Consolidated-Tomoka*, the new rulemaking standard may cause agencies to avoid rulemaking in favor of nonrule processes such as adjudication and policy statements.[15] This result is in extreme conflict with the express desire in Florida for presumptive rulemaking, if at all feasible and practicable.[16]

Part II of this Note will examine the history of rulemaking authority in Florida prior to the 1996 APA revisions, giving special

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10. *See* St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 81 (Fla. 1st DCA 1998).

11. *See* discussion *infra* Part V.B.; *see also Consolidated-Tomoka*, 717 So. 2d at 79 (stating that "the phrase 'particular powers and duties' in section 120.52(8) could have more than one meaning").

12. *See* discussion *infra* Part V.C.

13. *See* FLA. STAT. § 120.536(2) (Supp. 1998).

14. *See* discusssion *infra* Part V.D.

15. *See* discussion *infra* Part V.E.

16. *See* FLA. STAT § 120.54(1) (Supp. 1998).

consideration to the strict separation of powers requirement in the Florida Constitution. Part III summarizes the standards of rulemaking authority by reviewing key rule challenge cases prior to the 1996 revisions. The legislative history and political background of the APA revisions are summarized in Part IV. Part V then provides the background of the *Consolidated-Tomoka* case and discusses the court's interpretation of the new rulemaking standard. Part V describes potential repercussions of the new rulemaking standard not directly at issue in *Consolidated-Tomoka*. Finally, Part VI concludes by predicting how the court's ruling is likely to impact agencies, courts, and those who challenge agency rules.

II. RULEMAKING AUTHORITY PRIOR TO THE 1996 REVISIONS

The principle that agencies may only act within the scope of their delegated authority is central to the study of administrative law.[17] Scholars have discussed and debated the rulemaking authority of agencies nearly as long as agencies have existed.[18] For a delegation of authority to an agency to be proper, the legislature must sufficiently guide the agency as to the purpose and intent of the laws to be implemented. The necessary degree of guidance can differ greatly *vis-à-vis* the federal and state governments. At the federal level, the United States Supreme Court has upheld congressional grants of broad and vaguely defined rulemaking power to the agencies.[19] However, in many of the individual states, including Florida, the nondelegation doctrine "retains a certain vitality."[20] Florida case law bears out this statement in word, if not by deed.[21]

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17. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress >shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928))).

18. *See generally* SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER (1975); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Samuel W. Cooper, *Notes: Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361 (1994); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969); Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419 (1987); J. Skelly Wright, *Review: Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

19. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863 (1984) (concluding that Congress intentionally left certain policy decisions to the administrator in the area of environmental emissions because the competing interests in Congress could not agree); *see also* Yakus v. United States, 321 U.S. 414, 420 (1944) (upholding a statute that empowered an administrator to promulgate war-time price control standards that would be "generally fair and equitable and . . . effectuate the [enumerated] purposes of this Act").

20. WALTER GELLHORN ET AL., ADMINISTRATIVE LAW 90 (8th ed. 1987); *accord* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 76-77 (1965) (suggesting that state courts are especially likely to strike down delegations as improper in situations in-

A. Florida's Strict Separation of Powers and the Issue of Nondelegation

Florida's separation of powers doctrine is far more stringent than that of the federal government.[22] The United States Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[23] The Florida Constitution more explicitly declares: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[24] The Florida Constitution further states that the two houses of the Florida Legislature hold all lawmaking power.[25] While the Florida Constitution recognizes the presence of agencies, it does not grant any legislative or quasi-legislative authority to agencies.[26]

Even though agency rulemaking was not contemplated in the federal or state constitution, it has been allowed as a necessary delegation of legislative power.[27] The complexities of law and society make it impossible for legislatures to address and decide every issue pre-

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volving real property or the practice of a profession, as the uncertainty of standards "encourages undetectable discrimination or subjective notions of policy").

21. In reality, Florida courts generally uphold statutes that delegate authority to agencies as constitutional. *See* Johnny C. Burris, *Administrative Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 7, 11 (1991) (emphasizing that administrative agencies may not exercise any powers not expressly delegated to them).

22. *See* B.H. v. State, 645 So. 2d 987, 991-92 (Fla. 1994). The Florida Supreme Court has emphasized "that Florida has expressly and repeatedly rejected whatever federal doctrine can be said to exist regarding nondelegation." *Id.* at 992; *accord* Brown v. Apalachee Reg'l Planning Council, 560 So. 2d 782 (Fla. 1990); *see also* Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So. 2d 815, 820 (Fla. 1983).

23. U.S. CONST. art. I, § 1.

24. FLA. CONST. art. II, § 3.

25. *See id.* art. III, § 1.

26. *See id.* art. V, § 1 (stating that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices").

27. *See* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC SYSTEM 56-57 (3d ed. 1992). Mashaw states:

> The [Supreme] Court's reiteration of the nondelegation principle, coupled with its very sparing use to strike down legislation, illustrates a continuing judicial effort to harmonize the modern administrative state with traditional notions of representative government and the rule of law. It testifies also to a judicial sense . . . that legal techniques short of declaring statutes invalid are generally preferable means for accommodating the necessities of public policy with effective control of administrative discretion.

Id.; *see also* F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA*, 24 FLA. ST. U. L. REV. 309, 313 (1997) (stating that despite the stringent limitation of lawmaking power contained in the Florida Constitution, "Florida courts have found the delegation of some lawmaking power to administrative agencies inevitable" (citing Jones v. Kind, 61 So. 2d 188, 190 (Fla. 1952))).

sented.[28] Administrative agencies, for all their drawbacks,[29] are able to address regulation with greater experience, expertise, and flexibility than legislatures.[30] This notion is illustrated at the federal level in the functions of the Environmental Protection Agency (EPA). The EPA is charged with developing and enforcing national standards for air quality, water quality, and hazardous waste treatment and disposal, among other responsibilities.[31] In defining, monitoring, and enforcing these environmental standards, the EPA performs functions that Congress lacks the time or expertise to carry out. In this context, efficient lawmaking requires allowing agencies to relieve Congress of the burden of filling in the details of stated policy. Though the idea of delegation of authority to agencies has been accepted at both the federal and state levels for decades, proper delegation places constraints on the agency in the form of legislative guidelines.

By declaring that agencies have no inherent rulemaking authority,[32] and that all rules must be "authorized by law and necessary to the proper implementation of a statute,"[33] Florida's APA explicitly recognizes the need for agency constraint. These legislative guidelines ensure that agencies are carrying out the intent and purpose of the statute to be implemented.

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28. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); *see also* Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1979) ("Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society . . . ."); State v. Atlantic Coast Line R.R., 56 Fla. 617, 656-658, 47 So. 969, 982-84 (1908) (upholding an agency regulation imposing penalties for common carriers in the field of intrastate transportation).

29. There are many criticisms of the administrative process. *See, e.g.*, PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 84-89 (1981) (agencies are susceptible of "capture" by private interest groups); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1686-87 (1995) (agencies are scientifically incompetent); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (agencies can be inflexible in their rulemaking); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 27 (1958) (agencies are allowed excessive discretionary power).

30. *See* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 27-35 (1994); *see also* ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 14-15 (1989); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1516-19 (1992).

31. *See* Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (1970).

32. *See* FLA. STAT. § 120.54(1)(e) (Supp. 1998).

33. *Id.* § 120.54(1)(f).

B. Rulemaking Guidelines

The Florida APA, adopted in 1974,[34] was mainly geared toward combating the problem of "phantom government"[35] in which government "operates by rules known only to a select few and which are inconsistently applied."[36] Florida's first APA concentrated on rulemaking processes that included public participation,[37] rule challenges,[38] and rule publication.[39] The Act contained very little guidance for agencies, hearing officers, or courts to determine whether a rule was a valid exercise of the legislative authority delegated to the agency by the Legislature.[40]

As evidenced by the case law, a number of standards have been applied over the years. The Florida Supreme Court has directed the Legislature to provide agencies with "an intelligible principle,"[41] "adequate standards" for ministerial agencies,[42] "objective guidelines and standards,"[43] "adequate guidelines,"[44] and "reasonably definite standards."[45] Whatever the precise name for the standard, legislation should inform the agency of the "fundamental policy" necessary for

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34. *See* Administrative Procedure Act, ch. 74-310, 1974 Fla. Laws 952 (current version at FLA. STAT. ch. 120 (1997 & Supp. 1998)).

35. The term "phantom government" is said to have been coined by Sen. Dempsey J. Barron, Dem., Panama City, 1957-88. *See* Stephen T. Maher, *Getting Into the Act*, 22 FLA. ST. U. L. REV. 277, 280 n.8 (1994).

36. James P. Rhea & Patrick L. "Booter" Imhof, *An Overview of the 1996 Administrative Procedure Act*, 48 FLA. L. REV. 1, 5 (1996); *see also* GOVERNOR'S ADMIN. PROC. ACT REVISION COMM'N, FINAL REPORT 18 (Feb. 20, 1996) [hereinafter APA COMM'N REPORT].

37. *See* FLA. STAT. § 120.54(2) (Supp. 1974).

38. *See id.* §§ 120.54(3), .56.

39. *See id.* § 120.55.

40. *See* Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 965, 1010-12 (1986) ("[I]n this initial version of the validity challenge provision, no grounds for challenging the validity of proposed rules were specified and no requirement that the petition must allege facts sufficient to show that the challenger 'would be substantially affected' by the proposed rule was imposed.").

41. Phillips Petroleum Co. v. Anderson, 74 So. 2d 544, 547 (Fla. 1954) (holding that a zoning ordinance prohibiting construction and operations if injurious to other properties and objectionable to neighbors failed to establish an intelligible principle for the guidance of the Building Inspector and the Board of Adjustment in the performance of their duties).

42. Delta Truck Brokers, Inc. v. King, 142 So. 2d 273, 275 (Fla. 1962) (holding that a statute authorizing the Florida Railroad and Public Utilities Commission to grant licenses delegated an unlimited discretion to the Commission to determine the best way in which the public interest would be served).

43. High Ridge Mgmt. Corp. v. State, 354 So. 2d 377, 380 (Fla. 1977) (finding that sections of the Omnibus Nursing Home Reform Act was an unlawful delegation of authority because the Act lacked "objective guidelines and standards for enforcement").

44. Smith v. State, 537 So. 2d 982, 986 (Fla. 1989) (stating that legislative delegation of authority to agencies to promulgate rules implementing legislative enactments are valid if accompanied by adequate guidelines).

45. B.H. v. State, 645 So. 2d 987, 993 (Fla. 1994) (stating that the Legislature has exclusive power to decide reasonably definite standards used to implement policy).

rulemaking.[46] Equally important is the notion that courts must also be able to evaluate agency action in relation to the framework of articulated legislative policy:

> In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.[47]

Following the stated policy of the Legislature, agencies are able to fill in the details of legislative intent. Courts may then evaluate the validity of agency rulemaking in relation to the policy contained in the statute.

The nature of lawmaking is not constant, however, and the very conditions that may require the use of agency expertise and flexibility may also make the drafting of detailed or specific legislation "impractical or undesirable."[48] While some statutes may be explicitly detailed by the Legislature, the subject matter of another area of legislation "may be such that only a general scheme or policy can with advantage be laid down by the Legislature, and the working out in detail of the policy indicated may be left to the discretion of administrative or executive officials."[49] In such cases, the Florida Supreme Court has opined that "greater discretion must be delegated."[50] With the necessary amount of specificity in the statute varying with the subject matter to be regulated, it is perhaps only natural that the distinction between filling in details and establishing public policy often becomes blurred.[51]

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46. Askew v. Cross Key Waterways, 372 So. 2d 913, 920 (Fla. 1978). The Legislature must provide this guidance because "flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy." *Id.* at 924.

47. *Id.* at 918-19.

48. Department of Citrus v. Griffin, 239 So. 2d 577, 581 (Fla. 1970) (upholding provisions of the Orange Stabilization Act and a subsequent Department of Citrus marketing order alleged to be an invalid delegation of legislative authority).

49. State v. Atlantic Coast Line R.R., 56 Fla. 617, 622, 47 So. 969, 971 (1908) (upholding the validity of a Railroad Commission rule alleged to be an invalid delegation of legislative authority); *see also* Florida East Coast Indus. Inc. v. Department of Comm'y Aff., 677 So. 2d 357, 361 (Fla. 1st DCA 1996); Florida League of Cities, Inc. v. Administration Comm'n, 586 So. 2d 397, 411 (Fla. 1st DCA 1991).

50. *B.H.*, 645 So. 2d at 993 (citing Conner v. Joe Hatton, Inc., 216 So. 2d 209, 212 (Fla. 1968)).

51. *See* Boyd, *supra* note 27, at 314.

III. THE STANDARD FOR RULE CHALLENGES PRIOR TO THE 1996 REVISIONS

Prior to the 1996 revisions of the APA, any substantially affected person could seek an administrative determination of the validity of a rule on the ground that the rule was an invalid delegation of legislative authority pursuant to section 120.56, *Florida Statutes*.[52] A presumption of validity attached to all proposed and existing rules,[53] and the burden was placed on the party challenging a rule to demonstrate, based on a preponderance of the evidence, that one or more of the following was true: (1) the agency failed to follow applicable rulemaking procedures;[54] (2) the agency exceeded its grant of rulemaking authority;[55] (3) the rule enlarged, modified, or contravened the specific provisions of the law implemented;[56] (4) the rule was vague, failed to establish adequate standards for agency decisions or vested unbridled discretion in the agency;[57] or (5) the rule was arbitrary or capricious.[58]

Pre-revision courts ruled that administrative agencies were vested with "wide discretion in the exercise of their lawful rulemaking authority," whether it be clearly conferred or fairly implied, provided that the authority was consistent with the general statutory duties of

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52. FLA. STAT. § 120.56 (1995).

53. *See* Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 FLA. ST. U. L. REV. 283, 302-03 (1997) (citing Department of Labor & Employ. Sec., Div. of Workers Comp. v. Bradley, 636 So. 2d 807 (Fla. 1st DCA 1994); State Dep't of Health & Rehab. Servs. v. Framat Realty, 407 So. 2d 238, 241 (Fla. 1st DCA 1981); Agrico Chem. Co. v. Department of Envtl Reg., 365 So. 2d 759, 762 (Fla. 1st DCA 1978)).

54. Generally applicable rulemaking procedures were (and still are) contained in section 120.54, *Florida Statutes*, though certain statutes may create different or additional rulemaking procedures. *See* FLA. STAT. § 120.54 (Supp. 1998); Boyd, *supra* note 27, at 332 n.140.

55. *See, e.g.*, Grove Isle, Ltd. v. Department of Envtl. Reg., 454 So. 2d 571, 573 (Fla. 1st DCA 1984) (finding a Department of Environmental Regulation rule to be an invalid exercise of delegated authority because the rule exceeded the agency's delegated legislative authority by requiring applicants for a construction permit to demonstrate the "proposed activity or discharge is clearly in the public interest").

56. *See, e.g.*, Department of Bus. Reg. v. Salvation Ltd., 452 So. 2d 65, 66 (Fla. 1st DCA 1984) (finding a Division of Alcoholic Beverages and Tobacco rule invalid because it added to specifically listed statutory criteria); Department of HRS v. McTigue, 387 So. 2d 454, 457 (Fla. 1st DCA 1980) (striking down a Department of HRS rule because the rule modified specifically stated criteria for licensure eligibility).

57. *See, e.g.*, Florida East Coast Indus., Inc. v. Department of Comm'y Aff., 677 So. 2d 357, 362 (Fla. 1st DCA 1996) (finding that rules proposed by the Department were not vague or without adequate standards).

58. *See* Florida League of Cities, Inc. v. Department of Envtl. Reg., 603 So. 2d 1363, 1367 (Fla. 1st DCA 1984) (noting that "section 120.52(8)(e) . . . relating to the term arbitrary or capricious, 'codifies the long established principle that administrative rules cannot be arbitrary or capricious, i.e., unsupported by logic, despotic or irrational'" (citing Fla. H.R. Comm. on Govtl. Ops., H.B. 710 & S.B. 608 (1987) Staff Analysis (Oct. 1, 1987))).

the agency.[59] As stated by the First District Court of Appeal, "the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations."[60] The Florida Supreme Court, recognizing that the grants of authority given to agencies are often quite general in nature, supplied the oft-quoted pre-1996 standard of review for agency rulemaking:

> Where the empowering provision of a statute states simply that an agency may "make such rules and regulations as may be necessary to carry out the provisions of this Act," the validity of the regulations promulgated thereunder will be sustained as long as they are *reasonably related* to the purposes of the enabling legislation, and are not arbitrary or capricious.[61]

Some courts described the burden on challenging parties as a heavy one.[62] The 1996 revisions moved toward the goal shared by many in the Legislature and the business community by creating a "more level playing field."[63] As a result of the revisions, agencies were no longer able to rely upon the "reasonably related" test and would be pressed to show a stronger connection between rules and the statute implemented.

IV. THE FLORIDA APA RULEMAKING REVISIONS

Florida's APA has been amended every year since it was enacted in 1974,[64] yet none of the previous changes were as dramatic as the 1996 revisions. The revisions were not easily achieved—years of debate and proposed bills preceded the enactment of the new APA.[65] Many of the previous proposals and recommendations are reflected throughout the new APA, which is structurally and substantively dif-

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59. Department of Prof. Reg., Bd. of Med. Exam'rs v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984).

60. *Id.*

61. General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n, 446 So. 2d 1063, 1067 (Fla. 1984) (emphasis added) (citing Agrico Chem. Co. v. Department of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), and Florida Beverage Corp. v. Wynne, 306 So. 2d 200, 202 (Fla. 1st DCA 1975)).

62. *See, e.g.*, Board of Optometry v. Florida Soc'y of Opthalmology, 538 So. 2d 878, 884 (Fla. 1st DCA 1988) (providing the requirements necessary for challenging parties to meet the heavy burden of showing that the agency exceeded its authority and that the rule is not appropriate to the ends of the legislative act or the purpose of the enabling statute but are arbitrary and capricious).

63. *See* APA COMM'N REPORT, *supra* note 36, at 23 (recommending that proposed rules not be clothed in a presumption of validity and that attorneys' fees should be awarded to successful challengers of rules).

64. *See* Donna E. Blanton & Robert M. Rhodes, *Florida's Revised Administrative Procedure Act*, FLA. B.J., July/Aug. 1996, at 30, 30.

65. *See* Rhea & Imhof, *supra* note 36, at 2-23 (summarizing the legislative history of the 1996 APA); Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform*, 48 FLA. L. REV. 93, 95-105 (1996) (same).

ferent from the earlier Act. The structural changes are intended to simplify the administrative process,[66] and the substantive changes and additions are intended to add flexibility[67] and improve agency accountability.[68]

A. The Political Backdrop: Previous Attempts to Revise the APA

The impetus for the recent rulemaking reform can be traced back at least as far as the formation of the Florida House of Representatives Select Committee on Agency Rules and Administrative Procedures in 1992.[69] The Committee was organized for the purposes of "investigating allegations of agency abuse of delegated authority and recommending any necessary modifications" to the APA.[70] In 1993 the Florida Senate Select Committee on Governmental Reform was created to improve "'the effectiveness and efficiency of state government,'" and to "'ensure that all agency rules are based on statutory authority and that the rules do no more than the law requires.'"[71] In 1994 both the Florida Senate and House of Representatives presented comprehensive proposals for APA revisions through Senate Bill 1440[72] and House Bill 237.[73] Though the two houses were ultimately unable to agree on the extent of reform, both houses repeatedly passed provisions that contained some version of the reforms proposed in House Bill 237.[74]

Similar legislation was filed during the 1995 legislative session. Among the proposed changes was a provision designed to "level the playing field" in rule challenges by removing the judicially-created presumption of validity attached to rules.[75] All proposed and existing rules were to be presumed invalid and the burden would be placed on the agency to prove that the rule or portion thereof was a valid exercise of delegated authority.[76] If the agency failed to meet its burden,

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66. *See* Deborah K. Kearney & Kent Wetherell, *The Practitioner's "Road Maps" to the Revised APA*, FLA. B.J., Mar. 1997, at 53, 53.

67. *See* Donna E. Blanton & Robert M. Rhodes, *Loosening the Chains that Bind*: *The New Waiver and Variance Provisions in Florida's Administrative Procedure Act*, 24 FLA. ST. U. L. REV. 353, 353 (1997).

68. *See* Blanton & Rhodes, *supra* note 64, at 33-34.

69. *See* Sally Bond Mann, *Legislative Reform of the Administrative Procedure Act: A Tale of Two Committees*, FLA. B.J., July/Aug. 1994, at 57, 57.

70. *Id.*

71. *Id.* (quoting Letter from Sen. Pat Thomas, Senate President, to Sen. Charles Williams, Chair (Sept. 14, 1993)).

72. *See* Fla. SB 1440 (1994).

73. *See* Fla. HB 237 (1994).

74. *See* Sellers, *supra* note 65, at 97 & n.29.

75. *See* Fla. CS for CS for SB 536, § 11, at 45 (1995); *see also* Sellers, *supra* note 65, at 99-100; APA COMM'N REPORT, supra note 36, at 23.

76. *See* Fla. CS for CS for SB 536, § 11, at 45 (1995).

the rule or objectionable portion would be declared invalid and a judgment for attorneys' fees would be entered against the agency.[77]

The 1995 legislation passed both houses of the Legislature, but was vetoed thereafter by Governor Lawton Chiles.[78] Although the Governor was an outspoken proponent of regulatory reform, he viewed the bill as too burdensome on agencies.[79] The deciding factor in the Governor's decision to veto, however, was that the bill did not repeal section 120.535, *Florida Statutes*, which required rulemaking where practicable and feasible.[80] Although both the Legislature and executive branch pursued revisions to Florida's APA, disagreements about the revisions ensued in 1994 and 1995.

B. The Recommendations of the Governor's Administrative Procedure Act Review Commission

On the same day Governor Chiles vetoed the Second Committee Substitute for Senate Bill 536, he also issued an executive order reiterating his commitment to the reduction of rules, ordering administrative agencies to repeal obsolete rules, and at the same time establishing the Governor's Administrative Procedure Act Review Commission (Commission).[81] The fifteen-member Commission was comprised of members of the House of Representatives and Senate, attorneys practicing administrative law, the Governor's chief of staff, an ALJ, the president of the Florida Audubon Society, a representative of the business community, and the Director of the Center for Governmental Responsibility at the University of Florida.[82] The Governor directed the Commission to review the impact of the existing APA section 120.535, *Florida Statutes*,[83] and the viability of the Governor's efforts to reduce the number of administrative rules and restore "common sense"[84] to state governance.[85]

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77. *See id.* at 46.

78. Second Committee Substitute for Senate Bill 536 was vetoed by Governor Chiles on July 12, 1995. *See* FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 68; *see also* Craig Quintana, *Chiles Scuttles Regulatory-Reform Bill*, ORLANDO SENT., July 13, 1995, at C1.

79. *See* Rossi, *supra* note 53, at 277-78.

80. *See* FLA. STAT. § 120.535 (1995); Rossi, *supra* note 53, at 287; *see also* Sellers, *supra* note 65, at 100-01 (noting that the rationale for the Legislature's decision to retain section 120.535 was that the Legislature did not wish to return to the days of "phantom government").

81. *See* Fla. Exec. Order No. 95-256 (July 12, 1995). Governor Chiles ordered agencies to review all rules and immediately repeal all obsolete rules in a previous executive order as well. *See* Fla. Exec. Order No. 95-74 (Feb. 27, 1995).

82. *See* APA COMM'N REPORT, *supra* note 36 (listing the names and occupations of the commissioners).

83. *See* FLA. STAT. § 120.535 (1995).

84. Governor Chiles was especially interested in lessening the number of administrative rules. *See* Rossi, *supra* note 53, at 287-88 (describing the Governor's efforts to reduce regulation). Section 120.535 mandated that all agency policies of general applicability be

The Commission met over a six-month period in an attempt to resolve the sticking points that had held up previous legislative efforts.[86] The Commission's Final Report endorsed the "simplified APA" recommended by a committee of government and nongovernment attorneys formed by the Governor's office, and the addition of a waiver and variance provision.[87] With regard to rulemaking authority, the Commission reported: "The perception exists that state agencies sometimes adopt rules and policies that misinterpret legislative intent or go beyond specific statutory authorization. The response to such criticism often is that laws passed by legislators are so general that agencies have little choice but to develop their own implementation schemes."[88] To combat this problem, the Commission recommended that legislative staff analyses identify sections of proposed bills which would require agency implementation and "discuss whether the bill provides adequate and appropriate standards and guidelines to direct agency's implementation of the proposal".[89] The report also endorsed the inclusion of agency comments in staff analyses of bills.[90]

This recommendation was partially adopted in the revised APA. While there is no *requirement* that staff analyses include consideration of whether proposed legislation provides sufficiently clear rulemaking standards, the APA includes a statement of intent "to consider the impact of any agency rulemaking required by proposed legislation and to determine whether the proposed legislation provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposed legislation."[91] Though well-intentioned, this precatory language lacks the teeth of the requirement suggested by the Commission. Although some observers believe that agencies would benefit from legislative consideration of rulemaking at the bill analysis stage[92] and that agencies would be able to

published as a rule. For the current version of this mandate, *see* FLA. STAT. § 120.54(1), (Supp. 1998). The Governor sent a copy of the book *The Death of Common Sense: How Law Is Suffocating America* by Philip K. Howard to every member of the Florida Legislature in February 1995. Governor Chiles advocated Howard's message by stating that "[t]he book identifies 'Public Enemy Number One' and that is the rules and regulations and the way we are presently applying them." Governor Lawton Chiles, State of the State Address, *in* FLA. H.R. JOUR. 23, 24 (Reg. Sess. Mar 7, 1995); *see also* Rhea & Imhof, *supra* note 36, at 8-11.

85. *See* Exec. Order No. 95-256 (July 12, 1995).
86. *See* APA COMM'N REPORT, *supra* note 36, at 1.
87. *See id.* at 6, 9-15.
88. *Id.* at 16.
89. *See id.* at 17.
90. *See id.*
91. Act effective Oct. 1, 1996, ch. 96-159, § 1, 1996 Fla. Laws 147, 149.
92. *See* Rhea & Imhof, *supra* note 36, at 34.

advise the Legislature on the clarity of the standards.[93] To date, the Legislature has not gone so far as to require this.

C. Passage of the New Rulemaking Standard

As stated in the final staff analysis, the intent of the Legislature in adding the language of section 120.536 was to expand the definition of an "invalid exercise of delegated legislative authority as found in section 120.58(8), *Florida Statutes*."[94] The change would require agency rules to be based upon specific statutes rather than general rulemaking authority.[95] The staff analysis expressly states that the new standard would overrule the line of cases standing for the proposition that "rules and regulations would be upheld so long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious."[96]

After years of debate and stalled bills, the APA revisions passed without controversy in the spring of 1996.[97] The revisions incorporated many of the recommendations of the Governor's Review Commission and included many of the proposals included in the 1995 bill vetoed by Governor Chiles.[98] The inclusion of the new rulemaking standard contained in sections 120.52(8) and 120.536(1) did not cause much, if any, controversy within the Governor's APA Review Commission or the Legislature.[99] Though the legal community's reaction to the new standard was a bit delayed, several commentators noted the importance of the new language.[100] The *Consolidated-Tomoka* case involves some of the issues raised by commentators, while other potential problems have yet to be judicially reviewed.

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93. *See id.*

94. Fla. H.R. Comm. on Govtl. Rules & Regs., CS for SB 2288 and 2290 (1996) Staff Analysis 25 (Jun. 14, 1996) (on file with comm.) (evaluating FLA. STAT. § 120.52(8) (Supp. 1996)).

95. *See id.*

96. *Id.* at 23-24, 25 (citing General Tel. Co. v. Florida Pub. Serv. Comm'n, 446 So. 2d 1063 (Fla. 1984); Department of Labor & Employ. Sec. v. Bradley, 636 So. 2d 802 (Fla. 1st DCA 1994); Florida Waterworks Ass'n v. Florida Public Serv. Comm'n, 473 So. 2d 237 (Fla. 1st DCA 1985); Department of Prof. Reg., Bd. of Med. Exam'rs v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984); Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759 (Fla. 1st DCA 1978); Florida Beverage Corp. v. Wynne, 306 So. 2d 200 (Fla. 1st DCA 1975)).

97. *See* Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147 (current version at FLA. STAT. ch. 120 (1997 & Supp. 1998)).

98. *See* Fla. H.R. Comm. on Govtl. Rules & Regs., CS for SB 2288 and 2290 (1996) Staff Analysis 1 (Jun. 14, 1996).

99. *See* APA COMM'N REPORT, *supra* note 36; *see also* Donna E. Blanton, *Major Test of New APA Pending at First DCA*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Jan. 1998, at 2.

100. *See* Boyd, *supra* note 27, at 310 (noting that although the amendments relating to legislative checks on the rulemaking process had drawn little attention, "they alone have the potential to substantially alter the structure of administrative law in Florida"); *see also* Rossi, *supra* note 53, at 296 (referring to the rulemaking restriction as "remarkable" and a serious limitation of agency authority).

V. RULEMAKING AND RULE CHALLENGES AFTER THE 1996 REVISIONS: *CONSOLIDATED-TOMOKA* AND OTHER CONSIDERATIONS RAISED BY THE APA REVISIONS

Consolidated-Tomoka is one of the first cases to place the new rulemaking standard before a reviewing court.[101] The case highlights two of the problems inherent in the new standard. First, section 120.536 is facially unclear as to how specific a statute must be to denote the "particular powers and duties" of an agency. Second, applying the new rulemaking standard requires a new level of statutory interpretation, making it difficult to justify judicial deference to the ALJ rather than the administrative agency. Though not raised in *Consolidated-Tomoka*, other considerations are also discussed below, including the constitutionality of the legislative review of existing rules under section 120.536(2) and the impact of the new rulemaking standard on agency willingness to make rules.

A. The Background of Consolidated-Tomoka

West of the Intracoastal Waterway on the eastern side of Florida, the Tomoka River and Spruce Creek flow past the cities of Ormond Beach and Port Orange through farmland and undeveloped forests. Though some development is present, the area still supports habitat for many of the state's familiar wildlife—migratory birds, manatee, and white-tailed deer.[102] The development of the land bordering the Tomoka River and Spruce Creek was at the center of *Consolidated-Tomoka*. The case involved a dispute between the St. Johns River Water Management District and private landowners.[103]

The District, one of five in Florida,[104] operates under the authority of chapter 373, *Florida Statutes*, for the purposes of flood control, re-

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101. Though the appeal was filed prior to that in *Consolidated-Tomoka*, the opinion in *Department of Business and Professional Regulation v. Calder Race Course, Inc.*, 23 Fla. L. Weekly D1745 (Fla. 1st DCA July 29, 1998), was ultimately filed shortly after that of *Consolidated-Tomoka*.

102. *See* Ludmilla Lelis, *A Ruling About the Rules; Environmental Case Could Limit the Bureaucracy*, ORLANDO SENT., Nov. 30, 1997, at G1.

103. The land owners are Consolidated-Tomoka Land Co.; Indigo Development Group Inc.; Indigo Group Inc.; Indigo Group Ltd.; Patricia Lagoni as Trustee of Trust Nos. IDI-2, IDI-3, and IDI-4; Sea View Development Corp.; Leroy E. Folsom; James S. Whiteside, Jr., and Joan W. Whiteside; Susan Spear Root; Susan R. Graham and Chapman J. Root, II, Trustees of the Chapman S. Root 1982 Living Trust; Daniel P. S. Paul, Individually and as Trustee of the Daniel P. S. Paul Charitable Remainder Trust; Ava and Rufus, Inc.; and Samuel P. Bell, III, and Anne Moorman Reeves, as Tenants in Common.

104. The St. Johns River Water Management District is located in northeastern Florida. The remaining four water management districts are the Northwest Florida Water Management District, the Suwanee River Water Management District, the South Florida Water Management District, and the Southwest Florida Water Management District. For an overview of the various water management districts and the areas they oversee, see Florida Dep't of Envtl. Prot., *Water Management Districts* (visited Jan. 30, 1999) <http://www.dep.state.fl.us/org/watman/index.htm>.

source management, and water management.[105] The water management district maintains a permitting program through which the agency regulates development activity to protect water resources.[106] The Consolidated-Tomoka Land Company is based in Daytona Beach, Florida, and is engaged in the citrus and real estate industries, including property leasing, real estate development, and sales.[107] Consolidated-Tomoka and the other land owners, or trustees, all owned or oversaw real property within the Tomoka River and Spruce Creek area that would be affected by the water management district's proposed rules.[108]

The *Consolidated-Tomoka* case arose as a result of several proposed rules and amendments to the District's applicant permitting handbook. The proposed rules, which created more stringent standards for development in the Tomoka River and Spruce Creek areas, were seen by Consolidated-Tomoka and the other landowners as exceeding the District's rulemaking authority.[109] The landowners challenged the proposed rules on most of the grounds listed in section 120.52(8), including the new rulemaking standard.[110] The ALJ held that the statutes cited by the water management district as its rulemaking authority satisfied the portions of sections 120.52(8) and 120.536(1), which mandate that a grant of rulemaking authority is necessary.[111] The ALJ also found that the proposed rules were not arbitrary or capricious,[112] were supported by competent substantial evidence,[113] and did not vest unbridled discretion in the agency.[114] The ALJ concluded, however, that the proposed rules did not specify which "particular powers and duties" were being implemented, as required under the new rulemaking standard of section 120.536(1) and, as a result, most of the proposed rules and several of the related Handbook provisions were invalid exercises of delegated legislative authority.[115]

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105. *See* FLA. STAT. ch 373 (1997 & Supp. 1998).

106. *See* FLA. STAT. §§ 373.413, .416 (1997).

107. *See Market Guide Snapshot for Consolidated-Tomoka Land* (visited Mar. 17, 1999) <http://biz.yahoo.com/p/c/cto.html>.

108. Consolidated-Tomoka owns approximately 20,000 acres in the Tomoka River basin that would be affected by the proposed rules. *See* Lelis, *supra* note 102, at G1.

115. *See* Final Order, *supra* note 8, at 7.

110. *See id.*

111. *See id.* at 46-47.

112. *See id.* at 18, 20-22, 24, 25, 30.

113. *See id.* at 30.

114. *See id.* at 33-34.

115. The following were found to have exceeded the agency's grant of rulemaking authority: proposed rules 40C-4.091(1)(a), 40C-41.0011, 40C-41.023, and 40C-41.063(6)(a)-(d); and sections 11.0(e), 11.5, 11.5.1, 11.5.2, 11.5.3, 11.5.4, 18.1, and Appendix K of the HANDBOOK. *See id.* at 59. Proposed rules 40C-4.041(2)(b)3 and (2)(b)6, 40C-4.041(2)(g) (permit required thresholds), 40C-4.051(7) (exemptions), and 40C-41.052(2) (exemptions) were not invalidated. *See id.*

B. *The New Rulemaking Standard as Applied in* Consolidated-Tomoka: *How Specific Must the Enabling Statute Be?*

The primary problem with the new rulemaking standard is the ambiguity of section 120.536. The numerous briefs[116] filed in the *Consolidated-Tomoka* case focused mainly on this point, each urging the court to adopt a certain definition of the "particular powers and duties" language of section 120.536(1).[117] For example, the amicus brief submitted by the Florida Legislature stated that the new rulemaking standard is more clear because it further constrains agency action and provides a better understanding of what is required for rulemaking authority.[118] Yet, while it is obvious that the new rulemaking standard was meant to further constrain the rulemaking authority of agencies, *more* restrictions do not necessarily mean *clearer* standards.

Not all of the language in section 120.536(1), however, is ambiguous. The first sentence is plainly stated and understandable. It reads that "[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required."[119] Thus, an agency must be granted general rulemaking authority in order to adopt rules in a certain area, and an agency may only adopt rules that implement statutes other than the general rulemaking authority statute. True to the statements made in the final bill analysis, this first sentence of section 120.536(1) would appear to overrule the earlier precedent that permitted agencies to make rules which were simply "reasonably related to the purpose of the enabling legislation, and . . . not arbitrary and capri-

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116. Due to the importance of the court's decision and the impact the ruling will have on various private and public interests, many amicus briefs were filed with the court. Those amici who filed briefs in support of the District included the Department of Environmental Protection, the Department of Legal Affairs/Attorney General, the Department of Community Affairs, the South Florida Water Management District, the Southwest Florida Water Management District, the Governor's Office, 1000 Friends of Florida, the Sierra Club, and the Florida Wildlife Federation. Amicus briefs supporting Consolidated-Tomoka were filed by a group of corporations and industry associations including the Florida Citrus Processors Ass'n; the Florida Fruit and Vegetable Ass'n; U.S. Sugar Corp.; Sunshine State Milk Producers; the Florida Forestry Ass'n; the Florida Fertilizer and Agrichemical Ass'n; the Florida Farm Bureau Federation; the Florida Poultry Federation, Inc.; the Florida Nurserymen and Growers Ass'n; Florida Citrus Mutual; the Florida Land Council, Inc.; and A. Duda and Sons, Inc. The Florida Legislature also submitted an amicus brief, mainly in response to the issue raised in the brief of the Governor's office that the Department of Administrative Hearings (DOAH) should not issue final orders in rule challenges. *See* Amicus Brief for the Florida Legislature at 3-7, Consolidated-Tomoka Land Co. v. St. Johns River Water Mgmt. Dist., 717 So. 2d 72 (Fla. 1st DCA 1998) (No. 97-2996).

117. *See, e.g.*, Brief for Consolidated-Tomoka at 29-30, Brief of Amicus Curiae Florida Department of Environmental Protection at 12-13, Brief of Amicus Curiae Attorney General Department of Legal Affairs at 10-12, *Consolidated-Tomoka* (No. 97-2996).

118. *See* Amicus Brief for the Florida Legislature at 3, *Consolidated-Tomoka* (No. 97-2996).

119. FLA. STAT. § 120.536(1) (1997).

cious."[120] The rules promulgated by the District in *Consolidated-Tomoka* arguably meet this standard in that the water management district relied on the general rulemaking authority to adopt rules pursuant to sections 373.044,[121] 373.113,[122] and 373.418(3),[123] *Florida Statutes*, and the specific authority to promulgate the proposed rules addressing permitting criteria for the Tomoka River and Spruce Creek basins pursuant to sections 373.413(1)[124] and 373.416(1), *Florida Statutes*.[125]

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120. *See generally* General Tel. Co. v. Florida Pub. Serv. Comm'n, 446 So. 2d 1063 (Fla. 1984); Department of Labor and Employ. Sec. v. Bradley, 636 So. 2d 802 (Fla. 1st DCA 1994); Florida Waterworks Ass'n v. Florida Public Serv. Comm'n, 473 So. 2d 237 (Fla. 1st DCA 1985); Department of Prof'. Reg., Bd. of Med. Exam'rs v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984); Agrico Chem. Co. v. State Dep't of Envtl. Prot., 365 So. 2d 759 (Fla. 1st DCA 1978); Florida Beverage Corp. v. Wynne, 306 So. 2d 200 (Fla. 1st DCA 1975).

121. Section 373.044, *Florida Statutes*, provided in part:

> Rules and regulations; enforcement; availability of personnel rules.—
> In administering this chapter, the governing board of the district is authorized to make and adopt reasonable rules, regulations, and orders which are consistent with law; and such rules, regulations, and orders may be enforced by mandatory injunction or other appropriate action in the courts of the state.

FLA. STAT. § 373.044, (1995).

122. *Id.* § 373.113. Section 373.113 provided in part:

> Adoption of regulations by the governing board.—
> In administering the provisions of this chapter the governing board shall adopt, promulgate, and enforce such regulations as may be reasonably necessary to effectuate its powers, duties, and functions pursuant to the provisions of chapter 120.

123. *Id.* § 373.418(3). Section 373.418(3) provided:

> The department or governing boards may adopt such rules as are necessary to implement the provisions of this part. Such rules shall be consistent with state water policy and shall not allow harm to water resources or be contrary to the policy set forth in s. 373.016.

124. *Id.* § 373.413(1). Section 373.413(1) provided:

> Permits for construction or alteration.—
> (1) Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.

125. *Id.* § 373.416(1). Section 373.416(1) provided:

> Permits for maintenance or operation.—
> (1) Except for the exemptions set forth in this part, the governing board or department may require such permits and impose such reasonable conditions as are necessary to assure that the operation or maintenance of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto, will not be inconsistent with the overall objectives of the district, and will not be harmful to the water resources of the district.

1. Specificity Relative to the Powers Conveyed

The second sentence of section 120.536(1) is most troublesome, as it provides that "[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute."[126] This language was the focus of the court's decision in *Consolidated-Tomoka*. The First District Court of Appeal acknowledged the possibility of two distinct interpretations of the phrase "particular powers and duties," offering that the "statute could mean that the powers and duties delegated by the enabling statute must be particular in the sense that they are identified (and therefore limited to those identified) or in the sense that they are described in detail."[127]

In his final order, the ALJ adopted the latter approach, interpreting the phrase to mean that the enabling statute must "detail" the powers and duties that would be the subject of the rule.[128] Under this interpretation, the ALJ concluded that the rules proposed by the agency were invalid because the language of the enabling statute was "merely a general, nonspecific description of the agency's duties."[129] According to the ALJ, in order to be valid, rules must implement "statutes which describe more specific programs."[130] The First District Court of Appeal, however, chose the former, less restrictive interpretation, finding that "the term 'particular' . . . restricts rulemaking authority to subjects that are directly within the class of powers and duties identified in the enabling statute. It was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties."[131] In choosing the less restrictive interpretation of "particular powers and duties," the court stated that "[a] standard based on the sufficiency of detail in the language of the enabling statute would be difficult to define and even more difficult to apply."[132] The court stated that the concept of specificity is one that is relative and what is specific enough in one circumstance may be too general in another.[133]

This aspect of the First District's rationale is supported by a reading of *B.H. v. State*,[134] in which the Florida Supreme Court struck down a statute delegating authority to the Department of Health and Rehabilitative Services to define actions constituting a

126. FLA. STAT. § 120.536(1) (Supp. 1996).
127. Consolidated-Tomoka Land Co. v. St. Johns River Water Mgmt. Dist., 717 So. 2d 72, 79 (Fla. 1st DCA 1998).
128. Final Order, *supra* note 8, at 48.
129. *Id.*
130. *Id.*
131. *Consolidated-Tomoka*, 717 So.2d at 79.
132. *Id.* at 80.
133. *See id.*
134. 645 So. 2d 987 (Fla. 1994).

crime pursuant to a juvenile escape statute.[135] In *B.H.*, the court held the statute unconstitutional because granting an administrative agency the authority to define a crime was found to be of a different magnitude than regulation in a noncriminal context.[136] Though the defect in the statutory delegation was quite obvious in *B.H.*, the court stated that it would be "impossible to adopt a single bright-line test to apply to all alleged violations of the nondelegation doctrine. . . . [I]n some instances, the subject matter of the statute may be such that greater discretion must be delegated."[137] Citing the complexities of modern society, the court pointed out that flexibility in administering a legislatively articulated policy is essential, and that such flexibility is most necessary and permissible in areas such as land use regulations.[138]

It would follow that under the rationale of *B.H.*, agencies such as the water management district should be granted greater flexibility to implement the Legislature's stated policies regarding land use issues, such as permitting and the designation of areas in which permitting would be required.[139] The actions of the Legislature since the enactment of the rulemaking provision support such a reading. Despite the presence of the new rulemaking standard and the statement of the Legislature that there should be consideration in staff analyses as to whether there would be enough guidance for agencies in proposed legislation,[140] the Legislature continues to enact legislation granting broad powers to a variety of agencies.[141] "'[S]pecific legislative direction,'" agrees administrative law professor Jim Rossi, "'just doesn't happen.'"[142]

2. Specificity in Harmony with Presumptive Rulemaking Under Section 120.54, Florida Statutes

The First District Court of Appeal also favored the less restrictive definition of "particular powers and duties" to avoid conflict with the

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135. *See id.* at 994.

136. *See id.* at 993.

137. *Id.*

138. *See id.* (citing Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978)).

139. *See* FLA. STAT. §§ 373.413(1), .416(1) (1997) (authorizing the Department of Environmental Protection and the water management districts to require permits for the construction, operation, and maintenance of specifically enumerated kinds of activities which could harm water resources).

140. *See supra* text accompanying notes 91-93.

141. *See* Brief for the Department of Community Affairs as Amicus Curiae at 8-11, *Consolidated-Tomoka* (No. 97-2996) (discussing the recent amendments to the Accessibility Act and the Building Codes Act).

142. Lelis, *supra* note 102, at G1 (quoting Florida State University College of Law Professor Jim Rossi).

presumptive rulemaking provisions contained in Florida's APA.[143] Under the Florida APA, rulemaking is not a matter of agency discretion.[144] Since 1991,[145] each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency must be adopted by the rulemaking procedure set forth in the APA as soon as feasible and practicable.[146] This legislative imperative was retained in the 1996 APA, despite pressure from Governor Lawton Chiles to remove the requirement.[147] Thus, with the creation of the more restrictive rulemaking language, agencies were faced with two almost polar imperatives: first, make rules as soon as practicable and feasible, but second, make only those rules that fall under the domain of the particular powers and duties granted by the Legislature.

Because the APA requires rulemaking even where there is an agency statement of general applicability, the *Consolidated-Tomoka* court reasoned that rulemaking authority could not be restricted to situations in which the enabling statute precisely details the subject of a proposed rule.[148] Therefore, the court concluded, the legislative presumption in favor of rulemaking necessarily implies that agencies have authority to adopt rules "*within the class of powers* conferred by the applicable enabling statute."[149] Having read sections 120.536 and 120.54, *Florida Statutes*,[150] *in pari materia* to reach the definition of the restriction contained in the phrase "particular powers and duties" as that of identifiable classifications within the enabling statute, the District Court of Appeal set forth the following test to determine the validity of a rule "based on the nature of the power or duty at issue":

> The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in

143. *Consolidated-Tomoka*, 717 So. 2d at 76 (citing FLA. STAT. § 120.56(2)(a) (Supp. 1996), which required "the agency to establish the validity of a proposed rule once it has been properly challenged").

144. *See* FLA. STAT. § 120.54(1)(a) (Supp. 1996).

145. *See* Act effective Jan. 1, 1992, ch. 91-30, § 3, 1990 Fla. Laws 241, 244 (codified at FLA. STAT. § 120.535 (1991), and current version at FLA. STAT. § 120.54(1) (Supp. 1998)); *see also* Rhea & Imhof, *supra* note 36, at 5-7.

146. *See* FLA. STAT. § 120.54(1) (Supp. 1998) (requiring rulemaking); *id.* § 120.52(15) (1997 & Supp. 1998) (defining agency statements that meet the definition of a rule). *See, e.g.*, Matthews v. Weinberg, 645 So. 2d 487, 489 (Fla. 2d DCA 1994) (concluding that HRS exceeded its rulemaking authority by enacting policies dealing with homosexual and unmarried couples without following statutory rulemaking procedures).

147. *See* discussion *supra* Part IV.B.

148. *See Consolidated-Tomoka*, 717 So. 2d at 80.

149. *Id.* (emphasis added).

150. FLA. STAT. §§ 120.536, .54 (Supp. 1996).

> the statute to be implemented. This approach meets the legislative goal of restricting the agencies' authority to promulgate rules, and, at the same time, ensures that agencies will have the authority to perform the essential functions assigned to them by the Legislature.[151]

The court declared, "The Legislature gave the District authority to identify geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas, and the District did just that."[152] Thus, the enabling statutes[153] granted the District the following powers: (1) the power to regulate development activity in order to protect water resources; (2) the *class of powers* necessary to promulgate rules that classify areas of special concern; (3) the power to impose more stringent permitting standards; and (4) the power to set water recharge standards and riparian habitat protection zones.[154] Agencies, challengers, and ALJs may now focus on the class of powers granted to the agencies rather than the presence or absence of more specific programs or policy.

C. The Role of the Division of Administrative Hearings in Rule Challenges and Judicial Deference to the Administrative Law Judge's Interpretation

Though inapposite to the central issue in *Consolidated-Tomoka*, the case has led some observers to revive the question of the correctness of allowing ALJs to issue final orders in rule challenge cases.[155] Under the Florida APA, challenges to rules or proposed rules are generally raised before the Division of Administrative Hearings (DOAH) prior to judicial review.[156] Rule challenges are significantly distinct from agency adjudication challenges. In rule challenges, the presiding ALJ issues a final order;[157] in adjudication challenges, the ALJ issues a recommended order which is then forwarded to the agency for issuance of a final order.[158] In a different context than in *Consolidated-Tomoka*, the practice of DOAH issuing a final order has

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151. *Consolidated-Tomoka*, 717 So. 2d at 80.
152. *Id.* at 81.
153. *See* FLA. STAT. §§ 373.413, .416 (1995).
154. *See Consolidated-Tomoka*, 717 So. 2d at 75.
155. *See* Blanton, *supra* note 99, at 2 ("The Governor's Office brief initially questioned–in a footnote—the validity of section 120.54(4)(c), which gives final order authority to ALJs in rule challenge cases. The brief suggests that ALJs should only enter recommended orders in rule challenges, as they do in adjudicatory matters.").
156. *See* FLA. STAT. § 120.54 (Supp. 1998). Parties may choose to wait the prescribed period of time until the agency action becomes final to seek judicial review, but the lack of a record may be damaging.
157. *See id.* § 120.54(c).
158. *See id.* § 120.57 (stating the procedure for an appeal of agency adjudication).

been criticized but upheld by the First District Court of Appeal.[159] However, the practice of DOAH issuance of final orders coupled with the APA revisions and the scope of review in Florida courts, creates a key difference regarding who issues the final order effectively limits the ability of the agency to apply expertise to matters of statutory interpretation.

1. The Initial Question of DOAH Authority to Issue a Final Order

In *Department of Administration v. Stevens*,[160] the First District Court of Appeal found that the issuance of a final order by an ALJ did not usurp the role of the judiciary or violate the separation of powers doctrine.[161] In *Stevens*, the Department of Administration and the Department of Health and Rehabilitative Services challenged the ALJ's authority to decide whether agency guidelines were invalid rules because they were not adopted according to statutory procedure.[162] The court upheld the ALJ's final order on the grounds that the key in the control of administrative agencies is checked power. The court quoted Kenneth Culp Davis, "'As long as we continue to emphasize the principle of check, we may safely continue our increasingly deep-seated habit of allowing the blending of three or more kinds of power in the same agency.'"[163] In making its decision, the court also relied upon Article V, section 1 of the Florida Constitution and pronounced that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices."[164]

Stevens is inapplicable to cases like *Consolidated-Tomoka* because *Stevens* speaks to the problem of executive encroachment on another branch of the government. In cases like *Consolidated-Tomoka*, executive encroachment is not a problem for the judiciary, but for another arm of the executive branch: the executive branch becomes split against itself. Thus, the *Stevens* court's reliance on Professor Davis's *Administrative Law Treatise* is erroneous because Professor Davis discusses different powers within the agency, not within the executive.[165]

In challenges to agency adjudication, the agency always has the ability to issue a final order inconsistent with the ALJ's recom-

159. *See* Department of Admin. v. Stevens, 344 So. 2d 290, 291 (Fla. 1st DCA 1977) (upholding an ALJ's final order which concluded the Department's guidelines were rules that were improperly adopted and thus invalid).

160. 344 So. 2d 290 (Fla. 1st DCA 1977).

161. *See id.* at 294.

162. *See id.* at 292.

163. *Id.* at 294 (quoting 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 68 (1958)).

164. *Stevens*, 344 So. 2d at 293 (citing FLA. CONST. art. V, § 1).

165. *See* DAVIS, *supra* note 29, at 68.

mended order.[166] This allows the agency to apply its experience and expertise by taking exception to the ALJ's recommended order. By contrast, when DOAH issues a final order in the context of rule challenges, the agency is deprived of the ability to revisit the issue and apply its expertise.

2. Complicating the Question with the APA Revisions

In addition to the problems already inherent in depriving the agency of the ability to issue final agency action in rule challenges, the recent APA revisions make a difficult situation even worse. With the expansion of the definition of an invalid exercise of legislative authority under section 120.536(1) and the express removal of a presumption of validity attached to proposed rules under section 120.56(2)(c),[167] agency discretion in matters of statutory interpretation are even more at risk. The new rulemaking standard of section 120.536 raises the issue of who is entitled to deference in matters of statutory construction when the agency's rules fall within the scope of the particular powers and duties delegated by the Legislature. In cases where interpretation is required, Florida courts have, to some degree, followed the federal doctrine articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[168] which requires courts to give considerable weight to the agency's construction of the statutes the agency is entrusted to administer.[169]

In *Chevron*, the Supreme Court imposed a two-part test for judicial review of an agency's construction of the statutes it administers.[170] First, a court must determine whether the legislature has directly spoken to the precise question at issue.[171] If the court determines that the legislature has not directly addressed the precise question at issue, the court cannot simply impose its own construction on the statute, as it would in the absence of an administrative

166. *See* FLA. STAT. § 120.57(1)(*l*) (Supp. 1998), stating in part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

167. *See id.* § 120.56(2)(c).
168. 467 U.S. 837 (1984).
169. *See id.* at 845.
170. *See id.* at 843-44.
171. *See id.* at 843.

interpretation.[172] If the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's interpretation is based on a permissible construction of the statute.[173]

Echoing the *Chevron* test, the First District Court of Appeal in *Department of Health and Rehabilitative Services v. Framat Realty, Inc.*[174] upheld an interpretive rule of the Department because it represented a "permissible interpretation" that was validated by the rulemaking process and designed to refine agency policy.[175] In delivering the opinion of the court, Chief Judge Robert Smith noted that the goal of the 1974 APA was "to encourage agencies of the executive branch to interpret statutes in their regulatory care deliberately, decisively, prospectively, and after consideration of comments from the general public and affected parties—that is, to interpret their statutes by rulemaking."[176] In upholding the agency's rule, the court placed particular value on the agency's permissible interpretation of a statute in which the APA provides incentives for rulemaking and further provides a deliberative process for the development of agency policy:

> Otherwise, the elaborate statutory scheme, pressing for rulemaking and prescribing how it shall be accomplished with maximum public and private participation, has no productive purpose, and it has become only a snare for agency action, a device for the evasion, avoidance, or postponement of effective agency action in its authorized field of responsibility.[177]

The court noted that the remedy available to those opposed to the permissible interpretation of a statute was an appeal not to the judiciary, but to the politically responsive branches of the legislature and the executive.[178]

The question of which entity interprets the statute was put before the First District Court of Appeal again in *Department of Insurance v. Insurance Services Office*,[179] in which a rule of the Department of Insurance was found to have invalidly extended the statute.[180] The three judge panel was divided,[181] with Chief Judge Smith dissenting on the ground that there were twelve reasonable constructions of the

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172. *See id.* at 844.
173. *See id.*
174. 407 So. 2d 238 (Fla. 1st DCA 1981).
175. *Id.* at 239.
176. *Id.* at 241.
177. *Id.* at 242.
178. *See id.*
179. 434 So. 2d 908 (Fla. 1st DCA 1983).
180. *See id.* at 911 (invalidating a rule of the Department of Insurance that prohibited varying insurance rates based upon sex, marital status, or scholastic achievement of the insured).
181. *See id.* at 914.

term "unfairly discriminate," some of which would not have represented an "extension."[182] The Chief Judge favored deference in upholding the Department's construction:

> At this stage in the maturity of our judicial system, a modest disclaimer of judicial hegemony in matters of statutory interpretation would seem to be required by a decent respect for the executive as a coordinate branch of government, made more responsive to the public, and more disciplined, by APA processes.[183]

Chief Judge Smith based his dissent in part on the decisions in *Department of Administration v. Nelson*[184] and *Framat*.[185] In addition, he recognized the danger of allowing individual judges to select the single "correct" interpretation of a generally-worded statute that lends itself to several permissible interpretations: "[A]s we judges grow more numerous . . . the folly of three judges or a majority of them declaring the 'one right answer' to a question of statutory interpretation, when the executive branch has spoken another permissible answer through rulemaking, becomes more evident and more dangerous."[186]

Though the dissent in *Insurance Services Office* called for deference to the agency versus the judiciary, the need for agency deference is the same where individual ALJs, acting in a quasi-judicial capacity, are granted greater deference than the agency and where the individual ALJ's opinion is accorded greater deference by reviewing courts. This is precisely the result where, in cases like *Consolidated-Tomoka*, the ALJ, rather than the agency, issues a final order. The reviewing court applies a different standard of review dependent upon the route by which the administrative appeal reaches the court. As made clear in *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*:[187]

> [W]hen reviewing a hearing officer's determination arising out of . . . a quasi-judicial rule challenge proceeding, the appellate court's standard of review is whether the hearing officer's findings are supported by competent substantial evidence. . . . On the other hand, when reviewing on direct appeal an agency's adopted rule

182. *Id.* at 916-17 (Smith, C.J., dissenting).

183. *Id.* at 927 (Smith, C.J., dissenting).

184. 424 So. 2d 852 (Fla. 1st DCA 1982).

185. *See id.* at 918-19 (citing *Nelson*, 424 So. 2d at 858). The court in *Nelson* reversed a hearing officer's order invalidating an agency rule as being beyond its legislative authority and reiterated the principle that "when the agency committed with statutory authority to implement a statute has construed the statute in a permissible way under APA disciplines, that interpretation will be sustained though another interpretation may be possible. When the agency so interprets the statute through rulemaking, the presumption of correctness is stronger." *Nelson*, 424 So. 2d at 858.

186. *Insurance Servs. Office*, 434 So. 2d at 927 (Smith, C.J., dissenting).

187. 553 So. 2d 1260 (Fla. 1st DCA 1989).

> arising from a quasi-legislative rule enactment proceeding . . . the appellate court's standard of review is that the rule should be sustained as long as it is reasonably related to the purposes of the enabling legislation and is not arbitrary or capricious.[188]

Though the standard of review has been altered as far as the agency interpretation is concerned, there is still a difference in whose opinion is granted deference. Removing the agency's ability to issue a final order and granting great deference to the ALJ's final order creates the problem addressed in Chief Judge Smith's *Insurance Services Office* dissent—individual judges' interpretation of a statute is valued above that of the agency and the potential for meaningful review is essentially nonexistent.

D. The "Look Back" Provision

The implications of the new rulemaking authority standard are even greater due to the inclusion of a "look back" provision that imposed application of the new standard to existing agency rules as well as proposed rules.[189] In a state with close to 26,000 rules in place,[190] the look back provision immediately impacted agencies in three ways. First, upon the effective date of the APA revisions, each agency was given a year to review all of its existing rules and submit a list of rules of portions of rules which were in violation of the rulemaking standard to the Legislature's agency oversight committee, the Joint Administrative Procedures Committee (JAPC).[191] JAPC then combined and submitted the listings to the Legislature.[192] JAPC submitted approximately 5,850 rules to the President of the Senate and Speaker of the House of Representatives for determining whether specific legislation authorizing the rules or portions of rules should be considered during the 1998 session.[193]

Second, the agency was required to initiate proceedings by January 1, 1999, to repeal any rule which was submitted to the JAPC and the Legislature for more specific authorization and was not so authorized during the most recent session of the Legislature.[194] Third, if the Legislature did not enact a more specific authorization

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188. *Id.* at 1274.

189. *See* FLA. STAT. § 120.536(2) (1997) (requiring each agency to review rules and to provide a listing to the Joint Administrative Procedures Committee (JAPC) of each rule or portion thereof which exceeds the new rulemaking authority standard by October 1, 1997).

190. *See* Lelis, *supra* note 102, at G1.

191. *See* FLA. STAT. § 120.536(2) (1997).

192. *See* Robert M. Rhodes, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Jan. 1998, at 1.

193. *See id.*

194. *See* FLA. STAT. §120.536(2) (1997). Thirty-six "Rules Authorization Bills" were introduced in the 1998 Legislature, 29 of which passed and became law. *See generally* Legislative Information Services, *Final 1998 Bill Citator* (visited Jan. 22, 1999) <http://www.leg. state.fl.us/session/1998/citator/final/subindex.pdf>.

for a rule and an agency does not initiate repeal proceedings as of July 1, 1999, JAPC or any substantially affected person may petition the agency for repeal of the rule on the basis of a lack of legislative authority.[195]

The requirements of the look back provision raise potential separation of powers issues similar to that discussed in the landmark U.S. Supreme Court separation of powers case, *Immigration and Naturalization Services v. Chadha*,[196] in which a legislative body asserted a type of veto power over previously delegated executive authority.[197] In *Chadha*, a federal statute permitted one house of Congress, by resolution, to invalidate the decision of the executive branch to allow a particular deportable alien to remain in the United States.[198] The Supreme Court found the statute unconstitutional because the decision of the Attorney General was made pursuant to authority delegated by Congress.[199] To comply with constitutional requirements of separation of powers, the Court stated that Congress must abide by its delegations of authority until such delegation is legislatively revoked or altered.[200]

The look back provision of the APA is similar to the legislative veto in *Chadha* in that the Legislature has statutorily created a process in which rules that were previously considered valid exercises of delegated legislative authority may be repealed in cases where the Legislature does not enact new authorizing legislation.[201] This process allows the Legislature to revisit rules and potentially second-guess the agency's implementation processes without following the typical procedure for altering or revoking the enabling legislation in any way. Although the actual results of the look back provision and rule repeal activity are as yet unknown, the process is potentially devastating to the preservation of agency discretion in implementing statutes.

E. Comparable State and Federal Legislation and the Potential for Rulemaking Avoidance

Florida is not the only state to seek greater accountability through the restriction of agency rulemaking authority. In 1995 the Washington Legislature passed a regulatory reform bill that, among other things, required agencies to have clearer statutory authority to write

195. *See* FLA. STAT. §120.536(2) (1997).
196. 462 U.S. 919 (1983).
197. *See id.* at 923.
198. *See id.* at 925 (describing the effect of 8 U.S.C. § 1254(c)(2)).
199. *See id.* at 953.
200. *See id.* at 953-54.
201. *See* FLA. STAT. § 120.536(2) (1997).

rules.[202] In adopting the law, the Washington Legislature pronounced, "[S]ubstantial policy decisions affecting the public [are to] be made by those directly accountable to the public; namely the legislature . . . state agencies [are] not to use their administrative authority to create or amend regulatory programs."[203] Several sections of the Washington Regulatory Reform Act impose a restriction on certain agency heads similar to that in section 120.536, *Florida Statutes*. In Washington the agency administrator "may not rely solely on a section of law stating a statute's intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt any rule."[204]

The number of new rules promulgated in Washington has declined since the adoption of the Regulatory Reform Act.[205] It has been suggested that the decline seems to be caused in part by uncertainty about how strictly courts will interpret the new requirements.[206] There is also some evidence that agencies are seeking alternatives to rulemaking—in the form of guidelines, interpretive rules, and adjudication—in order to formulate new policy.[207] A similar response has been predicted in Florida, where agencies may respond to the new rulemaking standard by employing nonrulemaking mechanisms, when possible, to the exclusion of traditional rulemaking.[208]

As a result of the APA revisions, administrative agencies in Florida now have two reasons to resort to alternatives to rulemaking. First, as in the Washington administrative system, Florida agencies rightfully may be unsure how ALJs and courts will interpret their "particular powers and duties" contained in the new rulemaking standard. Agencies are less likely to promulgate rules when there is uncertainty as to whether the rule will fail to meet the new rulemaking standard in the eyes of the ALJ or reviewing court. Second, with the inclusion of a new provision in Florida's APA for the award

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202. *See* Regulatory Reform Act of 1995, 1995 Wash. Legis. Serv. Ch. 403 (West).

203. *Id.* § 1.

204. *See* WASH. REV. CODE § 43.12.045 (1997) (addressing the Commissioner of Public Lands); *id.* § 43.20A.075 (addressing the Secretary of Social and Health Services); *id.* § 43.23.025 (addressing the Director of Agriculture); *id.* § 43.24.023 (addressing the Director of the Department of Licensing); *id.* § 43.70.040 (addressing the Secretary of Health).

205. *See* William R. Andersen, *Of Babies and Bathwater—Washington's Experiment with Regulatory Reform*, ADMIN. & REG. L. NEWS, Fall 1996, at 15.

206. *See id.*

207. *See id.*

208. *See* Rossi, *supra* note 53, at 304 (stating that agencies will abandon rulemaking to the extent that Florida law allows). *But see* FLA. STAT. § 120.54(1)(a) (Supp. 1998) (stating that rulemaking is not a matter of agency discretion and that agencies shall adopt agency statements that meet the definition of a "rule" as a rule as soon as feasible and practicable). *See also* Matthews v. Weinberg, 645 So. 2d 487, 489 (Fla. 2d DCA 1994) (finding that HRS exceeded delegated authority by applying policies of general applicability and not rulemaking procedures).

of attorney's fees in the event the agency loses a rule challenge,[209] agencies have reason to be doubly wary of initiating rulemaking where a rulemaking alternative may suffice. Not only will the agency rule or proposed rule be invalidated, but the agency could potentially lose financially as well. The budgets of most state agencies are not large enough to support a number of judgments for attorney's fees. Combined together, the new rulemaking standard and attorney's fees award provision produce a result that runs counter to the express desire of the Legislature and the community at large[210]—when an agency promulgates a statement of general applicability that "implements, interprets, or prescribes law or policy,"[211] the agency must adopt the statement by rulemaking "as soon as feasible and practicable."[212]

In a similar effort to curb agency abuse of rulemaking authority, the Minnesota Legislature enacted a provision in 1995 that requires agencies to publish a notice of intent to adopt rules within eighteen months of receiving new statutory authority to adopt rules.[213] Under the new law, if notice is not published within the time limit, the authority for the rule expires.[214] Additionally, agencies are prohibited from using laws existing at the time of the expiration of rulemaking authority as authority to adopt, amend, or repeal rules.[215] Although the statute prevents an agency from dragging its heels when rulemaking is necessary, it prohibits the agency from engaging in a period of incipient policy development longer than eighteen months. The statute may also create situations in which rules require amendment if a poorly drafted rule is noticed and adopted simply to meet the time limitations. Finally, if an agency is unable to notice a rule within the time limit, it will be forced to utilize rulemaking alternatives that are less efficient and clear than a rule. Like Minnesota, Florida also has a "use it or lose it" provision that requires rules to be drafted and formally proposed within 180 days of the enactment of any legislation requiring agency implementation, unless the

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209. *See* FLA. STAT. § 120.595(2), (3) (1997). Attorney's fees may be awarded in challenges to proposed rules and existing rules, unless the agency can show its actions were "substantially justified." *Id.* An agency's actions are "substantially justified" if there was "a reasonable basis in law and fact at the time the actions were taken by the agency." *Id.*

210. *See* APA COMM'N REPORT, *supra* note 36, at 19 ("The Commission believes that published rules help provide certainty to the regulated community and also help inform the general public of an agency's policies. The rulemaking process provides interested persons the opportunity to comment on proposed rules and give necessary input to an agency as it develops its policies.").

211. FLA. STAT. § 120.52(15) (Supp. 1998) (defining "rule").

212. *Id.* § 120.54(1)(a) (setting forth the presumption of rulemaking).

213. *See* Act of May 23, 1995, ch. 233, 1995 Minn. Sess. Law Serv. Ch. 233, art. 2, § 12 (West) (codified at MINN. STAT. § 14.125 (1997)).

214. *See* MINN. STAT. § 14.125 (1997).

215. *See id.*

statute provides otherwise.[216] The provision does not apply to emergency rules,[217] and existing rules may be modified without violating the provision.[218] Similarly, the APA allows agencies to develop the knowledge and experience necessary before a rule is proposed.[219] However, the situation may arise where a new rule needs to be made based upon long-standing statutory authority. Will a nonrule policy statement be sufficient where the rule could not practicably or feasibly be made, given the 180-day limitation? The answer is uncertain as no courts have ruled on this question.

Attempts to limit agency rulemaking have also occurred at the federal level, as evidenced by the stalled Federal Comprehensive Regulatory Reform Act introduced by Senator Bob Dole in 1995.[220] The bill proposed that "any rule that expands Federal power or jurisdiction beyond the level of regulatory action needed to satisfy statutory requirements shall be prohibited."[221] Like the new Florida rulemaking standard, this proposed federal standard is ambiguous, as the "regulatory action needed to satisfy statutory requirements"[222] would likely lack a universal definition.

VI. CONCLUSION

The *Consolidated-Tomoka* ruling has been predicted to extend beyond the environmental context, affecting "'everybody's rules'"[223] and thereby impacting the entire administrative scheme in Florida. Because *Consolidated-Tomoka* was the first case to define the new rulemaking standard, the test set forth by the First District Court of Appeal will likely serve as the guideline used by agencies in their promulgation of rules, by opponents in their challenges of rules, and by ALJs in their interpretation of whether rules are authorized under the particular powers and duties granted to agencies. However, even though *Consolidated-Tomoka* was a victory of sorts for administrative agencies, the new rulemaking standard is not without teeth. Though the court found for the agency, the court made clear that there were greater restrictions placed on agencies, and that rules must be identifiable with the class of powers delegated by the Legis-

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216. *See* FLA. STAT. § 120.54(1)(b) (Supp. 1998).

217. Section 120.54(1)(b) is applicable to all rules other than emergency rules. *See id.* § 120.54(1).

218. Section 120.54(1)(b) only requires that necessary rules be "drafted and formally proposed" within the 180-day window.

219. *See id.* § 120.54(1)(a) (requiring rulemaking as soon as "feasible and practicable").

220. *See* S. 343, 104th Cong. § 627 (1995).

221. *Id.*

222. *Id.*

223. *See* Lelis, *supra* note 102, at G1 (quoting Scott Boyd, senior staff attorney for JAPC).

lature. This restriction of the new rulemaking standard was applied in a decision handed down on the heels of *Consolidated-Tomoka*.

In *Department of Business and Professional Regulation v. Calder Race Course, Inc.*,[224] the First District Court of Appeal reviewed the actions of another agency in the context of the new rulemaking standard.[225] *Calder* involved a proposed rule challenge brought by several entities that held permits and licenses to operate pari-mutuel facilities and conduct pari-mutuel wagering.[226] These entities[227] challenged a proposed rule of the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (DBPR), that set guidelines for searching people and stables, rooms, lockers, vehicles, automobiles, or other places within a pari-mutuel wagering permitted facility.[228] The ALJ found that the particular powers and duties required under the new APA were not specifically granted to the DBPR under the same rationale employed by the ALJ in *Consolidated-Tomoka*.[229] The First District Court of Appeal, however, affirmed the decision of the ALJ in *Calder*, finding that the rule at issue was not authorized by the statute that allowed the agency to conduct investigations:

> [T]here is nothing in the class of powers and duties identified in [the statute] that delegates to the Division the right to search persons or places within pari-mutuel wagering facilities, or any provision in the statute deeming a licensee of same to have waived the protections of the Fourth Amendment by consenting to such searches.[230]

Though the result in *Consolidated-Tomoka* will likely relieve agency rule drafters to some degree, the result in *Calder* serves as a warning to agencies to carefully appraise the class of powers granted to them by statute before promulgating rules. *Consolidated-Tomoka* and *Calder* will not be the only cases to interpret the 1996 revisions to the APA. These and the other issues raised by this Note are likely to be raised many times in the future as the most recent version of Florida's APA is adapted to the workings of the administrative scheme.

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224. 23 Fla. L. Weekly D1795 (Fla. 1st DCA July 29, 1998).

225. *See id.*

226. *Id.*

227. Calder Race Course, Inc., Tropical Park, Inc., Gulfstream Racing Association, Investment Corporation of Florida, Florida Horsemen=s Benevolent Association, Inc., and the Florida Veterinary Medical Association were either petitioners or intervenors in the rule challenge itself. Initial Brief of Appellant at 1, Department of Bus. & Prof. Reg. v. Calder Race Course, Inc., 23 Fla. L. Weekly D1745 (Fla. 1st DCA July 29, 1998) (No. 97-2705).

228. *See id.* (discussing proposed rule 61D-2.002).

229. *Calder*, 23 Fla. L. Weekly at D1795.

230. *Id.* at D1797.