THE GAVEL

Ave Maria School *of* Law
Moot Court Board Journal

Fall 2015
Volume 7,
Issue 1

Outdated Laws

FEATURING:

Associate Professor Timothy J. Tracey

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Volunteer Opportunity to Serve as Judge

for the
Ave Maria School of Law
Moot Court Board
The Saint Thomas More Trial Competition
in
March 2016

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MOOT COURT BOARD PRESIDENT'S MESSAGE

Being at the helm of the Ave Maria Moot Court Board is more than just a privilege; it is an honor. I have always preached to this Board and to other students that we should all strive to become better versions of ourselves. Being around this unique group of future litigators has helped me become not just a better oral advocate, but also a better man. Our Board is comprised of students who are well on their way to becoming outstanding litigators and I am grateful for the opportunity to participate in their success. Like any successful President, I cannot do this alone. This year I have surrounded myself with an Executive Board that will not only help our Board succeed, but also support me day in and day out. To my Executive Board: Andrew Riordan, Elizabeth Humann, Deanna Vella, Timothy Culhane, and Jorge Rodriguez-Sierra, I want to take this opportunity to say thank you for all that you do, and please know that with each of you by my side, nothing feels impossible.

Joining the Moot Court Board affords our members many opportunities. Each year our Board holds two internal competitions, an appellate and a trial. The internal competitions are open to the entire student body and are judged by Ave Maria professors, local attorneys, and local judges. If our members are eager for more experience, they can participate in a variety of external competitions. The Board sends teams to external competitions that range from the New York City Bar National Appellate competition to the National Baseball Arbitration competition at Tulane University. Each competition provides our Board members with both the opportunity to hone their oral advocacy skills and the chance to show the legal community that Ave Maria is a force to be reckoned with.

We had a very strong showing at the Robert Orseck Memorial Competition this summer. Kimberlee Mitton, Deanna Vella, and Elizabeth Humann represented Ave Maria School of Law, and advanced to the semi-final round of the competition. Additionally, the Board had strong performances in the other external competitions in which we competed. But last year was only a brick of success; a brick that we will use to build the Ave Maria Moot Court Board to higher levels. I will end this message with one of my favorite quotes, a quote that I believe embodies everything we try to do at Ave Maria:

> "The price of success is hard work, dedication to the job at hand, and the determination that whether we win or lose, we have applied the best of ourselves to the task at hand."
>
> *– Vince Lombardi*

Very truly yours,

Jovanni C. Fiallo
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STOP BOB JONESING FOR OUR RELIGIOUS TAX EXEMPTIONS

By Timothy J. Tracey
Associate Professor of Law,
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"It's time to abolish, or greatly diminish, their tax-exempt statuses."[1] So said *New York Times* columnist, Mark Oppenheimer, in response to the U.S. Supreme Court's legalization of same-sex marriage in *Obergefell v. Hodges*.[2] Oppenheimer argues that the 1983 Bob Jones University case[3] lays the groundwork for stripping religious organizations of their tax-exempt status.[4]

In *Bob Jones*, the Supreme Court held that the Internal Revenue Service (IRS) could, consistent with U.S. Constitution, revoke the tax exempt status of two private, religious schools—Goldsboro Christian School and Bob Jones University—because their admission policies were "contrary to a fundamental public policy."[5] Goldsboro flatly denied admission to black students, while Bob Jones admitted black students but prohibited interracial dating.[6]

Oppenheimer argues that the logic of *Bob Jones* applies with equal force to religious organizations that won't support same-sex marriage. After all, according to the Mark Oppenheimers of the world, opposition to same-sex marriage is just as "contrary to a fundamental public policy" as race discrimination.[7]

But Oppenheimer and his ilk make two fundamental errors in their understanding of religious tax exemptions. First, they assume that religious tax exemptions are government subsidies. "The Supreme Court's ruling on gay marriage," said Oppenheimer, "makes it clearer than ever that the government shouldn't be subsidizing religion and non-profits."[8] But when the federal government exempts religious groups from paying federal income tax, it is not choosing to bankroll religion. Rather the government is recognizing that the Establishment Clause of the First Amendment mandates a separation of church and state. The Clause acts as a restraint on the federal government's power over matters "respecting an establishment of religion."[9] It places these matters outside the purview of government power.[10] The government refrains from taxation of religious organizations "to accommodate the autonomy of religious actors and activities."[11] A religious tax exemption, explains tax expert Edward Zelinsky, is an "acknowledgement of sectarian sovereignty, … rather than the subsidization of religion."[12]

Every law student knows the one-liner from *McCulloch v. Maryland*:[13] "the power to tax involves the power to destroy."[14] The Supreme Court held in *McCulloch* that the principle of federalism—the structural restraint imposed by the Constitution on the federal government's power over the states and, vice-versa, the states' power over the federal government—prevented the State of Maryland from taxing the federal bank. Were it otherwise, the Court said, the state could tax the federal bank out of existence. That would invert the structure of the Constitution, which makes the federal government supreme over the states. Federalism—the very structure of the Constitution—placed the power to tax the instruments of the federal government outside the purview of the states.[15]

In the same way, the Establishment Clause places outside the purview of the federal government matters "respecting an establishment of religion," including the power to tax religious organizations.[16] Just as federalism recognizes the federal government and the states as distinct sovereigns with separate spheres of power, the Establishment Clause recognizes the church and the civil government as separate and distinct sovereigns.[17] Neither can encroach on the territory of the other. Were the federal government permitted to tax religious organizations, it could snuff religion out.

The IRS's own regulations recognize this limitation. Churches "are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS."[18] The Constitution itself precludes the government from taxing churches. It's automatic. The reason religious organizations, other than churches, must apply for tax exempt status is to ensure that they are in fact religious. Once that determination is made, they too are exempt from federal income tax.[19] The IRS is merely recognizing what the Constitution already mandates.

So the IRS is not subsidizing religious organizations by exempting them. Rather, it is recognizing a constitutionally-mandated tax base.

Second, Oppenheimer and his comrades fail to grasp the extraordinary character of the *Bob Jones* case. Eradicating race discrimination is the only "fundamental public policy" the Supreme Court has ever held overrides the First Amendment mandate of separation of church and state. The IRS agrees. In a recent letter ruling, it observed, "Currently the sole basis for revocation of exemption on public policy grounds is engaging in race discrimination."[20]

The historical context of *Bob Jones* is singular. Private, segregated schools had sprung up across the South as a way to dodge integrated public education. States were

fostering the expansion of these schools, according to Columbia Law School professor, Olatunde Johnson, "by enacting legislation mandating or allowing the closing of public schools to resist desegregation or providing state tax credits and tuition grants to students attending private schools."[21] Denying tax exempt status was the only way to curb the growth of these schools. Moreover, in *Bob Jones*, "the position of all three branches of the Federal Government was unmistakably clear"—racial discrimination in education "violates deeply and widely accepted views of elementary justice."[22]

Bob Jones, thus, sits alongside the myriad of other court decisions from the civil rights era where the Supreme Court was willing to go to extraordinary lengths to eradicate race discrimination. *Norwood v. Harrison*,[23] where the Court deviated from the norm to get at the horrible evil that is race discrimination, is such a case. In Norwood, the Court held that the racial discrimination of private schools in Mississippi could be attributed to the state, because the state provided the schools with free textbooks.[24] Yet the general rule is even if the state is providing 99% of the funding for a private organization and heavily regulating almost every aspect of its operation, the private organization is nonetheless not a state actor.[25] The Court was willing to set aside this general rule to go after racism. The Court didn't vitiate the rule. Instead, it found that the extraordinary circumstances—the long history of slavery, racism, and discrimination against African-Americans—warranted setting the rule aside in this one instance.

In the same way, *Bob Jones* cannot be generalized into a rule that the IRS can deny religious organizations tax exempt status anytime something smells mildly of discrimination. Even the panoply of court decisions, legislation, and public policy pronouncements concerning gender discrimination have not added up to a "fundamental public policy" sufficient to deny religious organizations tax exempt status. Churches and other religious organizations routinely discriminate on the basis of gender when it comes to ministers, priests, pastors, and the like. Yet they retain their tax exempt status.

Opposition to same-sex marriage similarly cannot be called a "fundamental public policy" that warrants overriding the constitutional mandate of separation of church and state. At least not yet. Unlike the history that gave rise to *Bob Jones*, thousands of private schools did not spring up as a means to avoid attending school with gays and lesbians. In fact, many private schools actively recruit gay men and lesbians.[26]

Nor have "all three branches of the Federal Government" been "unmistakably clear" in condemning sexual orientation discrimination.[27] Executive orders signed by Presidents Clinton and Obama prohibit sexual orientation discrimination by the federal government and its contractors.[28] But federal law otherwise does not prohibit sexual orientation discrimination. Congress has repeatedly declined to pass the Employment Non-Discrimination Act (ENDA), which would ban discrimination on the basis of sexual orientation in employment nationwide. ENDA has been introduced in every Congress since 1994, but has yet to pass both houses.[29] The version of ENDA that passed the Senate in November 2013 contained a broad religious exemption. Referring directly to the religious exemption in Title VII, it exempted from the prohibition on employment discrimination based on sexual orientation the same class of religious organizations that are exempt from the existing prohibition on religious discrimination in employment.[30] The Supreme Court in Obergefell held that the fundamental right to marry protected by the Fourteenth Amendment includes the right of same-sex couples to marry. But the Court did not hold that sexual orientation is a suspect or quasi-suspect class.[31] Federal law, thus, at least as it currently sits, provides no basis for concluding that a "fundamental public policy" of prohibiting sexual orientation discrimination exists.[32]

That of course could change. In mid-July, the Equal Employment Opportunity Commission interpreted Title VII of the 1964 Civil Rights Act to forbid sexual orientation discrimination on the job as a form of "sex" discrimination.[33] The EEOC's views on the scope of the Title VII are merely persuasive, not binding, authority on the courts. But if the EEOC's ruling sticks, it will accomplish what Congress could not: establishing a national policy of protecting gay men and lesbians from job discrimination. Even if that happens, it would still be difficult to argue "all three branches of the Federal Government" have been "unmistakably clear" in condemning sexual orientation discrimination.[34] Congress will have remained silent. But it would indicate a clear move toward a national policy against sexual orientation discrimination. Perhaps four to five years from now, the calculus under Bob Jones will come out differently. "But," to quote the legendary Aragorn, "it is not this day."[35]

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[20] I.R.S., FIELD SERVICE ADVICE MEMORANDUM, 1997 FSA LEXIS 478, at 11 (April 23, 1997).
[21] Olatunde Johnson, The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence, COLUM. PUB. L. & LEGAL THEORY WORKING PAPERS, Paper No.9184, at 4 (2010), http://lsr.nellco.org/columbia_pllt/9184.
[22] Bob Jones, 461 U.S. at 592, 598.
[23] 413 U.S. 455 (1973).
[24] See id. at 467 ("[T]he constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which, under the District Court holding, may discriminate if they so desire.").
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A HOMESCHOOLER'S PERSPECTIVE ON OUTDATED HOMESCHOOLING LAWS

By Kelsey Blikstad

Growing up, I jokingly nicknamed myself a "halfie student" – defined as a half-public school and half-homeschool student. After my parents unenrolled me from public school in the middle of my seventh grade year, I embarked on a new journey that opened my eyes to a completely new side of schooling. Homeschooling changed my life – I met my husband while playing for a local homeschool basketball team, and schooling from home gave me the flexibility to graduate from college before high school and attend law school at age 19. As a homeschooling advocate, I challenge *outdated foreign laws* that make homeschooling illegal.

Since the early pioneer days of the homeschool movement in the 1970's, homeschooling has radically changed. Today, homeschooling is legal in all 50 states.[1] While homeschooling grew in the 1970's due to religious efforts, it is now a popular alternative among all economic and social classes. Homeschoolers now have proms, sports teams, field trips, parties, and formal graduation ceremonies.

In 2008, homeschooling received global attention when the Romeike family fled persecution in Germany, where homeschooling is illegal, and sought asylum in the United States.[2] Because of the family's decision to homeschool, Germany threatened the Romeikes with jail time, large fines, and losing custody of their children.[3] Although the family sought refuge in the United States for six years, the Supreme Court declined to hear the Romeike's case in 2014.[4] However, just twenty-four hours after the highest court's decision, the Department of Homeland Security granted the family "indefinite deferred status."[5]

As of 2013, twenty-eight countries have made homeschooling illegal, while nine more have made homeschooling practically impossible.[6] Among the many countries that prohibit homeschooling are Greece, Turkey, Brazil, Cuba,

Guatemala, and El Salvador.[7] It should be legal to homeschool in all countries. Foreign laws that illegalize homeschooling are outdated for two reasons: (1) homeschoolers have statistically surpassed peers in public school and (2) homeschoolers excel in the social arena.

Although surprising to many, homeschoolers statistically outscore their public school peers. In 1997, a study evaluating over 5,402 homeschoolers showed that homeschoolers, on average, exceeded public school students "by 30 to 37 percentile points in all subjects."[8] After being a part of the homeschool community for nearly nine years, I noticed a common pattern among homeschool students: (1) students take less time to complete daily schoolwork; (2) many students advance in their studies faster because of time flexibility; (3) many students, age 15 and over, choose to attend college during high school; and (4) students often score higher on standardized testing.

One of the biggest benefits of my homeschooling career was the amount of time I had to work on my schoolwork. Many do not realize that much time is wasted during the public school day. After transportation to and from school, cafeteria lunch, and breaks in between class periods, there is little time left in the school day for learning. I saved those hours and worked on schoolwork or used the extra time to engage in extracurricular activities. My open schedule enabled me to finish my required high school classes faster and enroll in college courses that satisfied almost all of my high school credits. After graduating from high school, I knew I was equipped with an education that would prove useful to me in my college and professional career.

One of the widespread concerns about homeschooling is that students will not receive the opportunity to connect with peers through social outlets. This notion leads many people to think that because homeschoolers are not in traditional social settings at school, they are socially stunted and unprepared to enter the real world. As homeschooling has expanded, so have the social circles. During my first week as a homeschooler, my parents enrolled me in a homeschooling support group. Through the group, I enjoyed bowling, science and history fairs, classes, park events, sports, movie days, pool parties, and dances. As a result, there was never a dull moment in my homeschooling journey.

Furthermore, many homeschoolers get together and form classes. Twice a week a large group of teens would meet at our house where my dad would teach high school biology and another student's mother would lead a personal finance course. One semester, a group of students met once a week for a writing class, in which we each had the opportunity to write our own novel. Other classes included electives like cooking, car mechanics 101, and psychology.

Like traditional high school students, homeschoolers have the same opportunities to compete in sports. While homeschooled, I played volleyball, soccer, and basketball for a private school league that permitted homeschoolers to form their own group and play as a "school." Basketball season was always the hit of the year, and most years we won the state tournament or ranked within the top teams. Additionally, public schools allow homeschoolers to try out for their sports teams. One of my fellow homeschooling friends played for a local high school in her junior and senior year, and I enjoyed going to her games.

Finally, there are many different types of homeschooling options. Some are very traditional, while others offer options to those who want to go against the grain. In Southwest Florida, several private schools follow a system where students learn in a traditional school setting three days a week, while schooling at home the other two days. Although this setup does require tuition, it gives an opportunity to those who want the best of both worlds or have parents who work full-time. Further, many support groups form co-ops where parents will get together and teach a variety of classes that meet once or twice a week. Additionally, many students are enrolling in tuition-free, state virtual schools where they complete all of their high school courses online from the convenience of home. The variety of options makes homeschooling appealing to parents who choose not to send their children to public school.

As for the Romeike family today, they are living and homeschooling in Tennessee.[9] The Romeikes desire to become United States citizens and homeschool in freedom. Because of their testimony, legislation is pending to permit families treated unfairly in other countries to seek refuge in the United States.[10] In 2010, with the legal advocacy of the Home School Legal Defense Association, the Romeike family obtained asylum.[11] But it is unfortunate that Germany lost a homeschooling family; homeschoolers have much to offer in academic and social settings. Before becoming a homeschooler, I was a skeptic. Now that I have experienced this new side learning, I believe that the world would benefit from abrogating outdated homeschooling laws on a global scale.

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The Formality Requirements of Will Execution and Florida's Strict Compliance Approach

By Geoff Cuccuini

Under Florida law, wills that do not strictly comply with the formalities of will execution will be declared invalid.[1] In this regard, Florida's laws differ greatly from the laws of neighboring states that use a "substantial compliance" standard for will executions, based on the Uniform Probate Code.[2] Over twenty states have adopted the "substantial compliance" standard for will executions based on the UPC approach. Proponents of Florida's current statute argue that requiring strict compliance ensures that all wills have a uniform format, thus reducing the likelihood of fraudulent wills being admitted into probate. Proponents also argue that strictly adhering to statutory requirements and accepting nothing less than perfection insulates wills from being challenged. In theory, these arguments are well reasoned. However, when we analyze the case law of challenged wills, it appears that the UPC's "substantial compliance" standard has more than adequately insulated wills from being challenged while ensuring that the intent of the testator is protected. The significant downfall of the strict compliance rule is that the intent of the testator is null if the will is invalidated on a technicality. Once the will is declared invalid, the testator's entire probate estate is subject to intestate succession. This result is in direct conflict with the main reason a testator seeks to draft a will: to protect his property from intestate succession.

The witness requirement of the will execution procedure provides the most troublesome example of when the strict compliance rule creates the risk of invalidating a will. In Florida, failing to strictly comply with the witness attestation procedure will invalidate a will despite clear and convincing evidence that a testator intended the document to act as a will. Under Florida law, it is essential for both witnesses to sign in the testator's presence and in each other's presence. However, the definition of "presence" is unclear in the Florida statutes and thus strictly complying with this presence requirement can be troublesome.[3] A majority of states have adopted either a relaxed "conscious presence" test and others have used a more strict "line of vision" test for presence. The Florida legislature has not adopted either test, thus creating conflict amongst the Florida courts. The line of vision test requires that both witnesses actually physically see the testator sign, and vice versa. Hypothetically, if one witness is distracted and looks away during the testator signing, the will could potentially be invalidated for failing to strictly comply. Because the legislature has not indicated the required test, what strict compliance actually means under the statute is unclear. In the case of *In re estate of Watson*, the testator's witnesses, two employees of a local bank, signed the will while on the opposite side of a clear glass barrier from the testator. The will was contested on the grounds that it did not satisfy the presence requirement. Although the document clearly represented the intent of the testator, the door was open to litigation because of the lack of clarity in the law.[4] This issue would not arise under the UPC. As long as the document "substantially complied" with the execution procedure, the will would be admitted into probate. As indicated by the case law, much of the confusion regarding presence requirements can be attributed to the Florida legislature's failure to clarify the law. However, adoption of a substantial compliance standard would remedy any ambiguity in the statutes and would give greater deference to the testator's intent.

While preventing the admission of fraudulent wills is important, the substantial compliance standard of the UPC provides adequate protection to the testator and reduces the likelihood of the will being invalidated by a technicality. One drafts a will to avoid having his or her estate subject to intestate succession. Once a will is declared invalid, the intent of the testator cannot be protected nor is testamentary intent taken into account in the intestacy distribution. Florida's policy on this issue is outdated and may be causing unnecessary will invalidations while increasing litigation.

States that use a "substantial compliance" standard with regard to will executions are willing to forgive so called "harmless errors" committed by the testator as long as there is clear and convincing evidence of testamentary intent to create a will. In this way, the UPC method remedies the issues inherent in the strict compliance standard. In UPC jurisdictions, protecting the intent of the testator is paramount while there is less emphasis on compliance to the statutory formalities of will executions.

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COHABITATION IN FLORIDA

By Luis Cortinas

"If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together . . . they shall be guilty of a misdemeanor of the second degree."[1] That's right, cohabtitation can still get you into trouble in Florida. Florida's cohabitation law has been around since 1868, and is largely overlooked by many in our state. Many people can say that they know at least one couple living out of wedlock, and yet they don't think twice about it.

From the inception of the law in the 19th century, cohabitation has been a crime that has been largely an issue of circumstantial evidence.[2] In order to prove the crime even occurred, the State "must show that the parties dwell together as if [a] conjugal relation existed between them."[3] Given the potential for privacy rights violations, enforcing the law can be difficult for law enforcement.

Though the law has been on the books for over a century, it sees very little prosecution. As a result, the Florida legislature has begun the process of repealing it. On September 16th, 2015, the bill to repeal the law received a 10-3 vote by the Florida House Criminal Justice Subcommittee, in favor of the bill.[4] Rep. Charles Van Zant (R-Palatka) (1 of only 3 Subcommittee members to vote against the bill) stated that the mere fact that the Florida legislature is considering repeal of the law "is one more sign of Florida's moral decline." However, Rep. Michelle Vasalinda (D-Tallahassee) disagrees, and feels the statute "has to go." Vasalinda says that the law is discriminatory, as it only applies to heterosexual couples.[5] While it's safe to say the bill to repeal the cohabitation law has acquired some backing, it should be noted that a similar bill lost steam in the spring of 2015.[6] The spring bill died in both chambers, leaving the law very much alive.

Enforcement of this law would overburden the criminal justice system. There are currently approximately 549,000 unmarried couples living in Florida.[7] If the State began enforcing it, law enforcement and state attorneys would have over a million law-breaking citizens to round up and prosecute. Additionally, while the law is seldom enforced, its presence on the books makes it easy for law enforcement to target couples it does not like, based on sexual orientation, race or criminal history. Rep. Vasalinda feels this is an issue with the law as it is currently written.[8]

While the law may involve moral considerations, it is clear that its value as a law has diminished. After all, what is a law if it's not being enforced? The situation created by this law is akin to that created by Prohibition,[9] except that with Prohibition the law was at least nominally enforced by the government. The cohabitation law is both entirely disregarded by local citizens and unenforced. Even Rep. Rick Stark (D-Weston) stated he "had lived with his wife for about a year before they were married."[10] It is difficult to overlook the fact that a law created over a century ago has been applied very little. Only Florida, Michigan and Mississippi still have a cohabitation law on the books, so it is no surprise that that the law's possible repeal is news to some that the law even exists.

If the bill fails to pass again, North Carolina's supreme court decision in 2006 may provide some support to finding Florida's cohabitation law unconstitutional based on privacy rights. North Carolina, the latest state to remove a cohabitation law from its books in 2006, did so after its supreme court found the law to be unconstitutional based on the Supreme Court's decision in *Lawrence v. Texas*, which held that people have a protected liberty interest in private sexual activity.[11] The Florida law intrudes upon the exact same interests explicitly held to be protected in *Lawrence*.

Florida's cohabitation law has a short life ahead of it, likely to be taken off the Florida books permanently in the near future. However, before you decide it's time to live under the same roof as your sweetheart, until the law is repealed or found to be unconstitutional, remember you'll be breaking the law and could face a fine of $500 and up to 60 days in jail if found guilty. ○

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FLORIDA'S FIREARM LAWS:

LAST UPDATED THE SAME YEAR YOU BOUGHT A NINTENDO.

By Elizabeth Humann

Prior to 1987, Florida's counties and municipalities were permitted to create and enforce their own firearm ordinances. But that year, in response to the pervasive gun violence of the mid-80's, the Florida legislature passed Fla. Stat. § 790.06. This statute established the requirements for concealed weapons permits and also set forth restrictions on concealed carry, such as prohibitions against carrying in sensitive locations.[1] At the same time, the legislature passed a separate statute preempting all of the county and municipal ordinances, thereby abrogating all local firearm regulations.[2]

It did not take long for the legislature to realize that it had created a monster.[3] It had now passed a law that regulated concealed carry but had preempted all ordinances regulating open carry. The result? Florida citizens could not carry concealed firearms in bars, schools, and courthouses, but were free to carry openly in those exact same places. Within days, the legislature had passed a complete ban on open carry as an emergency measure. This is still the current state of Florida firearm regulation – firearms can only be carried legally outside the home for self-defense purposes under the auspices of a concealed weapons permit.

Along came *District of Columbia v. Heller*.

In *Heller*, the Supreme Court held that the right to bear arms is a fundamental right, and that the core of this right is self-defense. While the facts in Heller involved a prohibition against residential firearms, the Court strongly suggested that the right extends outside the home, because the need for self-defense extends outside the home.[5] In fact, the 4th District Court of Appeal of Florida has concurred with this view.[6] So how has the designation of the right to bear arms as a fundamental right rendered the Florida regulatory scheme obsolete?

First, the combination of the concealed weapons permit requirement and the prohibition on open carry effectively eviscerates the rights of Florida citizens to bear arms. Florida courts have held that concealed weapons permits are a privilege, not a right. While defenders of the current scheme assert that the difference is merely semantic, the reality is that privileges are not entitled to the same Constitutional protections as rights. This is illustrated in Crane, which held that the revocation of a concealed weapons permit did not implicate procedural due process because the permit itself was merely a privilege.[7] In addition, the Florida Supreme Court has determined that carrying a concealed firearm is presumptively a criminal act, and that the possession of a concealed weapons permit is only an affirmative defense.[8] As a result, the State of Florida has not only reduced the right to bear firearms to a privilege, but the exercise of that privilege is presumptively a crime. This is a far cry from the ability to exercise the fundamental right to "keep and bear arms" as guaranteed by the Second Amendment. Additionally, since open carry is forbidden altogether, Florida citizens have no *right* to bear arms whatsoever – even those who can obtain a concealed weapons permit only have the ability to exercise a privilege that has been granted to them by the state.

Certain groups of law-abiding citizens do not even have the ability to exercise the privilege under this scheme, which raises equal protection issues. For instance, those between the ages of 18 and 20 are ineligible to obtain concealed weapons permits, despite the fact that as law-abiding citizens they have a right to bear arms.[9] While proponents of the current laws may argue that this restriction should undergo rational basis scrutiny because it is based on age, this is fallacious now that the right to bear arms has been declared to be fundamental. Since the concealed weapon permit law infringes upon a fundamental right, strict scrutiny should actually be applied.[10]

For a law to meet strict scrutiny, the state must show that it has a compelling government interest and that the law is narrowly tailored to meet that interest.[11] It is unlikely that even the most radical gun enthusiast would deny that public safety is a compelling government interest. The problem with the age prohibition is that it is not narrowly tailored to achieve that objective. Persons between the ages of 18 and 20 can be trained to handle firearms responsibly and safely, as demonstrated by military training. Proponents of the current scheme argue that this is just a reasonable restriction, akin to prohibiting those under 21 from drinking alcohol or renting cars. But these comparisons are not analogous because drinking and renting vehicles are not fundamental rights. There is no other fundamental right that is denied to law-abiding adults based on age alone.

Another group that may assert an equal protection problem under this regulatory scheme is comprised of those who cannot afford the concealed weapons permitting fees. Currently, the cost of a concealed weapons permit in Florida is $112.00.[12] Proponents of the law argue that this $112.00 is merely an administrative fee used to do background checks, run fingerprints, and process the application. Yet, somehow, the state of Wisconsin manages to do this same thing for a mere $40.00.[13] The State of Florida has no right to leverage economic status against its citizens to restrict fundamental rights. In fact, there was a time when the poor in this country were prohibited from exercising their fundamental right to vote in the form of poll taxes. This is no different.

So what are some possible remedies for this outdated scheme? There are options that not only protect the right to bear arms but also promote the state's interest in public safety. One would be to retain the current concealed weapon permit requirements, but allow open carry with the same prohibitions against carrying in sensitive locations. Another might be to require proof of attendance at a safety course prior to the purchase of firearms, and then to prohibit private sales. However Florida lawmakers decide to proceed, future legislation needs to reflect the fundamental nature of the right to bear arms.

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JUDICIAL TRIAGE AND THE INJUSTICE OF THE AMTRAK LIABILITY CAP

By Antonette Hornsby

Since Amtrak's creation in the 1970s, the government has poured billions of dollars into the railroad industry while at the same time looking for ways to make it more profitable, safe, and less dependent on federal subsidies.[1] The Amtrak Reform and Accountability Act of 1997 was Congress' attempt to address these concerns. According to the legislative history, federal funding and tort reform were viewed as the proper means to transform Amtrak into a "competitive, efficient customer focused company."[2] When it came to tort reform, officials debated over whether Amtrak should pay punitive damages.[3] Some argued that if punitive damages did apply, then they should have a cap. The reverberating view was that "liability for non-economic compensatory damages should be capped at some reasonable amount to protect the federal taxpayer from the threat of run-away jury verdicts."[4]

The Amtrak Reform and Accountability Act turned out to be anything but reasonable. Instead of simply capping non-economic damages for Amtrak, the Act imposes a $200 million aggregate cap per incident for all passenger claims against all defendants in any Amtrak related incident.[5] Therefore, all economic, non-economic, and even punitive damages must be derived from the $200 million. The cap applies regardless of the size of the incident or the number of victims. If the money runs out before a victim is fully compensated then that individual is simply out of luck. The committee notes preceding the Act suggest that the amount for the cap was set simply because that was the amount Amtrak carried on its insurance policy at the time.[6] By setting the cap to reflect this arbitrary amount, Congress' rationale was that Amtrak could avoid bankruptcy and taxpayers would end up saving millions of dollars.[7]

Almost twenty years later, Amtrak continues to receive billions of taxpayer dollars. Just in the last eight years, Congress has authorized over $25 billion for the passenger railroad industry. Simultaneously, the liability cap protects Amtrak, regional state operated passenger railroad companies that have contracted with Amtrak, and any other contracted private railroad partners (who may supply engineers or conductors) from having to pay one cent over the $200 million cap.[8] In other words, instead of requiring that the railroad companies adequately compensate injured victims, Congress shields these companies and authorizes billions of dollars to improve safety for next time. In effect, victims are left to cover the cost of their own injuries while their tax dollars are being given to the very company that caused them.

For example, the cap was strictly enforced in 2008 after a head on collision between a passenger train and a freight train that left twenty-five people dead and over one hundred injured.[9] In that case, the passenger railroad company was found negligent after an investigation revealed that the engineer was too busy texting to notice his red light signal.[10] After the final decisions, the railroad companies deposited the $200 million with the court and went back to business as usual.[11] The total damages valued between $320 million to $350 million. This was well above the $200 million cap.[12] If a jury had not been stripped of its damage-awarding role, it likely would have awarded at least $320 million.[13] Instead, the court issued "tentative awards" after each hearing, which still exceeded the cap by at least $64 million.[14] Consequently, the court then employed "judicial triage," categorizing victims and rationing the money.[15] Thus, because of the cap, victims of judicial triage were deprived of compensation simply because there was "a shortage of funds to begin with."[16] This meant that the injured victims were responsible for their own medical bills while the company was not.

Despite being found negligent following the 2008 crash, the railroad companies continued benefitting as Congress passed a bill authorizing an estimated $15 billion for the industry.[17] Seven years later, in June of 2015, following a train crash in Philadelphia, Congress authorized another $9 billion.[18] Meanwhile, victims of the crash, which left eight people dead and over two hundred injured, realized that they would likely be left to pick up the tab on many of their own injuries.[19]

These cases illuminate the need for Congress to revisit and amend The Amtrak Reform and Accountability Act of 1997. The cap reflects an arbitrary amount that was set simply because $200 million was the company's policy amount eighteen years ago. The amount does not take into consideration relevant factors such as the size of the crash, the severity of the injuries, or the number of victims involved. This results in two scenarios: victims undercompensated or victims uncompensated. An additional problem is that the cap is not adjusted for inflation. Any new cap should include a mandated inflation adjustment; otherwise any new set amount will encounter the same problem as the current cap:

decreased value. That is, $200 million just does not hold the same value as it did in 1997. Furthermore, the current cap does not consider fault or cause when awarding damages.[20] The Act should allow for a case-by-case analysis instead of applying an overall incident cap to all passenger rail related incidents. A fault-based approach would alleviate the fear that railroad companies would have to pay for incidents out of their control. Additionally, the best solution for the liability cap would be to set no cap for economic damages while enforcing separate per party caps for non-economic and punitive damages. A no cap approach for economic damages would ensure that victims are fully compensated for measureable injuries. Furthermore, this approach would shift power back to judges and juries who could then allocate damages without the constraint of an arbitrary limit.[21] Finally, separate per party caps for punitive damages and per party caps for non-economic damages are reasonable compromises to address the concern of out-of-control jury verdicts. This separate cap approach would at least allow for an injured party to receive some recovery while imposing a reasonable restraint on the amount.

Critics may argue that these suggestions have the potential of bankrupting Amtrak and costing the taxpayers money.[22] However, given the billions of taxpayer dollars that are already being poured into the railroad industry, that argument simply lacks merit. Under the current law, railroad companies are not held responsible when they cause harm to rail passengers. Instead, Congress rewards the industry by authorizing billions of dollars towards safety improvements. This is essentially Congress' way of closing the proverbial barn door after the cows have all escaped. Meanwhile, the railroad companies are the oblivious perpetrators leaving it wide open each time.

True accountability will occur when the aggregate cap is removed. If these railroad companies know that they will be held accountable for all economic damages then they will likely prioritize safety. They should not be protected when they injure the innocent. Further, they should not be allowed to shift medical expenses to their victims. Otherwise, where is the accountability? Rail passengers who are injured by these companies should not have to cover their own measurable medical expenses. "That should [be] the responsibility of these national corporations," as pointed out by the brother of a victim from the 2008 crash. These companies need more than a "slap on the hand."[23]

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LOCKED UP: KIDS EDITION

Is our "tough love" mentality for adolescent offenders having any positive effect?
Or would the majority of these children be better off left within the juvenile justice system?

By Brittney Davis

Florida's Direct File Laws

Florida leads the nation in transferring juvenile delinquents from the juvenile system into adult criminal courts.[1] Sentencing juveniles as adults is a practice recognized nationwide, and has been since the inception of a separate juvenile justice system in the 1890's.[2] While each state has at least one procedure that allows a child to be transferred into adult court,[3] Florida's go-to mechanism is not the norm. Unlike most states[4] that give a neutral judge discretion in transferring juveniles to adult court, Florida leaves all of this discretion in the hands of the prosecution. This is the result of Florida's "Direct File" Statute.[5]

In the majority of states, children are transferred to adult courts through "Judicial Waiver."[6] During these types of proceedings, both the prosecution and the defense have an opportunity to be heard and the presiding judge considers different factors, including the potential for rehabilitation in the child.[7] Florida, however, is one of only 15[8] states that uses what is known as "Direct File" to transfer youths to adult court. When a prosecutor files charges against a child under Florida's Direct File Statute, a plethora of problems arises. Decisions are often made too quickly.[9] The statutes are too broad, providing little to no guidance as to what factors should be considered in each decision.[10] The filing prosecutor often has little information and typically lacks much experience.[11] Hearings are thrown out the window. While Florida Statute § 985.556(2) does provide for the availability of a waiver hearing and sets out procedures for transfer under Judicial Waiver, interviews prepared for a Human Right's Watch Report surrounding Florida's practices indicate that these hearings are rarely sought. In fact, nearly 98% of all transferred children are moved out of the juvenile justice system and into the adult criminal justice system without a judicial hearing.[12] William Cervone, an 8th Circuit State Attorney in Gainesville, was asked once if he had ever requested a hearing. His response was telling: "Why would I?"

But Why?

So what then, is the rationale behind Florida's high rate of sentencing kids to adult prison? There are often three arguments cited as the bases for these practices: (1) the adult system is the only place to incarcerate serious juvenile offenders because the juvenile justice system has failed; (2) if juveniles are sentenced as adults the public will be safer and more protected; and (3) children may learn moral and legal lessons and receive vocational services and psychological attention in adult prison, thereby becoming more productive and rehabilitated citizens.[13] In his 2001 article, Paolo G. Annino discredits each of the rationales, concluding that "Florida's policy is not based on facts but on empty rhetoric."

Failure of the Juvenile Justice System?

In response to the argument that the juvenile system has failed, research has revealed that 43% of the youngest inmates were never even committed to a juvenile commitment program.[14] This means that for almost half of these inmates, the juvenile court system couldn't possibly have failed because it was never even given a chance in the first place.

Is the Public Safer?

Between 2009 and 2013 more than 12,000 juveniles were arrested and transferred into the adult system.[15] However, transfer was not reserved for the "worst of the worst." Of all of the cases that were transferred, property felonies accounted for approximately 39%. Violent felonies also made up 39% of transfers, 8% were drug felonies, and misdemeanor transfers accounted for 4%. Offenses like murder and sexual battery accounted for only 2.7% and 3% respectively.[16] In addition, many of the delinquents transferred to adult courts are not categorized as being "high" risk to re-offend.[17] In fact, data collected indicated that from 2009 to 2013, nearly two out of every five youths transferred were categorized as only "low" or "moderate" risk for re-offending.[18] Recidivism rates among transferred children, when compared to those who remained in juvenile courts, were also troubling.[19] Not only were they more likely to re-offend, but studies reveal that transferred children were more likely to re-offend more quickly and commit more serious felonies.[20] The Department of Corrections also reports that almost 54% of transferred child inmates were released within only three years.[21] How then, is the public to be better protected from these youths? It seems we are making the problem worse by transferring these youths to serve time in adult prisons with adult offenders; numerous studies indicate that "transfer is likely to aggravate recidivism rather than to stem it."[22]

Leave Kids with Other Kids

The idea that all of these transferred children are better off in an adult prison, considering the ramifications that follow, is simply not logical. Not only are juveniles released from adult sentences more likely to commit more frequent and more serious future offenses, they also come out with an adult criminal record. The stigmatizing effect alone negates any benefit to these children. While there may be some

instances where transfer is warranted for a juvenile, that decision should be left up to a neutral judge and not left solely in the hands of the prosecutor.

The juvenile justice system was created for a specific reason. Children are inherently different than adults, and typically make better candidates for programs aimed at rehabilitation because their brains are still developing.[23] Instead of transferring such high numbers of our juvenile delinquents, we should leave them to the juvenile justice system, which was created specifically to handle their cases and is better equipped to handle their needs. Judicial Waiver procedures should remain a readily available option for prosecutors if it seems a delinquent will not be amenable to rehabilitation (after multiple opportunities for change have been provided and the child continues to reoffend) or if the crime is just so heinous that the child is not a good fit for the juvenile justice system. However, these decisions should be made once more information on the child has been made available and a hearing has been held. Florida needs to take a serious look at its current practice of Direct File and take away the blanket discretion provided to our juvenile prosecutors.

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THE SUNSHINE STATE'S SHORTAGE OF SOLAR ENERGY: *Ironic, don't you think?*

By Megan Strayhorn

Florida ranks third in the nation for solar energy potential, yet thirteenth for rooftop solar capacity.[1] Since there is no shortage of sun in Florida, what is hindering solar energy in the Sunshine State?

Implementing solar energy is extremely complex and involves net metering, taxes, rebates, third party purchasers, and third party investors. Under Florida Statute § 366.03, public utility companies are required to provide power.[2] Thus, in the event of a storm inflicted power outage, public utility companies such as Duke Energy or Florida Power and Light must make the appropriate repairs in order for companies and residences to have access to electricity.

Florida is one of four states that prohibit Power Purchase Agreements (PPA).[3] PPAs are agreements between third-party developers and customers in which the developer owns solar panels and customers allow the panels to be placed on their roofs. The benefit of PPAs is that the upfront costs associated with installing solar panels are diminished while customers enjoy smaller monthly utility bills. While Florida Statute § 366 permits "customer-owned renewable generation,"[4] any excess energy produced by the solar panels must be sold back to the public utility company. Although this decreases an individual's power bill, it does nothing to expand access to solar energy beyond that one customer.

The Florida legislature recently killed a proposed amendment that permitted purchasing energy from third parties.[5] If the bill had been adopted, companies and individuals would have been able to create "micro-grids" of self-generated solar power without connection to utility companies. For example, a real estate developer would have been able to implement solar panels into an apartment complex or subdivision. The solar panels would generate enough energy to provide power for all units located within the complex or "micro-grid." While tenants would indirectly pay for power through slightly higher rental prices, monthly utility bills would be eliminated.

Over the last few years, several bills have been proposed to amend Florida's renewable energy laws, none of which were adopted. As the laws stand today, anyone who wants to sell renewable energy must be regulated by the Public Service Commission and thus agree to repair outages when they occur. Although the legislature has attempted to make compromises with small energy companies wanting to implement solar energy, none have agreed to either the obligations or the compromises.

The state legislature more or less has its hands tied. On one hand, the state is concerned with protecting citizens' access to electricity and holding the public utilities accountable for repairing power outages. On the other hand, perpetuating the monopoly against solar energy contradicts legislative intent.[6]

These failed legislative efforts have spurred two proposals to amend the state constitution that could be included on the 2016 ballot.[7] Two different groups, Floridians for Solar Choice (FSC) and Consumers for Smart Solar (CSS), initiated the proposals.

Floridians for Solar Choice, the first to initiate a proposal, is a grassroots organization consisting of frustrated citizens and mom-and-pop solar energy companies. The utility-backed group Consumers for Smart Solar[8] emerged after FSC in an attempt to confuse voters. These proposals deserve much more review than I am capable of here, but are unlikely to pass because Florida requires a supermajority of 60% of votes to amend its constitution.

The bottom line is that Florida's solar power capacity is nowhere near where it should be. Until the laws change, the Sunshine State will be left in the dark. With so much sun, it seems senseless not to utilize it. In the words of President Theodore Roosevelt, "Do what you can, with what you have, where you are."

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MANDATORY MINIMUMS: SENTENCING GUIDELINES OR A LEGISLATIVE ABUSE OF POWER?

By Nick Bocci

As a former police officer,[1] I have seen first-hand how people can make stupid mistakes that change their lives forever. Although I spent a majority of time on the streets, I also served in the courtroom as prosecuting officer.[2] There I witnessed the Judge hand down life-changing sentences. He did not do this because he wanted to do so; rather, it was because the law required him to do so because of minimum sentencing guidelines.

A minimum sentence guideline is a law establishing the minimum amount of time a convicted criminal must serve in prison before becoming eligible for parole.[3] A mandatory sentence is a sentence established by law. In essence, then, a mandatory minimum is the minimum amount of time set out by law that must be given to a person convicted of a particular crime. It leaves the judge no discretion to individualize punishment.

Historically, mandatory minimum sentences were handed out for drug offenses. Congress created mandatory minimum sentences for first time drug offenders with the passage of the Boggs Act in 1951.[4] These offenders were sentenced to a minimum of 2 years or a maximum of 5 years in prison for relatively small amounts of cocaine, cannabis, and heroin.[5] In 1986, Congress enacted the Anti-Drug Abuse Act,[6] which extended the Federal sentencing guidelines for first time offenders from a minimum of 2 years to a minimum of 5 years. It used a 100-to-1 ratio of cocaine/crack to set the sentencing guideline. Thus, for every 100 grams of powered cocaine or 1 gram of crack, the offender would receive a minimum of 5 years of prison. To put that in perspective, 1 gram of crack is about the size of a sugar cube. Congress stated that this was to control the drug abuse epidemic that had started to take over the nation. This change was also in reaction to the zero tolerance policies created by the Drug Free Workplace Act of 1986.[7]

In 2010, President Obama called for the reform of federal mandatory minimum sentences with the creation of the Fair Sentencing Act of 2010.[8] The Act's main goal was to lower the minimum sentence for first time offenders convicted of a felony that carried a minimum sentence.

Mandatory minimums do not only apply to federal law or to drug offenses. Many states have enacted mandatory minimum guidelines, including Florida. Florida has one of the nation's highest incarceration rates and some of the strictest mandatory minimum laws. For instance, Florida's incarceration rate is 17% higher than the national average.[9] Here is just how strict those mandatory minimum sentences are: Florida has so called "Drug Free Zones" that make it illegal to distribute any controlled substance within 1,000 feet of a school (e.g. K-12). Florida Statute 893.13(1)(a) punishes the sale, manufacture, delivery, or possession with the intent to sell a controlled substance as a second or third degree felony depending on the scheduling of the drug activity.[10] If this activity occurs within 1,000 feet of a "Drug Free Zone", the crime is bumped to a first-degree felony with a minimum sentence of 30 years in prison, even if the accused is a first-time offender. There is no evidence to suggest that this mandatory minimum is reducing drug related activity around schools. In fact, this law has had a negative impact on communities located near "Drug Free Zones,"[11] because individuals who would have received 15 years in prison for conducting a cocaine deal on a street corner face a minimum of 30 years in prison based solely on location.

There will always be someone who believes that giving a convicted person a mandatory prison sentence is the answer, but mandatory minimum laws are not the way to go about this. Turning attention back to federal sentencing guidelines, in 2010 there were 10,694 individuals in prison because of mandatory minimum sentences. On average it costs the American public $29,000 a year for one person to sit in prison. So in 2010 it cost taxpayers $310,126,000 to keep these 10,694 incarcerated persons in prison.[12] This money could have been spent on education, military, or law enforcement resources instead of being used to keep offenders in prison because of a mandatory sentence. These laws have turned from guidelines to sentencing laws created by unwavering politicians aimed at keeping criminals off the street.

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1 I was a Police Officer for 7 months in the Town of Dewey Beach, Delaware.
2 I was a prosecuting officer for many of my arrests.
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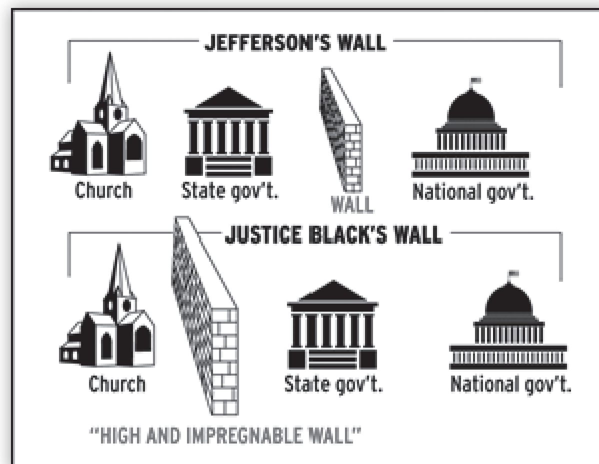
MR. SUPREME COURT JUSTICE, TEAR DOWN THIS WALL

By Jorge W. Rodriguez-Sierra

The wall between church and state. This vacuous phrase has been repeated ad nauseam by atheists and secularists alike for nearly 60 years. What very few people know is that its existence in modern nomenclature can be attributed to a member of the Ku Klux Klan. That Klan member just so happened to be a Supreme Court Justice as well – his name was Hugo Black. Hugo Black was a despicable person and a disgrace both to the Court and the law community at large. Every time I hear about the wall, the wall built by Good Ole racist Uncle Hugo, I bristle as if I were hearing someone quoting Adolf Hitler.

Justice Black, who I'm sure was ashamed of his own last name, was an unabashed racist. In fact, in both his memoirs[1] and his biographies[2] (one of which was written by his own son)[3] Black talked openly about his disdain towards "Negroes, Catholics, and Jews."



Not only was Justice Black a racist, he was obviously not much of a scholar either. The wall he erected came from an opinion he wrote in a case called *Everson v. Board of Education of Ewing*.[4] In this case, the Court actually held that parents who sent their children to school could be reimbursed for the money the spent on bussing to and from school.

"The First Amendment "was intended to erect 'a wall of separation between church and State'...[that] must be kept high and impregnable. We could not approve the slightest breach."[5]

Black later admitted that he ruled with the majority, somewhat ironically, so he could write the opinion and build his wall. "His goal he remarked at the time was to make it a Pyrrhic victory and we quoted King Pyrrhus, 'One more victory and I am undone.'"[6]

Black's supposed "constitutional analysis" consisted of a reference to an excerpt from a letter written by Thomas Jefferson to the Danbury Baptists after he became president.[7] If you are asking yourself, what does that have to do with the Constitution? The answer is nothing; Thomas Jefferson was in France when the Bill of Rights was being written, so Black was not even resting his opinion on anything even tangentially related to the Constitution.

Not only that, but Black choose to totally ignore the context surrounding the letter to the Danbury Baptists. The letter was written to a group of Baptists in Connecticut who were persecuted via state ordinances for their failure to adhere to the restrictions of operating business on holy days and days of religious obligation.[8] These were political supporters of Jefferson, and the letter was written as a thank you note shortly after he was elected. Two days later Jefferson addressed Congress invoking God's name, and even though his attendance at church had been spotty prior to becoming president, Jefferson attended Church every week while serving in office.

So there you have it, the story behind the maxim which is burped up as a Pavlovian response whenever a secularist or similar malcontent encounters faith in public. This foolish axiom was based on a complete lie put forth to further one justice's hate-fueled agenda. The question this begs is why? Why did we let some racist, anti-Semitic, anti- Catholic troglodyte rip God out of our daily lives?

The answer is because the Supreme Court has a fragile ego; its justices think that if they overrule themselves it will trigger the apocalypse. So instead, they decided to heap layer upon layer of more ill-conceived precedent onto this hollow foundation. Think about the "power of judicial review," the spawn of Marbury v. Madison. In Marbury, the Supreme Court granted to itself a power found nowhere in the Constitution. I can't imagine the founders contemplated creating a branch of government that could just grant powers to itself sua sponte, like some sort of juridical hermaphrodite.

Ronald Reagan said it best, as he did so often, "The Constitution was never meant to prevent people from praying, it was meant to protect their freedom to pray."[9]

So now we have this ridiculous patchwork of laws growing like kudzu all over Black's wall of separation of Church and State. Maybe you can have crèche in front of a courthouse, but it can't be by itself. The Ten Commandments can be at courthouses, except when they are too big, or not a part of a certain display (undoubtedly an exception carved out for their own courthouse). Public schools can let religious schools use text books, but hell hath no fury if some sniveling weasel at the ACLU finds out if public schools

let religious schools use their maps or globes. If that didn't make sense it's not because I wrote it wrong or because you read it wrong. That is the bizarre, illogical, and completely unconstitutional path the Supreme Court has chosen to stumble down.

The progeny of Everson include a line of cases riddled with defects and inconsistencies.[10] Thomas Jefferson himself would likely exclaim them to be inbred mutations of what his fellow founding fathers set out to protect. The earliest Americans came to America escaping religious persecution. They were forced to worship surreptitiously in hushed fearful whispers. The First Amendment was crafted so no American would ever have to suffer this indignity ever again. Confusion, disdain, and religious tyranny coalesce when you build a wall separating people from a true fundamental right, a right so important it was placed first in the Constitution. We don't need a wall separating church from state, we need a wall protecting the church from the state.

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CHARTER SCHOOLS: WHEN TAXPAYER DOLLARS ARE PROVIDING FUNDING, THERE MUST BE OVERSIGHT AND TRANSPARENCY

By Jacquelyn Boudreau

The public education system is a benefit enjoyed by the citizens of the United States. Unfortunately, America's public schools have, at times, failed to provide the education students deserve. Parents and families place their most precious cargo in the hands of the public education system and expect their children to be well-taught and nurtured. Every child comes from a different background and has a different learning style. To encourage innovation, foster pedagogical diversity, and meet the needs of all students, Florida enacted the Charter schools system. Charter schools offer a wide range of educational experiences that allow children to receive a quality education tailored to meet their needs. Many Charter schools are hugely successful; however, the exponential growth of Charter schools over the last twenty years has brought many challenges. Charter schools have outgrown the old laws and regulations. Accordingly, it is time to revisit those laws to address the educational challenges of the twenty-first century.

The expansion of the Charter school system is growing faster than the oversight needed to monitor it, compromising its original purpose. The original model was really only effective on a small scale. Charter schools were originally required to abide by less restrictive guidelines than traditional public schools with the hopes that this would allow innovation and give teachers the ability to be creative and flexible. Traditional public schools are required to be transparent, assuring the public that tax dollars are being spent on education and being directed where needed. Even though Charter schools are partially funded by public tax dollars they are not required to be transparent. Laws need to require accountability and transparency to ensure that abuses are not occurring and that students are getting the education they deserve. This not only protects the educational system but also protects the public's investment in education.

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One of the biggest problems with Charter schools is the application process and the ability of companies that operate failing and closing schools to continue to open new Charter schools.[1] Even if an applicant has opened a failing Charter school in the past, there is nothing in the law that requires the school district to deny the application.[2] In fact, the school districts are prohibited from denying an application for that very reason.[3] When the district school board attempts to deny applications, the Board of Education is still free to overturn that denial. Since 2003, the state Board of Education has overturned thirty application denials by local school districts.[4] Consequently, the local officials who are most equipped to know what is needed in their district are not given the means to control what Charter schools are opening. In addition, the district has little power to use its judgment on whether the Charter is actually capable of fulfilling the contract it submits.[5] This ties the hands of the district and leads to approval of Charters that should not be approved. When taxpayer money is being used to fund these schools, this leads to serious problems.

Another complication within Charter schools is management. Charter schools hire outside management companies that charge a percentage to run the school.[6] Many of these companies handle not only finances but have control over the budget, the curriculum, and the hiring of staff.[7] These private management corporations then gain control over the board's decisions. Many times they leverage the money they are managing so the Charter school board and administration have no choice but to do what the management company wants.[8] These management companies are for-profit companies that avoid any violations because the Charter school is technically still a not-for-profit organization that hired a for-profit company to manage them. This organizational procedure diverges from public funding rules and is not what the original concept of a Charter school entailed.

While a Charter school is a not-for-profit organization, the management companies that are hired to run them do not have to be. These private companies managing the Charter school's money often refuse to open their financial books to the governing board of the Charter school, let alone the public.[9] Traditional public schools are public taxpayer funded organizations; therefore, they must comply with transparency laws. Charter schools do not have to comply with these laws. There needs to be more disclosure from these management companies. First, the state should require that the contract between the Charter school and the management company be posted to the school's website.[10] Included should be all the details of the agreement; the services provided by the management company, the financial commitment and compensation agreed to, and any financial information such as fees and bonuses to the management company.[11] Second, the management company should be required to disclose all expenditures and profits related to the operations of each of the Charter schools managed by the company.[12] Third, in order to curb the conflict of interest issue, anyone who has a financial interest in the management company should not be allowed to serve on the governing board of the Charter school.[13] Finally, the governing board must be required to retain independent counsel and an accountant that are not related in any way to the management company.[14] This way the board can be assured that the Charter schools' interests are being looked after.

Charter schools provide a vital service to the public education system. The original laws giving life to Charter schools were intended for small-scale use. The expansion of Charter schools over the last twenty years requires that those laws be revised so Charter schools will be able to provide beneficial services in the future. Public education needs to stay public and not be privatized as a money making venture. Charter schools play a role in the public education system; we just have to ensure that those who need it most, the students, receive the benefit.

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PLANNED PARENTHOOD, #GOFUNDYOURSELF

By Angela Greenwalt

Laws that support the Federal Funding of Planned Parenthood are outdated for two reasons: (1) Planned Parenthood is not the only affordable option for women's healthcare; and (2) a non-profit organization such as Planned Parenthood should not receive federal funds while it is under investigation for trafficking human body parts and being sued for enabling child sex abuse.

Marissa Poulson of Alliance Defending Freedom stated, "No one is suggesting that we cut funds for Women's health. Just Planned Parenthood."[1] Why is Planned Parenthood being singled out for potential defunding? Planned Parenthood would like the American public to believe that it not only provides necessary services for women's healthcare, but that it is also deserving of over $500 million dollars in taxpayer funding annually for those services.[2] Women do not need Planned Parenthood for these services and taxpayer money would be better spent on more deserving low cost, federal-funds eligible health clinics. While there are only 655 Planned Parenthood clinics in the United States, there are as many as 13,540 low cost health clinic alternatives.[3] Most of these clinics are within a 5-mile radius of Planned Parenthood.[4] Getyourcare.org identifies the thousands of other federal-funds eligible facilities that include other "low-cost and free community clinics and private women's health care providers who accept Medicaid patients."[5]

Analysts at Alliance Defending Freedom have determined that if Planned Parenthood's 2.7 million annual customers were to go to the 13,540 other low-cost clinics, those other clinics would not be overwhelmed because they would each only treat one extra patient every other day.[6] While Planned Parenthood provides services other than abortions (pelvic examinations, PAP/HPV testing, STD testing, UTI inspections, manual breast exams, and birth control), the federally qualified alternative health centers include not only those services but mammograms, nurses on staff, bone mass measurement, cardiovascular blood tests, radiological services, well-child services, pediatric eye, ear, dental screenings, cholesterol screenings, diabetes and glaucoma screenings, immunizations, and emergency first responder care as well.[7] Defunding Planned Parenthood would not leave a void in women's health care.

Additionally, Planned Parenthood should not receive Federal funds while it is under investigation for trafficking human body parts[8] and also being sued for enabling child sex abuse. As Alliance Defending Freedom Legal Counsel Natalie Decker stated, "Americans shouldn't be forced to subsidize a scandal-plagued, billion-dollar corporation. The recent [Center for Medical Progress] undercover videos have revealed only the latest scandal…Planned Parenthood has been involved for many years in performing abortions on underage, sexually abused girls and letting their rapists go free, many times to go on abusing the same girl or other children."[9] Its detailed history of ignoring child sex abuse and enabling these predators to continue abusing has found its way into Alabama, Arizona, California, Colorado, Connecticut, Minnesota, and Ohio courts.[10]

Planned Parenthood annually receives $528 million dollars in taxpayer support.[11] This money is given to it through two different sources: (1) Title X "Family Planning;" and (2) the Medicaid Health Care Program.[12] According to analysts, stopping the flow of Title X money should be relatively easy because Congress controls how the money is divided and how much is distributed. Ten states have already moved in this direction by cutting family planning funds. Defunding Planned Parenthood via reduction of Medicaid will likely be a more difficult process because Medicaid funding goes out to states and organizations over a multi-year cycle.[13] According to Planned Parenthood, approximately seventy-five percent of its money is derived from Medicaid.[14] Thus far, the Ninth and Seventh Circuits have struck down state efforts to restrict the funds that Planned Parenthood receives from Medicaid,[15] because Medicaid law has long protected a patient's right to flexibility in choosing a health care provider. The Seventh Circuit held "the defunding law excludes Planned Parenthood from Medicaid for a reason unrelated to its fitness to provide medical services, violating its patients' statutory right to obtain medical care from the qualified provider of their choice."[16]

Women do not need Planned Parenthood. They have other choices: 13,540 in fact. The $528 million dollars in annual funds Planned Parenthood receives from taxpayers should be directed towards the thousands of other low cost clinics available to women. Moreover, as a non-profit, Planned Parenthood should not receive federal funds while it is under investigation for trafficking human body parts and being sued for enabling child sex abuse. Instead, it should be defunded.

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CARING FOR FLORIDA'S S
ON THE ROAD

By Olivia Farrell

In 2012, Florida was third in the nation with 3,412 driver involved fatal traffic crashes.[1] Drivers in the 65 and older category accounted for 474 of those crashes, which was the highest in the nation.[2] This number might not be surprising given that Florida has the highest population percentage of adults 65 years or older.[3] This also means Florida has a high percentage of "senior" drivers over 65. As of now, the Florida license renewal laws do not address the 65 and older senior drivers and the risk that they may pose to other drivers.

Currently, Florida law requires drivers who are under 80 to renew their license every 8 years.[4] If drivers are over 80, they must renew their license every 6 years.[5] In either case, the renewal process consists of an eye exam and a small fee. Based on the more frequent renewal requirements for drivers over 80, it seems that lawmakers are acknowledging that older drivers may need more attention when it comes to their driving skills. Still, the question remains: Are these frequent renewal requirements enough?

Considering the fatality statistics and the number of senior drivers on the road, perhaps now is the time for the Florida license renewal law to be updated. To be fair, it should be noted that any change to the license laws would simply be part of an overall regulatory safety scheme. The Florida Department of Highway Safety and Motor Vehicles has already added restrictions for young drivers on the road. For example, drivers that are 16 years old are only permitted to drive between 6:00 a.m. and 11:00 p.m., while drivers that are 17 are permitted to drive from 5:00 a.m. to 1:00 a.m.[6]

The proposed law would require drivers who are over 65 to take a physical driving test as part of the license renewal process. Florida has an extraordinary number of car accidents with severe injuries and fatalities.[7] The legislature may be able to reduce some of these accidents by updating the law. Florida is an ideal candidate for the updated law because there are other means of transportation available, such as public buses, an array of driving services, and taxi services. Additionally, Florida has a large population that produces substantial traffic. This proposed law would address the traffic problem by taking some unsafe drivers off the road.[8]

Aging causes some seniors to suffer from decreased cognitive abilities such as forgetfulness. A forgetful senior driver may forget to signal, to brake, or even forget on which side of the road to drive. The proposed law might prevent some of these forgetful drivers from getting behind the wheel. Additionally, some senior drivers might find that their forgetfulness is coupled with a decreased mental alertness. An alert driver easily responds to traffic signs, other

drivers, and dangerous road conditions. However, the senior driver who is not alert and responsive to these conditions is more likely to cause injuries on the road.

Along with decreased cognitive functions, seniors are more likely to suffer from deteriorated physical capabilities, such as deteriorated vision.[9] Seniors have a higher risk of developing cataracts, glaucoma, and other vision related conditions.[10] These conditions can negatively affect a senior's ability to drive and make it more difficult for them to see traffic signs, other drivers, pedestrians, and bicyclists on the road.[11] Additionally, seniors are more likely to suffer from hearing impairment.[12] While such a condition is certainly not dispositive of poor driving skills, a senior driver with poor hearing may pose a greater risk to himself and others on the road.[13] Other drivers often warn of danger by honking the horn.[14] Meanwhile, emergency personnel use sirens to warn others. However, senior drivers with hearing impairments may place their lives and other drivers' lives at risk if they are unable to hear these warnings.[15]

Finally, drivers must be coordinated and able to regulate speed, cope with distractions, and react to their surroundings.[16] While a skilled and coordinated driver is capable of regulating speed through different speed zones, an uncoordinated senior driver may find it difficult to quickly adjust speed in various zones. Additionally, drivers face distractions such as cell phones, Bluetooth, GPS, and radio. The availability of such technology can cause even the most skilled driver to become distracted. A senior driver may lack the coordination and ability to safely multitask between these items. A senior driver with decreased coordination may also have difficulty turning a steering wheel, signaling, braking, or accelerating. Lastly, a senior driver who is uncoordinated may have trouble safely reacting to other vehicles, pedestrians, or animals that enter the roadway.

Many senior drivers are safe drivers and are able to manage these conditions on the road. With the proposed 65+ mandatory physical driving test, the "safe" driver will pass the test and be back on the road in minimal time. In those cases, the renewal process will be easy and stress-free. Unfortunately, some senior drivers on the road should not be driving, and each time that they grab the keys they are putting their lives and others in harm's way.[17] In those situations, families may recognize that their loved ones are unable to drive and should not be driving.[18] Still, family members often cannot bring themselves to take the keys away from their loved ones.[19] This law would share that burden, prevent accidents, and help keep these valuable seniors and everyone else on the road safe.[20]

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FEDERAL RESERVE OVERSIGHT AND THE FALSE NARRATIVE OF OLIGARCHY VS. MOB RULE

By Sean Greenwalt

The Federal Reserve is the official national bank of the United States and is responsible for creating America's money supply, setting interest rates, and, in general, stabilizing the nation's economy. Throughout every economic crisis from the Great Depression to the 2008 recession, the Federal Reserve's monetary policy decisions and reasoning behind such policies have been completely free from public knowledge. Over 100 years after the creation of the Federal Reserve, the time is right to strike a careful balance between transparency and the powerbroker of our economy.

Congress created the Federal Reserve as the U.S's central banking system in 1913 via the Federal Reserve Act.[1] The Federal Reserve was created as an independent entity charged with executing and directing the country's monetary and credit policy in order to give the government more control over stabilization of the nation's economy.[2] In theory, the system is meant to operate free from political pressure because it operates without appropriations from Congress or directives from the executive branch. However, this also means that there is little say for the American people concerning the nation's economy.

The Federal Reserve System has three major layers in its hierarchy. First, the Board of Governors oversees the entire system and sets monetary policy through the Federal Open Market Committee ("FOMC").[3] The second layer consists of 12 regional Federal Reserve banks located throughout the country in major cities such as New York City.[4] These regional banks supervise "member banks." Member banks, the final layer, are commercial, national, and state-chartered banks that voluntarily choose to be members of the Federal Reserve.[5]

The Board of Governors is the most important component of the Federal Reserve because each Governor is a member of the monetary policy setting FOMC.[6] Each Governor is elected by the President and confirmed by the Senate, much akin to the nomination of a Supreme Court Justice.[7] However, Federal Reserve Governors only serve 14 year terms and cannot be reappointed.[8]

Monetary policy is set through the FOMC.[9] The FOMC is made up of the 7 Board of Governors, the New York City Regional Bank President (because this bank deals with open market securities trading), and a rotating group of four of the remaining regional bank Presidents.[10] The Federal Reserve, in broad terms, defines monetary policy as "influencing the monetary and credit conditions in the economy in pursuit of maximum employment, stable prices, and moderate long-term interest rates."[11]

The Federal Reserve is subject to some limited oversight, and even an "audit," in the loose sense of the term.[12] However, the serious monetary policy decisions or reasoning for them, are not subject to any scrutiny by the public or Congress.[13]

From 1933 to 1978, no entity was allowed to audit the Federal Reserve until the Federal Banking Agency Audit Act of 1978 was passed.[14] This act gave the Government Accountability Office (GAO) some authority to oversee certain aspects of the Federal Reserve.[15] However, the Federal Reserve's monetary policy decisions were specifically restricted from audit.[16] The GAO is still restricted from investigating the Federal Reserve's: (1) transactions involving foreign national banks, foreign currency; (2) deliberations, decisions, and actions on monetary policy decisions, including interest rate affecting activities such as 'discount window operations,' capital reserves for member banks, securities credits, interest on deposits and open market operations; (3) transactions made by the FOMC; and (4) any communication between the Board, officers, and employees of the federal reserve concerning restrictions (1)-(3).[17]

Unfortunately, while these activities are prohibited from public knowledge, they are actually what most shape America's economy and have the greatest impact on ordinary citizens through bank lending, inflation, and the stock market.

The Federal Reserve has always pushed back against increased oversight into its secret monetary policy deliberations.[18] The main argument against regulation is that if the public knows why the Federal Reserve is making its decisions, then the United States monetary system will become too politicized.[19] The underlying rationale is that hard decisions that need to be made for the greater good will become subject to short-term political gain and benefit from political pressure.[20] The Federal Reserve is a pure lamb that cannot be tainted by such, or so the sentiment would make it seem. There is some merit to making hard decisions based on long term considerations versus choosing a short term economy boost simply to make voters happy. However, we are also completely taking on faith that these "hard decisions" are actually for the good of the people or are even good decisions. The major example in recent years was the economic stimulus package sent to failing banks by the Federal Reserve.[21] Yes, this was a hard decision, and it likely helped save jobs. However, when the Federal Reserve was artificially lowering interest rates that contributed to the subprime mortgage crisis, was this act not also a hard decision that hurt many people?[22] Good or bad, both of these actions and their rationales were off-limits to public review.

It's clear from history that these "hard decisions" are not always good decisions. However, should we risk the country's monetary policy to the whim of the majority? The two competing sides have turned the debate into an oligarchy vs. mob rule warfare mentality. One side fears an invisible banking establishment adverse to an average person's interests, while the other claims increased oversight will lead to economic policy changes at the whim of an ignorant, riled up voter base.

However, Congress created the parameters of the entity and Congress can redefine them as it has in the past. The

argument that the Federal Reserve is totally free from the common man is more of a request than a reality, but it is a request that we should all be skeptical of…

The real answer to this issue likely lies in between both sides, and can be found in standards already available for obtaining government information. The GAO should be able to investigate the Federal Reserve's monetary policy, but the information should not immediately be made available to the public or even every member of Congress. Rather, the GAO should follow the standard set out by the Freedom of Information Act ("FOIA").[23] Under the FOIA, certain categories of information are exempted from disclosure, including sensitive financial or national security information.[24] However, agencies have "discretion to release information when there is no foreseeable harm in doing so and disclosure is not otherwise prohibited by law."[25] In this situation, for true transparent oversight, the discretion for exempted oversight should be removed from the Federal Reserve and given to an independent GAO committee. At that point, the GAO would decide what information could be released to the public at large, and the rest should remain confidential if necessary, but be given to the Senate Committee on Banking, Housing and Urban Affairs, and the House Committee of Financial Services, both of which oversee the Federal Reserve, albeit, in a limited capacity.[26] This way, information that would be truly damaging to the financial world and national security could be kept safe, but "the people," through Congress, would still gain representation in the Federal Reserve's monetary policy decisions. ○

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A TANGLED WEB OF INTERESTS

By Holly Paar

In personal injury cases, defense counsel is often asked to produce the names and number of cases in which they used a certain doctor for plaintiffs' compulsory medical exams (CMEs). A request to produce this information is a strategic move by personal injury attorneys who wish to establish bias between the defense firm and the doctor to whom it repeatedly refers clients. Do the proverbial tables turn? Are plaintiffs' attorneys required to disclose when and if they refer clients to a specific doctor to assess the gravity or permanency of their injuries? Producing such information may uncover an ugly truth; plaintiff attorneys often refer clients to physicians that recommend exceptionally expensive and often unnecessary medical treatments, procedures, physical and occupational therapy, rehabilitation, and even surgeries. Plaintiffs are forced to succumb to the demands of the referred physician and endure numerous appointments and procedures to arrive at a permanent injury rating. The higher the rating, the greater likelihood of a higher settlement.

The unfortunate answer is that defense counsel in Florida are often out of luck with their requests to produce information showing an existing referral relationship due to preclusion by the attorney-client privilege. In *Burt v. Government Employees Insurance Co.*, the court held that the attorney-client privilege protects disclosure of a client referral to a physician regardless of any blatant relationship between the plaintiff's firm and the treating physician.[1] However, there is a glimmer of hope thanks to the recent decision in *Worley v. Central Florida Young Men's Christian Ass'n, Inc.*[2] In *Worley*, the plaintiff did not see a specialist physician for more than a month after her slip-and-fall in a YMCA parking lot. Rather, she began her search for representation. Upon retaining counsel, she suddenly accrued unusually high medical bills from several physicians at a certain orthopedic office. The negligence suit included damages accumulated from those healthcare providers. While deposing the plaintiff, defense counsel asked who had referred her to that certain orthopedic office. Her attorney objected on the grounds of attorney-client privilege. Other attempts at ascertaining a referral relationship through interrogatories and supplemental motions to produce were fruitless. Thanks to Burt, defense counsel in Worley had their hands tied. They could do little to uncover the obvious truth; Worley's attorneys had referred her to several doctors they knew would provide a medical report with a permanent injury

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rating. The court in Worley certified conflict with *Burt v. Government Employees Insurance Co.*,[3] and now it awaits the Florida Supreme Court.

Personal injury attorneys are likely to argue that a decision requiring them to produce information relating to financial agreements with physicians invades the privacy of patients who are not parties, erodes the sanctity of attorney-client privilege, and is overly burdensome. While the interests protected by physician-patient confidentiality and attorney-client privilege are compelling, they do not outweigh the necessity of establishing the extent of a relationship between a treating physician and counsel. After all, bias is always relevant to the fact-finder.

First, courts have continuously expressed a willingness to allow private information to be redacted to protect the privacy of patients who are not parties in the current suit. Furthermore, it would be a rare situation in which confidential information identifiable to a patient would be within any financial agreement between a doctor and a firm.

True, we want to protect the sanctity of attorney-client privilege; this long established recognition deserves adherence. However, if there is an obvious referral relationship like the one established in *Worley*, defense counsel ought to be given reasonable means to discover financial documentation between the firm and the treating physician, particularly if the doctor is likely be called to testify as an expert witness. The evidence code allows a witness's credibility to be attacked based on bias,[4] and if a treating physician is called as an expert witness, he or she is subject to impeachment during trial.[5] Such bias is normally explored during discovery, when a person expected to testify as an expert witness may be required to produce documentation showing his "general litigation experience, including the percentage of work performed for plaintiffs and defendants."[6] Without allowing discovery of previous or contemporaneous agreements, the defense faces an overly burdensome challenge in showing these "cozy agreements."[7]

We can arguably inhibit erosion of the privilege by first requiring defense to provide evidence of a referral relationship before blindly risking a violation of interests. Once such evidence is produced, defense counsel should request production of all informal or formal agreements between the plaintiff's firm and the referring physician from the physician himself. Only after the treating physician fails to produce referral agreements or arrangements would it be necessary for the plaintiff's firm to produce them.[8] Defense experts are required to maintain records of their financial dealings.[9] Plaintiff experts can justifiably be expected to do the same.

Depositions are a vital component of the trial process in every state. A trial is the truth-seeking function of our court system. After defense counsel produces evidence of a referral relationship, it would seem that permitting them to establish bias has all the relevancy and fairness necessary to withstand personal injury attorneys' objections on the ground of attorney-client privilege. Furthermore, it is arguable that the scope of the attorney-client privilege does not even extend to any relationship between the plaintiff's firm and a treating physician.

Let's reiterate the current one-sidedness that *Burt* allows. While we await the Florida Supreme Court's decision, personal injury plaintiffs can walk into an attorney's office, hire and receive representation, obtain a referral to a physician known by that attorney to provide unreasonably expensive services, and not be required to produce the referral. Not surprisingly, as the costs of services increase, damages increase, and so do the economic returns to the attorney and his firm. Conversely, plaintiff attorneys can require defense counsel to produce the number of times they referred the same plaintiff to a certain doctor for a CME. This does not achieve the purpose of attorney-client privilege – public policy, fairness, impartiality, and justice certainly come to an immediate collision in this scenario that is not only continuous and widespread, but prevalent.

Hopefully, the Florida Supreme Court will untangle this web of interests in favor of justice and fairness. The decision in Burt provides for an unnecessarily broad rule with the idea that it protects the sanctity of attorney-client privilege, but in doing so, precludes important and needed measures that will provide evidence of bias to the fact-finder. After all, what's good for the goose should be good for the gander.

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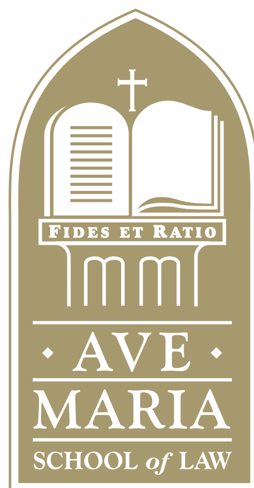

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