BUSH V. HOLMES: SCHOOL VOUCHERS AND STATE CONSTITUTIONS

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INTRODUCTION

In America's ongoing debate about how to better the education of our children, school vouchers have become a popular solution in recent years.[1] Proponents argue that school vouchers improve existing public schools by putting them in competition with other public and private schools.[2] Several states have adopted school vouchers in hopes of rescuing their failing public school systems; indeed, this was the goal of the first school voucher program, established by Wisconsin for the Milwaukee area in 1990.[3] The State of Florida implemented its own voucher system in the form of the Opportunity Scholarship Program (OSP).[4] This program immediately became the focus of public debate and court challenges. A series of constitutional challenges, initiated in 1999 by public school teachers' unions,[5] culminated in the Florida Supreme Court case of *Bush v. Holmes*.[6] In a decision that Florida Governor Jeb Bush called "a blow to educational reform,"[7] the court declared the state voucher program void under the Florida State Constitution.[8]

The Florida Supreme Court's decision comes in the wake of the United States Supreme Court's holding that school voucher programs are not prohibited by the Establishment Clause of the United States

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1. Brian L. White, Comment, *Potential Federal and State Constitutional Barriers to the Success of School Vouchers*, 49 KAN. L. REV. 889, 889 (2001).
2. *Id.*
3. Sam Dillon, *Florida Supreme Court Blocks School Vouchers*, N.Y. TIMES, Jan. 6, 2006, at A16; WISC. STAT. ANN. § 119.23 (West 1999); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 685 (1998).
4. FLA. STAT. ANN. § 1002.38 (West 2005).
5. Dillon, *supra* note 3.
6. Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).
7. Dillon, *supra* note 3.
8. *Holmes*, 919 So. 2d at 398.

Constitution.[9] As more courts consider the validity of school voucher programs, the decision in *Holmes* may set an important tone in the battle over school choice in states around the country.[10]

I.
The Opportunity Scholarship Program

The Florida state legislature created the OSP in an effort to provide a solution to Florida's failing public school system.[11] The legislature intended, according to the statute, "to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a technical education, or the world of work."[12] With that goal in mind, the Legislature further found that "a student should not be compelled, against the wishes of the student's parent, to remain in a school found by the state to be failing."[13] The program gives students who attend failing public schools two options: to move to a public school that is not failing, or to get assistance from the state to pay tuition at a private school within the state.[14] More precisely, the student's parent will be able to "apply the equivalent of the public [school] education funds generated by his or her child to the cost of tuition."[15] These are funds, taken from the public treasury, that would otherwise have been distributed to the failing district public school the student would normally attend.[16] The OSP funds are placed in an account designated for use by the program; as a result, the payments to participating students directly diminish the amount of state funding distributed to the public school district.[17] As the court noted in *Holmes*, the OSP maintains a given student's scholarship even when the "failing" public school has made substantial improvements.[18]

9. Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).
10. Dillon, *supra* note 3.
11. Fla. Stat. Ann. § 1002.38(1) (West 2005).
12. *Id.*
13. *Id.*
14. *Holmes*, 919 So. 2d at 397.
15. Fla. Stat. Ann. § 1002.38(1) (West 2005).
16. *Holmes*, 919 So. 2d at 397.
17. *Id.* at 408–09.
18. *Id.* at 401.

II.
THE FLORIDA SUPREME COURT'S DECISION IN *BUSH V. HOLMES*

The Florida Supreme Court's holding in *Holmes* is that the OSP violates the education clause of the Florida constitution; the public school system is the only constitutional means by which the state can provide for education, and the voucher program removes money from that system and redirects it to private schools.[19] However, as I will explain below, the aspect of the court's decision that is particularly interesting is the additional constitutional issue it chose not to address. Specifically, the court found it unnecessary to determine whether the OSP violated the "no aid" provision of the Florida constitution,[20] as the First District court had held.[21] Both the education clause argument and the "no aid" provision argument that arise in these cases offer insight into the legal battle surrounding school voucher programs that has now focused on state constitutionality and state courts.

A. The OSP and the Florida Education Clause

The Florida Supreme Court found that the OSP was repugnant to the language of the education clause of the state constitution, which states that "[i]t is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for uniform, efficient, safe, secure, and high quality system of free public schools."[22] The court found that the OSP's use of public funding for the support of private schools violated the education clause's particular "constitutional mandate" for a state educational *system*.[23] That is, the school voucher program funds a non-uniform assortment of private schools, disregarding the "uniform system of public schools" which the constitution provides as the sole means for the state to provide for the education of its children.[24]

The court discussed the history of the education clause at some length. The court noted that, while the clause has always been a part of the Florida constitution, it has expanded over time to reflect the growing importance of education to the people of Florida and the increasing responsibility placed on the state government to provide that

19. *Id.* at 398.
20. *Id.*
21. Bush v. Holmes, 886 So. 2d 340, 344 (Fla. Dist. Ct. App. 2004).
22. FLA. CONST. art. IX, § 1(a).
23. *Holmes*, 919 So. 2d at 398.
24. *Id.*

education.[25] In 1998, the state adopted an amendment designed to provided depth and clarity to the clause by creating more specific standards for the "adequate provision" of education by the state. It was this amendment that added the third sentence of the education clause, specifically addressing the uniformity, security, safety, and quality of the public school system.[26]

The court read the clause as providing a constitutional mandate for a particular type and manner of state-financed education.[27] In interpreting the current incarnation of the education clause in Article IX, section 1(a), the Court found that there were three facets to the clause: First, the clause makes the education of children a "fundamental value" of the state and a main priority for the state government; second, it gives the state the responsibility of providing for that education; and third, it "sets forth *how* the state is to carry out this education mandate."[28] As mentioned above, the court found that this last part of the clause dictated the sole means for providing for the education of the children, namely a uniform system of free public schools. In coming to this conclusion, the court's major interpretive step was to read the 1998 amendment of the clause, which provided standards for the adequate provision of education, as a limitation on the Legislature's power. The court based this argument on a method of statutory interpretation known as "expressio unius est exclusio alterius," stating that "[w]here the Constitution expressly provides the manner of doing a thing, it impliedly forbids it being done in a substantially different manner." Since the "uniform, efficient, safe, secure, and high quality system of free public schools" is a constitutionally provided mechanism by which the Legislature will adequately provide for state education, the Legislature is limited to that method. In omitting any reference to this component of the education clause[29]—a "crucial" omission—the Legislature failed to account for the constitutional limitations on its power to provide for the education of Florida's children.[30]

The OSP, the court found, is a "substantially different manner" of providing for education than the one mandated by the education clause in Article IX, and is therefore unconstitutional.[31] The OSP does nothing to establish uniformity. Instead, the OSP gives money to private

25. *Id.* at 402–05.
26. *Id.* at 403.
27. *Id.* at 405.
28. *Id.*
29. *Id*. at 406.
30. *See id*.
31. *Id.* at 407.

schools that are not uniform when compared to public schools and not uniform with respect to each other; private schools are not subject to the same standards as those applicable to public schools, their curricula need not address the same material, and their teachers need not have the same qualifications as their public school counterparts.[32] In addition, the OSP fails to promote the constitutional purpose of creating a "high quality" system of free public schools. While an argument can be made that a school voucher program indirectly increases the quality of public schools by putting them in competition with each other and with private schools in the state, the court noted that, by reducing the amount of funding going to failing public schools, the OSP's primary effect is to detract from the public schools' ability to provide a high quality education.[33]

Although the court held that the OSP itself violated the education clause of the Florida constitution, it did not declare school choice, or parental choice of alternatives to failing public schools, to be per se unconstitutional. Rather, "[o]nly when the private school option depends upon public funding is choice limited."[34] The constitution does not allow the Legislature to use state money to "fund a private alternative to the public school system."[35] The OSP, by transferring money from the public treasury to a special account for the school voucher program, does just that, and is therefore repugnant to the education clause.[36]

B. The OSP and the "No Aid" Provision

In deciding *Holmes*, the Florida Supreme Court relied principally on the education clause rationale discussed above, and made no finding on the issue of whether the OSP violated the "no aid" provision of the Florida Constitution.[37] This choice was particularly interesting, since the First District invalidated the law *solely* on "no aid" grounds without addressing the constitutionality of the OSP in relation to the education clause, and certified a question to the Supreme Court focused only on the "no aid" provision.[38] With that in mind, it is worthwhile to briefly review the First District's analysis. Since the lower court's rationale was not expressly disclaimed by the Florida Supreme

32. *Id.*
33. *Id.* at 408–09.
34. *Id.* at 412.
35. *Id.* at 408.
36. *Id.*
37. *Id.* at 413.
38. *Holmes*, 886 So. 2d at 367.

Court, it may be useful for the analysis of the constitutionality of school voucher programs in other states.

The "no aid" provision of the Florida Constitution states that "[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of . . . any sectarian institution."[39] The First District held that the OSP violated this provision in allowing public funds to be paid to religiously affiliated private schools in Florida.[40] In understanding the lower court's decision in *Holmes*, it is extremely important to distinguish between the "no aid" provision of the state constitution and the Establishment Clause of the United States Constitution.[41] The reason such a distinction is of primary importance in the case of school vouchers is that the U.S. Supreme Court had already held, in *Zelman v. Simmons-Harris*, that school voucher programs are constitutional under the Establishment Clause.[42] If the state constitution's "no aid" provision were coterminous with the Establishment Clause, then the case would be decided under *Zelman*. And in fact, the State made such an argument to the First District.[43] The First District rejected this argument, concluding that article I, section 3, while incorporating the language of the Establishment Clause, adds an *additional* restriction in the form of the "no aid" provision.[44] This interpretation of the state constitution is what opens the court to the analysis of the OSP under the "no aid" provision and allows it to find the program unconstitutional.

The Florida "no aid" provision was adopted in 1868, at a time when many states were adding so-called "Blaine Amendments" to their constitutions. Like many of these states, Florida's goal was to prevent the Legislature from using money from the public treasury to fund sectarian schools.[45] By 1900, 35 states had similar provisions in their constitutions, and today that number has risen to over 40.[46] The First District began its analysis, however, by noting that Florida's version of the Blaine Amendment is *more* strict than most, not only limiting its prohibition to direct funding of religious schools, but also preventing the State from indirectly providing public money to these

39. FLA. CONST. art. I, § 3.
40. *Holmes*, 886 So. 2d at 344.
41. U.S. CONST. amend. I.
42. 536 U.S. 639, 644 (2002).
43. *Holmes*, 886 So. 2d at 344.
44. *Id.*
45. *Id.* at 348–49.
46. *Id*. at 349.

institutions.[47] In fact, as the First District noted, the United States Supreme Court had previously held that Blaine Amendments similar to Florida's prevent the state government from using public tax funds to support religious institutions.[48]

According to the First District, there are three elements required for a violation of the "no aid" provisions: A court must find that (1) the law in question involves the use of state revenues; (2) the prohibited use of the state revenues directly or indirectly aids the beneficiaries of the program; and (3) the beneficiaries of the law are sectarian institutions.[49]

The First District found that Florida's school voucher program met all three elements. The OSP uses state revenues to pay the tuition for children to attend private schools.[50] While the voucher funds are not directly given to the private schools, the statute allows the parents of the student to endorse the voucher over to the private schools, and thus the private schools are indirect beneficiaries of the program.[51] Finally, the law does not limit the payment of the vouchers to nonsectarian institutions; rather, it allows the voucher funds to be given to religious schools.[52] In fact, "the vast majority of the schools receiving state funds from OSP vouchers . . . are operated by religious or church groups with an intent to teach their attending students the religious and sectarian values of the group operating the school."[53]

The invalidation of the school voucher system on these grounds was not without certain implications that could be politically and practically perilous, and the First District seemed well aware of the danger. The court made it clear that its holding applied only to the OSP, and was not intended to implicate any other state programs.[54] Of particular concern here would be various state programs run by religiously affiliated organizations, such as hospitals.

47. *Id.* at 350.
48. *Id.* (citing Locke v. Davey, 540 U.S. 712 (2004)).
49. *Id.* at 352–53.
50. *Id.* at 352.
51. *Id.* at 352–53.
52. *Id.* at 353–54.
53. *Id.* at 354.
54. *Id.* at 362.

III.
THE IMPACT OF *BUSH V. HOLMES*

A. The Education Clause Analysis

While the *Holmes* decision has no direct legal impact on the school voucher and parent choice decisions that face state legislatures and courts elsewhere in the United States, it is likely that the decision will inspire challenges to school voucher programs nationwide. In fact, some commentators have suggested that the Florida Supreme Court's decision could play a significant role in the ongoing debate over the legality and efficacy of school voucher programs.[55] Opponents of school vouchers have certainly been pleased by the decision, and "[v]oucher proponents across the nation [have] called the ruling a setback."[56] The importance of this case has not been underestimated by some of the major national players in this area, including both the Alliance for School Choice—a prominent proponent of voucher programs—and the American Federation of Teachers, which opposes voucher programs.[57]

One reason *Holmes* may be especially important is that the education clause is not an innovation unique to Florida. At present, forty-nine states have language in their constitutions guaranteeing to their children the right to some level of education provided by the state.[58] Many states also have specific provisions mandating that public education be "uniform."[59] However, the strength of the various states' education clauses varies. It is therefore worthwhile to note the different types of education clauses that exist and examine the potential impact of *Holmes* based on the similarities and differences between Florida's education clause and the analogous provisions incorporated into other state constitutions.

Generally speaking, state education clauses that provide stronger constitutional mandates will pose greater challenges to school voucher programs.[60] Academics have sometimes found it helpful to categorize state education clauses based on their specific requirements.[61] Notably, Gershon Ratner divided the state constitutional provisions into four categories: the first group creates only a basic requirement to pro-

55. *See* Dillon, *supra* note 3.
56. *Id.*
57. *Id.*
58. Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 795 (1995).
59. *See* Dillon, *supra* note 3.
60. White, *supra* note 1, at 932.
61. *See id.* at 926.

vide for education; the second group offers general standards for the provision of education; the third group provides "a stronger and more specific education mandate"; and the fourth group makes the provision of education a paramount responsibility of the state government.[62] At the time of the publication of his article, Ratner placed the Florida provision in the second category, since it contained only general standards for the quality of the education to be provided for the state's children.[63] However, as noted above, the clause was subsequently amended to include language that makes the adequate provision of education a "paramount duty of the state" and "a fundamental value" of its people.[64] Moreover, the amendment laid out specific and exacting standards for the adequate provision of education.[65] With these changes, the Florida provision should properly be grouped in Ratner's fourth category; in particular, its language now strongly resembles that used by states that Ratner found to have especially strong requirements such as Washington.[66]

Given this categorization, the Florida Supreme Court's analysis in *Holmes* may similarly be applied to any school voucher programs that arise in states within this fourth category. By Ratner's count, there are seven states other than Florida that "mandate the strongest commitment to education."[67] The particular aspect of the *Holmes* decision that will be applicable to these other strong state provisions is its holding that such clauses create a mandate and a duty for the state government to ensure that the children of their state are educated according to the specific constitutional standards set forth.[68] While the exact standards may differ even among the states within the fourth category, they all set a high bar for the provision of public education.

However, it seems unlikely that *Holmes'* impact will be limited to only those states with the most stringent education clauses. Given that every state education clause requires, at minimum, that the state government provide for some system of free public schools,[69] the argument in *Holmes* that the education clause forbids the state to use

62. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 815–16 (1985).
63. *Id.* at 815, n.144.
64. FLA. CONST. art. IX, § 1(a). *See Holmes*, 919 So. 2d at 403.
65. FLA. CONST. art. IX, § 1(a).
66. Ratner, *supra* note 62, at 816; WASH. CONST. art. IX, § 1.
67. *See* Ratner, *supra* note 62, at 816 & n.146 (citing GA. CONST. art. VIII, § 1; ILL. CONST. art. X, § 1; ME. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MO. CONST. art. IX, § 1(a); N.H. CONST. pt. 2, art. 83).
68. *See Holmes*, 919 So. 2d at 406–07.
69. White, *supra* note 1, at 932.

public funds to fund private schools may be applicable to any state that chooses to enact a school voucher program.[70] Moreover, *Holmes'* discussion of the "uniformity" and "high quality" requirements could apply to states that fall under the second or third category of education clauses—that is, those states whose constitutions provide explicit educational standards.[71]

On the other hand, decisions in two other states that currently have school voucher systems suggest that the significance of the *Holmes* decision might not be so large. Under Ratner's classification scheme, both the Ohio and Wisconsin education clauses fall into the second category of clauses, creating only general standards for the provision of education.[72] In both states, challenges have been brought under the education clauses of the respective state constitutions, and have been rejected.[73]

In *Jackson v. Benson*, the Wisconsin Supreme Court rejected the argument that the school voucher program violated the uniformity provision of that state's education clause.[74] While this seems to be the exact opposite of the court's decision in *Holmes*, there is a notable difference in the arguments presented to the courts. Unlike *Holmes*, the plaintiffs in *Jackson* did not argue that the school voucher program led to a system of schools that did not meet the uniformity standard. Rather, they argued that, by receiving public funds, the private schools effectively *became* "district schools," which must be held to the uniformity standard and are not permitted to offer religious instruction. Thus, the private schools, as district schools, would per se fail to meet the uniformity standards of the Wisconsin education clause.[75] As a result, the court, in order to reject the challenge, merely had to decide that the receipt of public funds did not convert the private schools into district schools.[76] On the other hand, the *Jackson* court did go on to say that the school voucher system "in no way deprives any student of the opportunity to attend a public school with a uniform character of education."[77] In any case, because Wisconsin's education clause is not especially stringent, the rationale employed in *Holmes*—namely, that the education clause sets out the sole means by which the state is

70. *Holmes*, 919 So. 2d at 408.
71. *See id.* at 409–10.
72. *See* Ratner, *supra* note 62, at 815 & n.144.
73. Jackson v. Benson, 578 N.W.2d 602, 607 (Wis. 1998); Simmons-Harris v. Goff, 711 N.E.2d 203, 206–07 (Ohio 1999).
74. *Jackson*, 578 N.W.2d at 627–28.
75. *Id*.
76. *Id.*
77. *Id.* at 628.

to provide for the education of its children—was not available to the court.[78]

In *Simmons-Harris v. Goff*, the Ohio court rejected the contention that the education clause prohibited the establishment of non-public schools that were supported by public monies.[79] Noting the long history of coexistence between public and private schools, the court concluded that the support currently being given to private schools through the voucher program is not substantial enough to "undermin[e] the state's obligation to public education."[80] The court did note, however, that if the school voucher program was expanded, and private schools received more funding at the expense of public schools, there could be a constitutional problem.[81] Once again, since Ohio's education clause is not nearly as strong as Florida's, there was little reason for the court to find that the constitutional mandate to provide for the education of students through public schools defined the sole means by which the state could achieve that end.

Jackson and *Simmons-Harris* may have the effect of limiting the potential impact of the *Holmes* decision in states that do not have education clauses falling into the most stringent fourth category. However, it should be noted that only a small sample of cases have addressed school voucher programs in light of state education clauses; at present, Florida represents one third of the states that have examined the issue. It will be interesting to see how future school voucher programs will withstand challenges under the education clauses of the state constitutions, given that "[d]espite inconsistent interpretations, state education clauses likely are the most substantial stumbling block to the implementation of voucher programs."[82]

B. The "No Aid" Provision

The Florida Supreme Court chose to "neither approve nor disapprove the First District's determination that the OSP violates the 'no aid' provision."[83] It may therefore prove important and relevant to examine any possible impact that the First District's reasoning may have on other states considering school voucher issues. Most state constitutions contain a "no aid" provision, and a majority of these provisions

78. *See id.* (noting that the education clause "provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin").
79. *Simmons-Harris*, 711 N.E.2d at 212.
80. *Id.*
81. *See id.* at 212 n.2.
82. White, *supra* note 1, at 931.
83. *Holmes*, 919 So. 2d at 413.

forbid the states to directly fund sectarian schools.[84] As with Ratner's categorization of state education clauses, there have been attempts to classify the different types of state religion clauses based on how restrictive they are towards state action.[85] Frank Kemerer provides an analysis that is especially relevant here, categorizing state "no aid" provisions based on his assessment of how restrictive they are towards school voucher programs that would allow funding of sectarian schools.[86] Kemerer places those provisions that prohibit both direct and indirect aid to sectarian institutions in the most restrictive category.[87]

Florida's provision falls squarely into this most restrictive category, since it expressly forbids both direct and indirect aid.[88] Four other states fall into this category, including Oklahoma.[89] Kemerer also expands this category to include constitutional provisions that proscribe any aid that "supports," "benefits," or "assists" religious private schools, and thus encompass the same meaning as indirect aid.[90] This includes twelve more state constitutional provisions in this most restrictive category.[91] The First District's decision, based on the Florida constitution's restrictive "no aid" provision, could be seen as persuasive precedent for potential school voucher challenges in any of these states.

Kemerer notes that the approval of state school voucher programs that benefit sectarian private schools would be difficult in states that have case law declaring their anti-establishment clauses to be more stringent than the Federal Constitution's Establishment Clause.[92] As discussed above,[93] the First District explicitly found that the religion provision of the Florida constitution was more restrictive than its federal counterpart.[94] This provides an additional reason why the First District decision may be persuasive in cases that arise in states with

84. White, *supra* note 1, at 913–14.
85. *See, e.g.*, Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 ED. LAW REP. 1, 4 (1997).
86. *Id.*
87. Kemerer, *supra* note 85, at 5.
88. FLA. CONST. art. I, § 3.
89. OKLA. CONST. art. II, § 5.
90. Kemerer, *supra* note 85, at 6–7.
91. *Id.* (citing, e.g., COLO. CONST. art. IX, § 7; DEL. CONST. art. X, § 3; IDAHO CONST. art. IX, § 5.)
92. Kemerer, *supra* note 85, at 7–8 (citing Epeldi v. Engelking, 488 P.2d 860 (Idaho 1971); In re Certification of a Question of Law from the United States District Court, Elbe v. Yankton Indep. Sch. Dist., 372 N.W.2d 113 (S.D. 1985).).
93. *See supra* Part I.B.
94. *Holmes*, 886 So. 2d at 344.

more restrictive "no aid" provisions, especially given the Supreme Court's decision in *Zelman*.

It is not clear whether the First Circuit's decision in *Holmes* could have any impact outside of this most restrictive category. Once again, it is instructive to look to Wisconsin and Ohio, both of which Kemerer places in an "uncertain" category.[95] Both Wisconsin and Ohio have rejected arguments that those states' school voucher programs violate their respective "no aid" clauses.[96] The Wisconsin court found that the state provision was equivalent to the federal Establishment Clause, and therefore presented no obstacle to the voucher program.[97] The Ohio court, by contrast, found that Ohio's religion clause was not coterminous with the federal Establishment clause; nevertheless, it still found that the school voucher program was constitutional.[98] Thus, the picture appears muddied outside of the most restrictive constitutional provisions, and the impact of the First District's "no aid" provision analysis may be quite limited.

CONCLUSION

This recent development was intended to bring to light the most important aspects of the Florida Supreme Court's decision in *Holmes* and its relation to the lower court decisions within the state. Although its immediate impact was limited to the Florida OSP, *Holmes* can be seen as a paradigm of the type of legal challenges, and perhaps even the strongest legal challenges, that are likely to be brought to school voucher programs throughout the United States. Even if the case's impact is limited to the states with the most restrictive education clauses and most restrictive "no aid" provisions, *Holmes* may still have a substantial effect on legal thinking about school vouchers. It may even meet one commentator's expectations and "reverberate through battles over school choice in many states."[99]

95. *See* Kemerer, *supra* note 87, at 27, 32.
96. *Jackson*, 578 N.W.2d at 620–23; *Goff*, 711 N.E.2d at 211–12.
97. *Jackson*, 578 N.W.2d at 620.
98. *Goff*, 711 N.E.2d at 211–12.
99. Dillon, *supra* note 3.