THE COMMON LAW AND THE RULE OF LAW: AN "UNCOMFORTABLE RELATIONSHIP"

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I. INTRODUCTION

This Article explores the domain of the common law, specifically as it has developed in Florida. A variety of sources are examined, reflecting a range of perspectives and spanning several centuries, with a focus on answering fundamental questions and making realistic assessments about the scope of judicial authority in remolding or modernizing the common law. Part II of this Article examines the definition and history of the common law, while Part III explains its tradition and methodology. Part IV provides an overview of the era of judicial policymaking by fiat, and Part V explains the relationship between the common law and the rule of law, as manifested in the constitutional principle of separation of powers. Part VI offers concluding remarks on how judicial authority to remold the law has impacted common law jurisprudence, the judiciary, and the legal profession, particularly in Florida.

II. DEFINITION AND HISTORY OF THE COMMON LAW

In the second of his seven essays written in 1773 and collectively entitled *The Independence of the Judiciary*, John Adams, a Founding Father, our second President, and an experienced common law lawyer, makes an effort "to determine with some degree of precision what is to be understood by the term[] 'common law.'"[1] Citing the first volume of Sir

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1. JOHN ADAMS, *The Independence of the Judiciary (1 February, 1773)*, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 88 (C. Bradley Thompson ed., 2000).

William Blackstone's *Commentaries on the Laws of England*, Adams concludes as follows:

> General customs, which are the universal rule of the whole kingdom, form the common law in its stricter and more usual signification. This is that law which determines . . . a multitude of . . . doctrines, that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support. Judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The law and the opinion of the judge are not always convertible terms; though it is a general rule, that the decisions of courts of justice are the evidence of what is common law.[2]

Adams's understanding of the common law through Blackstone likely was accepted generally in his time. But, while in its nascent stages the common law may have been viewed as an exposition of generally accepted social practices and customs, very early in its development "any equivalence between custom and common law had ceased to exist, except in the sense that the doctrine of *stare decisis* rendered prior judicial decisions 'custom.'"[3] In Florida, by the early twentieth century, the common law was defined as a "tradition" and "not a fixed body of well-defined rules embodied in the written records of this or the mother country, but . . . rather a method of juristic thought or manner of treating legal questions worked out from time to time by the wisdom of mankind."[4] The progression from expounded customs to a tradition or method of juristic thought followed changing attitudes about the nature and purpose of the common law.[5]

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2. *Id.* (footnote omitted).

3. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 4 (1997).

4. Orr v. State, 176 So. 510, 513 (Fla. 1937).

5. The evolution of those changes can be traced in the writings of various legal scholars such as Sir John William Salmond, Benjamin Cardozo, Oliver Wendell Holmes, and Dean Roscoe Pound. JOSEPH H. SMITH, DEVELOPMENT OF LEGAL INSTITUTIONS 2, 44 (1965). Sir John William Salmond stated:

> Orthodox legal theory indeed long professed to regard the common law as customary law, and the reported precedents as merely evidence of the customs and of the law derived therefrom. But this was never much better than an admitted fiction. In practice, if not in theory, the common law of England has been manufactured by the decisions of English judges.

Id. at 44 (quoting John W. Salmond, *The Theory of Judicial Precedents*, 16 LAW Q. REV. 376, 376 (1900)). Benjamin Cardozo stated:

In England, the common law had evolved from a process of appealing directly to the king, and "the rise of the king's courts, the jury, the system of actions, and the policy of a uniform law are all phases of an attempt to centralize and strengthen monarchial power."[6] Gradually, the appeals were made to the king's chancellor, his secretary and agent, who for a fee might grant a writ conveying authority to the king's judges to exercise jurisdiction and direct the sheriff to arrest the defendant.[7] Over time, new writs were framed and common law actions for trespass, case, ejectment, detinue, replevin, trover, covenant, debt, assumpsit, and account evolved along with substantive law for each type of action.[8] But, because each new situation had to be considered under the existing inflexible formulae, decisions often consisted of creative, and sometimes disingenuous, justifications for the conclusions in light of existing dogma rather than forthright analysis of the issues and determinations on the

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> In these days, at all events, we look to custom, not so much for the creation of new rules, but for the tests and standards that are to determine how established rules shall be applied. When custom seeks to do more than this, there is a growing tendency in the law to leave development to legislation. Judges do not feel the same need of putting the *imprimatur* of law upon customs of recent growth, knocking for entrance into the legal system, and viewed askance because of some novel aspect of form or feature, as they would if legislatures were not in frequent session, capable of establishing a title that will be unimpeached and unimpeachable. But the [judicial] power is not lost because it is exercised with caution.

Id. at 12–13 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 60–61 (1921)). Oliver Wendell Holmes stated: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Id.* at 14–15 (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 173 (1920)). Dean Roscoe Pound stated:

> History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law. . . . The creative process consists in going outside of the authoritative legal materials of the time and place, or even outside of the law, and selecting something which is then combined with or added to the existing materials, or the existing methods of developing and applying those materials, and is then gradually given form as a legal precept or legal doctrine or legal institution. In Jhering's apt phrase, the process is one of juristic chemistry. The chemist does not make the materials which go into his test tube. He selects them and combines them for some purpose and his purpose thus gives form to the result.

Id. at 15 (quoting ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 94–96 (1938) (footnote omitted)).

6. *Id.* at 2. Smith explains that "[t]he feudal organization and the wholesale disposal of jurisdictional franchises under William the Conqueror resulted in the creation of a powerful nobility more disposed to settl[ing] disputes by arms than by due process of law." *Id.* at 4. The resulting disorder made it necessary for the king to concentrate judicial power in himself rather than the local feudal courts, thus establishing uniformity and peace among the feudal factions. *Id.*

7. JOHN E. CRIBBET, CASES AND MATERIALS ON JUDICIAL REMEDIES 32 (1954); BERNARD C. GAVIT ET AL., CASES AND MATERIALS ON AN INTRODUCTION TO LAW AND THE JUDICIAL PROCESS 621–22 (2d ed. 1952); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 7, at 28–30 (4th ed. 1971).

8. CRIBBET, *supra* note 7, at 34.

merits.[9] Thus began a common law practice of employing artful language, legal fictions, and other indirect means to give the appearance that a decision fit a formula—a practice that has continued in the jurisprudence.[10]

Ironically, "the introduction of the common law [in America] was the result of political and legal theories that had their roots in the early [maneuvers] of English kings for supremacy."[11] In 1829, the common law of England as of July 4, 1776 was adopted in Florida by a "receiving statute."[12] This state legislative adoption imported a foundation for the paradox of judge-made law in a governmental system that constitutionally accords exclusive lawmaking authority to the legislature.[13] In addition, the adoption of the common law of England has led to our state courts employing the methodology and traditions applied by the English courts for the development of the common law.[14] The resulting inconsistency with the state's governmental scheme, modeled on the federal Constitution and recognizing strict separation of powers among the branches of state government, was relatively inconsequential when the scope of the common law was much more limited and negligence was not yet recognized as a separate field of tort liability.[15] But the stage had been set for a conflict of ideas about the proper scope of judicial authority that continues to this day.

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9. *Id.*

10. In general, the Founders feared and distrusted the notion of judicial law-making. RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 12–13 (1987). Montesquieu's political treatise, *The Spirit of the Laws* (1748), which had such a powerful influence on the Founding Fathers, recognized the need for an independent judiciary, but also considered it dangerous, remarking that "if judges were to be the legislators, the 'life and liberty of the subject would be exposed to arbitrary control.'" *Id.* at 13 n.43 (quoting 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6, 181 (English trans., Philadelphia 1802)).

11. SMITH, *supra* note 5, at 2.

12. FLA. STAT. § 2.01 (1829). The language and vehicle by which adoption was accomplished varied from state to state. *See* Frederick K. Beutel, *The Development of State Statutes on Negotiable Paper Prior to the Negotiable Instruments Law*, 40 COLUM. L. REV. 836, 837–39 (1940) (discussing adoption of the English common law in states such as New York, New Jersey, and Maryland).

13. *See* Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004) (discussing the strict separation of powers in Florida).

14. For over one hundred years, until the time of the *Erie Railroad Co. v. Tompkins* decision, federal courts also recognized a separate federal common law. Curtis A. Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 874–78 (2007) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938)).

15. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a (2010) ("Dean Prosser reports that the concept of duty did not develop until negligence emerged as a separate theory of liability in the [nineteenth] century and then was employed in order to confine the scope of liability." (citing William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 12–13 (1953))). Thus, negligence was not a part of the common law adopted under Florida's receiving statute.

In Florida, as in other states, the courts soon found "indirect" means to accomplish "progress and change"[16] despite the inflexible forms and dogma of the early common law. In the 1900s, Florida judicially adopted the notion that while the courts may have no inherent power to revise or amend settled principles or precedents in the common law, "[t]hey may, and should, however, remold and extend those principles to new conditions of advancing civilization."[17] But the authority of the courts to remold and extend common law, and to discard common law rules they regard as unreasonable or outdated, rests largely on the practice itself, dicta, and allusions to observations in early cases from this last century.[18] This is not surprising since English common law jurisprudence in the eighteenth century was regarded as the product of an infallible, divinely inspired monarch, and any proclaimed law that would require change or "remolding" was regarded as never having been the law at all.[19]

Blackstone regarded the common law as "rooted in Saxon customary law, which was itself natural law—specifically, the law of God as it had been perceived by human reason in clearer-sighted times. . . . [H]e downplayed the creative role of judges, calling them the 'oracles' of the law."[20] Blackstone commented briefly on the subject of judges changing or remolding the common law when he said: "[The] doctrine of the law then is this: that precedents and rules must be followed, unless

16. SAMUEL R. ARTMAN, THE LEGALIZED OUTLAW 64 (1908) ("[What] is often spoken of as the 'Evolution of the Law,' . . . is, in reality, an evolution of court opinions of the fundamental maxims and standards, and the advancement and progress of courts and judges in making application of them to new conditions or to old conditions, in light of the progress and change of an advancing civilization.").

17. 6 FLA. JUR. *Common and Civil Law* § 9 (1956) (footnote omitted) (citing Layne v. Tribune Co., 146 So. 234, 237 (Fla. 1933)); *see also* Ripley v. Ewell, 61 So. 2d 420, 421 (Fla. 1952) (en banc) ("'When the reason for any rule of law ceases, the rule should be discarded.'" (quoting Randolph v. Randolph, 1 So. 2d 480, 481 (Fla. 1941))). Neither *Layne* nor *Randolph* reference supporting authority for the assertions.

18. Both *American Jurisprudence* and *Corpus Juris Secundum* make references to this power to remold common law, but cited cases rely heavily on the musings of legal realists. 15A AM. JUR. 2D *Common Law* § 2 (WestlawNext through Nov. 2015) (stating that public policy influences the remolding of the common law in order to achieve justice); 15A C.J.S. *Common Law* § 15 (WestlawNext through Dec. 2015) (explaining that the common law is not static). *Fox v. Snow*, for example, references Oliver Wendell Holmes ("'It is revolting . . . to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'"), Judge Benjamin Cardozo ("'Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end.'"), and Dean Roscoe Pound ("'Law must be stable, and yet it cannot stand still.'"). 76 A.2d 877, 882–83 (N.J. 1950).

19. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (1765) ("For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law* . . . ."); *see also Blackstone's Commentaries on the Laws of England: Book the Third*, YALE L. SCH., http://avalon.law.yale.edu/subject_menus/blackstone.asp (last visited Apr. 7, 2016) (discussing private wrongs).

20. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 12 (1993) (quoting BLACKSTONE, *supra* note 19, at 69).

flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration."[21] Blackstone's view of judges as "oracles" of the law rendered them largely incapable of discerning or divining law that was "flatly absurd or unjust."[22]

The prevalent view that the common law was the product of divine inspiration and an outgrowth of natural law undoubtedly imbued the common law with powerful legitimacy for early America, which was predominantly Christian in its religion. The Florida Supreme Court recognized the importance of Christian morals, values, and traditions in our law when in the case of *Strauss v. Strauss*, the court observed that "[t]he common law draws its subsistence from [Christianity and] . . . the Christian concept of right and wrong or right and justice motivates every rule of equity."[23]

However, particularly in the twentieth century with the growth of secularism and rise of the school of thought referred to as "legal realism," Blackstone's view of the common law and its judges was rejected by jurists and legal scholars in favor of a notion considered more pragmatic, and one that has embraced judicial "creativity" in lawmaking, while maintaining the increasingly fictional linkage to custom and unwavering application of precedent.[24] This view was thought to find support in the opinions of Lord Sir Edward Coke, who in *Milborn's Case*, 7 Coke 7a (K.B. 1609) was reputed to have written: "[T]he reason for a law is the

21. BLACKSTONE, *supra* note 19, at 70.

22. *Id.* at 69–70.

23. 3 So. 2d 727, 728 (Fla. 1941); *see also* 15A C.J.S. *Common Law* § 8 (2012) (discussing Christianity's influence on the common law). Ironically, the Bible discourages among Christians the very types of lawsuits the modern, now largely secular, common law vigorously encourages. *See, e.g.*, 1 *Corinthians* 6:1–6:20 (King James) (shaming those that go to court to settle matters); *Luke* 12:58 (King James) (encouraging agreement with adversaries, rather than judicial disputes).

24. *See, e.g.*, SMITH, *supra* note 5, at 44. Sir John William Salmond, a distinguished legal scholar and judge in New Zealand, stated:

> [The] importance of judicial precedents has always been a distinguishing characteristic of English law. The great body of the common or unwritten law is almost entirely the product of decided cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward I at the close of the thirteenth century. Orthodox legal theory indeed long professed to regard the common law as customary law, and the reported precedents as merely evidence of the customs and of the law derived therefrom. But this was never much better than an admitted fiction. In practice, if not in theory, the common law of England has been manufactured by the decisions of English judges.

Id. (quoting Salmond, *supra* note 5, at 376).

soul of the law, and if the reason for a law has changed, the law is changed."[25]

Despite opposition to the notion of judge-made law especially from lawyers and judges collectively referred to as the "codification movement," which sought to legislatively codify the common law in the mid-1800s,[26] gradually, the practice of judges remolding modern common law in light of their professional wisdom, skill, training, and insights has become broadly accepted.[27] As United States Supreme Court Justice Antonin Scalia remarked: "The nineteenth-century codification movement espoused by [Robert] Rantoul and [David Dudley] Field was generally opposed by the bar, and hence did not achieve substantial success, except in one field: civil procedure, the law governing the trial of civil cases."[28]

Federal Circuit Judge Richard Posner, who describes himself as a judicial pragmatist, approves of this judge-made law in his book *The Problems of Jurisprudence*:

> Judges make rather than find law, and they use as inputs both the rules laid down by legislatures and previous courts ("positive law") and their own ethical and policy preferences. Those preferences are all that

25. Fox v. Snow, 76 A.2d 877, 882 (original in Latin). Lord Coke became legendary in America for his decision in *Dr. Bonham's Case*, which was used to justify the voiding of both the Stamp Act 1765 and writs of assistance, which led to the American War of Independence. Randy J. Holland, *Anglo-American Templars: Common Law Crusaders*, 8 DEL. L. REV. 137, 145–51 (2006). However, Sir Thomas Bingham points out:

> Those who seek to undermine the principle of parliamentary sovereignty draw sustenance from the observations of Sir Edward Coke in *Dr[.] Bonham's Case* in 1610 that a statute contrary to common right and reason would be void. But it is not entirely clear what Coke meant; it appears that this observation may have been added after judgment had been given; it did not represent his later view; it was relied on as one of the reasons for his dismissal as Chief Justice of the King's Bench; and it was not a view which commanded general acceptance even at the time.

TOM BINGHAM, THE RULE OF LAW 163 (2010) (footnotes omitted); *see also* SCALIA, *supra* note 3, at 129–30 ("It was not orthodoxy at all, but an extravagant assertion of judicial power, scantily supported by the authorities cited, . . . and seemingly abandoned by Coke himself in his *Institutes* [*of the Laws of England*]." (footnotes omitted)).

26. Robert W. Gordon, *Book Review of The American Codification Movement, A Study of Antebellum Legal Reform*, 36 VAND. L. REV. 431, 431 (1983).

27. *See generally* POSNER, *supra* note 20, at 9–33 (providing a succinct history of jurisprudence and the development of legal rules); SCALIA, *supra* note 3, at 12 ("It has proven to be a good method of developing the law in many fields—and perhaps the very best method.").

28. SCALIA, *supra* note 3, at 11 (footnote omitted).

> remains of "natural law," now that so many of us have lost confidence that nature constitutes a normative order.[29]

In Florida, the suggestion that judges should not make law has been ridiculed as "ignorant" and an affront to the independence of judges.[30] In this century, any incompatibility of judicial common law lawmaking with the principle of strict separation of powers largely has been dismissed or treated as a necessary by-product of a more realistic and efficient justice system.[31] But, there have been significant and lasting consequences from this by-product in our state law and government.

III. COMMON LAW TRADITION AND METHODOLOGY

The methodology of the common law has been colorfully described by Justice Scalia in a football analogy, comparing common law judging to a running back "distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law."[32] At the heart of this methodology is the principle of *stare decisis*—the idea that precedent will bind the decision-maker. Justice Scalia offered another gaming analogy to demonstrate how the common law developed based on this fundamental principle—"rather like a Scrabble board. No rule of decision previously announced could be *erased*, but qualifications could be *added* to it."[33] Decisions were announced in the holdings of the cases, as opposed to dicta, or remarks

29. POSNER, *supra* note 20, at 457. But Judge Posner also recognizes that his colleagues in the legal profession will disagree with his view, and some may consider "that [he has] announced 'the death of law.'" *Id.* at 461.

30. Peter D. Webster, *Who Needs an Independent Judiciary?*, 78 FLA. B.J., Feb. 2004, at 24, 26. Judge Webster, formerly of the First District Court of Appeal, argues that "when someone says that judges should merely interpret, rather than make, law, he or she is either ignorant of the history of our legal system or, more likely, speaking in code." *Id.* He accurately cites the Massachusetts Constitution 1780, Part I, Article XXIX in support of his argument for judicial independence. *Id.* at 24. However, he does not mention Article V: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." MASS. CONST. OF 1780, art. V. Nor is Article XXX on separation of powers mentioned.

31. *See* SCALIA, *supra* note 3, at 10 ("Consider the compatibility of what [James] Madison says in . . . [The Federalist No. 47] with the ancient system of lawmaking by judges. Madison quotes Montesquieu (approvingly) as follows: 'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary [control], for *the judge* would then be *the legislator*.' I do not suggest that Madison was saying that common-law lawmaking violated the separation of powers." (footnote omitted)); *see also* POSNER, *supra* note 20, at 11–12 (discussing the opinions of Sir Edward Coke, William Blackstone, and Jeremy Bentham).

32. SCALIA, *supra* note 3, at 9.

33. *Id.* at 8.

not essential to those holdings.[34] And only the holding established the law.[35]

The Supreme Court of Florida has declared that it "adheres to the doctrine of *stare decisis*."[36] Sometimes, however, our court says the doctrine must "bend[]"[37] so that the "integrity and credibility of the [c]ourt" will not be undermined.[38] In the 2009 case of *Wallace v. Dean*, the [c]ourt declared:

> As a necessary precondition to discounting the guiding principle of *stare decisis*, we have traditionally asked the following questions . . . : (1) whether the prior precedent has proven unworkable due to its reliance upon an erroneous legal fiction; (2) whether the rule of law could be reversed without serious disruption in legal doctrine and injustice to those relying upon the law; and (3) whether the underlying premise of the prior precedent has changed so dramatically that it lacks legal justification.[39]

However, without the guiding and foundational doctrine of *stare decisis*, the common law ultimately can become simply an exercise of human judgment, albeit educated perhaps, applied to the resolution of the controversy at hand. It has tenuous linkage to the past, either in methodology or tradition, and questionable predictability for the future. It becomes an *ad hoc*, subjective expression of policy preference. The erosion of *stare decisis*, along with the application of judicial fiat, case-by-case lawmaking, and elevation of dictum to precedent, have changed the landscape of Florida common law on a broad scale—most notably in the area of tort law.

IV. THE ERA OF JUDICIAL FIAT

Since declaring their power and duty to remold and modernize the common law, state courts (principally the highest courts) have done so with zeal at times, leaving the legislature in awe of their lawmaking,

34. *But cf.* POSNER, *supra* note 20, at 96–97 (commenting that the distinction between these terms has become blurred "operational[ly]").

35. *See, e.g.*, Hamilton v. Cannon, 80 F.3d 1525, 1530 (11th Cir. 1996) ("Those passages from *Wideman* are clearly dicta, because they were in no way essential to *Wideman*'s holding of no liability. The law cannot be established by dicta.").

36. State v. J.P., 907 So. 2d 1101, 1108 (Fla. 2004) (typeface altered).

37. *Id.* at 1109.

38. Smith v. Dep't of Ins., 507 So. 2d 1080, 1096 (Fla. 1987) (Erhlich, J., concurring in part and dissenting in part); *see* Weiand v. State, 732 So. 2d 1044, 1055 n.12 (Fla. 1999) (commenting that *stare decisis* must bend with public policy changes); *see also* Strand v. Escambia Cnty., 992 So. 2d 150, 159 (Fla. 2008) (noting existence of strong, yet not limitless, presumption in favor of precedent).

39. 3 So. 3d 1035, 1039 n.5 (Fla. 2009) (typeface altered).

particularly in the field of negligence. According to Dean William Prosser, negligence was not recognized as a separate tort at the time of the American Revolution and would not gain recognition until the early nineteenth century.[40] It certainly was not a discrete and substantial part of the common law at the time of the founding of our country, and became so only in the sense that unintentional wrongful conduct later became actionable by extension of the remedy of trespass on the case.[41] Yet, it has become the most prolific body of civil jurisprudence in the states in terms of reported caselaw and a tool of choice for judicial remolding and modernizing of the common law.

Professor Kenneth Abraham discusses the development of negligence law arising from actions for trespass on the case. He traces what he calls "a new era in American tort law"[42] to the opinion in *Brown v. Kendall*, 60 Mass. 292 (1850), which "[a]s legal history, . . . was inaccurate to say the least," and which "did not merely redescribe existing law, but changed it substantially," so that "there was no longer any substantive difference between trespass and case."[43] Professor Abraham explains that after the *Kendall* decision, "over time the number of situations in which liability might be imposed at all had slowly expanded," and "certainly the cumulative effect of all these developments was the expansion of liability between the seventeenth and nineteenth centuries."[44] That expansion has continued. In the name of modernization, particularly since the mid-1900s, there has been a rapacious and unremitting expansion of tort liability,[45] particularly in negligence law. In Florida, major change has been accomplished by means of what has been described as "judicial fiat."[46]

The word "fiat" is from the Latin term for "let it be done."[47] It is a term with a negative connotation of authoritarianism that long had been eschewed by our courts as inapplicable to their function in our system.[48]

40. Prosser, *supra* note 7, at § 28, 139; *see also* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 47–49 (2d ed. 2002) (providing a history of negligence law). *But see* Hoffman v. Jones, 280 So. 2d 431, 442 (Fla. 1973) (Roberts, J., dissenting) (arguing that contributory negligence was part of the common law much earlier in *Bayly v. Merrell*, Cro. Jac. 386, 79 Eng. Rep. 331 (1606)).

41. ABRAHAM, *supra* note 40, at 49.

42. *Id.* at 50.

43. *Id.* at 51.

44. *Id.* at 52.

45. POSNER, *supra* note 20, at 53–54.

46. Michael Cavendish & Blake J. Hood, *Florida Common Law Jurisprudence*, 81 FLA. B.J., Jan. 2007, at 9, 12.

47. BLACK'S LAW DICTIONARY 700 (Bryan A. Garner ed., 9th ed. 2009).

48. *See, e.g.*, Ripley v. Ewell, 61 So. 2d 420, 424 (Fla. 1952) (en banc) ("While we should not hesitate to declare the law as we find it, even though the unwary who have been ill advised in their

Yet, between the late 1950s and early 1970s in particular, state judiciaries began to emerge as policymakers. Sometimes, as in Florida, this judicial policymaking was accomplished by fiat, particularly in areas such as negligence law, where the legislature was seen as slow to respond to social change and "upheaval."[49]

In *Hargrove v. Town of Cocoa Beach*, the Florida Supreme Court took to task the common law notion behind municipal immunity that "'the king can do no wrong.'"[50] The opinion is remarkable for its sweeping hyperbole, scathing criticism, and condemnation of the common law maxim as un-American.[51] A wrongful death claim was brought against

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action may suffer, we should not by judicial fiat make changes in established law that will injuriously affect many persons who could not possibly foresee or anticipate such action on our part."). Curiously, *Ripley* is cited by both the majority and dissent in the landmark decision of *Hoffman v. Jones*, but for very different propositions. The majority, led by Justice Adkins, and the concurrence, led by Chief Justice Carlton, with Justices Ervin, Boyd, McCain, and Dekle joining, cite *Hoffman* for the proposition that "when grave doubt exists of a true common law doctrine[,] . . . we may, as was written in *Ripley v. Ewell*, . . . exercise a 'broad discretion taking into account the changes in our social and economic customs and present day conceptions of right and justice.'" Hoffman v. Jones, 280 So. 2d 431, 435 (Fla. 1973) (citation omitted). The dissent by Justice Roberts argued for the position that:

> The doctrine of contributory negligence was a part of the common law of England prior to July 4, 1776, and therefore, is part of the common law of this state pursuant to Florida Statutes, Section 2.01, . . . and is secure from the desires of this [c]ourt to supplant it by the doctrine of comparative negligence, provided that it is not inconsistent with the Constitution and laws of the United States and the Constitution and acts of the [l]egislature of this state.

Id. at 441 (Roberts, J., dissenting) (citing Duval v. Thomas, 114 So. 2d 791 (Fla. 1959); *Ripley*, 61 So. 2d at 420. In fact, both positions could be disputed, since negligence had not emerged as a separate tort in 1776 and was not part of the common law adopted by the statute. *See* Nelson P. Miller, *An Ancient Law of Care*, 26 WHITTIER L. REV. 3, 15 (2004) (discussing how negligence was not a separate tort prior to the beginning of the nineteenth century).

49. *See generally* Cavendish & Hood, *supra* note 46, at 12 (discussing how *Hoffman v. Jones* changed established common law). In Florida, this era actually had begun even earlier. Cavendish and Hood reference instances of fiat applied in *Waller v. First Savings & Trust Co.*, 138 So. 780 (Fla. 1931) and *Randolph v. Randolph*, 1 So. 2d 480 (Fla. 1941). Cavendish & Hood, *supra* note 46, at 12.

50. 96 So. 2d 130, 132 (Fla. 1957) (en banc).

51. *Id.* ("The problem in Florida has become more confusing because of an effort to prune and pare the rule of immunity rather than to uproot it bodily and lay it aside as we should any other archaic and outmoded concept."). However, as the Supreme Court of the United States notes in *Owen v. City of Independence*, the maxim that so infuriated the *Hargrove* court may not have been intended to suggest that the king was incapable of wrongdoing at all. 445 U.S. 622, 645 n.28 (1980). Yet, as the note further explains: "The seminal opinion of the Florida Supreme Court in *Hargrove v. Town of Cocoa Beach* . . . has spawned 'a minor avalanche of decisions repudiating municipal immunity.'" *Id.* at 646 n.28 (quoting PROSSER, *supra* note 7, at § 131, 985). "[I]n conjunction with legislative abrogation of sovereign immunity, [it] has resulted in the consequence that only a handful of [s]tates still cling to the old common-law rule of immunity for governmental functions." *Id.* (citing K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 25.00 (1976 and Supp. 1977) (stating that only two states follow the traditional common law tort immunity in the exercise of governmental functions); Philip A. Harley & Bruce E. Wasinger, *Governmental Immunity: Despotic Mantle or Creature of Necessity*, 16 WASHBURN L.J. 12, 34–53 (1976)).

the municipality for negligence involving a fire at the municipal jail in which Mr. Hargrove was incarcerated—and where he perished.[52] Although the lower court found the claim foreclosed under the prevailing rule of governmental immunity, in an opinion dripping with indignation that this vestige of monarchy should survive the American Revolution, the Supreme Court of Florida allowed the action, employing judicial license to circumvent the perceived common law obstacle of sovereign immunity and, by *fiat*, reach a "just" result.[53] In its concluding remarks, the court said: "[I]n absolute fairness to the trial judge[,] . . . he properly relied on our precedents. We here merely recede from the prior cases in order to establish a rule which we are convinced will be productive of results more nearly consonant with the demands of justice."[54] There was one dissent without an opinion, but judicial fiat had attained a significant measure of acceptance and legitimacy in the state common law methodology.

In the summer of 1973, a pivotal time in our state jurisprudence, even as storm clouds of scandal gathered over the Florida Supreme Court, it decided by fiat two major cases that would dramatically change the future course of Florida common law, and along with it, the role of the court and its relationship to the legislature. The justices who figured prominently in those decisions would ultimately find themselves at the center of a scandal resulting in their departure from the court.[55] In *Kluger v. White*,[56] the court declared a statute establishing a minimal claim threshold for civil lawsuits seeking recovery for property damage to be inconsistent with the "access to the courts" clause found in Article I, Section 21 of the Florida Constitution.[57] The court, as the protector of this "right" and any other rights that have "become a part of the common law of the [s]tate pursuant to [Section 2.01, Florida Statutes]," declared that

> the [l]egislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the [s]tate to redress for injuries, unless the [l]egislature can show

52. *Hargrove*, 96 So. 2d at 131.
53. *Id.* at 132–34.
54. *Id.* at 134.
55. *See generally* MARTIN A. DYCKMAN, A MOST DISORDERLY COURT: SCANDAL AND REFORM IN THE FLORIDA JUDICIARY (2008) (describing the nature of the scandal and the justices involved).
56. 281 So. 2d 1 (Fla. 1973).
57. *Id.* at 4.

> an overpowering public necessity . . . and no alternative method of meeting such public necessity can be shown.[58]

In *Hoffman v. Jones*,[59] the Florida Supreme Court, with those same justices again in the majority, decided to accomplish what the legislature had been unsuccessful in doing when it undertook to jettison the doctrine of contributory negligence in favor of comparative negligence, which the majority considered more enlightened and just.[60] These rulings—by a court in ethical turmoil—boldly marginalized the power of a co-equal branch by undisguised fiat, but have drawn scant criticism and, instead, have become foundational for monumental changes in the law of negligence in Florida.[61]

An explosion of caselaw expanding and refining new principles for liability under *Hoffman*'s "comparative negligence" doctrine has been fueled by the increasing availability of liability insurance and a legislative mandate for automobile insurance for those operating a motor vehicle in the state.[62] A major industry of personal injury law has developed to facilitate access to the insurance funds and exploit the invitation to unfettered access to the courts.[63] Marketing for the industry has become a staple of advertising in every type of media, impacting our bar and our culture.[64] The state legislature, after the fact, embraced the spirit of these

58. *Id.*

59. 280 So. 2d 431 (1973).

60. *Id.* at 438.

61. *See generally* Benjamin H. Brodsky, *Refining Comparative Fault in Florida: A Causation Theory for Apportioning Fault*, 89 FLA. B.J., Jan. 2015, at 9, 9–17 (tracing the development of comparative negligence in Florida based on policy determinations by Florida courts); Cavendish & Hood, *supra* note 46, at 12 (discussing how *Hoffman v. Jones* changed established common law).

62. Robert C. Timmons & Douglas K. Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737, 784 n.295 (1974).

63. Thousands of Florida lawyers are employed to represent the interests of both plaintiffs and defendants in personal injury litigation, and large professional associations such as the Florida Justice Association, formerly the Florida Academy of Trial Lawyers, and the Florida Defense Lawyer's Association have been formed to serve the competing interests involved. *See generally Who We Are and What We Do*, FLA. JUSTICE ASS'N, https://www.floridajusticeassociation.org/index.cfm ?pg=WhoWeAre (last visited Apr. 7, 2016) ("The Florida Justice Association . . . is dedicated to strengthening and upholding Florida's civil justice system and protecting the rights of Florida's citizens and consumer."); Andrew S. Bolin, *About the Florida Defense Lawyers Association*, FLA. DEF. LAWYERS ASS'N, http://www.fdla.org/about.asp (last visited Apr. 7, 2016) (describing the mission of the Florida Defense Lawyers Association). The increasing volume of personal injury cases involving appeals is amply evidenced in our Southern Reporter system. The organization IBIS, which advertises itself as a leading global publisher of business intelligence, particularly in industry and procurement research, provides a report containing industry analysis and trends for the personal injury law business. *Personal Injury Lawyers & Attorneys in the US: Market Research Report*, IBISWORLD (Apr. 2015), http://www.ibisworld.com/industry/personal-injury-lawyers-attorneys.html.

64. Susan Taylor Martin, *Florida's Swollen Ranks of Lawyers Scrap for Piece of a Shrinking Legal Pie*, TAMPA BAY TIMES (July 25, 2014, 10:48 AM), http://www.tampabay.com/news/business/floridas-swollen-ranks-of-lawyers-scrap-for-piece-of-a-shrinking-legal-pie/2190047.

changes and acted independently to remove protections from tort liability previously enjoyed by state and local governmental entities.[65]

Initially in 1969, in reaction to growing sentiment in the legal community and the courts against governmental immunity from tort liability, the Florida legislature enacted statutes containing general or specific waivers of sovereign immunity.[66] In 1973, the legislature passed Chapter 73-313, Laws of Florida, which was codified as Section 768.28, Florida Statutes.[67] The Florida Supreme Court, comprised mostly of new justices elected or appointed since the scandal, considered several cases involving the new statute. Significantly, in 1978, in *Carlile v. Game & Fresh Water Fish Commission*,[68] the court held that by enacting the general waiver of tort immunity not addressing the subject of venue, the legislature did not intend to waive the common law privilege of government to be sued in the county of its principal headquarters, since the statute was "clearly in derogation of the common law principle of sovereign immunity and must . . . be strictly construed. . . . Inference and *implication* cannot be substituted for clear expression."[69]

Yet, this strict standard for construction of the statute would not prevent the court—the next year—from inferring an *implied* "discretionary function" immunity not expressed in the statute when it decided *Commercial Carrier Corp. v. Indian River County*.[70] The opinion is the product of a new court of men of integrity, knowledge, and skill, who would successfully rebuild the tarnished public image of the institution. But the new court majority did not reject fiat in fashioning common law to achieve ideological goals that it perceived as desirable.[71] It was a majority for whom derogation of the common law afforded an

65. *See* FLA. STAT. § 768.81 (1986) (discussing comparative fault); FLA. STAT. § 768.28 (1975) (waiving sovereign immunity in tort actions to an extent).

66. *See* Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977) (providing a list of Florida statutes whereby the Florida legislature has allowed general or specific waivers regarding sovereign immunity).

67. 1973 Fla. Laws 711, 711–14 (codified as FLA. STAT. § 768.28 (1975)).

68. 354 So. 2d 362.

69. *Id.* at 364 (emphasis added) (citing Dudley v. Harrison, McCready & Co., 173 So. 820, 823 (Fla. 1937)).

70. 371 So. 2d 1010 (Fla. 1979).

71. To some extent, the judicial philosophy of the *Commercial Carrier* court on governmental tort immunity would be reflected a year later in *Owen v. City of Independence*. Owen v. City of Independence, 445 U.S. 622, 657 (1980) ("In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under [Section] 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.").

opportunity for innovation in the governmental tort law to develop a "discretionary function" immunity "without express statutory foundation."[72] The *Commercial Carrier* opinion is a marvel of eloquence in exposition, but its analysis and holding are not based on Florida common law precedent or on the rule of strict statutory construction announced in *Carlile*.

The *Commercial Carrier* court considered the assertion by two counties of a common law immunity that was applied to municipalities prior to the enactment of Section 768.28, Florida Statutes.[73] The counties argued that despite the waiver of tort immunity under that statute, they were shielded from liability under the immunity that municipalities had enjoyed for governmental functions because municipalities were not clearly covered under the waiver statute.[74] Thus, the counties claimed the municipal "governmental function" immunity for their alleged negligent failure to maintain existing traffic control devices and measures.[75] The court rejected not only the counties' position, but also the entire line of caselaw establishing the municipal immunity for governmental functions as inconsistent with the waiver statute.[76]

The decision was important for its holding that "although [S]ection 786.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain 'discretionary' governmental functions remain immune from tort liability."[77] But perhaps more important was the court's adoption of a "case-by-case" method for determining whether the newly-recognized "discretionary function" immunity applied.[78] In doing so, the court claimed as its prerogative the determination of the scope, not only of the statute, but of the constitutional separation of powers upon which the new immunity was based.[79] The approach affirmed a willingness to discount the principle of *stare decisis*, and depart from the court's own recent decision on statutory interpretation, in favor of a more flexible approach to decision-making

72. *See* Michael S. Finch, *Florida Governmental Litigation: Integrating Claims Under 42 U.S.C. § 1983 and Florida Statutes § 768.28*, 29 STETSON L. REV. 531, 540 (2000) (footnote omitted). Professor Finch explained: "The court recognized 'discretionary function' immunity in *Commercial Carrier* . . . and developed that immunity by analogy to the express immunity provision set forth in the Federal Tort Claims Act . . . ." *Id.* at 540 n.61 (citing 28 U.S.C. § 2680(a) (1994); *Commercial Carrier Corp.*, 371 So. 2d at 1022).

73. *Commercial Carrier*, 371 So. 2d at 1012–13.

74. *Id.* at 1013, 1016–17.

75. *Id.* at 1013–14.

76. *Id.* at 1016–17.

77. *Id.* at 1022. There is perverse irony in the exercise of judicial fiat to recognize this implied immunity that the court bases on the doctrine of separation of powers.

78. *Id.* at 1017–19.

79. *Id.* at 1018.

that would become a hallmark of the court in later decisions in the area of negligence law.

However, the elasticity afforded by this new "case-by-case" approach has been accompanied by a lack of clarity, predictability, and stability in the law.[80] The opinion has spawned a confused plethora of cases over the subsequent decades as governmental immunity law shifted between competing majority ideologies,[81] and both government lawyers and plaintiffs' attorneys were left scratching their heads over how to advise their clients regarding potential tort liability.[82] The four-part test,

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80. In his 1928 essay, William Searle Holdsworth, an Oxford professor of law and legal scholar, recognizing the necessity of balance of these components in the common law said: "It is because the legal systems of Rome and England solved this difficult problem of combining stability with elasticity that they have become two of the greatest legal systems that the world has ever seen." WILLIAM SEARLE HOLDSWORTH, SOME LESSONS FROM OUR LEGAL HISTORY 9 (1928).

81. Two years after the *Commercial Carrier* decision, Chief Justice Sundberg, who had authored the majority opinion, found himself dissenting on the application of Section 768.28, Florida Statutes, to municipalities. In *Cauley v. City of Jacksonville*, he expressed frustration, stating:

> *Commercial Carrier* dealt with a single narrow issue—the scope of the waiver of sovereign immunity for the state and counties under [S]ection 768.28, Florida Statutes (1975). It did not, as the majority asserts, totally abrogate the rules regarding municipal immunity. It merely held that the legislature did not intend for the rules of municipal sovereign immunity to be applicable to the state and counties.

403 So. 2d 379, 387 (Fla. 1981) (Sundberg, C.J., dissenting). By 1982, in *Department of Transportation v. Neilson*, Justice Sundberg, who had written the majority opinion in *Commercial Carrier*, again dissented saying:

> In a laudable effort to simplify the distinction between those acts of governmental agencies which still enjoy immunity and those which do not, it occurs to me that the majority has simply exchanged one set of result descriptive labels for another. Hence, the irreconcilable results among the several district courts of appeal are not harmonized, but rather the confusion is compounded. The enigma is now shrouded in mystery.

Dep't of Transp. v. Neilson, 419 So. 2d 1071, 1079 (Fla. 1982) (Sundberg, J., dissenting). The shrouded mystery would become even more densely convoluted when, in its 1985 decision in *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, the court revived Florida's public duty doctrine. 468 So. 2d 912 (Fla. 1985). The doctrine had previously been unceremoniously laid to rest in the *Commercial Carrier* decision with the language: "[W]e conclude that *Modlin* and its ancestry and progeny have no continuing vitality subsequent to the effective date of [S]ection 768.28." *Commercial Carrier*, 371 So. 2d at 1016 (citing Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967)). And despite yet another shift in ideology of the court, which reinforced the *Commercial Carrier* rationale, the court confirmed the continued vitality of Florida's public duty doctrine in *Pollock v. Florida Department of Highway Patrol*. 882 So. 2d 928, 938 (Fla. 2004).

82. *See generally* Thomas A. Bustin & William N. Drake, Jr., *Judicial Tort Reform: Transforming Florida's Waiver of Sovereign Immunity Statute*, 32 STETSON L. REV. 469 (2003) [hereinafter Bustin & Drake, Jr., *Judicial Tort Reform*] (providing an essay on Florida tort law developed by Florida courts after the state legislature passed various laws waiving sovereign immunity); William N. Drake, Jr. & Thomas A. Bustin, *Governmental Tort Liability in Florida: A Tangled Web*, 77 FLA. B.J., Feb. 2003, at 8 (discussing both common law and statutory government immunity and waiver of immunity); Finch, *supra* note 72, at 532 ("In a substantial number of consolidated filings [involving both federal civil rights claims and state law claims], plaintiff's counsel is simply unable to disentangle the varying elements of federal and state law." (footnote omitted)).

commended by the court in *Commercial Carrier* for distinguishing "planning level," immune governmental acts, omissions, or decisions from non-immune "operational-level" conduct, has proven too nebulous and malleable to be effective, and the Florida Supreme Court itself has been unable to agree on a single effective standard for making the distinction.[83] Compounding the confusion, the court has vacillated between apparent rejection of the "public duty" doctrine in *Commercial Carrier* and recognition of it in later cases, such as *Pollock v. Florida Department of Highway Patrol*.[84] The result has been a state sovereign immunity law described as a "doctrinal morass."[85]

A more subtle form of judicial lawmaking is reflected in *McCain v. Florida Power Corp.*,[86] in which the Florida Supreme Court again substantially modified the law of negligence by recognizing a standard for determining the existence of a duty of care that largely conflates foreseeability with duty and relieves the courts of the responsibility to rigorously analyze public policy and social factors traditionally considered in the duty analysis.[87] The resulting standard, which was not employed in other states,[88] vastly expanded exposure to negligence liability in Florida—not just for government but also for private individuals and entities.[89] This expansion was accomplished by the *McCain* Court's adoption as law of its earlier dictum in *Kaisner v. Kolb*,[90] that "[w]here a defendant's conduct creates a foreseeable zone of risk, the

83. *Commercial Carrier*, 371 So. 2d at 1019–22.

84. 882 So. 2d at 938. *See generally* William N. Drake, Jr., *The Rescue of an August Body of Law: Florida's Public Duty Doctrine*, 80 FLA. B.J., May 2006, at 18 (discussing Florida's public duty doctrine).

85. Finch, *supra* note 72, at 571. In *Vasconez v. Hansell*, the confusion resulted in the federal court rejecting the state common law recognition of the public duty doctrine in favor of the Eleventh Circuit's interpretation of the law. 871 F. Supp. 2d 1339, 1343–44 (M.D. Fla. 2013). The *Vasconez* court deferred to *Lewis v. City of St. Petersburg*, 260 F.3d 1260 (11th Cir. 2001), in which "the United States Court of Appeals for the Eleventh Circuit held that the public duty doctrine had not survived the enactment of [Section 768.28, Florida Statutes]." *Id.* at 1343. The *Lewis* opinion was authored by Judge Rosemary Barkett, who formerly had been a Justice of the Florida Supreme Court and had taken the position there that the public duty doctrine was not viable in Florida. Bustin & Drake, Jr., *Judicial Tort Reform*, *supra* note 82, at 484.

86. 593 So. 2d 500 (Fla. 1992).

87. *Id.* at 502–03. *But see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2010) (taking the position that judicial consideration of foreseeability is inappropriate to the determination of duty).

88. *See* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1258–60 n.47 (2009) (citing cases from forty-seven states which "treat foreseeability as a significant factor (and frequently the most significant factor) in analyzing whether the duty element is met in a negligence claim" (footnote omitted)).

89. *See generally* William N. Drake, Jr., *Foreseeable Zone of Risk: Confusing Foreseeability with Duty in Florida Negligence Law*, 78 FLA. B.J., Apr. 2004, at 10 [hereinafter Drake, Jr., *Foreseeable Zone*] (discussing the Florida Supreme Court's standard for a legal duty).

90. 543 So. 2d 732 (Fla. 1989).

law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses."[91]

In her dissent in *Davis v. Dollar Rent a Car Systems, Inc.*,[92] District Judge Jacqueline Griffin accurately pointed out that the principle relied upon in *McCain* as the foundation for analysis for the existence of duty is also contrary to the position of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*.[93] Despite the evidence that its approach to the determination of whether a duty of care exists is not followed in most other states and appears contrary to the *Restatement (Third)*, the Florida Supreme Court has continued to follow the *McCain* analysis.[94] The analysis facilitates the recognition of the existence of a legal duty and takes the negligence case a step closer to the imposition of liability without the bothersome analysis of public policy factors considered by most other jurisdictions on the question of whether a legal duty of care should exist.[95] As Justice Cantero, joined by Justice Wells, pointed out in his dissent in

91. *Id.* at 735–36 (citing Stevens v. Jefferson, 436 So. 2d 33, 35 (Fla. 1983) (citing Crislip v. Holland, 401 So. 2d 1115, 1117 (Fla. 4th Dist. Ct. App. 1981))).

92. 909 So. 2d 297 (Fla. 5th Dist. Ct. App. 2004).

93. *Id.* at 316–17 (Griffin, J., dissenting); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 (2010).

94. *See* Williams v. Davis, 974 So. 2d 1052, 1057 (Fla. 2007) ("[W]e have applied the *McCain* analysis to a countless variety of factual circumstances in order to determine the existence of a duty under our negligence law." (footnote omitted)). In a footnote, *Williams* lists ten such instances and references an article discussing the foreseeable zone of risk. *Id.* at 1067 n.3 (citing Drake, Jr., *Foreseeable Zone*, *supra* note 89, at 10).

95. *See* Zipursky, *supra* note 88, at 1258–60 n.47 (listing forty-seven states in which foreseeability is part of the analysis for duty, and while it is described by many as necessary, important, or essential, few states other than Florida, if any, consider it the sole factor, and no other jurisdictions use the hazy phraseology "foreseeable zone of risk" that was adopted by the Florida Supreme Court). The *Restatement (Third) of Torts* states:

> Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the factfinder must assess the foreseeable risk at the time of the defendant's alleged negligence. . . . Thus, for reasons explained in Comment *i*, courts should leave such determinations to juries unless no reasonable person could differ on the matter.
>
> A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care. These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7. The *Restatement (Third) of Torts* takes the position that foreseeability is often used to obscure what is essentially a public policy determination on the part of the courts regarding the existence or nonexistence of duty. *Id.*

Clay Electric Cooperative, Inc. v. Johnson, the court has expressed inconsistent positions regarding the appropriateness of public policy considerations in determining the existence of duty.[96]

The impact of *McCain* is evident in *Williams v. Davis*,[97] where the Florida Supreme Court, considering a question of great public importance certified by the district court in *Davis v. Dollar Rent a Car Systems, Inc.*,[98] proclaimed that "courts must remain alert to the changes in our society that give rise to the recognition of a duty even where none existed before. Absolute rules, while predictable in the outcomes they produce, may not be suitable to protect societal interests."[99] The court in *Williams* announced: "[W]e have applied the *McCain* analysis to a countless variety of factual circumstances in order to determine the existence of a duty under our negligence law."[100] So it has, and in the span of over twenty-five years since the *Kaisner* decision, the court has found the existence of duty numerous times, but the lower courts, applying the same analysis, often did not.[101] Curiously, the court itself did not apply a purely *McCain* (foreseeable-zone-of-risk) analysis to answer

96. 873 So. 2d 1182, 1202–04 (Fla. 2003) (Cantero, J., dissenting, with Wells, J., joining). The dissent commented: "The majority dismisses the public policy implications of its decision by stating that such considerations are for the [l]egislature. Yet this Court has recognized that whether to impose a duty in tort is quintessentially a *policy* decision." *Id.* at 1202 (emphasis added) (citation omitted). "Just last year," the dissent continued, "this Court quoted William L. Prosser . . . , acknowledging that the concept of duty 'is not sacrosanct in itself, but only an expression of the sum total of those considerations of *policy* which lead the law to say that the particular plaintiff is entitled to protection [or not].'" *Id.* (quoting Gracey v. Eaker, 837 So. 2d 348, 354 (Fla. 2002) (quoting Rupp v. Bryant, 417 So. 2d 658, 667 (Fla. 1982) (quoting PROSSER, *supra* note 7, at § 53, 325–26))).

97. 974 So. 2d 1052 (Fla. 2007).

98. 909 So. 2d 297 (Fla. 5th Dist. Ct. App. 2004).

99. *Williams*, 974 So. 2d at 1061.

100. *Id.* at 1057 (footnote omitted).

101. The ten Florida Supreme Court cases and one article cited by the *Williams* Court for the establishment of new duties of care also illustrate the lack of clear guidance for the lower courts. *Id.* at 1057 n.3 (citing Goldberg v. Fla. Power & Light Co., 899 So. 2d 1105, 1110–11 (Fla. 2005) (quashing the Third District Court of Appeal's en banc decision of no duty); Markowitz v. Helen Homes of Kendall Corp., 826 So. 2d 256, 259 (Fla. 2002) (quashing the Third District's decision); Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86, 88 (Fla. 2000) (approving the Fourth District's decision); Henderson v. Bowden, 737 So. 2d 532, 535–37 (Fla. 1999) (approving the Second District's decision); Fla. Power & Light Co. v. Periera, 705 So. 2d 1359, 1361 (Fla. 1998) (approving the Fourth District and disapproving the First District in conflict); Kitchen v. K-Mart Corp., 697 So. 2d 1200, 1202 (Fla. 1997) (quashing the Fourth District's decision on certified question of public importance); Union Park Mem'l Chapel v. Hutt, 670 So. 2d 64, 67 (Fla. 1996) (approving the Fifth District and disapproving the Fourth District in conflict); Pate v. Threlkel, 661 So. 2d 278, 279–82 (Fla. 1995) (quashing the First District's decision on certification of question of great public importance); City of Pinellas Park v. Brown, 604 So. 2d 1222, 1224–25 (Fla. 1992) (approving the Second District's decision on question of great public importance); Drake, Jr., *Foreseeable Zone*, *supra* note 89 (discussing Florida Supreme Court's standards for identifying whether a legal duty of care exists)). *See also* Limones v. Sch. Dist. of Lee Cnty., 161 So. 3d 384, 389–90 (Fla. 2015) (quashing the Second District's decision). The countless instances in which the court has found and continues to find it necessary to establish duties by quashing lower courts' decisions or answering certified questions are symptomatic of confusion in this important aspect of the state's negligence law.

the certified question; instead, the majority reasoned along public policy lines:

> In short, while we conclude that *McCain*'s principles of duty should be extended in appropriate circumstances to owners or occupiers of commercial property and to other property owners who permit conditions on their property to extend into the public right-of-way, we do not believe *McCain*'s principles lead to a finding of duty here. While all property owners must remain alert to the potential that conditions on their land could have an adverse impact on adjacent motorists or others, we are not convinced the existing rules of liability established by our [caselaw] that distinguish conditions having an extra-territorial effect from those limited to the property's boundaries should be abandoned.[102]

Thus, as the dissent expressed in *Clay Electric*, the court's inconsistent positions on the appropriateness of public policy considerations in determining the existence of duty remain confusing.[103] The lack of a clear, consistent standard and framework for analysis by the lower courts for the determination of this essential element of negligence results in that determination often becoming a matter for one court applying whatever analytical approach the majority is convinced best protects "societal interests" on a case-by-case basis, like "discretionary function" immunity. This approach is not a recipe for predictability or stability in the common law of negligence.

In Florida and other states, impediments to the imposition of liability for negligence gradually have been erased from the common law in order to broaden potential compensation for injuries. In some jurisdictions, even the idea that recovery should be linked to fault in an affluent society seems to have become judicially repugnant.[104] But this largess has had consequences. "First in the mid-[1970s] and then again in the mid-[1980s], there were tort liability 'crises' across the country, involving escalating rates of suit and increasing liability insurance costs."[105] These "crises" triggered tort reform legislation throughout the country, but none of the legislative reforms went to the core aspects of

102. *Williams*, 974 So. 2d at 1062–63 (footnote omitted). This conclusion seems to imply that sometimes policy considerations will trump *McCain*'s foreseeability in the analysis for duty, although only the Florida Supreme Court can determine when and under what circumstances.

103. Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1203 (Fla. 2003) (Cantero, J., dissenting, with Wells, J., joining) ("By blinding itself to the public policy implications, the majority abdicates its duty to consider such implications in developing the common law.").

104. *See* Brodsky, *supra* note 61 (tracing the development of comparative negligence in Florida based on policy determinations by Florida courts).

105. ABRAHAM, *supra* note 40, at 238.

the tort law. Rather, they sought to introduce limitations on the amounts recoverable and to implement no-fault systems in areas such as automobile liability law.[106] Such reform legislation has been enacted on several occasions in Florida as well, but it has not stemmed the rising tide of personal injury litigation now embedded in our society and culture.[107] With some exceptions, the state legislature has acquiesced to the expansion of tort liability and followed the lead of the judicial branch, enacting legislation mirroring the common law changes.[108]

But the changes in the methodology of the common law courts, particularly the willingness of the courts to resort to fiat and recognize dictum as precedent and the substantive development of the law that has ensued in the wake of those changes, have served to highlight inconsistency of common law lawmaking with a core principle upon which our system of government is founded: strict separation of powers—the principle which protects the rule of law itself. The incompatibility has not gone unnoticed, but has been broadly dismissed as an unfortunate, but necessary, by-product of a more realistic and efficient justice system.[109]

V. THE COMMON LAW VS. THE RULE OF LAW

The phrase "rule of law" is frequently invoked but not always with clarity as to its meaning. In the preface to his book entitled simply *The Rule of Law*,[110] the late Thomas Bingham, Law Lord of Britain (a rough equivalent of the Chief Justice of the United States Supreme Court),[111]

106. *Id.*

107. *See, e.g.*, FLA. STAT. § 768.81 (2015) (partly codifying the 1986 Tort Reform Bill); Walter G. Latimer, *Florida Tort Reform—1999*, 73 FLA. B.J., Nov. 1999, at 56 (describing a Florida statute that "cuts off liability claims [twelve] years after a product is put into service by creating a conclusive presumption that all products have a useful life of [ten] years").

108. *See, e.g.*, FLA. STAT. § 768.81 (adopting comparative negligence). *But see* FLA. STAT § 768.0710 (2004) (rejecting the opinion in *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315 (Fla. 2001) that had shifted the burden of proof in slip-and-fall cases as to the length of time and reasonableness of substances existing on the floor from plaintiffs to defendants, thus recognizing a relaxed standard for prima facie evidence of negligence in slip-and-fall cases); *id.* § 440.11(1) (creating a very stringent standard for overcoming employer workers' compensation immunity for intentional torts in reaction to the decision in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), based on dicta, and recognizing an intentional tort exception where none existed in the statute). *See generally* Peter D. Webster & Christine Davis Graves, *A Primer on the Intentional–Tort Exception to Employers' Workers' Compensation Immunity*, 88 FLA. B.J., Dec. 2014, at 14 (explaining the purpose of workers' compensation law).

109. *See* POSNER, *supra* note 20, at 11–12 (posing an illustration of what a judge does); SCALIA, *supra* note 3, at 10 (discussing how judges "write" common law).

110. BINGHAM, *supra* note 25.

111. Britain had no Supreme Court separate from the House of Lords until its adoption of The Constitutional Reform Act of 2005, establishing a new Supreme Court of the United Kingdom,

and one of that country's most renowned jurists, relates how after being asked to give a lecture at the University of Cambridge in 2006, he chose "The Rule of Law" as the subject of the lecture "because the expression was constantly on people's lips," and he "was not quite sure what it meant, and . . . was not sure that all those who used the expression knew what they meant either, or meant the same thing."[112] Lord Bingham's book traces the history of the rule of law through a number of historic milestones beginning with the Magna Carta in 1215, which "represented and expressed a clear rejection of unbridled, unaccountable royal power, an assertion that even the supreme power in the state must be subject to certain overriding rules."[113] In England, this signaled the beginning of what would become Parliamentary Sovereignty, "the supreme legislative authority . . . [of] the Queen in Parliament, of the executive as Her Majesty's Ministers and of the judiciary as Her Majesty's Judges," the Queen or King being subject themselves to the laws of Parliament.[114]

In America, however, a new experiment in democratic government would develop under the rule of law, a system of government recognizing no sovereign branch but rather, as Lord Bingham observes, capturing

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which now has its own President. *The Supreme Court 2009*, PARLIAMENT.UK, http://www.parliament.uk/about/living-heritage/evolutionofparliament/houseoflords/judicialrole/overview/supremecourt/ (last visited Apr. 7, 2016). Thomas Bingham died on September 11, 2010, having never become President of the separate Supreme Court he helped establish. *Lord Bingham*, ECONOMIST (Sept. 16, 2010), http://www.economist.come/node/17035933.

112. BINGHAM, *supra* note 25, at vii. Bingham also explains that, in the United Kingdom at least, "differing concepts of the rule of law were put forward until a time came when respected commentators were doubtful whether the expression was meaningful at all." *Id.* at 5. In the United Kingdom, The Constitutional Reform Act of 2005, which provided for a Supreme Court separate from the Parliament for the first time, stated that the "Lord Chancellor must, on taking office, swear to respect the rule of law and defend the independence of the judges. . . . So one might have expected the Constitutional Reform Act to contain a definition of so obviously important a concept as the rule of law. But there is none." *Id.* at 7. While he does not offer a concise definition, Lord Bingham asserts that "[t]he core of the existing principle [of the rule of law] is . . . that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of the laws publicly made, taking effect (generally) in the future and publically administered in the courts." *Id.* at 8. He also lists eight primary "ingredients": (1) the law must be accessible and so far as possible, clear and predictable; (2) questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; (3) the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation; (4) ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred without exceeding the limits of such powers; (5) the law must afford adequate protection of fundamental human rights; (6) means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the private parties are unable to resolve; (7) adjudicative procedures provided by the state should be fair; and (8) there should be compliance with obligations under international as well as national law. *See id.* at v (listing the "ingredients" for the rule of law).

113. *Id.* at 12.

114. *Id.*

> the fundamental truth propounded by the great English philosopher John Locke in 1690 that "[w]herever law ends, tyranny begins." The same point was made by Tom Paine in 1776 when he said "that in America the Law is King. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other."[115]

Thus, in America the law has been elevated to the position of sovereign and, enthroned in the United States Constitution (Article VI), with the Congress (Article I), the President (Article II), and the Judiciary (Article III), granted only such powers as conferred under the Constitution. "This [supreme status of the law] contrasted, and continues to contrast, with the legislative omnipotence theoretically enjoyed by the Crown in Parliament in the [United Kingdom] . . . ."[116]

The phrase "the rule of law" implies that no one is above the law but that everyone is subject to it, a popular concept in revolutionary times.[117] John Adams is credited with enshrining the rule of law in the Massachusetts Constitution. There he wrote: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of

115. *Id.* at 8 (typeface altered) (footnote omitted) (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 202, at 400 (Cambridge Univ. Press 1988); THOMAS PAINE, RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS 34 (Oxford's Univ. Press 1995)).

116. *Id.* at 26–27. Today, the legislative role of the Crown, or royalty, is formal only. *Id.* at 169. But "[p]arliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any [a]ct that it passes." *Id.* at 165. Of course, as Lord Bingham points out, by reason of becoming a member of the European Communities Act of 1972 and subjecting itself to the decisions of the European Court of Justice and other international law such as the Human Rights Act of 1998, parliamentary authority has been voluntarily curtailed or arrogated in some instances, arguably subject to parliamentary revocation. *Id.* at 164.

117. There is considerable ambiguity surrounding the use of this phrase, the meaning of which has varied through history and still seems to be evolving. However, when lengthened to include the contrasting phase "not of men," the meaning is unmistakably what the Founders had in mind. DAVID CLARK, *The Many Meanings of the Rule of Law*, *in* LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 28–44 (Kanishka Jayasuriya ed., 1999). In seventeenth-century England, Sir Edward Coke, as Chief Justice, is credited with having declared in *Dr. Bonham's Case* that the king was subject to the law, and the laws of Parliament would be void if in violation of "common right and reason." Ian Williams, Dr Bonham's Case *and 'Void' Statutes*, 27 J. LEGAL HIST. 111, 111–28 (2006). These and other actions challenging the authority of the Crown and Parliament led to Coke's appointment as "chief justice of the Court of King's (Queen's) Bench" in an effort to silence his views. Gareth H. Jones, *Sir Edward Coke*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/biography/Edward-Coke (last visited Apr. 7, 2016). However, Coke "continued to maintain the supremacy of the common law over all persons and institutions" and was dismissed from office on November 14, 1616. *Id.* In 1620, with no prospect of returning to the judiciary, Coke instead "entered Parliament . . . [and became] a leading member of the opposition." *Id.*

them: to the end it may be *a government of laws and not of men*."[118] Justice John Marshall recognized this statement of the principle in *Marbury v. Madison*:[119] "The government of the United States has been emphatically termed a government of laws, and not of men."[120] From this statement, it is plain that the purpose is to insulate our law, through diffusion of powers and a system of checks and balances, from the interests and whims of individuals and groups. The rule of law in our system of government is manifested through the principle of separation of powers and is premised on the notion that ours should not be a government of men, but of laws—that men should not rule us.[121] The concept of separation of powers is not based on the common law, but rather was "a development of our revolutionary experience."[122] It is meant to protect against tyrannical government, which is exactly how many of the Founders viewed Great Britain.[123]

Taken literally, this conception of the rule of law is a fanciful ideal, since humans must be involved in making our laws. So, to understand the principle, it is necessary to discount the overstatement: the idea was not that men would be completely removed from our system of lawmaking, but that the power of individual lawmakers in government would be dispersed, diminished, and diluted. It is a principle calculated to minimize individual favoritism and self-dealing in governmental lawmaking.

While the Founders were protective of judicial independence,[124] their writings do not reflect an intention to alter the common law to

118. MASS. CONST. pt. 1. art. XXX (emphasis added). "Adams' biographer, Page Smith, confirms that Adams meant by that phrase that 'men are secured in their rights to life, liberty and property by clear and fair laws, falling equally on all . . . justly administered,' differentiating a society where a king bestows rights at 'whim' as 'a society of men, not of laws.'" RAOUL BERGER, SELECTED WRITINGS ON THE CONSTITUTION 293 (1987) (footnote omitted) (quoting 1 PAGE SMITH, JOHN ADAMS 246 (1962)).

119. 5 U.S. 137 (1803).

120. *Id.* at 163.

121. *But see* Mark D. Killian, *ABA President Zack Derides Attacks on the Judiciary*, FLA. B. NEWS (Mar. 1, 2011), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/SMTGT/ABA&20President%20Zack%20derides%20attacks%20on%20the%20judiciary (suggesting the rule of law is all about access to the courts).

122. Jonathan L. Alpert & Stephen M. Masterson, *The Judicial Power: Is Florida Covering Its Bets?*, 8 STETSON L. REV. 265, 268 (1979).

123. Thomas Jefferson complained of such a system of government in the 1776 *Declaration of Independence*: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

124. One of the facts offered in the *Declaration of Independence* as proof of the King's tyranny is that the King "has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." *Id.* at para. 11.

accord judges authority to remold or change the law.[125] The form of federal government they envisioned involved a judiciary independent of the vagaries of the British Parliament but subject to the checks and balances of the co-equal branches and ultimately accountable to the people, so that the likelihood of any branch becoming the tool of any single individual or group would be greatly reduced.[126]

In his essay entitled "Common Law Courts in a Civil Law System" published in 1997, Justice Antonin Scalia pointed out that while the "image of the common law" was different in the era of the Founders and the "rise of legal realism" has led to an acknowledgement of judicial lawmaking, "this realistic view of what common-law courts do," highlights "the uncomfortable relationship of common-law lawmaking to democracy (if not the technical doctrine of separation of powers)."[127] He discussed how this "uncomfortable relationship" led to the law-codification movement of the nineteenth century before legal realism carried the day.[128] Nevertheless, he concluded that he is "content to leave the common law, where it is" because "[i]t has proven to be a good method of developing the law in many fields—and perhaps the very best method."[129] This view is not universally shared, and the debate continues

125. James Madison also opposed judicial legislation. In *The Federalist*, No. 47, he approvingly quotes Montesquieu's *The Spirit of the Laws* as follows: "Were the power of judging . . . would be exposed to arbitrary control, for the *judge* would then be *the legislator*." HAMILTON, JAY & MADISON, THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 268–69 (1898) (citing MONTESQUIEU, *supra* note 10, at 181 ("Were [the judiciary power] joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator.")). *But cf.* POSNER, *supra* note 20, at 141 ("[T]he most influential framers were lawyers, and it is unlikely that they greatly feared an 'imperial' judiciary."); Nicholas (Cole) Fegen, *Thick or Thin? Defining Rule of Law: Why the "Arab Spring" Calls for A Thin Rule of Law Theory*, 80 UMKC L. REV. 1187, 1196–1200 (2012) (discussing scholars' disagreement on this authority).

126. The benefits of the "horizontal" separation of powers among the branches, as described here, has been replicated in state governments and was to be further enhanced by the "vertical" separation of powers envisioned between the state and federal government embodied in the concept of federalism. However, in his book *American Creation: Triumphs and Tragedies at the Founding of the Republic*, Joseph J. Ellis points out that in describing the principles of separation of powers in his 1776 *Thoughts on Government*, "Adams was proposing an outline for republican government at the state, not the national, level. He was also careful not to describe *Thoughts* as a prescription that each colony should adopt wholesale." JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC 47 (2007).

127. SCALIA, *supra* note 3, at 10 ("It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact 'make' the common law, and that each state has its own.").

128. *Id.* at 10. Justice Scalia explains that opponents of legal realism sought legislative codification of the law in the nineteenth century, but the "codification movement . . . was generally opposed by the bar, and hence did not achieve substantial success, except in one field: civil procedure." *Id.* at 11.

129. *Id.* at 12. Of course, the federal courts have not been in the business of common law lawmaking since *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). However, federal courts do interpret state common law, and sometimes their interpretation differs from that of the state courts. *See* Bosarge v. Miss. Bureau of Narcotics, 796 F.3d 435, 444 (5th Cir. 2015) (making an "*Erie* guess" as

among legal scholars and judges over the legitimacy and scope of judicial lawmaking as well as constraints. Perhaps, codification is not a feasible or desirable solution, but neither is turning a blind eye to inconsistency and ignoring its consequences. Several schools of thought align themselves under various names, such as "formalists" and "realists," and hold a broad variety of views on the extent to which judges should be involved in "making" law.[130]

Judge Posner acknowledges that "[t]he rule of law is a genuine, indeed an invaluable, public good."[131] Lord Bingham asserts that constraint of judicial discretion is an important ingredient of the rule of law, and that "[t]he job of judges is to apply the law, not to indulge their personal preferences."[132] He opines: "The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered."[133]

Similarly, Judge Posner observes that "[a] *system* of untrammeled official discretion would be inconsistent with the premises of the liberal state, prominent among which is the rule of law—the concept of 'a government of laws, not men.'"[134] He says that "[i]t is desirable to minimize the discretion of officials, including judges, but undesirable as well as impossible to eliminate official discretion altogether."[135] He describes our current legal system as "a mixture of rule and discretion" and declares that "[t]he practical question is whether it is better than a system with even more rules and less discretion or a system with even more discretion, more standards, and fewer rules."[136]

The proper mixture of rule and discretion, and the constraints that will promote and maintain the optimum comfort level between the common law and the foundational rule of law enthroned in both our federal and state constitutions, may not be reduced to a formula, but

to Mississippi's "discretionary function immunity"); Vasconez v. Hansell, 871 F. Supp. 2d 1339, 1343 (M.D. Fla. 2012) (dismissing the state law claims).

130. *See generally* POSNER, *supra* note 20, at 9–24 (providing a historical overview of jurisprudence).

131. *Id.* at 467 (which is not to say that they agree on the meaning of "the rule of law").

132. BINGHAM, *supra* note 25, at 51.

133. *Id.* at 54. One example of the application of constrained discretion which Lord Bingham cites with approval is the awarding of costs in a civil action, where the ordinary rule in the United Kingdom—unlike the United States—is that the loser pays the reasonable costs incurred by the winner. *Id.* at 53.

134. POSNER, *supra* note 20, at 61.

135. *Id.* at 60.

136. *Id.* at 61 (footnote omitted).

some guiding principles appear beyond dispute. Foremost, while the common law may be dynamic, it should not be volatile to the degree that its principles are in a constant state of flux so that stability and predictability are impossibilities.[137] Common law lawmaking characterized by judicial fiat without the essential control of *stare decisis* must be rejected as inconsistent with the established methodology for the development of the law and, more importantly, incompatible with fundamental principles underlying the rule of law.[138] Likewise, judicial restraint and deference to the legislature must be accorded particularly on significant matters of public policy, because the failure to do so can represent a profound threat to the rule of law, eroding and compromising the principle of separation of powers as the judiciary increasingly

137. *See* Levy v. Fla. Power & Light Co., 798 So. 2d 778, 781–82 (Fla. 4th Dist. Ct. App. 2001). In *Levy*, the Fourth District refused to depart from precedent to recognize a duty by the power company to a motorist who died in an auto accident at an intersection where the traffic light was malfunctioning, stating:

> Judicial policy making is not a freewheeling exercise. As Judge Judith Kaye has observed:
>
> > If appellate adjudication is not a cold, scientific process of affixing precedents to facts found below, neither is it a free-form exercise in imposing a judge's personal beliefs about what would be a nice result in a particular case. Our government is after all a government of law, and our court is a court of law. Though it must move, the law also must have stability, certainty, and predictability so that people will know how to conduct themselves in order to come within the law, and will know what rights they may reasonably expect will be protected or enforced. An appellate court decision resolves a dispute between litigants, but it also establishes the rule for the future. Stability is essential for fairness and evenhandedness: if certain conduct produces a result in one case, then blind justice should produce the same result for other people in other cases like it. Courts simply cannot decide one way one day and another way the next.

Id. (citing Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1014 (1988)). The court goes on to say:

> The drastic shift in policy which Levy seeks is more properly made on a statewide basis by the supreme court or by the legislature, the branch of government best suited to weigh and allocate social costs. "[S]elf-restraint by the courts in lawmaking must be their greatest contribution to the democratic society."

Id. at 782 (quoting Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 777 (1965)).

138. In *McGinley v. Houston*, the court explained the relationship of *stare decisis* to the rule of law: "The United States federal legal system is structured as a common law system. This system embodies the rule of *stare decisis* that 'courts should not lightly overrule past decisions.'" 361 F.3d 1328, 1331 (11th Cir. 2004) (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970)). The court went on to say that *stare decisis* was important because "[s]tability and predictability are essential factors in the proper operation of the rule of law." *Id.* (quoting Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)). Furthermore, "[t]he rule of law requires 'fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.'" *Id.* (quoting *Moragne*, 398 U.S. at 403).

assumes a dominant policymaking role in our government.[139] The practices of fiat and judicial dominance in lawmaking are repugnant to any reasonable conception of the rule of law.[140]

VI. CONCLUSION

The wistful image many lawyers hold dear of a common law linking us to grand British institutions and a lofty jurisprudence spanning centuries is at odds with the reality of the modern common law in our state.[141] It would have been impossible for the Founders to envision that the common law they regarded as a birthright and understood as their countrymen's customs and practices as expounded by divinely guided judges could be transmogrified as sometimes has occurred in Florida and other states.

Judge Richard Posner laments that "a carapace of falsity and pretense surrounds law."[142] Decrying the attitude of the American lawyer toward the law as too "pious and reverential," he declares:

> Law is not a sacred text, however, but a usually humdrum social practice vaguely bounded by ethical and political convictions. The soundness of legal interpretations and other legal propositions is best

139. *See* Joseph W. Hatchett & Annette Boyd Pitts, *A Balancing Act*, 80 FLA. B.J., Nov. 2006, at 27, 28 ("Judges must follow the U.S. and Florida constitutions in their decisions as well as applicable law as opposed to making decisions based on their personal beliefs."). It is clear that often the state legislature has been lethargic in regard to change and what actions it has taken have been incremental and reactive rather than proactive and comprehensive. These tendencies have doubtlessly contributed to the court taking matters into its own hands in instances such as the adoption of comparative negligence in our state. Where deference is given, responsiveness in some degree would be expected.

140. Princeton Professor of Jurisprudence, Robert P. George, explained:

> Fidelity to the rule of law imposes on public officials in a reasonably just regime (that is, a regime that it would be wrong for judges to attempt to subvert) a duty in justice to respect the constitutional limits of their own authority. To fail in this duty, however noble one's ends, is to behave unconstitutionally, lawlessly, unjustly. The American founders were not utopians; they knew that the maintenance of constitutional government and the rule of law would limit the power of officials to do good as well as evil. They also knew, and we must not forget, that to sacrifice constitutional government and compromise the rule of law in the hope of rectifying injustices is to strike a bargain with the devil.

Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2283 (2001).

141. *See, e.g.*, Cavendish & Hood, *supra* note 46, at 9 ("[J]udges . . . today grasp [a broken] cord of tradition and precedent spanning many centuries; a record of proceeding, argument, and opinion revealing both accreted wisdom and discarded errancy—[t]he common law.").

142. POSNER, *supra* note 20, at 469.

> gauged, therefore, by an examination of their consequences in the world of fact. That is a central contention of this book.[143]

He says that law

> cannot accurately or usefully be described as a set of concepts, whether of positive law or of natural law. It is better, though not fully, described as the activity of the licensed professionals we call judges, the scope of their license being limited only by the diffuse outer bounds of professional propriety and moral consensus.[144]

Candidly, this may be an accurate description of the freewheeling domain of the common law at its worst. Although a pretender to a noble pedigree, at times the modern common law in Florida, as in other states, is surrounded by such a carapace of falsity. At times, its stature has been diminished by recourse to fiats and subterfuges and incompatibility with the rule of law. It has been stripped of its coherence and predictability by the erosion of *stare decisis*, the adoption of dictum as a substitute for precedent, and the application of case-by-case analysis and decision-making. In short, at times it has become a law of men, disconnected from the tradition that has imbued it with legitimacy.

Sometimes the methodology of the common law has become exactly the uneven and unsteady process that Blackstone condemned, where justice will "waver with every new judge's opinion."[145] The consequences in "the world of fact" may be gauged by the current state of negligence law in Florida—a state of confusion and uncertainty. The legal framework for the analysis of a legal duty in negligence issues has become formulaic to the point that it equates foreseeability with duty obviating policy considerations relevant in most other states unless the majority decides otherwise in a specific case. And, particularly in cases involving governmental entities, the analysis has become complex and often convoluted to the point that it is, as Justice Sundberg termed it, an enigma.[146]

However, at its best, the common law need not be at odds with the rule of law. As Lord Bingham observes in his book *The Rule of Law*:

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143. *Id.* at 467.

144. *Id.* at 456–57.

145. BLACKSTONE, *supra* note 19, at 69.

146. *See* Dep't of Transp. v. Neilson, 419 So. 2d 1071, 1079 (Fla. 1982) (Sundberg, J., dissenting) ("[T]he irreconcilable results among the several district courts of appeal are not harmonized, but rather the confusion is compounded. The enigma is now shrouded in mystery.").

> In civil cases also we may agree with Justice Heydon of the High Court of Australia that judicial activism taken to extremes can spell the death of the rule of law: it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. It is also, of course, very tough on the loser in the particular case, who has lost because the goalposts have been moved during the course of the litigation. This can, if the movement is substantial and unpredictable, offend the rule suggested earlier, that laws should generally take effect in the future.[147]

It is peculiarly within the control of the judiciary to adjust and maintain the comfort level in the relationship between the common law and the rule of law, and it is their responsibility to do so in a manner that will preserve both.[148] Judges and lawyers are both stewards and beneficiaries of the common law, but they are foremost sworn protectors of the rule of law. Despite its flaws and shortcomings, the common law has proven value and benefits in our civil society, but without the rule of law, there would be no civil society. The common law is important, but the rule of law is paramount. The rule of law provides the medium of civil society in which the common law may be developed and applied to resolve our civil disputes.

To foster and maintain a more comfortable relationship between the common law and the rule of law will require that judicial deference be accorded to the state legislature particularly on important public policy decisions that arguably will have major social or economic consequences.[149] Such an approach respects the principle of strict

147. BINGHAM, *supra* note 25, at 45–46 (footnote omitted).

148. Of course, deference to the legislative branch will be facilitated if that branch can be more responsive to change than it has shown itself inclined to be in the past.

149. Occasionally, the Florida Supreme Court has recognized constraints and limitations upon judicial policymaking. In *Clay Electric Cooperative, Inc. v. Johnson*, the majority opinion states:

> Although courts, where appropriate, will address existent public policy concerns, Clay Electric's "floodgate" argument asks this Court to base its decision on pure speculation. The electric company cites *no* record evidence supporting its hypothesis. To permit meaningful review, this claim in fact would require a projection of future rate hikes based on established rate-setting formulae governing the utility and insurance industries. No such assessment has been made here and, under Florida's statutory scheme, such matters fall squarely within the purview of the legislative, not judicial, branch.

873 So. 2d 1182, 1189–90 (Fla. 2003) (footnotes omitted). Yet, rather than deferring to the legislature, the court recognized the existence of a duty of care. *But see* POSNER, *supra* note 20, at 139–41 (arguing against judicial deference).

separation of powers that is foundational in our federal and state constitutions. Judicial fiat and overreach, the erosion of *stare decisis*, the adoption of dictum as precedent, the advancement of personal ideology or policy preferences under the guise of modernization of the law or protecting society do not demonstrate such respect. Most of the legal scholars examined in the preparation of this Article do not support such practices.[150] The creation of opacity, incoherence, and confusion in the common law all militate against compatibility and must be rejected if the rule of law and integrity of our judicial system are to be preserved. On our Florida Supreme Court, the voices of dissent and caution against such practices have not fallen silent, but they have become more reticent.[151] They are needed to remind the court of the subordination of

150. While Judge Posner does not seem to advocate for judicial fiat, it is difficult to determine the degree to which he supports adherence to precedent.

151. *See, e.g.*, Rodriguez v. Miami-Dade Cnty., 117 So. 3d 400, 410 (Fla. 2013) (Candy, J., with Polston, C.J., concurring in the judgment) ("I disagree with the majority's conclusion that legal immunity from suit is not a proper basis for determining that the jurisdictional requirements for certiorari are satisfied. Once it is legally established that the statutory waiver of sovereign immunity is inapplicable, the sovereignly immune entity is both immune from liability and immune from suit. At that point, the erroneous continuation of legal proceedings against the immune governmental entity constitutes irreparable harm because the full benefit of the legal immunity from suit cannot be restored on appeal."); Williams v. Davis, 974 So. 2d 1052, 1065 (Fla. 2007) (Lewis, C.J., with Wells and Bell, JJ., concurring in the judgment) ("I would not expand the law as the majority appears to do without a factual case and controversy that requires such an expansion. The decision of the majority, based on hypothetical facts, is a practice we have avoided in the past and one which may produce unknown and unintended consequences."); *Clay Elec. Coop., Inc.*, 873 So. 2d at 1202 (Cantero, J., with Wells, J., dissenting) ("The majority dismisses the public policy implications of its decision by stating that such considerations are for the [l]egislature. Yet this [c]ourt has recognized that whether to impose a duty in tort is quintessentially a policy decision. Just last year, this [c]ourt quoted William L. Prosser, . . . acknowledging that the concept of duty 'is not sacrosanct in itself, but only an expression of the sum total of those considerations of *policy* which lead the law to say that the particular plaintiff is entitled to protection [or not].' The [c]ourt now ignores the reality that, in developing the common law of this State, this court necessarily considers the public policy implications." (citations omitted)); Fla. Dep't of Health & Rehab. Servs. v. S.A.P., 835 So. 2d 1091, 1108 (Fla. 2002) (Wells, J., with Harding, J., dissenting) ("The waiver of sovereign immunity is solely a prerogative of the legislative branch of government. Because this waiver is solely a prerogative of the legislative branch and not the judicial branch, I believe the [c]ourt is without authority to exercise judicial equity powers to extend the waiver of sovereign immunity beyond that which the [l]egislature has expressly granted."); Dep't of Health & Rehab. Servs. v. Yamuni, 529 So. 2d 258, 266 (Fla. 1988) (Overton, J., with McDonald and Grimes, JJ., dissenting) ("If the Florida [l]egislature wants to establish a policy requiring the state to pay damages for injuries due to child abuse, it clearly has the authority to do so. The judiciary, however, has no authority to impose that obligation."); Hoffman v. Jones, 280 So. 2d 431, 440, 443 (Fla. 1973) (Roberts, J., dissenting) ("My primary concern is whether this [c]ourt is empowered to reject and replace the established doctrine of contributory negligence by judicial decree. . . . If such a fundamental change is to be made in the law, then such modification should be made by the legislature where proposed change will be considered by legislative committees in public hearing where the general public may have an opportunity to be heard and should not be made by judicial fiat. Such an excursion into the field of legislative jurisdiction weakens the concept of separation of powers and our tripartite system of government.").

all branches in our system of government to the rule of law and the limits of judicial power.

However dominant the judges' role in the production and administration of the common law, it belongs not to them but to the people, who must be confident of the legitimacy of that law and its fidelity to the core principles of our government. With special knowledge of the law and authority to administer it comes an obligation to the people and to the rule of law they have chosen. Judges occupy a very special position of trust within our systems of government both at the federal and state levels. If, as Thomas Paine declared "in America the law is King," then judges have been accorded the highest honor and privilege of administration of the sovereign law, but, concomitantly, they are responsible for maintaining and preserving the overarching principle of the rule of law together with its distinctly American component, separation of powers. Judges are not oracles or oligarchs; neither are they legislators. They are not rulers but servants of the public in our democratic system. But they are servants who have been given much honor and much responsibility.

In the 1978 case which resulted in the disbarment of a former Florida Supreme Court Justice involved in the scandals of the early 1970s, we are reminded of this fact in the following observation in the concurring opinion of the late Justice Alan Sundberg, joined in by the late Justice Arthur England:

> [T]here is an obligation which corresponds to the privilege of being a member of the Bar and it is best expressed in a passage from the book of our most fundamental laws:
>
> For unto whomsoever is much given, of him shall be much required: and to whom men have committed much, of him they will ask the more.[152]

Even so for lawyers and for judges of the common law, for to them is entrusted the administration of the people's law in a government of laws and not of men.

152. Fla. Bar v. McCain, 361 So. 2d 700, 709 (Fla. 1978) (footnote omitted) (quoting *Luke* 12:18 (King James)).