Legal Strategies to Challenge Chemical Restraint of Children in Foster Care
A Resource for Child Advocates in Florida

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OVERVIEW

Section 39.407 of the Florida Statutes establishes that "before the department provides psychotropic medications to a child in its custody, the prescribing physician shall attempt to obtain express and informed consent . . . from the child's parent or legal guardian."[1] If parental consent cannot be obtained,[2] "the department must file a motion seeking the court's authorization to initially provide or continue to provide psychotropic medication to a child in its legal custody".[3] Thus, in the absence of parental consent, Section 39.407 requires a court order prior to initiation of non-emergency medical treatment. Dependency judges must understand the alternatives, the potential dangerous side effects of the proposed drug(s), and the possibility that the drug(s) is a chemical restraint rather than a meaningful form of active treatment. This resource will help you educate dependency judges and protect children in foster care against

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[1] FLA. STAT. § 39.407(3)(a) (2005). Exceptions to parental consent are set forth in Sections 39.407(b)(1) or (e). Section 39.407(b)(1) allows psychotropic medication to be administered without parental consent or court order if the child is removed from the home under Section 39.401, the child is receiving prescribed psychotropic medication at time of removal, and parental authorization to continue providing the medication cannot be obtained. *Id.* In such circumstances, "the department may take possession of the remaining medication and may continue to provide the medication as prescribed until the shelter hearing, if it is determined that the medication is a current prescription for that child and the medication is in its original container." *Id.* Section 39.407(e)(1) allows psychotropic medications to be administered without parental consent or court order "[i]f the child's prescribing physician certifies in the signed medical report required in paragraph (c) that delay in providing a prescribed psychotropic medication would more likely than not cause significant harm to the child." Section 39.407(e)(2) further provides that "[p]sychotropic medications may be administered in advance of court order in hospitals, crisis stabilization units, and in statewide inpatient psychiatric programs." *Id.*

[2] Court order is only required if parental consent cannot be obtained. Section 39.407(3)(a) provides that "[i]f . . . a parent whose parental rights have not been terminated provides express and informed consent to the provision of a psychotropic medication, the requirements of this section that the department seek court authorization do not apply to that medication until such time as the parent no longer consents."

[3] § 39.407(3)(c). Exceptions to court consent are set forth in Sections 39.407(b) and (e) discussed *supra* note 1.

rights violations, harmful drugs, and/or chemical restraint. This resource includes information about commonly prescribed psychotropic drugs, their side effects, and strategies for challenging harmful treatment and/or chemical restraint.

Many advocates believe that children in foster care receive psychotropic drugs as a means of chemical restraint, rather than as a treatment. Chemically restraining a child involves "using medication to stop behavior by dulling a child's ability to move and/or think".[4] Advocates also believe that chemical restraints cause a child to become more compliant and therefore less labor-intensive for the state. Children in foster care are at risk of loss of liberty and serious, and in some cases life-threatening, physical side effects. [5]

Child advocates should be alert to the use of diagnosis to justify psychotropic drug use by children. Psychiatry has created a number of childhood diagnoses to describe behavior. Diagnoses such as Attention-Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), and Intermittent Explosive Disorder have never been definitively shown to exist as any sort of organic pathology.[6] Nevertheless, they have provided a medical imprimatur justifying excessive drugging of healthy children in foster care.

It is critical that child advocates understand that *all* children tend to externalize their conflicts or "act out". Children in the dependency system have had difficult and often traumatic lives. They act out not because they are "sick" but precisely because they are healthy. These children need the love and stability often lacking in their families of origin, through absolutely no fault of their own. The advocacy community is extremely concerned that instead of being provided with what they need, children in foster care are at very high risk of being labeled with questionable diagnoses and being drugged with dangerous substances.

Psychotropic drugs may be harmful to a child and not contribute to his or her well-being. However, despite these harmful physical and psychological side effects, such drugs are receiving greater acceptance within the medical community as a means of treating childhood behavioral disorders.[7] Accordingly, guardians should be prepared to challenge any instances that appear to involve overmedication or inappropriate treatment.

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[4] *In The Name of Treatment*, http://www.tash.org/publications/parentguide/inthenameoftreatment.pdf (last visited March 15, 2006).

[5] DAVID R. ROSENBERG ET AL., TEXTBOOK OF PHARMACOTHERAPY FOR CHILD AND ADOLESCENT PSYCHIATRIC DISORDERS, 105-50 (1994).

[6] *See* Jonathan Leo & David Cohen, *Broken Brains or Flawed Studies?*, 24 J. MIND & BEHAV. 29, 29-31 (2003) (stating that neuroimaging studies have not provided support for a specific "biological basis" for ADHD); Fred A.Baughman Jr., *The Millions of Children Labeled ADHD (or any Psychiatric "Disorder") Were Normal All Along*, July 1, 2004, http://www.adhdfraud.com/frameit.asp?src=commentary.htm (last visited Jan. 27, 2006) (asserting that not a single mental, emotional, or behavioral disorder has been validated as a disease or medical syndrome with a confirmatory physical or chemical abnormality); Fred A. Baughman, Jr., *Psychiatry Invents "Chemical Imbalances" of the Brain—Neurology "Validates" Them, Deceiving and Drugging The Normals (Cradle-To-Grave) of the Nation*, May 26, 2003, http://www.adhdfraud.com/frameit.asp?src=commentary.htm (last visited Jan. 27, 2006); John Breeding, *Does ADHD Even Exist? The Ritalin Sham*, MOTHERING, July/August 2003, http://www.mothering.com/articles/growing_child/education/ritalin-sham.html (last visited Jan. 29, 2006) ("The diagnosis of ADHD is, itself, fraudulent."); Gretchen B. LeFever et al., *ADHD Among American Schoolchildren*, SCI. REV. MENTAL HEALTH PRACT., 2003, http://www.srmhp.org/0201/adhd.html (last visited Jan. 26, 2006) (stating that there is no pathognomonic biological marker for ADHD).

[7] Jacqueline A. Sparks & Barry L. Duncan, *The Ethics and Science of Medicating Children*, 6 ETHICAL HUMAN PSYCHOL. & PSYCHIATRY 25 (2004).

UNDERSTANDING SPECIFIC DRUGS

Psychotropic drugs are those that alter brain function, resulting in temporary changes in perception, mood, consciousness, or behavior.[8] Included are antidepressants, mood stabilizers, stimulants, antipsychotics and antihistamines. These substances typically cause a child to become more docile, have less diffuse focus, and have a lower level of motoric activity. Many advocates note that a child on psychotropic drugs will tend to be more conforming and compliant, and that may be construed as "clinical success" by teachers, physicians and caseworkers. However, these drugs are extremely dangerous.

DRUGS	PHYSICAL SIDE EFFECTS
ANTIDEPRESSANTS	
Prozac Paxil Zoloft Lexapro	Headache,[9] nausea,[10] trouble sleeping.[11]
MOOD STABILIZERS	
Lithium Can be toxic at high blood levels, so regular blood tests are required.[12] Depakote Sometimes used for this purpose—see anticonvulsant. Tegretol Sometimes used for this purpose—see anticonvulsant.	Urinary frequency,[13] weight gain,[14] tremors,[15] gastrointestinal (GI) problems.[16]
STIMULANTS	
Ritalin Adderall	Weight loss,[17] growth deficits,[18] "zombie effect."[19]

[8] Reference.com, Encyclopedia, www.reference.com (last visited Jan. 26, 2006).
[9] Drugs.com, Drug Information Online, http://www.drugs.com (last visited Jan. 27, 2006); PDRhealth, Drug Information, http://www.pdrhealth.com (last visited Jan. 26, 2006).
[10] Drugs.com, *supra* note 8; PDRhealth, *supra* note 8.
[11] Drugs.com, *supra* note 8; PDRhealth, *supra* note 8.
[12] For information regarding the toxicity of lithium see PETER R. BREGGIN, TOXIC PSYCHIATRY 172 (1991); DAVID R. ROSENBERG ET AL., *supra* note 2, at 257-61. *See also* PDRhealth, *supra* note 8 (stating that frequent blood tests are needed when taking Eskalith, a commonly prescribed brand name of lithium, to ensure the correct dosage and prevent lithium poisoning).
[13] ROSENBERG ET AL., *supra* note 2, at 253 (stating that patients who suffer from severe polyuria as a result of lithium therapy have been reported to excrete several liters of urine per day).
[14] *Id.*
[15] *Id.*
[16] FRANK J. AYD, JR., LEXICON OF PSYCHIATRY, NEUROLOGY AND THE NEUROSCIENCES 562 (2d ed. 2000); ROSENBERG ET AL., *supra* note 2, at 252 (listing gastrointestinal discomfort as a side effect of lithium use).

Cylert Dexedrine Note: Strattera is chemically a non-stimulant drug, but it has a very similar side effects profile.	Note: The FDA issued a warning on 9/29/05 concerning Strattera causing suicidal ideation in children.[20]
ANTIPSYCHOTICS (SEE NOTE)	
Risperdal Abilify Zyprexa Seroquel Clozaril Haldol	Sedation,[21] lethargy,[22] drowsiness,[23] dizziness,[24] Tardive Dyskinesia (involuntary muscle movements),[25] Neuroleptic Malignant Syndrome (NMS).[26] Note: Tardive Dyskinesia is potentially irreversible[27] and NMS potentially fatal.[28]
ANTICONVULSANTS	
Depakote Dilantin Tegretol Topamax	Decreased performance at school,[29] drowsiness,[30] behavioral changes,[31] bleeding gums.[32]
ANTIHYPERTENSIVES	
Clonidine (Catapres) Tenex Lopressor (Toprol)	Sedation,[33] drowsiness,[34] dizziness.[35]

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[17] Dennis P. Cantewell & Gabrielle A. Carlson, *Stimulants*, *in* PEDIATRIC PSYCHOPHARMACOLOGY: THE USE OF BEHAVIOR MODIFYING DRUGS IN CHILDREN 190-92 (John S. Werry ed., 1978).
[18] *Id.*
[19] Peter R. Breggin, *What Psychologists and Therapists Need To Know About ADHD and Stimulants*, J. PSYCHOL. & PSYCHOTHERAPY, *Spring 2000*, http://www.breggin.com/whatpsychologists.pbreggin.2000.pdf (last visited Jan. 26, 2006).
[20] U.S. Food and Drug Administration, *FDA Issues Public Health Advisory on Strattera (Atomoxetine) for Attention Deficit Disorder*, FDA NEWS, Sept. 29, 2005, http://www.fda.gov/bbs/topics/NEWS/2005/NEW01237.html (last visited Jan. 24, 2006).
[21] ROSENBERG ET AL., *supra* note 2, at 197.
[22] Bertrand G. Winsberg & Luis E. Yepes, *Antipsychotics (Major Tranquilizers, Neuroleptics)*, *in* PEDIATRIC PSYCHOPHARMACOLOGY: THE USE OF BEHAVIOR MODIFYING DRUGS IN CHILDREN 247 (John S. Werry ed., 1978).
[23] *Id.*
[24] PDRhealth, *supra* note 8.
[25] AYD, *supra* note 15, at 69, Winsberg & Yepes, *supra* note 23, at 256-58.
[26] ROSENBERG ET AL., *supra* note 2, at 216-20.
[27] AYD, *supra* note 15, at 965.
[28] ROSENBERG ET AL., *supra* note 2, at 216.
[29] Drugs.com, *supra* note 8.
[30] PDRhealth, *supra* note 8.
[31] *Id.*
[32] Drugs.com, *supra* note 8.
[33] PDRhealth, *supra* note 8.

ANTIHISTAMINES	
Benadryl	Sedation,[36] drowsiness,[37] dizziness,[38] GI symptoms.[39]
ANTIANXIETY DRUGS (Anxiolytics)	
Valium Klonopin Atiyan Buspar Tranxene Effexor (Also an antidepressant)	Drowsiness,[40] mental slowing and confusion,[41] GI symptoms,[42] dizziness.[43]

NOTE: Antipsychotics are indicated primarily for the treatment of psychosis.[44] Psychosis is defined as a severe mental disorder, such as schizophrenia, characterized by defective or loss contact with reality (e.g., hallucinations, delusions).[45] These are arguably the most powerful (and therefore most sedating) psychotropic drugs, and also the most dangerous. Advocates are concerned that the vast majority of children for whom these drugs are prescribed are NOT diagnosed with psychosis.

PSYCHOLOGICAL SIDE EFFECTS

In addition to the physical side effects, psychotropic drugs can have a number of psychological effects:

- The child learns he/she is not responsible for his/her own actions[46]
- The child is disempowered and comes to see her/himself as "defective"[47]
- The child learns to use drugs to deal with social/academic problems[48]
- The child has to deal with the stigma of being labeled with a psychiatric disorder (which can also have long-term consequences for future employment or for obtaining a driver's license, among other things)

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[34] *Id.*
[35] *Id.*
[36] MedicineNet.com, Medications, www.medicinenet.com (last visited Jan. 27, 2006).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Drugs.com, *supra* note 8.
[41] About, Mental Health Resources, http://mentalhealth.about.com/od/psychopharmacology/a/anxmedsetc.htm (last visited Jan. 27, 2006).
[42] Drugs.com, *supra* note 8.
[43] PDRhealth, *supra* note 8.
[44] *See* ROSENBERG ET AL., *supra* note 2, at 197.
[45] AYD, *supra* note 15, at 813. *See also* Merriam-Webster Online Dictionary, http://www.merriamwebster.com/dictionary/psychosis (last visited Jan. 26, 2006)
[45] Bob Jacobs, *Celebrate, Don't Medicate*, YOUTH AFFAIRS NETWORK QLD, http://www.yanq.org.au/?page=extra (last visited Feb. 1, 2006).
[46] *Id.*
[48] *Id.*

LEGAL STRATEGIES

GALs and GAL Attorneys are entrusted with the responsibility of protecting a child's health and ensuring that the child's well-being is preserved. Thus, it is incumbent upon child advocates to carefully scrutinize all requests seeking psychotropic prescriptions for a child in state custody and, where appropriate, challenge such chemical restraint as contrary to the child's well-being. Three strategies are particular valuable: effective cross-examination of experts, effective school based advocacy, and illuminating the contrast between the rates of psychotropic drug use by children in the parental home vs. children in foster care.

A. *Effective Cross-Examination of State Expert*: When possible, GALs and GAL attorneys should present expert testimony to challenge inappropriate diagnosis and prescription recommendations. However, medical practitioners typically dislike publicly criticizing their colleagues, especially regarding subjective diagnosis and somewhat controversial issues. Thus, effective cross-examination of the state's expert is critical.

1. **Alternatives – A Child's Right to the Most Inclusive Environment (Least Restrictive Environment)**: It is a well established principle in both state and federal law (Chapter 39, IDEA, and elsewhere) that the least restrictive environment (LRE) must be tried before moving onto something more restrictive. The underlying philosophy is that the more restrictive something is the more potentially harmful it is, so you want to ensure that safer strategies have been exhausted first. This principle applies perfectly to the use of psychotropic drugs in children. Very few things could be more intrusive than the invasion of bodily integrity created by ingesting a substance. Often with children in foster care, psychotropic medications are the first response, rather than the last. On cross-examination, child advocates should illuminate that no alternatives were first tried and/or that the treating physician has given the prescription(s) without knowing if less invasive interventions were attempted.

2. **Potential Side Effects**: Be prepared with documentation of prevalence and incidence of side effects and elicit this on cross. In this line of inquiry you can bring out that these psychotropic medications have not been tested on children,[49] and in the case of polypharmacy there is little if any research into drug interactions.[50] You can develop the fact that the long-term effects are unknown.[51] You can attempt to elicit testimony that a child is less likely to assume

[49] Sumner J. Yaffe & Michele Danish, *The Classification and Pharmacology of Psychoactive Drugs in Childhood and Adolescence*, *in* PSYCHOPHARMACOLOGY IN CHILDHOOD AND ADOLESCENCE 41 (Jerry M. Wiener ed., 1977) (stating that the classification of psychotropic agents for use in children is greatly hampered by a lack of data regarding their safety and efficacy in the pediatric population).
[50] Marilyn Elias, *More Kids Get Multiple Psychiatric Drugs*, USA TODAY, Aug. 1, 2005, http://www.usatoday.com/news/health/2005-08-01-kids-drugs_x.htm (last visited Jan. 27, 2006); Carol Hoy, *Polypharmacy in Children on the Rise in the US*, MED. NEWS TODAY, Aug. 2, 2005, http://www.medicalnewstoday.com/medicalnews.php?newsid=28500 (last visited Jan. 27, 2006).
[51] Kathi Grasso, *Children and Psychotropic Drugs: What's An Attorney To Do?*, ABA CHILD LAW PRACT., June 1997, http://www.abanet.org/child/medart.html (last visited Jan. 27, 2006).

responsibility for his/her own behavior if he/she is told it is attributable to a "disorder". In the case of antidepressants you can elicit testimony that they have been banned for children in the UK (except for Prozac)[52] and were the subject of congressional and FDA hearings in the US.[53]

3. **Lack of Specificity of the Diagnoses**: There are no known organic correlates for these "behavioral disorders," so there are no laboratory tests to confirm the diagnoses.[54] They are entirely subjective. You can elicit on cross the fact that no blood test, ECG, EEG, MRI, CT or PET scan or any other objective test went into the diagnostic process.

4. **Lack of Specificity of the Treatment**: It is not uncommon for drug regimens to change each time there is a change in treating physician. Children with long histories of psychiatric "treatment" have typically been given a myriad of different psychotropic drugs. Most important in this line of questioning is to develop the idea that the drugs are being used to control behavior, and not to ameliorate any sort of identifiable pathology.

5. **Lack of Sufficient Time Spent with the Child**: Psychiatrists will typically devote very little time into interacting with the child and reading the clinical record before prescribing psychotropic drugs to children in foster care. Sometimes they will not see the child themselves but may prescribe on the report of teachers and caseworkers. Some physicians allow a nurse-practitioner, operating under individual practice protocols, to do the face-to-face. You can develop the lack of personal knowledge about the child and/or the child's history.

B. *Resisting School Based Coerced Drug Use*: Many children in the dependency system are identified as students with disabilities who require special education and related services to benefit from education. These children are protected by the Individuals with Education Improvement Act (IDEA) of 2000. Child advocates should be aware that the IDEA prohibits schools from requiring use of a controlled substance such as Ritalin or Adderall as a condition of a student's attendance.[55] Child advocates should ensure that schools provide all the instruction, supports and services children with disabilities are entitled to under the IDEA.

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[52] Barbara K. Hecht, *Antidepressants Banned for UK Kids*, MEDICINENET.COM, http://www.medicinenet.com/script/main/art.asp?articlekey=25670 (last visited Jan. 28, 2006). *See also* CNN.com, *UK May Ban Antidepressants for Children*, Dec. 10, 2003, http://www.cnn.com/2003/HEALTH/12/10/drugs.children.reut/index.html (last visited Jan. 28, 2006).

[53] Marilyn Elias, *Antidepressant Debate Takes a Delicate Turn*, USA TODAY, Oct. 18, 2004, http://www.usatoday.com/news/health/2004-10-18-antidepressant-usat_x.htm (last visited Jan. 27, 2006). *See also* CBS News, *FDA Orders Antidepressant Warning*, Oct. 15, 2004, http://www.cbsnews.com/stories/2004/08/04/health/main634089.shtml (last visited Jan. 26, 2006); MSNBC, *FDA Debates Antidepressant Use in Kids*, Feb. 2, 2004, http://www.msnbc.msn.com/id/4135173 (last visited Jan. 27, 2006).

[54] See sources cited *supra* note 6.

[55] 20 U.S.C. § 1412(25).

Section 1006.0625 of the Florida Statutes also forbids a public school from denying any student access to programs or services because the parent of the student has refused to place the student on psychotropic medication. A public school teacher and school district personnel may share school-based observations of a student's academic, functional, and behavioral performance with the student's parent and offer program options and other assistance that is available to the parent and the student based on the observations. However, a public school teacher and school district personnel may not compel or attempt to compel any specific actions by the parent or require that a student take medication. Child advocates should resist efforts by schools to pressure decision-makers to consent to psychotropic drugs as a condition of attendance or receipt of needed services.[56]

Advocates are working to extend protections to all children nationwide. The Child Medication Safety Act of 2005 seeks to prevent schools from requiring that any student receive psychotropic medication as a condition of attendance.[57] The bill recently passed the U.S. House by an overwhelming margin and remains pending in Congress.

C. *Contrasting Rates of Psychotropic Drug Use by Children in the Parental Home vs. Children in Foster Care.* Children in foster care are drugged at a significantly higher rate than children in the general population and this is largely because of a lack of meaningful advocacy.[58] The position that a child would be protected from needless diagnosing and drugging if he/she had parents can be compelling. It may also be helpful strategically to differentiate "medications," which are used to ameliorate disease, from "drugs", which are used to change behavior. Using the term "drugs" emphasizes the belief of many advocates that these are not real medical interventions.

CONCLUSION

More than eighty percent of children in foster care have developmental, emotional, or behavioral problems.[59] Such challenges are often rooted in the complex circumstances surrounding the life of a child in foster care. These children are typically struggling to cope with the traumatic events that brought them into foster care, including abuse and neglect, homelessness and exposure to domestic violence.[60] Simply being in the foster care system may increase feelings of impermanence and instability and further contribute to the child's psychological burden.[61]

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[56] National Association of State Boards of Education, *State Level School Health Policies: Florida*, http://www.nasbe.org/HealthySchools/States/states.asp?Name=Florida (last visited May 9, 2006).
[57] H.R. 1790, 109th Cong. (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h1790rfs.txt.pdf (last visited Feb. 1, 2006).
[58] Sparks & Duncan, *supra* note 48, at 25 (stating that foster children were sixteen times more likely to receive a prescription than their non-foster counterparts).
[59] Child Welfare League of America, *Child Mental Health: Facts and Figures*, http://www.cwla.org/programs/bhd/mhfacts.htm (last visited March 8, 2006).
[60] Fostering Families Today, *Sobering Facts, Startling Statistics*, http://www.fosteringfamiliestoday.com/FFT/fft_web/ci_spotlight_beanId_2833.html (last visited March 15, 2006) (quoting the Director of Behavioral Health for the Child Welfare League of America) [hereinafter *Sobering Facts*].
[61] *Id.*

In light of these problems, children in foster care are extremely susceptible to being prescribed psychotropic drugs. Statistics reveal that one in four children in foster care in Florida is taking at least one mind-altering drug, and nearly one in every ten is taking as many as three simultaneously.[62] But Florida is not the only state where psychotropic drug use in children in foster care is common.[63] In a culture addicted to drugs, it has become easier and cheaper to deal with troubled children by simply drugging them.[64] This "quick fix" for handling unruly children, however, has serious consequences.[65]

As noted above, a child taking psychotropic drugs may experience physical side effects which range from sedation and drowsiness to bleeding gums. In some situations, the physical side effects can be irreversible and even fatal. In addition to these physical side effects, many advocates are concerned that the child may begin using drugs to handle social problems or may begin to view himself or herself as defective. The child may also be permanently labeled with a psychiatric disorder which can have long-term consequences as an adult.

Children in foster care must be protected. In becoming a ward of the state, a child's mental and physical health should not be compromised. As a guardian ad Litem, you must remain always alert to the prescribing of mood and/or behavior-altering drugs to a child despite the potential health risks. This resource provides tools to help you protect the well-being of a child. It is up to you to ensure that psychotropic drugs are not administered improperly to children in foster care as a means of chemical restraint.

The Advocacy Center for Persons with Disabilities Inc. is a non-profit organization providing protection and advocacy services in the State of Florida. The Center's mission is to advance the dignity, equality, self-determination and expressed choices of individuals with disabilities.

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[62] Carol M. Miller, *1 in 4 Foster Kids on Risky Mind Medication*, MIAMI HERALD, Jan. 15, 2005, at 1A.
[63] *Sobering Facts*, *supra* note 59.
[64] *Id.*
[65] *Id.*