

# *Nova Law Review*

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# NOVA LAW REVIEW



## LEO C. GOODWIN SYMPOSIUM:

*Thirty Years After Anita Bryant's Crusade:*

*The Continuing Role of Morality in the Development of Legal Rights for Sexual Minorities*

Introduction: The Florida Example

*Anthony Niedwiecki  
William E. Adams, Jr.*

Intuition, Morals, and the Legal Conversation  
About Gay Rights

*Suzanne B. Goldberg*

A Public Lecture: It Is Time to Tell the Truth

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Gay Is Good

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A Public Lecture: Why Religion Matters in the  
Civil Rights Debate for Gays and Lesbians

*V. Gene Robinson*

## SYMPOSIUM ARTICLE

Incorporating Issues of Sexual Orientation into a First Year  
Property Law Course: Relevance and Responsibility

*Angela Gilmore*

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## THE ELEVENTH ANNUAL LEO C. GOODWIN, SR. SYMPOSIUM:

### *THIRTY YEARS AFTER ANITA BRYANT'S CRUSADE: THE CONTINUING ROLE OF MORALITY IN THE DEVELOPMENT OF LEGAL RIGHTS FOR SEXUAL MINORITIES*

#### INTRODUCTION: THE FLORIDA EXAMPLE

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WILLIAM E. ADAMS, JR.\*\*

Over the past couple of decades, issues of morality have played a significant role in how the law regulates behavior and sexuality. For example, the debates about regulating sex and the legal rights of gay, lesbian, bisexual and transgender ("LGBT") individuals have often centered on society's differing views of what is right and what is wrong.<sup>1</sup> In fact, one does not have to look further than the State of Florida's own history to see how views of morality have shaped its laws regarding sexual identity.

Much of this history began thirty years ago when a runner up to Miss America and spokesperson for Florida Citrus Association, Anita Bryant,<sup>2</sup> began a crusade against "homosexuality." Bryant began with her efforts to overturn an anti-discrimination ordinance passed in Dade County in 1977,

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1. See e.g. Mary Becker, Article, *Women, Morality, And Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165 (1998); John M. Finnis, Article, *Law, Morality, and "Sexual Orientation*, 69 NOTRE DAME L. REV. 1049 (1994).

2. Anita Bryant had three big pop songs: "Til There Was You" (1959); "Paper Roses" (1960) (successfully covered 13 years later by Marie Osmond); and "In My Little Corner of the World" (1960). She became a spokeswoman for the Florida Citrus Commission in 1969, and nationally televised commercials featured her famous saying: "A day without orange juice is like a day without sunshine." She sang "The Battle Hymn of the Republic" during the graveside services for Lyndon Johnson in 1973, and performed the National Anthem at Super Bowl III in 1969. See William Eskeridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 Fla. L. Rev. 1011, 1015 (2005); Thomas C. Tobin, *Bankruptcy, Ill-will Plague Bryant*, St. Petersburg Times (April 28, 2002).



which included protections based on sexual orientation.<sup>3</sup> Through her efforts, the ordinance was overturned and the Florida legislature subsequently passed a statutory ban on adoptions by gay and lesbian individuals.<sup>4</sup> Although a new anti-discrimination law was later passed and remains good law in Miami-Dade County,<sup>5</sup> the State of Florida's adoption ban is still being applied today and remains the only statutory ban in the entire nation.<sup>6</sup>

During Bryant's campaign, she invoked religious and morality arguments into her speeches and political commercials.<sup>7</sup> These arguments were often built on her underlying assumption that being gay was morally wrong. Knowing that she could not simply rely on demonizing gays,<sup>8</sup> she tried to develop a message that was both secular and promoted a goal that would be uniformly accepted—that nothing should be done to harm children:

But I am a wife and a mother, and I especially address you today as a mother. I have a God-given right to be jealous of the moral environment for my children . . . . And I, for one, will do everything I can as a citizen, as a Christian, and especially as a mother to insure that they have the right to a healthy and morally good life.<sup>9</sup>

To show how overturning the gay rights law would promote this seemingly neutral goal, she needed to show how gays were harmful to children. The central part of this argument was that because gays and lesbians could not have children naturally, they would need to recruit children to be gay, which was morally unacceptable. To show how the fight against the Dade County ordinance was based on protecting the children,

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3. See Dudley Clendinen & Adam Nagourney, *Out for Good: The Struggle to Build a Gay Rights Movement in America* 296–97 (1999). The ordinance specifically protected individuals from discrimination based on “sexual preference.” *Id.* at 299.

4. See *id.* at 308.; FLA. STAT. § 63.042(3) (2007).

5. Miami-Dade County Code 11A-2(8), 11A-12, 11A-19, 11A-26.

6. FLA. STAT. § 63.042(3).

7. She often stated that gays were “abnormal” and “vile beastly creatures.” ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 13–15 (Fleming H. Revell Co. 1977) (“I express the valid fears we now felt of widespread militant homosexuals’ efforts to influence their abnormal way of life”); William Eskeridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1017 (2005) (quoting PERRY DEAN YOUNG, *GOD’S BULLIES: NATIVE REFLECTIONS ON PREACHERS AND POLITICS* 44 (Holt, Rinehart, & Winston 1982)) (stating that she compared gays to Sodom and Gomorrah and called them vile).

8. See Eskeridge, *supra* note 7, at 1017.

9. Part of Anita Bryant's speech given to the Dade County Commission. See BRYANT, *supra* note 7, at 24–25.

Anita Bryant and her husband named the group “Save Our Children.”<sup>10</sup> A typical argument about how gays recruit children appeared in one of the advertisements by “Save Our Children” that appeared in Miami newspapers:

This recruitment of our children is absolutely necessary for the survival and growth of homosexuality—for since homosexuals cannot reproduce, they *must* recruit, *must* refresh their ranks. And who qualifies as a likely recruit: a 35-year old father or mother of two . . . or a teenage boy or girl who is surging with sexual awareness? (The Los Angeles Police Department recently reported that 25,000 boys 17 years old or younger in that city alone have been recruited into a homosexual ring to provide sex for adult male customers. One boy, just 12 years old, was described as a \$1,000-a-day prostitute).<sup>11</sup>

Further illustrating Bryant’s underlying assumption that being gay was morally wrong, she made this statement about the dangers of laws protecting gay and lesbian individuals:

What these people really want, hidden behind the obscure legal phrases is the legal right to propose to our children that there is an acceptable alternate way of life . . . . No one has a human right to corrupt out children. Prostitutes, pimps and drug pushers, like homosexuals, have civil rights, too, but they do not have the right to influence our children to choose their way of life. Before I yield to this insidious attack on God and his laws, and . . . parents and their right[] to protect their children, I will lead such a crusade to stop it as this country has not seen before.<sup>12</sup>

These themes still are heard today. Just last summer, the Mayor of Fort Lauderdale, Florida spent a great deal of time preaching about the problems he believed are associated with “homosexuality” and the need to protect our children.<sup>13</sup> The mayor even stood next to some religious leaders at a press conference in city hall while they spoke against the immorality of homo-

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10. BRYANT, *supra* note 7, at 41.

11. BRYANT, *supra* note 7, at 146.

12. DUDLEY CLENDINEN & ADAM NAGOURMEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 292 (1999).

13. Abby Goodnough, *A Mayor Stands by His Comments, and Gay Advocates Stand Against Him*, N.Y. TIMES, August 16, 2007, at A13 (quoting Naugle as saying “I’m more concerned about protection of parks for our kids and saving lives”); Amy Sherman, *Mayor’s Refusal to Apologize Riles Gays for Rally: Hundreds Rallied to Show Distaste for Comments Mayor Jim Naugle Made About Gays, But He Had Supporters, Too*, MIAMI HERALD, July 25, 2007, at A1.

sexuality and how we need a new religious crusade to establish a better moral foundation in South Florida.<sup>14</sup>

This assumption that being gay or lesbian is immoral has a long history in the State of Florida. It is appropriate that this seminar take place in Florida, and not only because of the fact that Anita Bryant launched her initial campaign against anti-discrimination laws meant to protect lesbians and gay men. Florida has long been at the center of legal controversies concerning the rights of lesbians and gays, as recounted in earlier articles published in this law review by the late Allan Terl, an attorney who spent most of his legal career advocating for the rights of LGBT persons and the civil liberties of everyone<sup>15</sup> and one of the co-authors of this introduction.<sup>16</sup>

Not unlike many other metropolitan areas in the 1950's, some Florida cities had ordinances seeking to prevent gays from congregating in bars. In 1954, the City of Miami enacted an ordinance that precluded alcoholic beverage licensees from knowingly employing "a homosexual person, lesbian or pervert" or from serving alcohol to homosexuals or permitting them to congregate or remain in the licensee's business.<sup>17</sup> The Supreme Court of Florida disbarred attorney Harris L. Kimball in 1957 for violating a state law prohibiting homosexual relations. Kimball was arrested for lewd and lascivious conduct for having sex with a man on a deserted stretch of lakefront late at night in Orlando.<sup>18</sup>

In the 1950's, a Florida Legislative Investigative Committee named the "Johns Investigative Committee" after its Chair, Senator Charley Johns engaged in an extensive witch hunt of gays. Utilizing spies and informants traveling undercover, individuals engaged in a variety of activities to discover gays and lesbians, including "luring persons to places where the [Investigative Committee] staff waited, hidden, with cameras" so as to take pictures of the persons.<sup>19</sup> The Committee members also targeted "college students and educators" by renting hotel rooms and hosting parties where gays and lesbians would be led to believe that the informants were sexually attracted to the "guests" and conversations were recorded to be turned over to

14. *Fort Lauderdale's Gay Stance Splits Local Blacks: Mayor Jim Naugle's Anti-Gay Crusade Threatens to Drive a Wedge into South Florida's Black Community*, MIAMI HERALD, September 24, 2007, at B1.

15. Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 NOVA L. REV. 793 (2000).

16. William E. Adams, Jr., *A Look at Lesbian and Gay Rights in Florida Today: Confronting the Lingering Effects of Legal Animus*, 24 NOVA L. REV. 751 (2000).

17. Miami Fla. Ordinance 5135 (1954) (codified at Miami Fla. Code § 4-13 (167)), cited in Terl, *supra* note 15 at n.9.

18. *Florida Bar v. Kimball*, 96 So. 2d 825 (Fla. 1957).

19. Terl, *supra* note 15, at 796.

campus police. The campus security would then question the individuals and expel them or force them from their jobs.<sup>20</sup> As Terl reported, it is not possible to know how many persons were forced from Florida schools. However, one report indicated that sixteen faculty and staff were forced out of their jobs in the spring of 1959. An additional seventy-one teachers had teaching certificates revoked and thirty-nine deans and professors had been removed from universities by April of 1963. Interviews of over 200 teachers resulted in the names of more than 123 teachers being turned over to the Florida Department of Education as being suspect.<sup>21</sup> State educational institutions that permitted gay organizations on campus would be threatened with denials of funding in the 1980's in a series of state legislative amendments, which were successfully challenged in court.<sup>22</sup>

Florida courts have long been involved in deciding the constitutionality of ordinances and laws aimed at LGBT persons.<sup>23</sup> Circuit Court Judges in Dade County ruled that ordinances banning persons from wearing clothing of persons of the opposite sex and of serving drinks to homosexuals to be unconstitutional.<sup>24</sup> In 1972, two Miami Beach ordinances were also declared unconstitutional by trial judges, one of which made it illegal for a man to impersonate a woman and another that made it illegal for a person to wear "a dress not becoming to his sex."<sup>25</sup>

The Supreme Court of Florida would be asked to determine whether an openly gay applicant to the Florida Bar could be considered to be of good moral character.<sup>26</sup> The Florida Board of Bar Examiners had deadlocked on the question of whether an admitted homosexual who was otherwise fully qualified for admission could be so considered.<sup>27</sup> Although it admitted Mr. Eimers, opining that sexual orientation alone could not disqualify, it reserved judgment on the issue of whether an individual who admitted engaging in "homosexual acts" could be admitted.<sup>28</sup> It would be three more years before the Supreme Court of Florida would address that issue.<sup>29</sup> The Court ruled, with two dissents, that the private commercial sexual activity between consenting adults was not relevant to prove fitness to practice law.<sup>30</sup>

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20. *Id.*

21. *Id.* at 796-797.

22. *See* Terl, *supra* note 15, at 811-815.

23. *Id.* at 801-803.

24. *Id.* at 802.

25. *Id.*

26. *In re* Fla. Bd. of Bar Examiners, 358 So.2d 7 (Fla. 1978).

27. *Id.* at 8.

28. *Id.*

29. *In re* Fla. Bd. of Bar Examiners, 403 So.2d 1315 (1981).

30. *Id.* at 1316.



Florida courts have also addressed sexual orientation issues in a number of family law cases. A Monroe County Circuit Court Judge would find Florida's statutory ban on adoption to be unconstitutional under the state constitution, but the case was not appealed.<sup>31</sup> A similar decision, however, would be overturned by the Second District Court of Appeal.<sup>32</sup> The Supreme Court of Florida upheld the DCA opinion denying the challenges on state due process and privacy grounds, although it remanded the equal protection claim.<sup>33</sup> Another challenge to the constitutionality of the adoption statute would also fail in Broward Circuit Court.<sup>34</sup>

A lesbian mother had the custody of her eleven-year-old daughter removed and placed in the household of her natural father, who had murdered his first wife. The trial court held that the child should be permitted to live in "a non-lesbian world or atmosphere."<sup>35</sup> The First District Court of Appeal upheld the trial court's order, although it stated that it was not suggesting that sexual orientation alone would justify a custodial change.<sup>36</sup> The First DCA would also uphold another trial court decision removing children from the custody of a lesbian mother so that they could be raised in a more traditional family environment.<sup>37</sup>

During the time that anti-gay ballot initiatives similar to the one overturned in *Romer v. Evans*,<sup>38</sup> the State of Florida also faced an anti-gay amendment trying to limit the right of local governments to ban discrimination on the basis of sexual orientation. The proposed Florida measure would not have permitted the state or any local government to ban discrimination on the basis of any category other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or family status. The measure was struck from the Florida ballot for failing to abide by the state constitution's single-subject requirement.<sup>39</sup> This was probably beneficial for the LGBT community, as a number of local Florida communities had previ-

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31. Seebol v. Farie, 16 Fla. L. Weekly C52 (16th Cir. Ct. Mar. 15, 1991).

32. Fla. Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210 (Fla. 2d Dist. Ct. App. 1993).

33. Cox v. Fla. Dep't of Health & Rehab Servs., 656 So. 2d 902 (Fla. 1995).

34. Amer v. Johnson, No. 92-14370 (11) (Fla. 17th Cir. Ct. Sept. 5, 1997).

35. Ward v. Ward, No. 92-2424-CA01-H (Fla. 1st Cir. Ct. Aug. 1995); cited in Terl, *supra* note 15, at 826.

36. Ward v. Ward, 742 So. 2d 250 (Fla. 1st Dist. Ct. App. 1996).

37. Packard v. Packard, 727 So. 2d 918 (Fla. 1st Dist. Ct. App. 1998).

38. 517 U.S. 620 (1996).

39. *In re Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination*, 632 So. 2d 1018 (Fla. 1994).

ously repealed anti-discrimination ordinances through local ballot initiatives.<sup>40</sup>

These same moral principles also are at play in today's legal debates regarding gay rights laws. One only needs to look to the majority and dissenting opinions of *Lawrence v. Texas*<sup>41</sup> to see the disagreement over the role morality should play in determining law. Justices Kennedy warned against mandating a moral code,<sup>42</sup> while Justice Scalia adopted the belief that the promotion of a majoritarian view of sexual morality is a legitimate state interest.<sup>43</sup>

Throughout the lecture series, the Goodwin speakers examined a wide range of theories and beliefs about how morality has shaped the legal doctrine affecting sexual minorities. The first speaker was Suzanne Goldberg, a former attorney with Lambda Legal Defense and the current Director of the Sexuality and Gender Law Clinic at Columbia Law School. While working for Lambda, Professor Goldberg worked on some of the most important United States Supreme Court cases dealing with LGBT issues, including *Lawrence v. Texas* and *Romer v. Evans*. Professor Goldberg's speech focused on the lack of legal justification for laws that discriminate based on sexual orientation. Instead, she points out, our courts tend to intuition and morals based justifications for upholding or creating such discrimination.

The second speaker was David Mixner, an influential political activist who was at the forefront of the civil rights, Vietnam, and HIV/AIDS awareness movements when it was dangerous to do so. Mixner is known as one of the most successful LGBT activists because of his prolific writing and influence with political leaders such as Bill Clinton—his college roommate. Mixner even influenced then Governor Ronald Reagan to change his mind and oppose a California ballot proposition banning gay and lesbian individuals from being public school teachers. Mixner's lecture, which also touched on the 292 friends he buried due to AIDS, was not only a great history lesson, but a moving and inspirational experience for the audience.

Our third speaker was Matt Foreman, who served as the Executive Director of the National Gay and Lesbian Task Force for several years. Foreman visited Nova at a historic time in our country because the United States Congress was debating adding sexual orientation to the federal employment

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40. See Terl, *supra* note 15, at 839.

41. 539 U.S. 558 (2003).

42. *Id.* at 571 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)) (affirming the proposition that the court should not be mandating its own "moral code").

43. *Id.* at 599 (Scalia, J., dissenting) ("This effectively decrees the end of all morals legislation.").

non-discrimination laws on the same day that Foreman was visiting the law center. Foreman speech focused on the fact that, despite the innumerable social advancements our society has made, we remain stagnant in our moral and political attitudes toward LGBT people and change is desperately needed.

The final speaker was the Right Reverend V. Gene Robinson, the Bishop of New Hampshire. After being elected the first openly gay Episcopalian Bishop in 2003, Bishop Robinson became the focus of the debate over the full inclusion of gays and lesbians in the Anglican Communion. Bishop Robinson's speech focused on the role religion plays in the debate over LGBT rights. He analyzed the manipulation of scripture by some sectors of the religious community to incorrectly use Bible passages in support of the denial of LGBT rights. Bishop Robinson faced a sometimes tough and vocal audience, but his warm and calming presence was the perfect end note to the Eleventh Annual Leo Goodwin, Sr. Lecture Series.

## INTUITION, MORALS, AND THE LEGAL CONVERSATION ABOUT GAY RIGHTS

SUZANNE B. GOLDBERG\*

When lawyers and judges converse in litigation, factual and legal analysis typically takes center stage. Yet, when the legal conversation<sup>1</sup> turns to the rights of lesbians, gay men, and bisexuals,<sup>2</sup> the ground shifts. Intuition

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\* Clinical Professor of Law, Columbia University School of Law. This essay is an edited version of remarks delivered for the 2007 Eleventh Annual Leo Goodwin, Sr. Lecture Series on the Continuing Role of Morality in the Development of Legal Rights for Sexual Minorities. My thanks to Henry Monaghan, Kent Greenawalt, Bill Adams, David Enoch, Jeff Gordon, and other colleagues at Columbia Law School and the Shepard Broad Law Center for helpful conversation about the role of intuition in legal argument, and to Amy McCamphill, Michael Budabin McQuown, Ethan Frechette, and the *Nova Law Review* staff for excellent research assistance.

1. By legal conversation, I mean to encompass both the arguments made by lawyers in litigation and the court's adjudication of those claims.

Although this essay focuses on litigation, similar questions arise regarding arguments made in the legislative arena and in political discourse more generally. Kent Greenawalt offers thoughtful explorations in two books, with a particular focus on the legitimacy of religious convictions in law-related political discourse. See KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); see also Kathleen M. McGraw, *Manipulating Public Opinion with Moral Justification*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 129 (1998) (observing the effectiveness of moral claims in shaping public opinion and the difficulty of detecting deceptive use of these kinds of claims).

2. Actually, legal discussions rarely turn to questions specifically related to bisexuals. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 359 (2000).

Many of the points made in this essay are also relevant to legal conversations about the rights of transgender individuals, although this essay's limited scope precludes development of that analysis here. Likewise, many of the points here may be relevant to legal conversations about abortion, where intuition and moral judgment have often similarly displaced reasoned analysis. In *Gonzalez v. Carhart*, 127 S. Ct. 1610 (2007), for example, the U.S. Supreme Court incorporated its own, non-evidence-based views about abortion's effect on women in sustaining the federal "Partial-Birth Abortion Ban Act of 2003." The Court wrote:

*While we find no reliable data to measure the phenomenon*, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . The State has an interest in ensuring so grave a choice is well informed.

*Id.* at 1634 (emphasis added). On the use of this type of argument in abortion jurisprudence and political rhetoric, see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, DUKE L.J. (forthcoming 2008).



and morals rationales often displace evidence-based reasoning.<sup>3</sup> More specifically, arguments to limit the rights of lesbians and gay men tend to depend explicitly on intuition,<sup>4</sup> and sometimes morality,<sup>5</sup> in ways that contemporary arguments to restrict the rights of other social groups<sup>6</sup> rarely do.<sup>7</sup>

In addressing this dissonance, this essay has two central aims. The first is simply to observe the disproportionate openness to arguments based on intuition and morals in legal conversation regarding gay rights, particularly in equal protection litigation.<sup>8</sup> The second is to consider some of the func-

3. Some commentators have described more generally a “gay exception” to constitutional doctrine and family law rules. See Tobias Barrington Wolff, *Political Representation and Accountability Under Don’t Ask, Don’t Tell*, 89 IOWA L. REV. 1633, 1710 & n.319 (2004) (citing discussions identifying “gay exceptions” to the ordinary application of settled rules).

4. In this essay, I use the word intuition in its ordinary, dictionary-definition sense, meaning a “knowing or sensing without the use of rational processes” or, put another way, “[a] sense of something not evident or deducible.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 947 (3d ed. 1992). At later points in the essay, I also refer to “unprovable assumptions” to mean essentially the same thing. See *infra* note 51 and accompanying text. The essential shared trait is the impossibility of marshalling support that would satisfy ordinary evidentiary rules.

5. By morals-based justifications, I mean to include only rationales that rely explicitly on morality as a justification for government action as distinct from the larger number of arguments and analyses that may have morality-based underpinnings. A paradigmatic example of the morals justifications I focus on here is *Bowers v. Hardwick*, in which the majority relied on “the presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable” to sustain Georgia’s sodomy law. 478 U.S. 186, 196 (1986). In *Lawrence v. Texas*, the Court rejected this reasoning, holding that “‘the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.’” 539 U.S. 558, 577 (2003) (citation omitted). Although we see less explicit reliance on morals rationales post-*Lawrence*, I include reference to morals-based justifications in this essay both because they continue to appear in some cases involving lesbians and gay men, and because they share many of the troubling features that are associated with intuition-based arguments. For an example of morals-based reasoning in a post-*Lawrence* case, see *State v. Limon*, 83 P.3d 229, 375, 383 (Kan. Ct. App. 2004) (holding that state interest in “prevent[ing] the gradual deterioration of . . . sexual morality” justified more burdensome age-of-consent rules for same-sex than different-sex couples). I have addressed morals-based justifications in greater detail elsewhere. See Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004) [hereinafter Goldberg, *Morals-Based Justifications*].

6. Asylum law context provides a useful definition of social group for the purposes of this essay. See, e.g., *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (defining “particular social group” category to include individuals of “similar background, habits, or social status”) (citation omitted).

7. To be clear, the point here is a comparative one—that gay and lesbian rights cases have a relatively high concentration of these arguments—and not a claim that these arguments always appear in gay rights cases or never appear in other cases. Cf. *supra* note 2.

8. Again, my focus here is on contexts in which intuitions play an explicit role in justifying government action rather than on contexts where intuitions may underlie arguments or

tions and consequences of intuition-based arguments in legal conversations more generally. I concentrate primarily on intuition-based arguments because they are the focus of scholarly inquiry less often than morals arguments, although I address morals-based arguments as well.

I begin by sketching the work that intuitions do in sexual orientation cases. Against this backdrop, I propose that the explicit proffer of intuitions and moral claims as rationales for government action in cases involving the rights of lesbians and gay men, while pleasingly transparent, also raises troubling problems for legal decision-makers. Finally, I offer some brief thoughts as to why intuition- and morals-based arguments are so freely made in connection with challenges to sexual orientation-based distinctions, when references to similar intuitions and moral views would not typically appear in conversations about other types of government action.

## I.

Our first task is to consider the work of intuition rationales in sexual orientation cases. Although any constitutional law student knows that the rationales function in constitutional adjudication as justifications for government action, I discuss the background law here briefly to highlight the contrast between the justifications offered in sexual orientation and other types of cases.

The requirement that governments justify their acts arises everywhere in constitutional law, whether the acts involve treatment of enemy combatants,<sup>9</sup> punishment of students for unfurling a “Bong Hits for Jesus” banner,<sup>10</sup> or anything in between. In the equal protection context, in particular, govern-

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judicial reasoning but remain unmentioned. There is an extensive literature addressing questions of intuition and adjudication more generally. See, e.g., Chris Gunthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007) (proposing a model “[s]upported by contemporary psychological research on the human mind and [the authors’] empirical evidence” which posits that “judges generally make intuitive decisions but sometimes override their intuition with deliberation”); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929) (discussing the use of “hunches” in judicial decisionmaking); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1063–68 (2006) (discussing “the role of the personal, the emotional, and the intuitive” in judicial decisionmaking); R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1384 (2006) (concluding that “intuition is invariably central—whether overtly so or not—to the process of arriving at a judicial outcome by any standard recognized means”).

9. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2003).

10. See *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

ments must legitimize their decisions to draw the challenged classifications.<sup>11</sup> Explanations for line-drawing must be given when courts are deciding, for example, whether a public university can exclude women from admission<sup>12</sup> or whether the state can maintain different rules regarding involuntary institutionalization for people with mental retardation and mental illness.<sup>13</sup>

At this general level, equal protection's demand for justification of government action related to sexual orientation is, of course, no different. Questions regarding a government's authority to deny same-sex couples the right to marry or to allow or forbid gay adults from adopting children, for example, are all variations on the standard constitutional inquiry into a government's authority to impose a limitation on the rights of some, but not others.

When these questions arise, standard principles of constitutional adjudication require us to look to the text of the Constitution's equal treatment guarantees<sup>14</sup> and to cases interpreting that text. Most fundamentally, we ask whether the government has supplied a good enough justification for its action.<sup>15</sup> What qualifies as "good enough" depends on what the government is doing and against whom it is acting.<sup>16</sup> Under current constitutional doctrine, restricting rights based on a person's race or sex requires a fairly weighty rationale.<sup>17</sup> By contrast, the hurdle a government must surmount before re-

11. In some circumstances, governments need not themselves produce the legitimizing justification. See *Heller v. Doe*, 509 U.S. 312, 320 (1993) ("[A] legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.'" (citation omitted)). See also *infra* note 47 and accompanying text.

12. See *United States v. Virginia*, 518 U.S. 515, 519 (1996).

13. See *Heller*, 509 U.S. at 314–15.

14. See U.S. CONST. art. V; *id.* amend. XIV, § 1. Although the Equal Protection Clause is the central repository of constitutional equal treatment jurisprudence, cases applying due process guarantees also frequently bear on equality questions. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003). Compare, e.g., *Goldberg v. Kelley*, 397 U.S. 254 (1970) (finding due process protections require pre-termination hearing for public assistance recipients), with *Mathews v. Eldridge*, 424 U.S. 319 (1976) (rejecting due process claim for re-termination hearing for disability benefits recipients).

15. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985) (stating that all legislation must, at a minimum, be "rationally related a legitimate state interest" and that some legislative classifications call for heightened judicial scrutiny).

16. Elsewhere, I have argued that the traditional separation of equal protection review into three distinct tiers serves as a barrier to equality and meaningful analysis. See generally Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 515 (2004) [hereinafter Goldberg, *Equality Without Tiers*].

17. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328–30 (2003) (applying strict scrutiny to law school's consideration of race in affirmative action plan); *Virginia*, 518 U.S. at 532–33 (requiring the state to proffer an "exceedingly persuasive" interest to justify a sex-based classification); *City of Cleburne*, 473 U.S. at 440–41 (explaining that strict scrutiny applies to

stricting the rights of most social group members, including the elderly, the young, the disabled, and gay people, tends to be rather easier to overcome.<sup>18</sup> According to the weakest version of this review standard, any reasonably conceivable justification will do.<sup>19</sup>

Ultimately, though, whether the standard is one of strict scrutiny or rational basis review, the bottom line question in any constitutional equal treatment challenge is the same: Does the government have a permissible justification for its action?<sup>20</sup>

## II.

It turns out, however, that although the core question regarding government rationales remains the same for classifications involving different types of social groups, the conceptualization of “permissible” reasons—how we think about which reasons are legitimate and sufficient and which are not—often looks different in sexual orientation cases than in others.<sup>21</sup>

In the usual case, the government characterizes its restriction on an individual or group member as necessary to prevent a demonstrable harm. For

statutes “classif[y]ing by race, alienage, or national origin” and that “heightened” scrutiny applies to “classifications based on gender”).

18. See, e.g., *Heller*, 509 U.S. at 320–21 (upholding a distinction between mentally ill and mentally disabled individuals under rational basis review); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (sustaining mandatory retirement statute under rational basis review); cf. *Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (applying rational basis review to state constitutional amendment that classified based on sexual orientation and invalidating the amendment because animus, rather than a legitimate government interest, explained the state’s distinction). But see *In re Marriage Cases*, No. S147999, 2008 WL 2051892, at \*45 (Cal. May 15, 2008) (holding that sexual orientation-based classifications should be subjected to strict scrutiny under the California Constitution’s equal protection clause).

19. *Heller*, 509 U.S. at 320 (“[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”) (internal quotation omitted). At times, however, even low-level, rational basis review is applied with some degree of rigor. See, e.g., *Romer*, 517 U.S. 620 (invalidating state amendment notwithstanding application of rational basis review); see also *Lawrence v. Texas*, 539 U.S. 558, 580–83 (2003) (O’Connor, J., concurring) (explaining that criminal law imposing penalties on same-sex but not different-sex couples violated the Equal Protection Clause); Goldberg, *Equality Without Tiers*, *supra* note 16, at 514–17 (discussing additional weight added to minimal rational basis requirements in some “strong” rational basis cases).

20. See, e.g., Goldberg, *Equality Without Tiers*, *supra* note 16, at 533.

21. For an illustrative list of cases in which courts have rested decisions in sexual orientation cases on intuition- or morals-based frameworks, see *infra* note 30. Again, I do not suggest that this approach appears in all sexual orientation cases but instead that advocates and courts that make arguments to sustain sexual orientation discrimination are unusually likely to deploy this type of reasoning.



example, the argument goes, national security depends on restricting the rights of enemy combatants.<sup>22</sup> Or a school argues that its educational mission will be undermined if it cannot punish the “bong hit” banner-waver.<sup>23</sup> Simply put, the government identifies some demonstrable need that it aims to serve by whatever action it has taken. A related premise of the argument is that something particular about the burdened group—enemy combatants or high school students in the illustrations here—justifies restricting members of those groups but not others.

In the kinds of cases that we think of as classic individual rights cases involving discrimination based on an aspect of individual identity, courts also typically focus on a demonstrable fact about the group that justifies the restriction on group members’ rights. When the United States Supreme Court sustained different involuntary institutionalization rules for people with mental retardation and mental illness, for example, the Court cited factual differences between the two groups to support the differential treatment.<sup>24</sup> The Court similarly looked to the fact that only women can give birth when considering whether to sustain immigration sponsorship rules that are more onerous for fathers than mothers.<sup>25</sup>

To be clear, I am not suggesting that these “demonstrable fact” arguments always succeed. For example, when Virginia argued that it could exclude women from its military training institute because the school’s adversative training method was better suited to men than women, the Supreme Court rejected the argument as flawed and impermissibly stereotyping.<sup>26</sup> Nor am I suggesting that the assertion of factual difference should be enough to justify a state-sponsored classification. As Justice O’Connor observed in her dissent in *Nguyen v. INS*, the fact that women can give birth to children cannot, without more, explain why the government treats mothers as more likely to inculcate American citizenship values than fathers.<sup>27</sup>

Whether or not we agree that these empirical distinctions justify a governmental restriction in any particular case is not my concern here, however. Instead, the point is simply that when a government seeks to restrict the rights of one group of people relative to others, the focus tends to be on whether demonstrable differences exist between the burdened group and

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22. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

23. See *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

24. *Heller*, 509 U.S. at 321–29.

25. *Nguyen v. INS*, 533 U.S. 53, 62 (2001).

26. *United States v. Virginia*, 518 U.S. 515, 520–23, 558 (1996).

27. *Nguyen*, 533 U.S. at 79–83 (O’Connor, J., dissenting).

others sufficient to justify the burden being challenged.<sup>28</sup> So, returning to the high school students and enemy combatants for a moment, the discussion turns, at least in part, on demonstrable features or attributes associated with the relevant population—whether it is a susceptibility to being distracted in the case of high school students, or a heightened risk to the interests of the United States thought to be posed by enemy combatants. The legal conversation in these cases is about facts that are arguably related to the group and about the connection between those facts and the need for the governmental restriction.

When it comes to restrictions on the rights of lesbians and gay men, however, the conversation and analysis tend to be different. The rationale for the government treating gay people differently from others for purposes of marriage, the military, adoption, or anything else is not, except in the outlier case, tied to a feature that makes gay people demonstrably different from non-gay people. More specifically, the focus of courts and governments is not typically on physical differences, educational differences, or differences in mental health. Even the once-favored argument that gay people are more likely than others to be sexual predators no longer gets much traction in legal or, indeed, popular conversation.<sup>29</sup>

Instead of arguing that demonstrable differences exist, the claim, made by both advocates and judges, is often that intuition or morality, or both in some cases, are enough to justify treating gay people differently from everyone else.<sup>30</sup> Put most simply, the argument is that “our” shared intuition or

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28. See, e.g., *Nguyen*, 533 U.S. at 77 (O'Connor, J., dissenting); *Virginia*, 518 U.S. at 533; see also *Heller*, 509 U.S. at 321 (noting that the state “has proffered more than adequate justifications for the differences in treatment between the mentally retarded and the mentally ill”).

29. See Gregory M. Herek, Facts About Homosexuality and Child Molestation, [http://psychology.ucdavis.edu/rainbow/html/facts\\_molestation.html](http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html) (last visited June 3, 2008).

30. See, e.g., *Lofton v. Sec’y of Dep’t of Children & Family Servs. (Lofton I)*, 358 F.3d 804, 819–20 (11th Cir. 2004) (relying on “unprovable assumptions” about parenting to sustain Florida’s ban on gay adults from adopting children); *State v. Limon*, 83 P.3d 229, 236 (Kan. Ct. App. 2004) (finding that “the legislature could have reasonably determined that” an age-of-consent statute that imposed greater punishment on same-sex than different-sex couples could help “prevent the gradual deterioration of the sexual morality approved by a majority of Kansas”) *rev’d*, 122 P.3d 22 (Kan. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (relying on “[i]ntuition and experience” regarding childrearing to sustain the state’s exclusion of same-sex couples from marriage). In other cases where the language of intuition and unprovable assumption is not used explicitly, courts have embraced rationales that rest on similar intuitions. See, e.g., *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality opinion) (sustaining Washington’s ban on same-sex couples’ marrying in part because “children *tend to thrive*” in a “‘traditional’ nuclear family”) (emphasis added); cf. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 999–1000 (Mass. 2003) (Cordy, J., dissenting) (finding the state legislature could have rationally concluded that “married opposite-sex parents”

life experience shows that being gay is not as desirable, morally preferable, or good for society as not being gay. These intuitions or moral commitments, the argument concludes, suffice to support official distinctions between gay and non-gay people. Some describe this as “heteronormativity” to convey the idea that the social norm is heterosexual and that anything other than heterosexuality involves a non-neutral, negative deviation.<sup>31</sup>

While this intuition or preference for heterosexuality undoubtedly plays a powerful role in social conversation among individuals and within many communities, the aim here is to capture its role in *legal* conversation. So, we might ask, if the government has to point to a difference between gay and non-gay people to justify its sexual orientation-based distinctions between constituents, what are the available options, other than intuition?

There’s the rub, at least for government lawyers and courts that would uphold these classifications. As just noted, unlike for some other social groups, sexual orientation gives rise to no known differences in physical capacity, intellectual ability, and mental health.<sup>32</sup> There are also no credible

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are “the optimal social structure in which to bear children” and that same-sex couples “prefer[] an alternative structure for child rearing that has not yet proved itself”).

31. Linda C. McClain, *Some ABCs of Feminist Sex Education (in Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63, 74–75 (2006); see also Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 184 (2001). For discussion of sex stereotyping embedded in some of these intuition-based rationales, see generally Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

32. At one time, homosexuality was considered a psychiatric disorder among mental health experts, but in 1973 the American Psychiatric Association (APA) voted unanimously to remove homosexuality as a disorder from the Diagnostic and Statistical Manual’s (DSM) section on Sexual Deviancy. John Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 116 (1991). A year later, a majority of the general APA membership confirmed this decision, voting to replace the diagnosis with a milder category of sexual orientation disturbance. The DSM-III, in turn, replaced this diagnosis with “ego-dystonic homosexuality,” which was deleted in 1986 in the DSM-III-R. Gregory M. Herek, *Facts About Homosexuality and Mental Health*, [http://psychology.ucdavis.edu/rainbow/html/facts\\_mental\\_health.html](http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html) (last visited June 3, 2008). The APA now classifies “persistent and marked distress about [one’s] sexual orientation” under “Sexual Disorders Not Otherwise Specified.” AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 582 (4th ed. 2000).

This shift has been followed in many parts of the world, including the British Government in 1994, the Ministry of Health in the Russian Federation in 1999, and the Chinese Society of Psychiatry in 2001. See Michael Kirby, *The 1973 Deletion of Homosexuality as a Psychiatric Disorder: 30 Years on*, 37 AUSTL. & N.Z. J. PSYCHIATRY 674, 675 (2003); Nigel Warner, *The Russian Federation Has Dropped “Homosexual Orientation” from Its New Classification of Mental and Behaviour Disorders*, ILGA EUROLETTER 75, Nov. 1999, <http://www.france.qrd.org/assocs/ilga/euroletter/75.html>; John Balzano, *Toward a Gay-*

studies showing that sexual orientation affects a person's ability to parent or raise an emotionally and physically healthy child.<sup>33</sup> Indeed, the American Academy of Pediatrics has taken the position that sexual orientation is not a relevant determinant of parenting ability, and has opposed governmental distinctions between gay and non-gay parents and prospective parents.<sup>34</sup>

The dearth of factual evidence to support distinctions between gay and non-gay people thus poses a challenge both for governments and courts that would prefer to sustain sexual orientation-based distinctions, whether in marriage, adoption, the military, or other contexts. What is a judge or government lawyer to do? This is where arguments based on intuition and morality come in—they fill the gap left by the absence of demonstrable and relevant factual differences related to sexual orientation.

Consider for example, the Eleventh Circuit's decision sustaining Florida's ban on adoption by gay adults.<sup>35</sup> Two rationales played a prominent role. First, the court embraced Florida's contention that it could restrict adoption to heterosexuals because "the marital family structure is more stable than other household arrangements."<sup>36</sup> And, second, the court agreed with Florida "that children benefit from the presence of both a father and mother in the home."<sup>37</sup>

Turning first briefly to the marital stability point,<sup>38</sup> two flaws bear noting. For one, no reputable support exists for the court's proposition that mar-

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*Friendly China?: Legal Implications for Gays and Lesbians*, 16 LAW & SEXUALITY 1, 36 (2007). At the supranational level, the World Health Organization has not classified homosexuality as a mental illness since the early 1990s. See WORLD HEALTH ORG., INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES & RELATED HEALTH PROBLEMS V (10th rev. 2007), available at <http://www.who.int/classifications/apps/icd/icd10online/>.

33. See E.C. PERRIN, SEXUAL ORIENTATION IN CHILD AND ADOLESCENT HEALTH 110–30 (2002) (reviewing studies and finding no material disparities in mental health and social adjustment between children of gay and non-gay parents); Melanie A. Gold et al., *Children of Gay or Lesbian Parents*, 15 PEDIATRICS IN REV. 354, 357 (1994) ("There are no data to suggest that children who have gay or lesbian parents are different in any aspects of psychological, social, and sexual development from children in heterosexual families."); see also Brief for Am. Psychol. Ass'n et al. as Amici Curiae Supporting Plaintiffs-Respondents at 36, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 86), 2006 WL 1930166; Brief for Child Rights Orgs. as Amicus Curiae Supporting Respondents at 11, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (No. 75934-1), 2006 Wash. LEXIS 598.

34. Am. Acad. of Pediatrics, *Co-parent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339 (2002).

35. *Lofton I*, 358 F.3d 804.

36. *Id.* at 819.

37. *Id.*

38. Although the court in *Lofton I* acknowledged the marital stability argument, it focused primarily on the mother/father claim. *Id.* (describing the state's interest in "plac[ing] adoptive children in homes that have both a mother and father" as more important).



ried mothers and fathers have more stable relationships than partnered mothers and mothers or fathers and fathers. All of the credible studies showing the relative stability of marital relationships when children are in the home encompass only heterosexual couples.<sup>39</sup> At most, those studies demonstrate that couples that have the option to marry and choose not to marry are less likely to stay together than those that marry. However, for same-sex couples that lack that option, studies comparing the duration of heterosexual relationships do not provide accurate comparative information. Second, the marital stability rationale begs the question whether the state can justify one discriminatory rule, the adoption law, by pointing to another discriminatory rule, the marriage law.<sup>40</sup>

The *Lofton* court's disregard of the serious weaknesses in its reasoning can be explained, I believe, by the court's strong sense—we can call it intuition—that marriage really does hold families together, at least more so than non-marital commitments. The power of that intuition led the court to disregard both the facts and the law just mentioned, which, if given a fair hearing, would have rendered the state's marital stability argument untenable.

The court's response to the state's childrearing rationale, which the court characterized as even “[m]ore important[]”<sup>41</sup> than the marital stability claim, was even more misplaced as a result of the court's deference to intuition. First, the constitutional question in the case was not, as the court put it, whether children do well with a mother and father in the home.<sup>42</sup> That determination, which amounts to a choice among policy preferences, falls classically within the legislature's domain. Children, after all, do well with many things: more money, better education, more loving, committed, and capable parents.

The proper approach in this case would have been, instead, to apply the run-of-the-mill equal protection inquiry to the classification at issue: Can the

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39. See, e.g., Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607 (2006); see also Brief of the Am. Psychol. Ass'n et al. as Amici Curiae in Support of Plaintiffs-Appellees, *Conaway v. Deane*, 903 A.2d 416 (Md. 2006) (No. 44) (mem.), available at <http://www.aclu.org/lgbt/relationships/272531gl20061019.html>; L.A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. MARRIAGE & FAM. 880 (2004).

40. Because this question does not bear on this essay's intuition-based argument point, I will simply note it here rather than discussing it in full. For further discussion of this point, see, for example, Vanessa A. Lavelly, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 252 (2007).

41. *Lofton I*, 358 F.3d at 819.

42. See *id.* at 819–20.

state legitimately choose sexual orientation as a basis on which to distinguish between prospective adoptive parents?

If it were true, counterfactually, that sexual orientation was relevant to parenting ability and that gay adults posed a particular danger to children, the analysis would have been easy. The danger could have reasonably explained the state's exclusion of gay people from the pool of prospective adoptive parents. But because no factual support exists for the proposition that an individual's sexual orientation correlates either positively or negatively with parenting ability, the state and the court had to look elsewhere.

In the absence of persuasive facts, the state contended that children "benefit" from the presence of a male and female parent, and the court accepted that argument as a sufficient justification for the adoption law's sexual orientation-based line.<sup>43</sup> And here lie the analytic errors. Most basically, stating that different-sex parents confer a particular benefit does not, in itself, show that same-sex parents do not confer either the same benefit or another that is equally important.<sup>44</sup>

But even if we infer, as intended by the state, that different-sex parents provide a benefit not provided by same-sex parents,<sup>45</sup> we have restated, but not responded to, the equal protection inquiry. That is, the adoption law itself states that the government prefers adoptive parents to be heterosexual rather than gay.<sup>46</sup> Equal protection requires something more than repetition of those preferences. Government must, at a minimum, have a legitimate explanation for *why* it drew the challenged line.<sup>47</sup> If it does not, equal protection review would be effectively meaningless because a state could always justify its distinction between two groups of people by stating that group A offers benefits that group B does not—or more simply, that it prefers group A to group B and has, therefore, drawn a line between them.<sup>48</sup> Something more than mere reiteration of the classification is required.<sup>49</sup>

What, then, is the equal protection-sanctioned *explanation* for why Florida can constitutionally prefer straight adults to gay adults when deciding who can adopt? The Eleventh Circuit sought to fill that gap, but lacking demonstrable evidence of differences between gay and non-gay parents, as

43. *Id.* at 819.

44. See *Lofton v. Sec'y of Dep't. of Children & Family Servs. (Lofton II)*, 377 F.3d 1275, 1297-1301 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

45. *Lofton I*, 358 F.3d at 820.

46. FLA. STAT. § 63.042(c)(3) (2007); *Lofton I*, 358 F.3d at 806-07.

47. See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (stating that classifications must "bear a rational relationship to an independent and legitimate legislative end").

48. See *id.* at 632-33.

49. See *id.* at 632 (ruling that "the link between classification and objective gives substance to the Equal Protection Clause").

noted above, it invoked intuition instead.<sup>50</sup> The state's premise, the court wrote, was "one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action."<sup>51</sup> It added that "[a]lthough social theorists from Plato to Simone de Beauvoir have proposed alternative childrearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model."<sup>52</sup> "Against this 'sum of experience,'" the court concluded, "it is rational for Florida to conclude that it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother."<sup>53</sup>

Before turning to the merits of this reasoning, I want first to make a simple, descriptive observation. In most cases, as discussed earlier, parties and courts do not rest decisions explicitly or exclusively on intuitions, unprovable assumptions, moral judgments, or similar rationales that are not susceptible to ordinary methods of proof. It is difficult even to imagine a court opining that "we have no real evidence for limiting the rights of group B—but we have our intuition, based on history, that limiting group B's rights is rational and permissible." Or that "we have no evidence to show that the relationships of A couples and B couples are different in their day-to-day existence, but we know that there is a moral or commonsense difference between them, and that difference justifies granting more rights to A couples than B couples." Yet, in *Lofton v. Secretary of the Department of Children and Family Services*<sup>54</sup> and numerous other sexual orientation-related cases,<sup>55</sup> the opposite is true. Courts in these cases proceed as though they are free from the norms of legal conversation that lead them to offer evidence-based, accessible reasoning in other kinds of cases.

50. *Lofton I*, 358 F.3d at 819–20.

51. *Id.* (emphasis added). The court cited *Paris Adult Theatre I v. Slaton* to support the "unprovable assumption" proposition. *Id.*; see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62–63 (1973). *Paris*, however, did not rest its decision solely on "unprovable assumptions" but instead pointed to public safety and health rationales to support its ruling sustaining Indiana's nude-dancing ban. 413 U.S. at 58, 61, 63 (referring to reports of "an arguable correlation between obscene material and crime" and noting the "social interest in order," and describing that interest as a concern with "antisocial behavior" that might flow from the "crass commercial exploitation of sex"). For further discussion of the limitations of *Paris Adult Theatre I* on this point, see generally Goldberg, *Morals-Based Justifications*, *supra* note 5, at 1269–70.

52. *Lofton I*, 358 F.3d at 820 (citing PLATO, *THE REPUBLIC*, Bk. V, 459d–461e; SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans., Vintage Books 1989) (1949)).

53. *Id.* at 820 (quoting *Paris Adult Theater I*, 413 U.S. at 63).

54. *Lofton I*, 358 F.3d 804.

55. See *supra* note 30.

My point is not that moral concerns, and unprovable assumptions and intuitions are absent from government action and judicial reasoning. Surely they are present regularly and perhaps even inevitably, at least to the extent they shape individuals' capacity to understand and interpret information.<sup>56</sup> My point, instead, is that those concerns, assumptions, and intuitions are not typically the major—and almost never the sole—stated factor in legal conversation about what a government can or cannot do. Yet, in cases involving sexual orientation-based distinctions, we see that governments and courts advance these types of reasons explicitly.<sup>57</sup> This move begs the question whether references to intuition or morals are constitutionally sufficient, without more, to support state-sponsored distinctions between social groups.

### III.

Even if we agree that moral commitments, intuitions, and unprovable assumptions play an unusually strong role in legislative and judicial analysis related to sexual orientation, we need not necessarily conclude that this role should be cause for concern. Some would argue that the overt presence of intuition- and morals-based arguments is the sign of a healthy decision-making process, given what we know about how decision-makers use empirical evidence to justify decisions that were *really* made based on intuitive or moral priors.<sup>58</sup> Indeed, the argument could be made that the legal conversation around gay and lesbian rights should be emulated in other subject areas because it is more honest than most other public policy and law-related conversations.

To take the point a step further, some would argue that reliance on intuition is precisely within the domain of states. If the Constitution ties the government's hands from acting on intuitions or moral views about what is good for the populace, some would say we disserve the state and its constituents. Lord Devlin sought to shore up this point by maintaining that society would

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56. For discussion of the ways in which cognitive biases shape information processing more generally, see, for example, David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, in *THE NEW ECONOMICS OF HUMAN BEHAVIOR* 188 (Mariano Tomassi & Kathryn Ieruli eds., 1995). Also see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995), for a review of the effects of cognitive biases on individuals' interpretation of information.

57. See, e.g., *Lofton I*, 358 F.3d at 819–20.

58. See generally Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 *COLUM. L. REV.* 1955 (2006) (discussing the ways in which courts rely on facts to stand in for normative judgments about social groups).

“disintegrate” if basic moral norms went unenforced.<sup>59</sup> In this vein, some argue that if we do not allow the government to safeguard the populace’s moral well-being—by either reserving marriage to heterosexuals or barring gay people from adopting—we are endangering our community’s well-being as much as if we prevent the government from developing licensing standards for teachers or punishing people who write graffiti on buildings, drive through stop signs, or commit violent acts. How, these advocates might ask, can we have a government that cares only about insuring our physical well-being and protecting our property, when so much of what makes for a good society is the society’s moral health?

Yet, much as honesty might be desirable as general policy, honesty alone does not convert intuition and moral commitments into credible legal arguments. The problem, broadly put, is that rationales and decisions based on intuitions and moral values are not contestable.<sup>60</sup> Either you agree or you do not, and even examples and evidence that undermine the proffered intuition or moral position cannot provide conclusive disproof. When my morals and intuitions are pitted against yours, what, really, can an adjudicator do? One person’s claim that her intuitions and moral commitments require Florida’s legislature to bar same-sex couples from marriage leaves the decision-maker with no more basis for a reasoned determination than another’s assertion that her moral commitments and intuitions mandate the converse result.

While this tension between competing intuitions and moral positions may make for engaging social conversation, its centrality in legal conversations about gay and lesbian rights raises serious concerns for courts. Faced with a government’s intuition-based rationales and moral claims, courts have three choices, none of which is ideal: 1) they can accept the assertions as reflective of majoritarian sentiment; 2) they can accept the assertions because they share them and find them to be correct; or 3) they can disagree with the assertions and reject them.<sup>61</sup> Yet embracing majoritarianism elides the important judicial screening function to insure that the intuitions are not merely stand-ins for bias.<sup>62</sup> And making independent judgments about the intuitions—whether for or against—runs the risk that courts will appear to be (or actually will be) substituting their own preferences for those of the majority.

59. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 13 (1965).

60. I develop this point at length in Goldberg, *Morals-Based Justifications*, *supra* note 5.

61. An additional option might be to categorically reject any rationale that relies explicitly on intuition without considering the argument’s merits.

62. See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (stating that the obligation of courts conducting equal protection review is to “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law”).

Legal realists and critical theorists might say that this description does no more than track the usual way in which outcome-oriented courts work. But, even if that is the case, we ought still take note of the effect that open reliance on intuition and morals has on the decision-making process.

In the usual case, we expect some evidentiary support to justify the state's actions. We expect, for example, to hear about national security needs, effective school disciplinary practices, public health, or sound educational or economic theory. Then, in our legal conversation, we can agree or disagree with the proffered evidence by critiquing the methodology, the authors' biases, or the analysis.

But, when ordinary norms of legal argument give way to intuition and moral judgments, without even the expectation of demonstrable evidence, the possibilities for rigorous contestation of the government's interests drop off sharply. With this drop comes a substantially increased risk that courts will substitute majoritarian preferences for meaningful legal analysis, and that those in disagreement will be able to do little, at least in litigation, to overcome the intuitions and moral judgments that have been deemed decisive.

#### IV.

Finally, two closing thoughts on why sexual orientation-related legal conversations are so often dominated by intuition when others are not.

First, longstanding biases tend to remain strong even in the face of contravening evidence. To elaborate briefly, individuals who hold biases toward a social group frequently see the disliked or feared group as deficient in some demonstrable, factual way. Consider, for example, the demonization of Jews in Nazi Germany and the dehumanization of African and African-American slaves in the United States.<sup>63</sup> Powerful cartoons and stories portrayed members of those groups as sexual predators, disloyal, untrustworthy, and general menaces to society.<sup>64</sup> We can see this as well in depictions of lesbians and gay men in the past century as mentally ill, sexually predatory, and otherwise unfit to participate in society.<sup>65</sup> As the "facts" about Jews and African Americans gave way in the face of reality, so too have the similar "facts"

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63. See *Colored Citizenship*, N.Y. TIMES, Feb. 15, 1860, at 2; see also *Anti-Jewish Boycott Flares Up in Munich*, N.Y. TIMES, May 21, 1935, at 9. For an overview of this topic, see Jeffrey Herf, *Ideologies in Comparative Perspective: Reflections on Nazi Germany and the Pro-Slavery South* (2006) (unpublished manuscript, available at <http://www.yale.edu/glc/events/herf.pdf>).

64. Herf, *supra* note 63.

65. See, e.g., EDMUND BERGLER, *HOMOSEXUALITY: DISEASE, OR WAY OF LIFE?* (1956).

about lesbians and gay men—not everywhere, of course, but in many quarters in the United States.<sup>66</sup>

This changed understanding of “facts,” however, does not necessarily result in the immediate eradication of bias. Instead, at least in some instances, courts and legislatures permit intuitions, unprovable assumptions, and even moral positions to do the justificatory work that was once accomplished by belief in the demonstrable deficiencies of the targeted group.

The current lack of credible facts to justify burdens on lesbians and gay men thus helps explain the contemporary invocations of intuition and morals by judges and lawyers who would sustain sexual orientation discrimination. These intuitions and moral commitments are actually the residual—though reframed—negative sentiments that were previously expressed as facts.

The second explanation for the relatively high concentration of intuition-based arguments in sexual orientation matters is more particular to the treatment of sexuality in society. Our own legal history shows Americans to be—or at least to have been—especially anxious about sexuality and sexual identity.<sup>67</sup> Indeed, just as gay people were beginning to publicly demand legal rights during the early 1970s, many governments responded by tightening prohibitions against sexual relations between same-sex partners.<sup>68</sup> In addition, even as popular sentiment was turning against laws that criminalized the sexual relations of consenting adults, the Supreme Court concluded, in 1986, that moral disapproval of homosexuality was sufficient to justify Georgia’s ban on oral and anal sex.<sup>69</sup> Recall that the Court reached this conclusion notwithstanding a long line of its own cases reinforcing that the Constitution’s privacy and liberty guarantees protect individuals’ most intimate, formative decisions.<sup>70</sup>

Although the Court invalidated “sodomy” laws in 2003 as violating the Constitution’s liberty guarantee,<sup>71</sup> the nearly twenty-year survival of *Bowers*

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66. By contrast, myths that are styled as facts about transgender people are only now, and only in some communities, starting to be destabilized in this way. See generally Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle To Achieve Judicial And Legislative Equality For Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000).

67. See generally PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* (2000); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994). See also Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth-Century America*, 16 COLUM. J. GENDER & L. 43, 44–45 (2007).

68. CAIN, *supra* note 67, at 36.

69. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

70. See *id.* at 199 (Blackmun, J., dissenting); see also *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

71. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

*v. Hardwick*<sup>72</sup> in the wake of the sexual revolution, based on nothing more than presumed moral judgments, sharply illustrates the way in which discomfort related to sexual orientation has influenced the course of legal conversation. It should not be surprising, then, in light of this pervasive discomfort, that popular intuitions and moral commitments have played an especially strong role in shaping sexual orientation law and policy when similar arguments would have been disregarded in other regulatory contexts.

Once we recognize the particular leeway given to unprovable rationales, we can then begin to ask whether legal conversation can and should tolerate the relatively high concentration of intuition and morals-based rationales associated with sexuality-related restrictions. I hope you will join me, perhaps in my skepticism toward intuition as a sufficient rationale for government action, but at least in asking whether intuition, moral claims, and unprovable assumptions should be taken as seriously as they are in our contemporary legal conversations about the rights of lesbians and gay men.

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72. 478 U.S. 186.



## A PUBLIC LECTURE: IT IS TIME TO TELL THE TRUTH

DAVID B. MIXNER\*

Good Evening. First of all thanks to Bill and Anthony for being two of the most gracious hosts that any speaker could possibly hope for on this campus. Thanks to you for turning out tonight. I promise you I'll get done in time for the World Series. Go Rockies!

Yes, I've been in jail fifteen times. My friends are a little confused whether that is for human rights or a fetish that I might have for handcuffs. I'm honored to be here, and I value that word very much because honor is so important. You see, I was a liar for the first years of my life. For thirty years. I lied about who I was. I made up names. I made up girlfriends. I even lied about states I lived in and professions I had. Anything I could do so they would not find out who I was. This in a nation that teaches us from our very early years that honesty is one of the most prized American virtues: George Washington never told a lie. A father to his son: "I don't care what you did son; just tell me the truth." People go to jail for perjury more than they do for the crimes they commit, except if you are a member of the LGBT community. And in our churches and our faith-based institutions and our synagogues and our mosques, mother and father, our family, the Grange Hall, the Union Hall, Corporate America says to us in the community:

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\* This essay is based on a recorded verbatim transcript of David B. Mixner's public lecture on October 25, 2007 as part of the Eleventh Annual Leo Goodwin, Sr. Lecture Series at Nova Southeastern University's Shepard Broad Law Center. The author has made minor revisions for clarity.

Mr. Mixner has been involved in public life, policy, and business for nearly forty years. A prolific writer, he is the author of the critically acclaimed memoir *Stranger Among Friends* and the number one bestseller *Brave Journeys*. His screenplay, co-written with Richard Burns, *Dunes of Overveen* won the Outfest MTV Award for "Best New Screenplay," and another screenplay, co-written with Dennis Bailey, *Fire in the Soul*, is being considered by a number of production companies. The Sterling Memorial Library at Yale University recently created the "David B. Mixner Collection" of his papers spanning over forty years. He is Executive Producer of the award-winning documentary, *House on Fire*, about HIV/AIDS in the African American community. Mr. Mixner has worked on over seventy-five campaigns as a campaign manager, fundraiser and strategist, including Bill Clinton's presidential campaign. He has raised over \$30 million for candidates and charity organizations and well over \$1 million for openly gay and lesbian candidates across the country. Mr. Mixner is currently a successful international public affairs/strategic-planning consultant with an expertise in HIV/AIDS. He is working tirelessly to bring worldwide attention to the ongoing health and political crises in Africa. In addition, he continues to fight for HIV/AIDS awareness here in the United States.

"You're so bad David. What you are, please lie to us. You have the exemption. We don't want to know who you are."

I remember trying to figure out how I knew at an early age that I couldn't talk to anyone about this and I remember reading in *LIFE* Magazine in the 1950's during the McCarthy period—yeah you can add up age; it won't take you long; sixty-one, I'll save you some trouble—reading in *LIFE* Magazine an article where there was a shortage of space in certain mental institutions because families were committing their sons and their daughters to have forced lobotomies because they were gay, lesbian, bisexual, or transgendered.<sup>1</sup> They were cutting our brains open in order to change who we were. I got the message. I got the point. I remember when young Freddie Davis, who—I will always remember his name—went to my school and was known as the "town queer." He was bright. He was handsome. He was articulate. But I didn't stand up for him. He committed suicide at sixteen; and I remember my father at our kitchen table, evening meal sitting there and telling my mother, "the family is better off with him dead." I got the point. I got the message a lot.

And so for the first thirty years of my life, I lied to everybody. I lied to my mom and dad. I lied to my sister and my brother. I lied to the guys on the football team that I played with. I lied to my schoolmates. I lied to my best friends! I lied to everybody in politics about who I was. I lied to everybody in the anti-war movement and the civil rights movement while fighting for justice.

I had a heroine, a woman named Fannie Lou Hamer.<sup>2</sup> In 1964—I know many of you will find this a little more difficult to believe in reality—Mrs. Hamer lived in Sun Flower County, Mississippi, and she was a pig farmer with a number of children. In Mississippi, in 1964, African Americans were not allowed to vote.<sup>3</sup> In Sun Flower County, when you went to register to vote, if you were Caucasian, the criteria to vote was that you had to completely memorize the Constitution of the United States before you could register.<sup>4</sup> Now, amazingly, every Caucasian in this county completed that amazing task, and obviously, every black, African American failed it, except one,

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1. Del Martin & Phyllis Lyon, eNotAlone.com, *Wanting More*, <http://www.enotalone.com/article/4763.html> (last visited Mar. 30, 2008) (reviewing DAVID MIXNER & DENNIS BAILEY, *BRAVE JOURNEYS* (2000)).

2. National Women's Hall of Fame, Women of the Hall: Fannie Lou Hamer, <http://www.greatwomen.org/women.php?action=viewone&id=72> (last visited May 28, 2008).

3. See Visitmississippi.org, African-American Heritage Timeline, [http://www.visitmississippi.org/itineraries/themes\\_african\\_american\\_timeline.asp](http://www.visitmississippi.org/itineraries/themes_african_american_timeline.asp) (last visited Mar. 30, 2008).

4. See Spartacus Educational, Voting Rights Act, <http://www.spartacus.schoolnet.co.uk/USAvoting65.htm> (last visited Mar. 30, 2008).

an elderly man who was a field hand all of his life who memorized the entire Constitution of the United States to vote. And I was sent down to Mississippi one summer when I was about seventeen or eighteen, with hundreds of students who went south to fight for justice and register people to vote. I was there three days and I was put in jail for thirty days in Indianola, Mississippi with a group of freedom fighters, which had, like the "Klan," come out and tried to talk in front of us about which one of us they would take out and hang from a tree.

I got out of jail and Mrs. Hamer had become disabled. Because she had walked up the main street of Indianola, Mississippi time after time up the court house steps to try to register to vote. And every time she walked up those steps they beat her to the ground until they made her permanently disabled. She got out of the hospital just after I got out of the jail. She said, "Well, let's go David." And I said, "Where are we going Mrs. Hamer? I want to go home. I want my mommy." She said, "Well, I'm gonna go register to vote." I said, "Mrs. Hamer, you can barely walk." "Well," she said, "it will take us a little longer." And I said, "Where do you get the courage to do this? I am so afraid." And she came over and gave me a big bear hug and said, "Honey, courage is just a lack of options, just a lack of options. I can't look at my children in the face and not walk back down that street." She said, "One, I've got to vote, my children got to vote and, number two, I can never let violence win, ever. And, if I succeed in letting them beat me into the ground and I don't walk up that street again," she said, "they win." So we walked up the street one more time. But this time, as she pulled her right leg behind her, like the Red Sea, the police parted and she walked up the county court house steps and she became the second African American registered in Sun Flower County.

Now let me tell you, I recently went back for a reunion—we now have reunions of those days—and her grandson is county supervisor of Sun Flower County, having been elected to office. And I learned a very powerful lesson, as Andrew Jackson said: "One [person] with courage makes a majority."<sup>5</sup> A person with values, a person with principles, a person with honor and integrity can't be touched.

And so I threw myself in the civil rights movement and the Vietnam peace movement because I didn't yet have the courage to deal with who I was. But at least I could help others who were crying out for help in the struggle for freedom and justice. You know how I got involved against the Vietnam War? There were four of us. We had \$125 between us and, in

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5. WorldofQuotes.com, Andrew Jackson, <http://www.worldofquotes.com/author/Andrew-Jackson/1/index.html> (last visited Mar. 30, 2008).

March of 1969, we held a press conference. And we said that on October 15, 1969, we were going to have a nationwide day-long moratorium, called the Vietnam Moratorium. And on that day we would ask all the universities and schools to shut down and not to do anything except discuss the war, no matter what you felt about it. Now, we had \$125 and one phone line in one office for the four of us. We said, as we walked into that press conference, "What in the hell are we doing?" Then, on October 15, 1969, six hundred universities and colleges closed down.<sup>6</sup> The United Automobile Workers and AFL-CIO all wore black armbands.<sup>7</sup> Troops in Vietnam wore black armbands and three million people across the country took the day off to discuss the war in Vietnam.<sup>8</sup> It just takes an idea, a dream, a vision. But I had to come to terms with myself.

You exported—and I lived in California at the time—a wonderful export choice and we want to thank you—Anita Bryant. In the mid seventies, she started her rampage against homosexuals and put on those ballot initiatives and we lost in Miami and we lost in St. Paul and we lost in Wichita and we lost in Eugene—and we lost hope. And I was in the closet and I had a partner, Peter, who I loved more than I love life. And our community decided that they didn't want to fight it; that we shouldn't spend any money because we would just lose again. I said I can't let that happen. I don't care if we lose, but we've got to fight. You know I came out of the South and the Vietnam movement; I know how to fight. So I came out of the closet! I was banished from my home for three years. But we took it on and I became, with Harvey Milk, a campaign manager for the "No On Six Briggs Initiative."<sup>9</sup>

When Harvey and I took over, sixty percent of the state approved an initiative in California that would have made it against the law for school teachers to be homosexuals.<sup>10</sup> If they were discovered, they would be put on trial before the local school board, and if found guilty of being a homosexual,

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6. See *War and Protest: The U.S. in Vietnam (1969–1970)*, BBC News, Apr. 17, 2002, <http://www.bbc.co.uk/dna/h2g2/A715042>.

7. See generally *Strike Against the War*, TIME, Oct. 17, 1969, available at <http://www.time.com/time/magazine/article/0,9171,840217,00.html>

8. See Microsoft Encarta Online Encyclopedia 2007, *Vietnam War*, [http://encarta.msn.com/text\\_761552642\\_34/vietnam\\_war.html](http://encarta.msn.com/text_761552642_34/vietnam_war.html) (last visited Mar. 30, 2008). See also *Kaleidoscope of Dissent*, TIME, Oct. 17, 1969, available at <http://www.time.com/time/magazine/article/0,9171,901564-2,00.html>

9. See generally THE HUMAN TRADITION IN AMERICA: 1865 TO THE PRESENT 294 (Charles W. Calhoun ed.) (2003).

10. See *id.* at 294–95.

would lose their teaching credentials for the rest of their lives.<sup>11</sup> And sixty percent of the people of California supported it.<sup>12</sup> Well, I'll tell you a funny story—I have two funny stories about that. We got it up to forty-five percent of the vote against in the last weeks. We couldn't figure out how to get that last six percent and we were four weeks out and we had come so far, so hard. And that six percent was driving us crazy. So I said I wanted to see Governor Reagan. Harvey said, "You're nuts. Number one—he's not going to see you, and, number two, there is no way in hell he is going to come out against Anita Bryant!" I said, "I want to see him." What happened, and I know this will shock many of you, there happened to be some "closeted" Republicans that I knew, and I made some calls and, through a very circumspect way, I got fifteen minutes with Governor Reagan. So my partner Peter and I, walked in and he said, "Well boys," and we were in our thirties, "what can I do for you?" And I said, "We are here to get your opposition to Proposition Six." He said, "You know I'm gonna support it. You knew that when you came in here, but I wanted to extend a courtesy because so and so asked me to." And I said, "I just need you to listen to one line, one line." And he said, "What's that?" "Why are you supporting anarchy in the schools?" He said, "Anarchy in the schools?" I said, "Well Governor, that is what you are supporting when you support that initiative." And he said, "What do you mean?" And I said, "Governor, all a child who is getting a failing grade has to do is accuse his teacher of being a homosexual and they would have to be put on trial. The kids will run the classrooms. There will be total anarchy. Our teachers will live in fear of giving a failing grade. Discipline will disappear in our schools." "By God, you're right young man!" The next day he printed a column in all the newspapers coming out against the initiative, and we carried every county in California and won by fifty-eight percent of the vote.<sup>13</sup>

I have to tell you my favorite story from the campaign. Clive Kearns and Jim Lantry, who were two of the most famous interior designers in Los Angeles at the time—both have passed away from AIDS now—came in and we got a headquarters. It was your typical store front headquarters. And so Julian Dixon, an African American Congressman from Los Angeles, promised to give us some furniture for the office. So I called Clive and Jim and I said, "Can you get a truck from your design firm and go over and pick it

11. See Nan D. Hunter, Comment, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1703-04 (1993).

12. See HUMAN TRADITION, *supra* note 8, at 295.

13. Don Romseburg, *20 Years Ago – Briggs Initiative Defeated – Failed 1978 California Referendum Banning Gays from Public School Jobs*, ADVOC., June 9, 1998, [http://findarticles.com/p/articles/mi\\_m1589/is\\_n761/ai\\_20752198](http://findarticles.com/p/articles/mi_m1589/is_n761/ai_20752198).

up?" So they said yes and they went over in their truck and came back and there was no furniture in their truck. I said, "Where is the furniture from the Congressman?" They said, "It was so ugly, there was no way we were going to bring it into the headquarters." I said, "Guys, we need desks!" He said, "Don't worry, we've called every designer in the city; tomorrow it will be taken care of." I opened the door at eight o'clock. At nine o'clock, truck load after truck load of the best designer office furniture you have ever seen arrived from all over the city.

And just one more story. There was a woman named Gail Wilson who pioneered fundraising for women in this country.<sup>14</sup> She was a lesbian real estate broker, quite wealthy and she came out, like I did, to help defeat this initiative. And she raised hundreds of thousands of dollars and was the first woman in California to become a really powerful fundraiser. An extraordinary woman and she had raised tons of money. And then in the last week, the Beverly Hills Chamber of Commerce decided that they would support the Briggs Initiative. And she came to me and she said, "David, look at this; look what they are doing." And I said, "Gail, the polls show that we've pulled ahead; they're not going to cost us any votes in Beverly Hills, don't worry about it." But then she looked at me and in the deepest voice she could muster, she said, "You don't understand, I shop there." I said, "Do with it what you want." The next day at noon, through Gail's organization, every hairdresser left their clients in the chair and walked out of their salon refusing to cut hair until they changed their endorsement. The second day, Norman Lear, Cher, and Donna Summer did a full page ad with Gail Wilson's name in the L.A. Times saying "Don't shop in Beverly Hills."<sup>15</sup> The third day, the Beverly Hills Chamber of Commerce unanimously agreed to reverse their vote.<sup>16</sup>

It's only our own imagination that calls us and limits us. I helped form the first gay and lesbian political action committee in the history of the world called MECLA, Municipal Elections Committee of Los Angeles.<sup>17</sup> Now, let me take you back to those times so that you understand. This was the first one in history. The police were still raiding our homes, raiding our dinner parties, raiding wherever gay and lesbian people gathered. So we met in a bar called the Carriage Trade, where you went down a long alley and you

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14. *EXPERTS TALK: AIDS Out of Control*, REUTERS ALERTNET, Mar. 10, 2005, <http://www.alertnet.org/thefacts/reliefresources/111045354777.htm>.

15. See generally *The Race That Did Not Happen*, SACRAMENTO BEE, May 21, 1989.

16. Narda Zacchino, *Beverly Hills Chamber Does a Quick Switch on Prop. 6*, L.A. TIMES, Oct. 26, 1978, at C1.

17. Bettina Boxall, *L.A.'s New Gay Muscle with Big Bucks and Connections, the Local Gay Community is Changing Politics Nationwide*, LOS ANGELES TIMES, Mar. 28, 1993, at 27.

had to knock on the door, and they look through a peep hole and let you in. But we were afraid to walk in as a group, so we went in one by one—thirty of us—every five to ten minutes. Then another one of us would go in, so that our meeting would not be raided. We divided up the membership list, and each of us hid them so in case the police raided our home they could not find our membership list.

We held our first event. We raised \$40,000 which was an all-time record in California at that time. We sent out checks to candidates in the Democratic Party, to liberal Democrats, and they sent them back to us and said we cannot afford politically to accept any money that comes from a gay person. These are people that I worked with side by side. But I looked at the group and I said, “You know I don’t think it’s a question of when they accept our money; I just think it’s a question of how much we offer.” And eventually they took our money, and we were given credit for turning around a race and suddenly we had black tie dinners that were raising a hundred to two hundred to three hundred thousand dollars a night. And it was being duplicated and eventually a national organization emerged from it called HRC.<sup>18</sup> We thought we were on the top of the world. We thought the freedom land was in sight. We were doing it right. There was a great grassroots activity. Harvey Milk and Elaine Nobel got elected to office.<sup>19</sup> And then suddenly, in a span of three years, the world came crashing down on us. Elaine received so many death threats—she was the first openly gay, lesbian, bisexual, transgendered person in the country elected to office—she had to have two full-time state troopers by her side at all times to protect her from being shot. Her car windows were smashed out and her tires were slashed. She stopped owning a car because it didn’t make sense anymore. Then Harvey was assassinated in San Francisco.<sup>20</sup> We bounced up again and said we can pick ourselves up and we can continue. And then came AIDS.

This is always a difficult part for me. I’ve lost 292 friends to AIDS. I gave ninety eulogies for young men under forty years of age in two years,

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18. See generally Human Rights Campaign, Who We Are, [http://www.hrc.org/about\\_us/2514.htm](http://www.hrc.org/about_us/2514.htm) (last visited Mar. 30, 2008).

19. See Dan Allen, *Mixner Goes to Yale-at Least on Paper*, ADVOC., Nov. 22, 2005, at 44, 2005 WLNR 19079463. Harvey Milk was the first openly gay man to be elected to any office. John Cloud, *The Time 100: Harvey Milk*, TIME, June 14, 1999, available at <http://www.time.com/time/time100/heroes/profile/milk01.html>. Elaine Nobel was the first openly lesbian woman to be elected to any office. Larry Nichols, *Noble Woman: An Interview With Elaine Nobel*, D.C. METRO WEEKLY, Oct. 17, 2007, available at <http://www.metroweekly.com/feature/?ak=3032>. She was elected to the Massachusetts House of Representatives in 1974. See *id.*

20. George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 556 (2005).

1989 and 1990. Every other week, I gave a eulogy to bury a young man. I lost my partner of twelve years and you have got to know what it was like. No one would touch us. Doctors wouldn't treat us. Undertakers wouldn't bury us. We had to dig our own graves. Dentists wouldn't take us as patients. Nurses refused to serve us on the floors of the hospitals. Health care workers wouldn't come into our homes. We had to sell everything we had because health insurance companies wouldn't insure because they said we were gay and we brought this on ourselves. Politicians wouldn't speak the name. No one would speak and we were left alone. Most people collapsed under such discrimination.

I remember the most humiliating moment of my life. Peter was the first co-chair of AIDS Project Los Angeles. We were raising money. We were invited to a liberal entertainment dinner party on the west side of Los Angeles. We were very excited because we thought we could come out with a lot of money to fight AIDS and to help people. And we went and we dressed up. I went to Neiman's and got a new suit. We walked in and it was very elegant. People were passing trays and we felt very welcome. We sat down to dinner and everyone else got a plate of china and they put paper plates in front of us. I don't know what was more humiliating, the paper plates or the fact that we did not walk out. But we knew we needed money and we knew that compared to our young friends who were dying, sitting there and being humiliated was a price we were willing to pay.

This community was not defeated. We did not hide. We did not bend down any longer after that humiliation. We discovered a new meaning for the word "truth" and a new meaning for the word "honor." We built our own health care clinics. We found our own dentists. We found our own undertakers and we listed those who would bury us. We found people and organizations that would walk people's pets as they lay dying in their beds. We found organizations to do their laundry. We had organizations that would do their grocery shopping or bring them their meals—sometimes their one meal that day—and with Project Angel Food or God's Love, we delivered. We did all of this, plus took care of our friends and partners who were sick and dying, plus earned a living, plus manned the barricades of liberty, fighting for our freedom and fighting for our lives. That is honor, that is justice, and that is nobility, and I found myself, finally, in that struggle against AIDS discrimination. It is a hard way to find it, but the only way I could possibly dishonor those that gave their lives so we could be in this room tonight, is to forget that they gave their lives so we could have that honor and that dignity to gather without fear of police raids and paper plates and that we were somebody. There was nothing to hide. We were magnificent in our most challenging hour.



While gay men lay dying, lesbians stepped up to the plate and took over the leadership of the organizations, took over the fundraising, and then came and sat by our sides and held our hands as we laid in the beds. They were magnificent. They were magnificent and they proved themselves to be great leaders—State Senators Sheila Kuehl and Carole Migden, HRC’s Elizabeth Birch, the Task Force’s Tory Osbourne. I can go through a litany of people who did not abandon us and stepped forward to assume leadership. What a magnificent moment with all of us working together. And out of that came power. I remember I went to Mike Dukakis, and we offered to raise him a million dollars in 1988, and the campaign told us that they could not accept the money. It was too controversial. So we lost. Bill Clinton didn’t make that mistake. I know many of you are perhaps disenchanted with the political parties. I am certainly disenchanted with this President. I certainly can tell you that.

I know you think it wasted time to go and vote, but I want to tell you a story that is hard for me to tell. My partner died in 1989, May 13th. During the 1988 elections, he had been in a bed in a coma and we didn’t think he was going to pull out before Election Day. I, of course, did not get him an absentee ballot. I didn’t think he would be alive on Election Day. And before Election Day, he asked to see his parents—a Texas family—who neither knew he was gay nor had AIDS. So I had to call these parents and tell them their son both was lying and dying from AIDS and was gay. And the response I got from his parents was not “we’re coming right away,” but “I hope he dies soon.” And I had to go in and tell my partner that his mom and dad were not coming to see him before he died. It was OK. He wasn’t alone. There were dozens of friends in that room when he passed. He was very loved and very respected.

But on Election Day, he had come out of his coma and asked, “When are we voting?” I said, “Peter, I didn’t get you an absentee ballot; you can’t walk.” He said, “I am voting against the people who have done this to me.” I said, “Peter, you can’t,” and he said, “I am voting against the people who have done this to me.” So three of us carried him to the car, put the seat down, and loaded him in the back of the car. We got to the polling place which was in a garage at the end of a driveway, and he pushed us aside and walked on his own to the voting booth to vote against the people that had done this to him and collapsed by the voting booth when he was done.

So don’t ever tell me that you are too busy or too indignant to vote. You really don’t want my reaction after seeing what people will go through; not only Peter but people all over the world who risk machine gun fire, long lines, beatings, to vote and change this world for a better place. I don’t care how you vote—that’s a lie, that’s just a lie; I’ve stopped lying but I just

caught myself—what's important is that you vote because people have paid a terrible price so that you can.

You know we have come a long way. In 1992, it was considered a major victory to have Bill Clinton at the Democratic Convention just to say the word gay in his acceptance speech. And we all cheered and we considered it a victory. Now, we are fighting for marriage equality. Now, I'm going say a few words about marriage and then I'll wrap this up and give you freedom.

You know, I want to make clear a couple of things. A lot of gay people said to me, "David, why do we pick marriage now to do this battle; now is not the time." As if like ten of us got in a room and said, "OK, now here are the issues: we are gonna go with this in '86, this one in '90, and this one in '92. We have a grand plan here." I had nothing to do with it. What had something to do with it was the Massachusetts Supreme Court who said we should not be treated this way.<sup>21</sup> It was Mayor Gavin Newsom giving a license to Del Martin and Phyllis Lyon—who had been together fifty years—and suddenly he found six thousand people in the pouring rain waiting for licenses.<sup>22</sup> They decided now is the time, not "us." No one promised us that this battle would be easy. Do any of you know of a struggle for freedom in this world that has been easy? High school students in Birmingham faced fire hoses, dogs, and jail. People marching to vote in Selma were beaten to the ground by troopers on horses. Of course, this battle is tough. It's because there is so much at stake. Now I know, God Bless 'em—bless their heart as we used to say at home—that the politicians are uncomfortable. I'd like them to be comfortable but not at the expense of my freedom. I know they are looking for every conceivable word, model, contraption, legal loophole to try and give us the same rights without using the word marriage. Separate but equal does not work.

We are finding in state after state that has adopted civil unions that we are excluded from many rights, privileges, and protections granted to every other American citizen. Now, you might say, "Let's stay quiet this year 'cuz we want so-and-so to win; let's tip-toe through so that they don't notice us this year." If you want that strategy, we can do it. But please stand up if you are willing to give up your social security rights. Please stand up if you would like not to be by the bedside of your partner when they die. Please stand up if you would like to pay more taxes because you are gay. Please stand up if you would like to see your lover from another country deported because you can't get married. Please stand up for thirteen hundred rights,

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21. See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

22. *Mayor Defends Same Sex Marriages*, CNN, (Feb. 22, 2004), <http://www.cnn.com/2004/LAW/02/22/same.sex>.

privileges, and benefits granted to every other American citizen and denied to us. I'm not willing to surrender one of them.

They talk about us "asking" for marriage. It's not a religious thing. No faith-based, religious institution is obligated to marry us. It's a civil law. They act like we're asking, like we're lobbying, like we're pleading to be heard. It is not their's to give me. It is mine already, and I am just stepping up to claim my constitutional rights. And you have to do the same. Never go hat in hand. We've discovered honor. We have discovered integrity. We have proven ourselves worthy in the '80's of the great gifts we are capable of giving this world. Because of our struggle, because of our magnificence, this troubled world needs us and we have a moral obligation to offer our gift. So throw it back. I can stand in front of you today and say, "I am David Mixner; I am a gay man; and I am proud and I don't have to lie to anyone ever again." Thank you very, very much.

#### QUESTION & ANSWER SESSION<sup>23</sup>

Q: [Inaudible] long the history of our country marriage became both a religious institution and legal institution, and they have become intertwined. You made the point that it's strictly a legal issue, so how do we convince people that it's strictly a legal issue and de-emphasize the religious part of it?

A: Well, I think there are two parts to that question. There is the strategic, political one, which is, we keep talking and we keep making it clear and we train people who are running for office, especially the young people. It's the old folks like me that have a problem with marriage. If you're thirty-five, forty years, or older, almost by a two-to-one margin, people are opposed to marriage. Forty or younger by a two-to-one margin, they're in favor of marriage. We live in a changing world. You know I grew up in my time, in a town where there were signs for white and colored drinking fountains. And there were white and black sections in the movie theaters, and at the bus stations and so forth, and everyone assumed that that's just the way it was, and it was going to be that way forever. Guess what, they were wrong, and they were wrong because people refused to accept the deformation that they had for us. And no matter how many times they say in my ear that it is a religious institution in their mind—it is a civil law of the land. It has nothing to do with religion. Now, politicians want everybody to be comfortable. A lot of people in our gay community had this disease, what I call "the com-

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23. Mr. Mixner took questions from the audience after presenting his lecture. The transcript was made from an audio/video recording of the entire session, and unless otherwise noted by brackets "[ ]", represents a verbatim transcription of the entire session.

fortable disease.” “Let’s not make anybody uncomfortable by pushing too hard.” Now I want people to like me, and I think I give a pretty good dinner party, especially if Steve’s doing the cooking. I know I have better china than most of them, but if they’re not comfortable they have to seek help. It’s not my problem. Because, you see, in the Constitution—nowhere in that document, does the word “comfortable” appear as a criteria for freedom. In fact, the document says we’re supposed to protect an unpopular minority from the tyranny of a majority. If you read the Madison Papers, or the Federalist Papers. So it actually protects us, and I hope people become more comfortable. I hope the work I do in Africa, and Russia—I hope the work I do in getting people out of jails, will make people look at me in a way, that will make them want their children to grow up and do the same things in the world. But if not, that’s their problem. It is their problem. I’ve paid my therapy bills, they can go get theirs’.

Q: You’re very plainly a political animal all of your life—why have you not sought political office at some stage, and, at sixty-one, it’s one of the few industries and few professions, where you’re still not over the hill?

A: God bless you—can you come around wherever I speak, and make that point. Well, when I was growing up, I wanted to be president. Those were the days we had presidents we wanted to be like, like John Kennedy and people like that I mean. It was interesting, in my day and age, you know, if you wanted to be president you thought of Franklin Roosevelt, or John Kennedy, and everyone in the class raised their hand. Now if you ask a group of first graders if they want to be president, all they answer is “are you kidding?” But I wanted to be president. I wanted to be a senator. I wanted to be an ambassador—I worked very hard. I started doing what everyone is supposed to do. But we weren’t allowed to run for office. We could run in some places where ballot access was easy as a third party, but if people found out you were gay—with a few exceptions until the late 70’s—I got the message real clear—that we were not allowed to run for office. We weren’t allowed to work for campaigns openly. They wouldn’t accept our checks.

You know, running for office was quickly driven out of my mind. I never thought it was a great law until we got this president, and I thought, gosh, I’m about his age, you know, I think I could have done better, I could have had those troops home from Iraq by now. Yeah, I mean it’s . . . I want to take a minute and I’ll come right back to you.

I’m going to take a minute though, because I don’t feel right having said that without acknowledging that I am a pacifist. I’m a Quaker, a pacifist, Buddhist, Gandhi follower—a Gandhi king—do a little chanting, a little drum circles here and there. But I found myself ironically fighting for the rights of the LGBT community who serve in the military. And through that process I have gotten to know many of the fine men and women of our

community who serve our country and they're in Iraq, dying. Now I'm eminently opposed to this war and I know that's no surprise to you. And they're dying, and their partners don't get the letters, and their partners don't get the flag, their partners have to watch out since their emails are screened. They can't say I love you with all my life no matter what happens to me. Now, don't ask don't tell—no matter that candidates tell you it was a good progressive step—it has destroyed the careers of eleven thousand LGBT members of our community. Eleven thousand completely destroyed. Many committed suicide, many were court marshaled, many lost their benefits. I have talked to people who have served in Iraq who are now living their dreams of flying planes and leading the military. So I just want to acknowledge their heroism, their willingness to serve no matter what your political beliefs are, and their courage because no one else remembers them and honors them, so I think that's the least we can do, and I want to acknowledge that tonight.

Q: I'm curious, obviously the gay culture has really been advanced. People like yourself have done so much to stand up for our rights, but on an international level, on the face of statements made by the President of Iran—I just read a recent statement by a . . . it was attributed to the chief of police in Iran—all around the world, that there are statements that are saying the rise of the gay movement in America are leading the doomed. What is the responsibility, or how do you access, everything that you've done and what the gay community has done to face that?

A: Well, I think that it is our moral obligation to offer what we've learned in thirty, forty, fifty years of struggle—and by the way, no place that I go in the world where there are activist organizations, whether it be Poland or Russia, or even in Iran where we have an underground operation working to help to get people out, or get them political asylum once they do get out—do I not run into an openly gay man or lesbian working in those teams and projects no matter where I go, who are from America. And that's what I was referring to earlier, we have so many gifts. We know how to organize a healthcare system; we created one for ourselves. We can go into these villages and these towns and offer these magnificent gifts and help these people. Thirteen countries have the death penalty for being gay. Increasingly, we are seeing a trend in Africa for life imprisonment.

Now, I was sent by the Dutch government to Kenya, with two of the hottest French bodyguards you have ever seen in your life—I have a picture this big of them on my wall at home—I'm sorry. Whoa, as I was saying, I'm sorry. I was sent to Kenya to document. Kenya had passed life imprisonment for gay, lesbian, bisexual and transsexual gender people. Six hundred had been rounded up. So we went to get their names, and I went up into the northern villages to collect data on who they were so the Dutch government

could have a list, with documentation, to formally protest to the Kenyan government. What we found was that only half of the people rounded up were from our community, about half, and they were rounded up in case anyone came asking. What the oppressive forces in Kenya had figured out was this was a way to aggress their opposition supporters because they knew that the United States would never protest if they just said they had arrested gay people. So they found out a way to round up the political opposition by saying they were gay or lesbian, put them in jails, and surround them by enough members of our community to prove their case in case anyone came asking; and our government has yet to issue a protest.

You know, I've got to say something—we have a moral obligation to do all we can, and we are. We just replaced a government in Poland that encouraged people to beat the participants in the gay pride parade in Warsaw and our community was intricately involved in replacing that government through Michael Cashman of the European Union and getting money from all over the world through to the opposition. We are working in other nations, including Russia, to make life more tolerable. The Middle East is a very difficult process and we have to work very discreetly and very quietly and that's all I'll say. But, we're working on it. But I want you to understand it's not just a moral obligation to help ourselves.

I want you to raise your hand if any of you have talked to anyone else about Congo. One, two, three, four, five, six, seven. In the last five years, in the Congo, four million people have died. I have been there. It is a genocide. It is four times more than died in Rwanda. It is twice the amount that died in Poppa, in Cambodia. I have walked down roads where there have been hundreds of bodies on each side of the road—of women and children. I have entered villages where seventy-two percent of the women had been raped. Children, thirteen, fourteen, have been forced into trafficking and are made drug addicts, and are given AK-41s or 47s or whatever—you can tell I am a pacifist. I don't know guns from hell. It is a crisis calling out for every one of us. It's fifty-eight million people, we have three hundred million. We lost three thousand in the World Trade Center, and we know the impact that had on us as a society. Among the fifty-eight million people, they are losing three thousand people a day—three thousand people a day. They are having a World Trade Center every day among their women and children in the Congo. Today, another truce broke down, and this week, another seven hundred and fifty thousand new refugees. In one day almost the entire refugee number for Darfur. Has anybody here called their congressman? The order of official policy in this war—I dare you to find a policy paper. Have we sent any troops? Have we sent any humanitarian aid as a nation? Have we sent counselors for those women? Have we tried to put those children back together who have drug addictions and guns? No. Zero.

So our moral obligation, so we don't become narcissists and say how magnificent we are—because we are—but because of that magnificence there is a moral obligation to take the gift to a greater world, and not just ourselves. And that will speak more highly to the world than anything else we can do.

Wherever I go, whatever country I am in—I've been in Sierra Leone, the Congo—wherever I go, I say I'm David Mixner, I am a gay man and I am here to help, and so do others. So we have that obligation, and I promise you by the time I help with the healing and I help put things back together and I help people get out of jail, they will think differently of the LGBT community. So the battle is us, this planet is crying for leadership, your community needs you, the women and children of the Congo need you, and nation after nation needs you. I hope that twenty years from now that the future generation of married gays and lesbians come to you and they say tell us what it was like during the great battle and tell us the stories. And that you don't have to look down at the ground and have to tell them you were too busy or too scared to fight.

Thank you very, very much for coming tonight, I am very, very honored.

## GAY IS GOOD

MATT FOREMAN\*

Thank you—it is a tremendous honor to be here with you this evening.

I went to law school in the late 70s, was a member of what was then a pretty well-established gay and lesbian law students association, and helped organize the first national conference for law students on gay issues—it was called “Law and the Fight for Gay Rights.” I bring this up not to show my age, which is increasingly evident, but rather as a time marker for my remarks tonight.

I’m not sure how far others thought we would be now, nearly thirty years later, but I thought that full equality was just around the corner. Straight America was singing along with the Village People’s “YMCA” and “In the Navy,” our movement’s leaders were invited to meet in the White House, we had a huge national march on Washington, and gay issues were everywhere in the media, or at least it seemed that way to me.

We were convinced that the courts and the Constitution would be there for us. The political and religious rights—people like Anita Bryant’s crusade in Miami-Dade—were just beginning their assault on gay America, and they seemed destined to be quickly relegated to the reactionary fringe. The rightness of our cause and the slogan so many of us espoused—that gay was indeed *good*—seemed unstoppable. I was clearly wrong.

While we have, indeed, made enormous progress—perhaps more progress more quickly than any other social justice movement in the history of the world—we are not where we should be by any stretch of the imagination. While we have won many important court cases and state and local legisla-

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tive victories, and while public opinion has changed dramatically over the last thirty years, we also have lost ground in profoundly important and, I think, long-lasting ways.

We are caught in a bizarre reality, an era of utter national schizophrenia when it comes to lesbian, gay, bisexual, and transgender (LGBT) people, where completely different standards are applied when an issue involves our people or our families. Where public perception is that we are on top of the world or nearly so, while the legal, socio-economic, and political *realities* are quite the opposite. Let me share some examples.

The public myth is that we live in an age of political correctness, yet schoolyards and blogs and public discourse are awash with the faggot epithet. When Ann Coulter called John Edwards a “faggot” last year,<sup>1</sup> leaders of “respectable” conservative organizations howled with approval and no one seriously suggested that she be banned from her frequent TV appearances. Similarly, for more than a decade, Don Imus made overt anti-LGBT jokes with no repercussion of any kind.<sup>2</sup> Compare that to the justifiable firestorm that erupted when he denigrated the Rutgers University women’s basketball team.<sup>3</sup>

Last winter, Ellen DeGeneres hosted the Oscars and received rave reviews,<sup>4</sup> while Melissa Etheridge acknowledged her wife on the show and barely raised an eyebrow. Within days, here in Florida, a screaming mob of hundreds called for the literal and figurative head of the city’s much-respected, long-tenured city manager because he disclosed he was transitioning to be a woman. The response? The city commission capitulated to their howling.<sup>5</sup>

Over the summer, two “family values” Republican senators were caught with their pants down. Senator David Vitter of Louisiana admitted to using

1. See Kerry Laureman, *Freak Speech*, SALON.COM, March 3, 2007, [http://www.salon.com/ent/video\\_dog/politics/2007/03/02/coulter/index.html](http://www.salon.com/ent/video_dog/politics/2007/03/02/coulter/index.html) (last visited Mar. 30, 2008); see also Michael Scherer, *The Republican Candidates—and Ann Coulter—Try Out Their Acts*, SALON.COM, March 3, 2007, <http://www.salon.com/news/feature/2007/03/03/cpac/> (last visited Mar. 30, 2008).

2. See, e.g., *Matthews Cited Savage’s “Bareback Mounting” Characterization of Brokeback Mountain; Imus Cited Producer’s “Fudgepack Mountain” Remark*, MEDIA MATTERS FOR AMERICA, Jan. 19, 2006, available at <http://mediamatters.org/items/200601200002>. On the January 18, 2006 edition of *Imus in the Morning*, Don Imus refers to the award-winning film *Brokeback Mountain* as “Fudgepack Mountain.” *Id.*

3. See *CBS Fires Don Imus over Racial Slur*, CBS NEWS, Apr. 12, 2007, <http://www.cbsnews.com/stories/2007/04/12/national/main2675273.shtml>.

4. See *Ellen DeGeneres Looks Comfortable as Oscar Host*, FOX NEWS, Feb. 26, 2007, <http://www.foxnews.com/story/0,2933,254579,00.html> (last visited Mar. 30, 2008).

5. See Mitch Stacy, *Transgender Fla. City Manager Loses Job*, ABC NEWS, <http://www.abcnews.go.com/print?id=2978322> (last visited Mar. 30, 2008).

the services of the “D.C. Madam,”<sup>6</sup> and other sources said Vitter’s relationship with prostitutes was well known to insiders when he ran for the U.S. Senate in 2004.<sup>7</sup> Paying for sex is a felony in both D.C. and Louisiana.

Then, Senator Larry Craig of Idaho was entrapped in a foot-tapping public restroom episode in the Minnesota-St. Paul airport, and pled guilty to misdemeanor disorderly conduct.<sup>8</sup> The Vitter revelation faded from public view in days, while the Craig episode went on for weeks. More tellingly, Senate Republican leaders immediately called for and are now conducting an ethics investigation into the Craig incident—but none for Vitter.<sup>9</sup> And even more tellingly, when Vitter returned to the Senate after his confession, he received thunderous applause from his Senate GOP colleagues while Craig has been shunned.<sup>10</sup>

One thing that these relatively disparate examples say to me is that the issue of how people see sexual orientation *morally* is the biggest challenge we face in moving forward. I will go so far as to say that we consciously and unconsciously allowed our opponents to seize and hold the issue of moral values around our lives and that we are paying for that now. To move forward and go on the offensive we must create a new moral values frame.

This evening, I’d like to propose three ways to do that. First, I think we need to be much more aggressive in talking about the immorality of homophobia. Second, I believe we must stop avoiding talking about the morality of homosexuality by using “moral bracketing” to advance our civil rights. And finally, I’d like to lay out a way for us and others to articulate that acting on our sexual orientation or gender identity is not only not bad or morally neutral, it is a moral imperative.

### THE IMMORALITY OF HOMOPHOBIA

Let me start with some of the ugly facts about the immoral results that discrimination against lesbian, gay, bisexual and transgender (LGBT) people

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6. See *Scandal-linked Senator Breaks a Week of Silence*, CNN, July 17, 2007, <http://www.cnn.com/2007/POLITICS/07/16/vitter/index.html> (last visited Mar. 30, 2008).

7. See Shailagh Murray, *Senator’s Number on ‘Madam’ Phone List*, WASH. POST, July 10, 2007, at A3.

8. See John McArdle, *Craig Arrested, Pleads Guilty Following Incident in Airport Restroom*, ROLL CALL, Aug. 27, 2007, available at [http://www.rollcall.com/issues/1\\_1/breakingnews/19763-1.html](http://www.rollcall.com/issues/1_1/breakingnews/19763-1.html).

9. See *Craig Admonished over Men’s Room Incident*, MSNBC, Feb. 13, 2008, <http://www.msnbc.msn.com/id/23154082>.

10. See Charles Babington, *Sen. Vitter Quietly Returns to Work*, ABC NEWS, July 17, 2007, <http://a.abcnews.com/Politics/wireStory?id=3385860>.

inflicts. I bring this up because I don't believe any thinking or feeling person can say these results are good from any moral values perspective.

Here we go:

- Still today, young LGBT people are at least three times more likely than their heterosexual counterparts to attempt and commit suicide.<sup>11</sup>

- Up to forty percent of homeless youth in this country are LGBT, thrown out of their homes simply because of who they are.<sup>12</sup>

- Survey after survey shows widespread anti-gay discrimination in employment, with between two-thirds and three-quarters of us hiding our sexual orientation on the job or on the street for fear of discrimination or violence.<sup>13</sup> Yet, discrimination in employment, housing, public accommodations and credit is perfectly legal in thirty states and in thirty-seven states if you are transgender.<sup>14</sup>

- An analysis of FBI statistics—which notoriously undercount anti-gay hate crimes—shows that gay and bisexual people (they don't track anti-transgender crime, unfortunately) are more likely to be a victim of hate violence than any other minority in this country.<sup>15</sup>

- And, as I'm sure you are aware, Florida is hardly immune to this epidemic. Earlier this year, Ryan Skipper of Polk County was stabbed more than twenty times, his body was left on the side of a road, and the two assailants bragged to their friends about savagely killing him.<sup>16</sup> Anti-gay hate crimes are at their highest level ever in Florida, and according to the Florida

11. Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 3-110, at 115 (1989), *available at* [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/23/15/84.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/23/15/84.pdf). See generally WARREN J. BLUMENFELD & LAURIE LINDOP, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, GAY, LESBIAN, BISEXUAL, TRANSGENDER YOUTH SUICIDE (1994), <http://pactsnetwork.org/grace/docs/Youth%20Suicide.pdf>.

12. See NICHOLAS RAY, NAT'L GAY & LESBIAN TASK FORCE POL'Y INST., LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1, 166 (2006), <http://www.thetaskforce.org/downloads/HomelessYouth.pdf> (citing the National Network of Runaway and Youth Services which estimates "that 20–40% of youth who become homeless each year are lesbian, gay, or bisexual").

13. See generally M.V. LEE BADGETT ET AL., THE WILLIAMS INST., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007), *available at* <http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf>.

14. Nat'l Gay & Lesbian Task Force, State Nondiscrimination Laws in the U.S., (Jan. 8, 2008), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/non\\_discrimination\\_01\\_08\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_01_08_color.pdf).

15. William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1229 (2003).

16. Eva Kis, *Men Charged in Wahneta Killing*, LEDGER, Mar. 17, 2007, <http://www.theledger.com/article/20070317/NEWS/703170401>.

Attorney General's office, hate crimes targeting LGBT Floridians have increased thirty-three percent in the most violent categories during the two most recently reported years. But, there's been near silence by Florida's religious and political leaders.

▪ And, of course, the examples of injustices in the area of partner and family recognition are too many to list—from grossly disparate taxation to partners of twenty or thirty years being denied pension or line of duty death benefits to the unending stories of someone not being able to say goodbye to his or her partner of forty or fifty years in a hospital Intensive Care Unit because they're not “family.”<sup>17</sup>

I do want to emphasize that each of these injustices—as with the rest of society's ills—fall hardest on LGBT people of color and poor LGBT people. And, contrary to popular wisdom, studies and U.S. Census data show that on average LGBT people and our families are significantly poorer than others.<sup>18</sup>

No, we're not all Will & Grace or L Word people, not by a long shot.

I could go on and on with other examples, but you get the picture. Clearly, LGBT people are targets, victims—or whatever word you choose—of discrimination. Again, what thinking or feeling person can believe that these injustices are moral? Indeed, even our most ardent opponents have backed away from such a position.

Yet, our own movement has often shied away from talking directly and forcefully about all of these problems. We have not wanted to sound like whiny victims, or that we are trying to compare and rank our problems over those of other minorities. We have been afraid that the facts—data that show high rates of substance abuse in our community, for example—will be used

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17. See generally Dayna K. Shah, Associate General Counsel, U.S. General Accounting Office to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (identifying the 1,138 federal statutory provisions in which “marital status is a factor in determining or receiving benefits, rights, and privileges”).

18. See M.V. LEE BADGETT, THE POL'Y INST. OF THE NAT'L GAY & LESBIAN TASK FORCE & THE INST. FOR GAY & LESBIAN STRATEGIC STUD., INCOME INFLATION: THE MYTH OF AFFLUENCE AMONG GAY, LESBIAN, AND BISEXUAL AMERICANS i, 14 (1998), available at <http://www.thetaskforce.org/downloads/reports/reports/IncomeInflationMyth.pdf> (examining data from seven different surveys and concluding that none support the stereotype that GLB people are an economic elite insulated from discrimination by their wealth and disconnected from society at large by a privileged status). See generally JUDITH BRADFORD ET AL., THE NAT'L GAY & LESBIAN TASK FORCE POL'Y INST., THE 2000 CENSUS AND SAME-SEX HOUSEHOLDS: A USER'S GUIDE (2002), available at <http://www.thetaskforce.org/downloads/reports/reports/2000Census.pdf>.

by others to argue that we are, in the words of the current Pope, “intrinsically disordered.”<sup>19</sup>

These have all been legitimate concerns because, in fact, our opponents skillfully attack us using these points, including the charge that we are seek to expropriate—indeed equate—our own struggles with the long, brutal and still unfolding civil rights movement to end racism and the still much-alive legacy of slavery in this country.

This ugly canard has been a deliberate and focused strategy of the anti-gay industry in America for more than twenty-five years. But, that does not mean we cannot speak the truth that anti-gay discrimination shares a common source and a common language with racism, anti-Semitism, and other forms of religious and ethnic bigotry our nation knows all too well. Indeed, the parallels in the rhetoric behind the current attack on LGBT Americans and past attacks on others are too striking to be ignored.

In 1871, Pope Pius IX said that Jews, “owing to their obstinacy and their failure to believe, they have become *dogs*,”<sup>20</sup> adding that “[w]e have today in Rome unfortunately too many of these dogs, and we hear them barking in all the streets, and going around molesting people everywhere.”<sup>21</sup> This is the Pope beatified by John Paul II in 2000.<sup>22</sup>

Today, a justice of the United States Supreme Court, Antonin Scalia, says that ending the criminalization of gay adults having private, consensual sex calls into question laws banning bestiality.<sup>23</sup> In the 1880’s and beyond, interracial marriage was an effort to “destroy western civilization itself.”<sup>24</sup>

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19. See Sacred Congregation for the Doctrine of the Faith, *Persona Humana: Declaration on Certain Questions Concerning Sexual Ethics*, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19751229\\_persona-humana\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html). The Declaration maintained that according to scripture, “homosexual acts are intrinsically disordered.” *Id.* Eight years later, the Vatican’s Congregation for Catholic Education, acknowledging the role of physiological or psychological factors in homosexuality, drew the same conclusion. *Id.*

20. DAVID I. KERTZER, *THE POPES AGAINST THE JEWS* 130 (2001).

21. *Id.*

22. See John W. O’Malley, *The Beatification of Pope Pius IX*, AMERICA, Aug. 26, 2000, available at [https://www.americamagazine.org/content/article.cfm?article\\_id=2118](https://www.americamagazine.org/content/article.cfm?article_id=2118).

23. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia J., dissenting).

24. See Robert Patterson, *Protect Arizona Now Selects White Supremacist Leader to Chair National Advisory Board*, CITIZENS INFORMER (Council of Conservative Citizens, St. Louis, Mo.), Fall 1994, at 3. “Western civilization with all its might and glory would never have achieved its greatness without the directing hand of God and the creative genius of the white race. Any effort to destroy the race by a mixture of black blood is an effort to destroy Western civilization itself.” *Id.*; see also Steve Rendall, *A Sex-Free Scandal*, EXTRA! (Fairness & Accuracy in Reporting (Fair), New York, N.Y.), Mar./Apr. 1999, available at <http://www.fair.org/index.php?page=1451>.

Today, James Dobson says that due to our campaign to win the freedom to marry “[b]arring a miracle, the family as it has been known for . . . five millennia will crumble, presaging the fall of [w]estern civilization itself.”<sup>25</sup>

One hundred fifty years ago, the Bible was used to justify slavery and the moral superiority of white people. Just 47 years ago, 41 states had anti-miscegenation laws on the books and their rationale was simple and absolute, as exemplified by the Virginia Supreme Court in holding that “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.”<sup>26</sup>

Today, seven of the more than one million verses in the Bible are deliberately misinterpreted to justify anti-gay animus, and the airwaves are full of preachers misquoting Leviticus and Saint Paul, railing against the abomination of homosexuality.<sup>27</sup>

In spite of what I see as a near perfect alignment between the justifications offered for past, immoral treatment of other minorities and women and today’s anti-gay movement, many of our opponents say—and I think a majority of Americans believe—that prejudice and discrimination on the basis of sexual orientation and gender identity are profoundly different. Indeed, that it’s understandable and in some way justified. Why? Because of moral values.

That is, while most religions and most people are now to the point of saying—but perhaps not really believing—that sexual orientation by itself is morally neutral, acting on it—and let’s be straightforward here, gay sex—is immoral. Why? The Bible tells us so. And, pundits say there is an “ick” factor—that the thought of gay sex revolts non-gay people, as if it were an innate, visceral reaction—and that reaction is proof positive that there is something wrong with homosexuality.

I actually sort of get this argument because ever since I can remember and to this very day, the thought of heterosexual sex makes me queasy. But I’ve actually never thought that meant straight people were intrinsically immoral.

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25. See James C. Dobson, *In Defending Marriage—Take the Offensive!* (Focus on the Family, Colo. Springs, CO), Apr. 2004, <http://www.focusonthefamily.com/docstudy/newsletters/A000000334.cfm>.

26. *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

27. See generally DANIEL A. HELMINIAK, WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY (1994); MEL WHITE, SOULFORCE INC., WHAT THE BIBLE SAYS—AND DOESN’T SAY—ABOUT HOMOSEXUALITY, available at <http://www.soulforce.org/pdf/whatthebiblesays.pdf> (last visited Mar. 30, 2008).

Here again, this “ick” rationale—prejudice based on another community’s behaviors—is not unique to gay people, but has past parallels, including European immigrants to this country merging racial and sexual ideology to differentiate themselves from Indians and Blacks; to strengthen the mechanisms of social control over slaves; and to justify the appropriation of Indian and Mexican lands through the destruction of native peoples and their cultures. But, again, past parallels have little persuasive value in today’s discourse.

The sad thing? Not only have we and liberals not talked about the immorality of anti-gay discrimination, we have constructed an alternative to morality-based politics, a practice called “moral bracketing.”

### MORAL BRACKETING

According to Georgetown Law Professor Chai Feldblum and Michael Boucai—from whom I am borrowing heavily tonight, to engage in moral bracketing is to ask voters, policy-makers, judges, and other political actors to set aside their moral views on the political or legal question before them and try to decide, as “neutrally” as possible, what is best for a society in which people subscribe to many different moral systems. The essence of moral bracketing is that it should not matter if we do not like someone—or if we do not like something that someone is doing—as long as that person and/or his behavior does not hurt anyone else.<sup>28</sup>

This moral bracketing started eclipsing “gay is good” early on.<sup>29</sup> We have been saying to straight people: you don’t have to like us or approve of what we do or even consider us fully human, so long as you share some of your rights with us.

Polling information underscores how effective this moral bracketing has been. Even today, a majority of Americans believe that sexual relations between two adults of the same sex is “always wrong”<sup>30</sup> or “morally wrong”<sup>31</sup>—depending on how the question is asked—while only one-third are willing to state unequivocally that gay sex is not wrong.<sup>32</sup> Yet, since

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28. See CHAI R. FELDBLUM & MICHAEL BOUCAI, *THE MORAL VALUES PROJECT: DEPLOYING MORAL DISCOURSE FOR GAY EQUALITY* 26–27 (2006).

29. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149 (John D’Emilio et al. eds., 2000).

30. See KARLYN BOWMAN & ADAM FOSTER, AM. ENTER. INST., *ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE* 2 (2006), available at [http://www.aei.org/research/politicalcorner/publications/pubID.14882,projected.14/pub\\_detail.asp](http://www.aei.org/research/politicalcorner/publications/pubID.14882,projected.14/pub_detail.asp).

31. *Id.* at 4.

32. *Id.* at 2.

1996, public opinion polls have found that more than eighty percent of Americans believe “homosexuals should have equal rights in terms of job opportunities.”<sup>33</sup>

So what’s so wrong with moral bracketing? First, it completely cedes the moral argument to the other side. We say right up front, “it doesn’t matter what you believe about me, you just shouldn’t discriminate against me.” But even more important, once we start moving away from basic nondiscrimination protections and push for broader human rights such as adoption, the freedom to marry, equal benefits and the like, public and legislative support declines precipitously. Why? Because, as Feldblum and Boucai state, these matters “connote approval of homosexuality—in an explicit manner.”<sup>34</sup> Legislators and many in the public are simply not ready for laws that presume a moral *equivalence* between homosexuality and heterosexuality.

It is precisely because we have avoided the moral issue, made moral bracketing the cornerstone of our discourse, and refused to insist on our fundamental goodness and equality as human beings, that when we push into these core areas, such deep-seated unease arises from even our closest friends and family members. You feel that push back, that hesitancy, that unwillingness to go there. Why? Because so many people still believe deep down that heterosexuality is fundamentally and morally superior to homosexuality and that gay people are fundamentally inferior to straight people.

This, I believe, also explains the depressing and shocking societal tolerance and acceptance of the many tentacles of anti-LGBT discrimination and the appalling harm it inflicts on our people. It explains how in just over a decade, forty-one states have passed laws or state constitutional amendments to prohibit the recognition of same-sex marriage<sup>35</sup>—that is, to deprive a tiny minority of a right the majority sees as a fundamental human right. And yet, almost never, were these attacks framed in morality. It was as if the public and legislatures were voting on property tax measures, not the lives and futures of other human beings. This explains the string of state Supreme Court decisions—New York, New Jersey, Washington State, and Maryland—refusing to extend the freedom to marry to same sex couples. It is as if the majority opinions are talking about alien species.

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33. *Id.* at 11.

34. Feldblum, *supra* note 29, at 12; see FELDBLUM & BOUCAI, *supra* note 28, at 12.

35. See Nat’l Gay & Lesbian Task Force, Anti-Gay Measures in U.S. (Sept. 25, 2007), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/GayMarriage\\_09\\_25\\_07.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_09_25_07.pdf).



## TOWARD A NEW MORAL FRAMEWORK

The final thing I want to talk about is how to move away from moral bracketing and start talking about a new framework that advances the morality of being gay from a secular point of view. We need to reach back into beginnings of our movement and reassert the fundamental principle that being gay—and that means acting on one's gayness—is, indeed good, *morally good*. And, second, because being gay is good, actions which other people or society take to hurt gay people, and to keep us from being openly gay, are wrong, *morally wrong*.

Getting back to “gay is good” does not require moving the needle as much as some might think. First off, only right-wing extremists are willing to publicly defend the objective harms that homophobia inflicts on LGBT people that I cited earlier—hate violence, job discrimination, homelessness among LGBT youth, and on and on. Second, many of our most ardent opponents do not assert that *being* gay is immoral, only that *acting* on our orientation is. In other words, and as I mentioned earlier, most people are neutral about our existence, and the growing understanding of the impact of homophobia on LGBT people, I believe, sets us up to move them into forward gear.

How do we move people from neutrality to the fundamental concept that gay is good? Feldblum and Boucai identify four principles that even our most vocal opponents cannot dispute that a good society embodies. These four moral understandings are: 1) it is good for people to feel safe; 2) it is good for people to be happy; 3) it is good for people to give and receive care; and 4) it is good for people to live a life of integrity.<sup>36</sup> These understandings are not tied to any particular religious belief.

If these understandings are valid—and I would challenge anyone to explain how they are not—then it is clear that anti-gay attitudes and discrimination are not only objectively wrong, but so is the position that it is fine for LGBT people to *be*, so long as they do not act on their orientation or identity. In other words, forcing LGBT people to live in the closet; and life in the closet is wrong and damaging.

A. *Safety*

Let's start with safety. Whenever I speak at an anti-violence rally, I start by asking people to raise their hands if they have been beaten, chased,

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36. FELDBLUM & BOUCAI, *supra* note 28, at 25. See generally ROBIN WEST, CARING FOR JUSTICE (1997); ROBIN WEST, RE-IMAGING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW (2003).

or otherwise physically harassed because of their sexual orientation or gender identity. Nearly everyone raises their hand. I then ask if someone they know and love who is LGBT has been beaten, chased, or otherwise physically harassed because of who they are. At that point, every hand is up. Clearly, hate violence, and fear of it, is a near-universal experience of gay people. The hate crimes statistics I discussed earlier underscore this fact.

But physical violence is on the far side of the safety continuum.<sup>37</sup> Along the continuum are all the other things that contribute to a person's sense of safety—the ability to get and hold a job, rent an apartment, or get service in a restaurant or hotel. Even today, LGBT people face daily and difficult choices about whether they should try to hide their orientation or identity to escape overt or subtle discrimination, and many LGBT people could not hide who they are even if they wanted to.

Most victims of anti-LGBT discrimination in employment, public accommodations, credit, and education will not find a safety net in the law. Here in Florida—and twenty-nine other states—it's still perfectly legal to fire, evict, or deny services to someone because of their sexual orientation, and in forty states on account of one's gender identity.<sup>38</sup> This lack of legal recourse undermines the ability of LGBT people to feel safe in almost every aspect of life.

The impact of this discrimination cannot be denied, and here are just two examples. Even though academia is known for attracting large numbers of lesbian and gay people into its ranks, there is only one openly gay law school dean in the nation, and only two openly gay or lesbian college presidents.<sup>39</sup> Similarly, even though so many LGBT people are actively involved in politics, less than one-tenth of one percent (0.08%) of all elected officials in this country are openly LGBT.<sup>40</sup> Clearly, LGBT people do not see their out colleagues breaking through lavender ceilings, which only leads to LGBT people continuing to hide their orientation and identity in hopes of keeping their jobs and moving ahead, which leads to the lavender ceiling remaining intact, and on and on.

Some might say LGBT people encounter discrimination when they “flaunt” their orientation or identity. For many of us, it is simply not possi-

37. FELDBLUM & BOUCAI, *supra* note 28, at 26.

38. Nat'l Gay & Lesbian Task Force, State Nondiscrimination Laws in the U.S., (Jan. 8, 2008), [http://www.thetaskforce.org/downloads/reports/issues\\_map/non\\_discrimination\\_01\\_08\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issues_map/non_discrimination_01_08_color.pdf).

39. See Paul Fain, *And Now There Are 3*, CHRON. OF HIGHER EDUC., Aug. 10, 2007, at A18.

40. See Rachel La Corte, *Gay Caucus Grows in Washington*, REGISTER-GUARD, Jan. 24, 2008, at E34.

ble to hide one's sexual orientation or gender identity, no matter how hard one tries, and, as discussed below, for those who can, passing or hiding inescapably involves deceit and loss of personal integrity—hardly a morally defensible outcome.

## B. *Happiness*

Happiness is defined as “feeling or showing pleasure or contentment.”<sup>41</sup> It's obviously difficult—if not impossible—to feel happy when you don't feel safe at work, or on the street, or when you are bombarded by anti-LGBT jokes from all sides, or when you're worried about or unable to protect your family. Happiness isn't only the absence of fear or harm. Feldblum and Boucai say: “[h]appiness may mean being in a relationship that you can share and celebrate with others and have formally recognized.” Or it can be as simple as putting a picture of your lover on your desk at work, just like your straight colleagues.<sup>42</sup>

Sadly, data indicate that because of all the challenges they face, LGBT people experience rates of depression that are significantly higher than heterosexual people,<sup>43</sup> and, of course, for many people—if not most at one time or another—happiness comes from sex.

Yet, the way so many of us are raised—again because of moral values—is to believe that gay sex is wrong and harmful. It takes enormous work to overcome that and many never do completely. In fact, the House of Representatives voted a huge increase for the utterly discredited abstinence-only programs, which say to gay young people “no sex until you're married,” and, by the way, that means no sex your entire life because you can't get married!<sup>44</sup>

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41. OXFORD AMERICAN DICTIONARY 297 (1980).

42. See FELDBLUM & BOUCAI, *supra* note 28, at 26.

43. SPENCER COX, MEDIUS INST., LIVING ON THE EDGE: GAY MEN, DEPRESSION AND RISK-TAKING 6 (2007), available at <http://mediusinstitute.org/Living%20On%20The%20Edge.pdf>. The most reliable “estimates suggest that gay men are about three times more likely than the general population to experience depression.” *Id.* “In a study of depression and gay youth, researchers found depression strikes homosexual youth four to five times more severely than their non-gay peers.” Parents, Friends and Family of Lesbians and Gays (PFLAG), Welcome, <http://www.pflag.com/pages/0022.html> (last visited Mar. 30, 2008).

44. See H.R. 3043, 110th Cong. § 2 (2007). On July 19, 2007, the United States House of Representative passed, by a vote of 276 to 140, the Labor-HHS Appropriations Bill which included an unprecedented \$27.8 million increase for abstinence-only-until-marriage programs. *Id.* Ultimately, the spending bill that Congress passed contained flat funding for abstinence-only programs at \$113.5 million. A total of over \$1.5 billion in government funding has been spent on abstinence-only programs since 1982. This is despite repeated publicly funded and private studies that have shown that these programs are ineffective, do not de-

Some gay and lesbian people deal by forcing themselves into abstinence or sex with people of the opposite gender, which explains high rates of pregnancy among young lesbians, or gay and lesbian people get married to straight people that they truly love, but not sexually, which frequently causes tremendous hurt and harm to that person's spouse and children.

But this issue—gay sex—is where the rubber hits the proverbial road when it comes to moving people from being neutral to positive about our lives. It's remarkable to me that straight people cannot imagine living their lives without having sex—but that's what so many of them expect of us. This view isn't restricted to those who think we "choose" to be LGBT, but even religious leaders, who admit there might be some genetic basis to sexual orientation or gender identity, still say we need to commit to a life of abstinence.

There's no sidestepping this fundamental point and the question needs to be posed directly: If you can't imagine living your life happily without sex, how do you demand abstinence from gay people and still expect them to be happy?

### C. *Give and Receive Care*

The third moral principle that Feldblum and Boucai posit is that it is good for people to give and receive care. Gay people certainly know what it is like to care for our families of birth and of choice. When the AIDS crisis hit, lesbians and gay men rallied to care for our own when the government and so many blood relatives turned their backs. Gay and lesbian siblings even assume disproportionate responsibility for caring for their aging parents.<sup>45</sup>

On the other hand, we also know about not being able to take care of those we love in times of sickness and trouble.<sup>46</sup> The broad protections we have won under state law through marriage equality—in Massachusetts—and civil unions—in Vermont, Connecticut, California, New Hampshire and New Jersey—are not recognized by the federal government and effectively vanish the minute we cross state lines. Contrary to popular wisdom, we cannot get the same protections, benefits or peace of mind through legal con-

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crease pre-marital sex or unsafe sexual practices and often contain religious doctrine, and propose inaccurate medical information and harmful stereotypes about LGBT individuals.

45. See, e.g., MARJORIE H. CANTOR, ET AL., NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST., CAREGIVING: AMONG OLDER LESBIAN, GAY, BISEXUAL, AND TRANSGENDER NEW YORKERS (2004), available at <http://www.thetaskforce.org/downloads/reports/reports/CaregivingAmongOlderLGBT.pdf>.

46. See Feldblum, *supra* note 29, at 26; FELDBLUM & BOUCAI, *supra* note 28, at 26–27.

tracts or wills and even these second-rate options are out of the financial reach of most of us. Second parent adoptions, for example, run as high as \$25,000 and, of course, are illegal here in Florida. After we die, we want our partners to get our social security and pension benefits and our estate pass without taxation, but that doesn't happen. When our partners die, we want their remains treated the way he or she wished, but that too is all too frequently not the case.

Our opponents cannot have it both ways. They cannot preach family values, monogamy, family responsibilities, and life-long commitment and then fight tooth-and-nail any law or policy that promotes these things for gay families.

#### D. *Integrity*

Finally, and most importantly, is the value of integrity. All too many lesbian, gay, bisexual, and transgender people know what it is like to feel forced into lying and hiding who we are and what we do. For many, even the simple question posed by work colleagues on a Monday, "What did you do last weekend" becomes a daunting exercise in evasion. In this reality, it's virtually impossible to live a life based on internal and external integrity.

This isn't abstract or a rare occurrence for many of us. I've had the privilege of leading three gay organizations over the last eighteen years, but even I have to weigh how to respond to the questions, "What do you do?" or "Are you married?" depending on where the question is asked and who is doing the asking. Even weighing how to respond makes me feel ashamed.

Professor Kenji Yoshino discusses this experience in terms of "covering," which refers to an increasingly prevalent norm in society and anti-discrimination law, which tells gay people that it is acceptable to be gay as a matter of fact, but that it is unacceptable for gay people to act out that identity. In other words, while it is acceptable to be gay, it is not acceptable to show same-sex affection, to discuss gay sexuality in any significant way, or to engage in behaviors that are perceived as "gay." As Yoshino argues, this denial of integrity, this severing of the self, can exact significant physical damage on gay people and their relationships, and is ultimately stifling and harmful to society as a whole.<sup>47</sup>

This takes us back to the "flaunting" argument. How does simple honesty with friends, family, and colleagues get turned into flaunting? I'm always struck by the low threshold that triggers this insult. Straightforward

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47. See Feldblum, *supra* note 29, at 27–28; FELDBLUM & BOUCAI, *supra* note 28, at 27–28.

statements that have nothing to do with sex—"I spent the weekend with my boyfriend" or "We went to X club dancing"—are somehow interpreted as "forcing one's 'lifestyle' down someone else's throat."

Here again, the issue is that if we believe it is good for people to live lives of integrity, isn't it wrong to force LGBT people to live lives based on lies and half-truths? Of course it is.

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The inescapable conclusion of all of this is that our society and our government *fail* to support the ability of LGBT people to uphold these moral, good-society principles. Indeed, our society and its institutions work overtime—overtly and covertly—to deny them to LGBT people. This is wrong, morally wrong.

## A PUBLIC LECTURE: WHY RELIGION MATTERS IN THE CIVIL RIGHTS DEBATE FOR GAYS AND LESBIANS

V. GENE ROBINSON\*

What an honor it is to be named a Leo Goodwin Distinguished Visiting Professor and to be invited to address you this evening! I'd feel a little more confident if the word "distinguished" were added by you *following* my lecture and based on its merits, rather than being attached right up front—but there it is. You have already been addressed by some wonderful—and distinguished—authorities and activists in this movement for full civil rights for gay, lesbian, bisexual, and transgendered people. I am honored to be included among them and hope to be able to add some small contribution to their reflections on this issue facing American culture.

Let me set out some questions I hope to answer in this time with you: Why are we here in this particular moment, struggling with this particular issue? Why does religion play such a central role in this debate, and is that an appropriate role in public discourse? Who are the loudest, strongest voices coming from the religious community, and why are they so strident, unrelenting and passionate? What does the Bible really say about homosexuality, what does it NOT say, and why does it matter in a secular State? What IS the rightful role of religion in public discourse in a secular State? How does this debate about the civil rights of LGBT (lesbian, gay, bisexual and transgendered) people relate to the other "isms" of our culture, and what is the broader context for discussion of human rights for all our citizens? How do we move forward in the never-ending search for the common good? As I contemplate trying to accomplish all this in the allotted time, as well as leave time for some questions, I'm glad that I'll be here for several days for some follow up with you!

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Permit me to own up to the biases and limitations I bring to this task. Let's just note for the record that I am male. I will never know what it is like to live my life as a female, and if this were a lesbian delivering this lecture, that would be wholly authoritative perspective different from mine. I am a white man. The experience of being gay in a community of color is different than mine, especially in the fact that these people have experienced a double discrimination I can but only imagine. I grew up in a family that was poor, uneducated, and deeply religious, in rural, largely segregated Kentucky, where we were tobacco tenant farmers, living without running water and central heat, but rather unaware of how poor we were. All of that colors who I was, who I came to be, and how I understand my own story. And believe me, not in my wildest dreams did I ever imagine a world in which we would be talking openly about homosexuality, nor a debate in which often I would reluctantly find myself at the center.

I am a Christian. The fact that I am tempted to add "but not that kind of Christian" speaks to the powerful role the conservative Religious Right has come to play in this country and in this debate—but more about that later. While I believe Jesus of Nazareth to be the Messiah, the Christ, long hoped for by the Jews, and for Christians fulfilled in this itinerant preacher and reformer, I do not believe that Jesus is the sole revelation of God's self to the world. Such a God, capable or willing to reveal God's self in only one way, seems like a God too small to be worthy of worship. And so, despite the fact that I believe Jesus to be God's perfect revelation of God's self, I respect and revere all those who have come to know God through other faith journeys. I can only speak out of my own context as a Christian, and I will trust you to make the connections and translations into the understandings of your own faith communities, as well as those of you who hold no particularly religious beliefs at all. After all, the challenge before us as citizens of this country is to define our rights and responsibilities to one another no matter what our faith beliefs are.

Finally, let me own up to the fact that I am not a scholar, and while I may talk for much too long a time, I will not be thinking of this as a lecture. A lecture implies that I know something that you don't know, and if you just sit there, quietly absorbing all that I have to say, at the end the knowledge in my brain will have been transferred into yours, for good or ill. Rather, I would merely like to think out loud in your presence, in the hopes that something I say might assist you in your own thinking about these issues.

Why are we here in this particular moment in the history of this country and in the struggle for human rights? Thirty years ago, as the title of this series suggests, we were in a different moment. Anita Bryant was the poster



child and spokesperson for a movement to squelch any forward movement in the fuller inclusion of gay and lesbian people in the life of the citizenry.<sup>1</sup> And while we may now look back on her and the views she represented as being outdated, course and even a bit quaint, let's not forget that thirty years ago, those views had a huge following and were racking up huge victories against those who would more widely accept the participation of gay and lesbian people in the benefits of citizenship.<sup>2</sup>

Thirty years ago, even twenty years ago, most Americans would have told you—honestly—that they did not know any gay or lesbian people. If pushed, they might admit that there was weird Uncle Harry, a lifelong bachelor whom everyone knew to be a bit different, or those two spinster ladies who have lived together down the street for as long as anyone remembers. But did they know any out, proud and self-affirming gay and lesbian people? No, probably not.

Fast forward to today, and is there ANYONE left who doesn't know some family member, co-worker, or neighbor who is gay? The reason, of course, is that the last two decades have seen the unprecedented movement by gay and lesbian people to make themselves known—AS gay and lesbian—to their families, co-workers and friends.<sup>3</sup> This has, of course, proceeded at differing rates based on geography, demographics, and culture. Certain regions of the country seem more accepting than others; metropolitan areas, to which many gay and lesbian people have gravitated because of both anonymity and generally more liberal attitudes, were the vanguard of such public admissions of sexual orientation; and more secular, less religious, settings have provided more open and accepting environments for coming out.<sup>4</sup> But the REAL shift in the culture has been the quiet, largely private admissions by sons and daughters, cousins, and aunts and uncles, in families from Birmingham to Boise, that “yes, I too am gay.”

Harvey Milk, the first openly gay man to serve as Supervisor of the San Francisco City Council—and who was assassinated in 1978 by an anti-gay colleague on the Council—once said that “coming out is the most political

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1. See Tina Fetner, *Working Anita Bryant: The Impact of Christian Anti-Gay Activism on Lesbian and Gay Movement Claims*, 48 SOC. PROBS. 411, 411, 414–15 (2001).

2. See *id.* at 415.

3. See Evan Wolfson, *Book Review: Ian Ayers & Jennifer Gerarda Brown, Straightforward: How to Mobilize Heterosexual Support for Gay Rights*, 12 WM. & MARY J. WOMEN & L. 733, 733 (2005–06).

4. Gaiutra Bahadur & Andy Alford, *A New Haven for Gay Couples: The Suburbs Census Shows Lesbians Lead Exodus from Cities to Newly Accepting Areas*, AUSTIN AM. STATESMAN, Aug. 22, 2001, at A1.

thing you can do.”<sup>5</sup> He was right, and I believe it was the countless dramas, one at a time, of gay and lesbian people courageously sharing who they really were at their core with those they loved or worked with, which has literally changed the world and brought us to this moment.

The change that we see occurring is happening in the same way change always happens. One has a world view that seems to work pretty well at interpreting reality. Then something happens to us that doesn't fit into that world view—indeed, something for which our old world view is insufficient to explain. We are thrown into a bit of chaos and confusion, when it seems like nothing is certain anymore. And then our old world view is reshaped in such a way as to accommodate this new truth.

That's the way it happens for families of gay and lesbian people. A parent believes the traditional view that homosexuals are immoral, sick, disordered, and misguided in their choices. Then a beloved child comes and says, “Mom, Dad, I'm gay.” Now the parent is plunged into the chaos of knowing their beloved child, and knowing that he or she is NOT immoral, sick or misguided, and yet they've always been told this about homosexuals. Then, over time, they come to understand that their child is the same child he or she has always been, only now happier and healthier. The child who never seemed able to maintain a relationship is now hopelessly in love. The old world view about homosexuality undergoes an overhaul and is changed to incorporate a new understanding of sexuality that allows them to continue loving their child. They may not be out there beating the drum for marriage equality—although many of them are—and they may not be bragging to all their friends about their son's new boyfriend, but something deep and important has changed, some significant piece of ground has shifted, and the world is never again the same as it was. THAT is happening all over America as we speak.

There is not a single nation, culture, or religion that is not dealing with the issue of homosexuality.<sup>6</sup> Even those religions which are absolutely clear and unswerving in their condemnation of homosexuality are being challenged by their gay and lesbian members to take another look at that condemnation.<sup>7</sup> Some estimate the percentage of Roman Catholic priests who are gay to be between forty and sixty percent.<sup>8</sup> The Southern Baptist Con-

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5. Serena Nanda, *Getting Away with Murder: Cultural Diversity and the Criminal Justice System*, 5 J. CRIM. JUST. EDUC. 117, 117 (1994).

6. See George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 533 (2007).

7. See *id.* at 555.

8. U.S. Research Survey: *Younger Priests Are Generally More Orthodox*, AD2000, Aug. 2003, available at [http://www.ad2000.com.au/articles/2002/aug2003p7\\_1404.html](http://www.ad2000.com.au/articles/2002/aug2003p7_1404.html).

vention, which values congregational autonomy as almost sacred, has expelled some congregations for offering blessings to same sex couples or calling a gay minister.<sup>9</sup> Conservative Jews have finally admitted gay and lesbian, bisexual and transgendered rabbinical students to their seminaries.<sup>10</sup> Evangelical Christians have been rocked by revelations that some of their leaders have had secret affairs with people of the same sex.<sup>11</sup>

Who would have thought any of us would live long enough to see legal civil unions and even marriage for gay and lesbian couples? Who would have thought that a country like South Africa would write gay and lesbian civil rights explicitly into their constitution,<sup>12</sup> or that a Catholic country like Spain would permit marriage to same sex couples?<sup>13</sup> Many Anglicans from around the world continue to call on me to resign my position as bishop, naively believing that if I went away, this issue would go away, and the Church would return to its quiet, peaceful existence—a peaceful existence, which, by the way, the Church has never enjoyed. In fact, this is an issue that is not going to go away, even for those who most oppose it.<sup>14</sup> Simply put, this toothpaste is not going back into the tube!

Why does religion play such an important role in this debate? Religion, of course, has always played a role in the debates and public discourse of nations—and certainly so here in the United States, which is probably the most religiously fervent of all the Western nations.<sup>15</sup> But why the particularly virulent and passionate stances on this issue? And why can't we simply ignore the religious argument in this secular debate?

Religion makes its beliefs known on a variety of issues—from abortion to stem cell research, from environmental stewardship to capital punishment. But most religious faith communities have people on BOTH sides of these issues within their ranks—at least in part because these positions can only be extrapolated from sacred texts.<sup>16</sup> There is no seemingly overt “adherence to” or “proscription against” to be found in scripture for these issues. One can

9. Keith Hartman, *Congregation in Conflict: The Battle Over Homosexuality*, 47–48 (Rutgers Univ. Press 1996).

10. Neela Banerjee, *Conservative Jewish Seminary Will Accept Gay Students*, N.Y. TIMES, Mar. 27, 2007, at A14.

11. *Board Forces Evangelical Leader Out of Church*, BEAUMONT ENTERPRISE, Nov. 5, 2006, at A11.

12. S. AFR. CONST. 1996 § 9(3).

13. Jennifer Green, *Spain Legalizes Same-Sex Marriage*, WASH. POST, July 1, 2005, at A14.

14. Mike Hudson, *The Future of Gay*, THE ADVOC., June 22, 2004, at 59.

15. Martin E. Marty, *Pluralisms*, 612 ANNALS AM. ACAD. POL. R. SOC. SCI., 253, 254 (2007).

16. *Id.*

read Genesis 1:28, for instance—"Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth."—and argue for good environmental stewardship OR total exploitation of the environment using the same verse, but interpreting it differently, depending on the meanings of the words "subdue" and "dominion!"<sup>17</sup> Abortion can be defended on the basis of our God-given personal conscience or opposed on the basis of the sanctity of life.

But unlike these other moral questions, the issue of homosexuality at least seems to be explicitly condemned. At first reading, Leviticus seems to condemn quite specifically male homosexuality: "You [men] shall not lie with a male as with a woman; it is an abomination;" and "If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death."<sup>18</sup> The absence of same sex proscriptions for women in these texts is a subject for later discussion. The fact that the Bible seems specifically to name homosexuality as repugnant to God and worthy of capital punishment makes religion particularly relevant to our discussion of this issue, in ways that are more compelling than with other hot button issues.

This Biblical proscription also has an effect on gay and lesbian people. I was once present for a discussion among a group of gay and lesbian teenagers discussing their sexual orientation. Not one of them had grown up in a religiously observant household; not one of them would have particularly identified themselves as religious Jews or Christians. But every single one of them thought they knew what God thought of them, and they all knew the word "abomination." Now these kids could not have found the Book of Leviticus in the Bible if their lives had depended on it, yet each was confident that God condemned them for their sexual orientation. The fact is, at least in American and Western culture, God's condemnation of homosexuality is assumed. It's in the air we breathe. And because of that, religious belief IS relevant in our discussion of how to achieve civil rights for gay and lesbian people.

Let's be honest. The vast majority of the discrimination experienced by gay and lesbian people has come at the hands of religious people, and the greatest single hindrance to the achievement of full civil rights for gay, lesbian, bisexual, and transgendered people can be laid at the doorstep of the three Abrahamic faiths: Christianity, Judaism, and Islam. And it is going to take religious voices and religious people to undo the harm, devastation and discrimination wrought at the hands of religious people.

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17. *Genesis* 1:28 (New Revised Standard Version [hereinafter NRSV]).

18. *Leviticus* 18:22 (NRSV); *Leviticus* 20:13 (NRSV)

So, what does the Bible really say about homosexuality? This is a topic which could and should be the subject of a lengthy lecture, all on its own, and I am happy to address it more fully in the subsequent time we have together. But let me at least make several points about why I believe our traditional understanding of the Biblical—and hence God’s—attitude toward homosexuals is flawed and in need of reinterpretation.

First, the philosophical and psychological construct of sexual orientation is a modern phenomenon.<sup>19</sup> It was only at the very end of the nineteenth century that the notion was first posed that there might be a certain minority of us who are naturally-oriented, affectionally and sexually, toward members of the same gender.<sup>20</sup> In Biblical times, and until the last 100+ years, it has been assumed that everyone is heterosexual.<sup>21</sup> And therefore, any who acted in a homosexual manner were acting “against their nature.”<sup>22</sup> In other words, homosexuals were “heterosexuals behaving badly.”<sup>23</sup> Indeed, many recent evangelical translations of the Bible use the word “homosexual” to translate certain Greek and Hebrew words which are actually somewhat obscure and puzzling as to their meaning, and most likely related to sexual exploitation and abuse of underage boys, quite common in Roman and Greek culture, and to temple prostitution in neighboring heathen cultures, rather than to homosexuality *per se*.<sup>24</sup> Yet, reading one of these translations using the word “homosexual,” one would assume that the ancient Hebrew and Christian communities were talking about precisely the same thing we are talking about today. Such is not the case. One cannot take a twentieth century word, insert it back into an ancient text and proclaim that it means precisely something that was totally unknown to the authors of that text.

Second, our understanding of the word “abomination” is different from its original use. According to the Holiness Code of Leviticus, many things were an “abomination” to God, including the eating of pork.<sup>25</sup> That was not to say that eating pork was innately wrong, but that it was to be one of the

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19. *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

20. Brent Pickett, *Homosexuality*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 29, 2006), <http://plato.stanford.edu/entries/homosexuality/>.

21. B.A. Robinson, *The Bible and Homosexuality: An Introduction*, ONTARIO CONSULTANTS ON RELIGIOUS TOLERANCE (Dec. 19, 2006), [http://www.religioustolerance.org/hom\\_bibi.htm](http://www.religioustolerance.org/hom_bibi.htm).

22. Andy Mapstone, *The Bible and Homosexuality*, COURAGE (Dec. 2003), <http://www.courage.org.uk/articles/Bible.shtml>.

23. QUEST, QUEST CONFERENCE 2001: A REPORT (2001), <http://www.questgaycatholic.org.uk/conferences/conf2001report.asp>.

24. See *The New Testament and Homosexuality*, Robin Scroggs, Fortress Press, 1983.

25. The Holiness Codes are contained mostly in *Leviticus* 11–16 and 17–26. The prohibition of pork as being unclean is found at *Leviticus* 11:7.

ways Jews were constantly reminded that they were different, a separate chosen people of God, and in so observing these dietary laws, would be reminded of this special relationship to God.<sup>26</sup> Likewise, they were not to eat shellfish, plant two kinds of seed in the same field, or wear two kinds of cloth simultaneously.<sup>27</sup> Tattoos were forbidden;<sup>28</sup> those who cursed their parents were to be put to death.<sup>29</sup> One does not hear leaders from the Religious Right upholding these “abominations” nor urging their compliance – yet these all occur within the same Holiness Code of Leviticus along with the proscriptions of men lying with men.<sup>30</sup> Even with the proscription against male same sex behavior, most fundamentalists stop short of demanding death as the penalty, as prescribed by Leviticus.<sup>31</sup>

Third, the science of reproduction and sexual activity of the ancient Hebrews was different from what we know today.<sup>32</sup> Male sperm was thought to contain all of nascent life.<sup>33</sup> The only contribution made by women in the reproductive process was a place for the fetus to incubate.<sup>34</sup> A man’s sperm, or “seed,” contained everything necessary for human life, and therefore any “spilling” of male seed was tantamount to murder.<sup>35</sup> Ancient Hebrews were a small minority, living in a hostile heathen environment, struggling to reproduce and build its population for survival purposes.<sup>36</sup> Therefore any kind of waste of male sperm was antithetical to that survival and synonymous with murder – whether that be same sex activity, masturbation, or even *coitus interruptus* in heterosexual copulation (the so-called “sin of Onan”) – because it wasted male seed and squandered the possibility of new human life.<sup>37</sup> Today, we understand that both sexes contribute to the process of human reproduction and over-population, not under-population, is a problem. We believe sexuality to have purposes far beyond reproduction.<sup>38</sup> Yet, these few verses of scripture are quoted as if nothing has changed in our under-

26. Elijah L. Milne, *Protecting Islam’s Garden From the Wilderness: Halal Fraud Statutes and the First Amendment* 2 J. FOOD L. POL’Y 61 (2006).

27. *Leviticus* 19:19 (NRSV)

28. *Id.*

29. *Leviticus* 20:9 (NRSV)

30. *Leviticus* 18:22 (NRSV); *Leviticus* 20:13 (NRSV)

31. *Leviticus* 20:13 (NRSV)

32. Faith & Social Justice: In the Spirit of Richard Overton and the 17th C., <http://levellers.wordpress.com/category/hebrew-bible/>.

33. Seventh-Day Adventist Kinship, Homosexuality: Another Adventist Point of View, <http://www.sdakinship.org/anotherpov/05.htm> (last visited Apr. 10, 2008).

34. *See id.*

35. *See id.*

36. *See id.*

37. *Genesis* 38:9 (NRSV).

38. See the “Celebration and Blessing of a Marriage,” Book of Common Prayer

standing since Biblical times. Note, of course, that all the other references to the “spilling of seed” have been reinterpreted to be acceptable, but not the proscription against same sex behavior.

The study of hermeneutics, the methodologies by which we interpret a text, has yielded rich information about the culture in which these texts were written and heard. Much of the Biblical scholarship in the past fifty years has focused on the sociological cultures which formed the settings for these scriptural texts, both the cultures of the ancient Hebrews and the early Church, as well as the competing and often hostile cultures which surrounded them. We have come to know the meaning of these sacred texts because we have become so much more knowledgeable about the cultural situations to which they were responses. Conservative Christians often act as if none of this scholarship has occurred or makes any difference in a 21<sup>st</sup> century understanding of those texts.

But let me be clear, I believe the Holy Scriptures of the Old and New Testaments to be the Word of God. But that is different than believing them to be the “words” of God, virtually dictated by God through human media. And let’s not forget that the real “Word” of God is Jesus himself! “In the beginning was the Word, and the Word was with God, and the Word was God,” begins the Gospel of John. The Jesus “event,” – his life, death and resurrection – is believed by Christians to be the perfect revelation of God, NOT the Bible. The Bible is perhaps the best and most trustworthy witness TO that event, but it neither replaces Jesus as the Word nor does it take precedence over Christ’s continuing action in the world through the Holy Spirit. To elevate the words of scripture to a place higher than the revealed Word of God in Jesus is an act of idolatry.

Indeed, Jesus says a very interesting thing to his disciples, on the night before he is betrayed. According to the Gospel of John, Jesus tells his disciples: “I still have many things to say to you, but you cannot bear them now. When the Spirit of truth comes, he will guide you into all the truth.”<sup>39</sup> It sounds to me as if Jesus is saying: “You are not ready to hear everything I have to teach you – things you cannot culturally comprehend right now. So I will send the Holy Spirit to guide you and teach you, over time, those things which you need to understand.” And as a Christian, I believe that the Holy Spirit has done just that.

Less than a century and a half ago, “good” Christian people were still using scripture to justify slavery.<sup>40</sup> In the 1950’s and 60’s “good” Christian

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39. *John* 16:13 (NRSV)

40. The Bishop of Vermont, in 1864 – AFTER the Emancipation Proclamation – published a scripture-based defense of slavery.

people were enforcing Jim Crow laws and blocking entrances to their schools to black children.<sup>41</sup> I believe that the Holy Spirit led us into a deeper truth, about the equality, worth and dignity of every human being, regardless of race. And the culture changed. Not enough, of course, because racism is alive and well among us in the culture and in the Church. But many of us learned.

It is almost inconceivable to me that the Episcopal Church first allowed women to be deputies to our national General Convention in 1970, and only began ordaining women to the priesthood 30 years ago.<sup>42</sup> And yet, the largest Christian denomination in the world still does not open the ranks of the ordained to the women who form its core. Scripture passages from St. Paul about the inappropriateness of women holding leadership positions or making their voices heard in the Church are still being used to subjugate women all over the world. All in the name of God as revealed in scripture. But the Holy Spirit unrelentingly keeps teaching and guiding us to the full inclusion of all of God's children.

Indeed, those who believe that the 2,000-year tradition against homosexuality argues against change forget that the Church has changed its understanding of some very important teachings that it has held for countless centuries. For instance, the Church for nearly 2,000 years took seriously Jesus' words that remarriage after divorce was adultery.<sup>43</sup> Until the early days of my own ministry as a priest, divorced people were not welcome to take communion, and if one of them decided to become married to someone else, that second marriage could not be solemnized in an Episcopal Church. And then, two things happened. We perceived that we were denying communion to people at one of those times they most desperately needed it. And we noticed that these second marriages were turning out to be a blessing to the couple and to the community. Indeed, GOD seemed to be showing up in those marriages and relationships and families. And so, in spite of the explicit injunction against it from the mouth of Jesus himself, we began to offer the Church's blessing upon these marriages. I believe it was the work of the Holy Spirit, guiding us into the truth, just as Jesus promised the Spirit would.

All of this may seem hopelessly off-topic for issues related to gay and lesbian people, but I would assert that such is not the case. We are talking about how we change our minds – as a culture, a nation and a Church – about something we've been very sure about for thousands of years. To some, it

41. See generally *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955); 347 U.S. 483 (1954).

42. *Episcopalians Elect First Woman to Head U.S. Church*, PBS NEWSHOUR, June 19, 2006, available at [http://www.pbs.org/newshour/bb/religion/jan-june06/episcopal\\_06-19.html](http://www.pbs.org/newshour/bb/religion/jan-june06/episcopal_06-19.html).

43. *Matthew 5:32* (NRSV)



seems like the height of madness, and a willy-nilly discarding of ancient truths. To some, it seems as if nothing is certain anymore, or that the Church doesn't know what it believes. But to others of us, it seems like it's nothing to be fearful of, but rather merely the kind of change that the Holy Spirit is promised to inspire. Only through such a gentle and comforting understanding of the continuing work of God will people find the courage to change their minds about this issue.

Why is the resistance to this change so vehement, so vitriolic, so deep? In the nation, why would two people who want to pledge their love and fidelity to one another for their mutual benefit and the benefit of society be such an issue? Why wouldn't conservatives applaud the pledge of faithful monogamy in gay marriage for the people they have always accused of being promiscuous and irresponsible? Why wouldn't conservative Christians support the end to a gay person feeling like they have to enter a usually-disastrous heterosexual marriage in order to be happy and accepted? Why can the Republicans use gay marriage as such an effective wedge issue in political campaigns?

Or, in the Church, why would my election as bishop of a reasonably conservative, rural and small town diocese in New England become such a huge thing? How could such an event spawn thousands of hateful letters and emails? Why would I, a Christian elected by the clergy and people of a diocese to be their bishop, receive numerous death threats from other religious people, and have to wear a bulletproof vest for my own consecration as bishop? Why would people debate my fitness for such a calling, based not on my skills, experience and faithfulness, but solely on my sexual orientation – not just in metropolitan churches, but in a small theological school deep in the bush of Kenya and on the remotest of Pacific islands? Why would some leaders in the Anglican Communion consider it dangerous even to meet with me, talk with me or be seen with me?

Allow me to speculate about why I believe the upheaval has been so widespread and the resistance so great to the full acceptance of gay and lesbian people into the life of the nation, and in doing so, perhaps set this debate in a larger context. There's not enough time to explore each of these dynamics in depth, but let me file some notions by title, and we can discuss them later.

First, these are issues about sexuality – and we have never been very comfortable talking about such things. I'm not sure we were ever comfortable talking about sexual matters, but the Puritans in our own culture didn't help. We all were influenced by the Victorian Age with its often duplicitous sensibilities. While sexual escapades were rampantly going on behind the scenes and below the surface, all the talk was about chastity, fidelity and monogamy. It's no wonder we find these things hard to talk about. The re-

alities of our sexual lives are perhaps too frightening to bring to the light of day.

And yet, many of the moral issues that face us today involve sexuality. Abortion, fertility therapies, alternative methods of reproduction, the role of men and women, and the appalling crisis of the American family all involve sexuality. We need to be talking about these things, and yet we have little experience in doing so. Parents still falter over what to tell their children about sex and when to tell them. By the time most parents get around to it, their children are already knowledgeable about (and sometimes are participating in) practices the parents won't even get close to in their "birds and bees" speech. I'm not at all sure that our near-obsession with homosexuality isn't a group denial mechanism for heterosexuals not to talk about their own sexual issues. If we can talk about *them*, then we don't have to talk about *us*. If we can focus on *their* problems, then we don't have to talk about our own.

In addition, most people resist seeing the treatment of homosexuals as "their" problem. Gay and lesbian people have known for a long time that the problem here isn't gay and lesbian people's sexuality, but their ill treatment by a hostile society.

You may notice that I have not once used the word "homophobia." I think it exists in some people, but I find it to be a word that acts as a conversation stopper. Some will claim that they are not fearful of homosexuals and are therefore "not guilty" of homophobia. But aside from the hatred of homosexuals, which does exist, the further sin against which we need to speak and act, of which the secular society is guilty, is "heterosexism."

You know what an "ism" is: a set of prejudices and values and judgments backed up with the power to enforce those prejudices in society. Racism is not just fear and loathing of non-white people; it is the systemic network of laws, customs and beliefs that perpetuate prejudicial treatment of people of color. I benefit every day from being white in this culture. I don't have to hate anyone, don't have to call anyone a hateful name; never have to do any harm to a person of color to benefit from a racist society. I merely have to sit back and reap the rewards from a system set up to benefit me. I can be tolerant, open minded and multi-culturally sensitive. But as long as I am not working to dismantle that system, I am racist.

Similarly, sexism is not merely the denigration and devaluation of women; it is the myriad ways in which the system is set up to benefit men over women. It takes no hateful behavior on my part to reap the rewards given to men over women. But to choose not to work for the full equality of women in this culture is to be sexist.

So, the sin we are fighting in this country right now in the secular sphere is the sin of heterosexism. More and more people are feeling kindly toward gay and lesbian people—probably not the majority yet, but a growing

number. But that will never be enough. It will never be enough not to hate gay people (although that's a good beginning!). What is needed is the dismantling of the system which rewards heterosexuals at the expense of homosexuals. That is why equal marriage rights are so important. That's why "don't ask, don't tell" is such a failure and such a painful thing for gay and lesbian people, even those who have no desire to serve in the military. They are ever present reminders that our identities, our lives, our relationships are second class – because the very system of laws that govern us discriminates against us and denigrates our very lives. Over one thousand rights are automatically granted to a couple who marries. Britney Spears received those one thousand rights on the night she decided on a lark to get married in Las Vegas, yet the gay couple who has been faithfully together for 30 years has none of those rights.

This systemic heterosexism affects gay and lesbian people in countless ways, large and small. Because my partner's parents were not accepting of our relationship, we had to draw up documents which would prevent his parents from making all his medical decisions if he became sick and incompetent, or from taking his body away from me if he were to die. He and I just returned from overseas, and while every other family on the plane had to fill out just one immigration and customs form, we had to fill out two, as if we were strangers, or merely friends, as if the twenty years we've been together doesn't qualify as family. It's a little thing, but it's mightily symbolic of the way the system is set up to devalue us as people and as families. The problem here is not just homophobia, it is heterosexism.

Lastly, let me try to put this into an even larger context. I believe with my whole heart that what we are up against in this struggle is the beginning of the end of patriarchy. At their root, heterosexism and homophobia are expressions of misogyny, the hatred of women. The "sin" of a "man lying with a man" (remember Leviticus?) is in the next few words: "as with a woman." The sin is that a man, favored by his status as a man, would allow himself to be treated "like a woman." The classic defense in a gay bashing case is "he made a pass at me." Can you imagine how empty the streets would be if we locked up every man who had ever made a pass at a woman? That's "normal." But for a man to allow himself to be treated like a piece of meat by another man is to defy the gods, and to defy the privilege that comes with being male. In recent times, before people knew many gay couples, people (mostly men) would often inquire as to which one was the "woman" in the relationship. In other words, which was allowing himself to be denigrated "like a woman?" In ancient times, it was not uncommon for one army, when it had prevailed over another army, to rape the vanquished soldiers. In the ancient mind, nothing was so degrading, nothing was so symbolically victorious over another, than to treat another man like a woman.

And with respect to those passages in Leviticus, there is even some evidence that the punishment meted out in ancient Biblical days for defying the proscription to same sex behavior (which is only a proscription between men, by the way, not women) was administered only to the receptive partner in anal intercourse, not the insertive partner, because only he was acting like a woman. At least the insertive partner was still acting "like a man." It seems that the reason female same sex behavior is only mentioned once, in the New Testament, is that women are already at the low end of the status totem pole. It is the usurping of male privilege and status that seems to be the "abomination."

If you doubt the currency of this misogynistic attitude, go to the video store and rent any movie about football. At some point, in every single one of these movies, when the team is about to lose the big game, and the coach needs to pump them up, the coach will belittle, anger and presumably empower the team by calling them a bunch of girls. Why does that work? Because nothing could be worse!

All of this is to say that what I think we see going on in our society and in the Church is nothing short of the beginning of the end of patriarchy. For a very long time now, most of the decisions affecting the world have been made by white, heterosexual, educated, Western men. Ever so gradually, people of color have been invited to that table; then women, and now gay and lesbian people. And things will never be the same when the oppressed have a voice. But it's no wonder the resistance is so fierce, given that we are changing a patriarchal system that has been in place almost forever.

How do we now move forward? And what is the rightful role of religion in this public discourse? Unlike some issues that have faced us in the past, the movement forward in the civil realm is tied intimately to moving forward in the religious realm. There is perhaps no other prejudice, ensconced in the laws of the land, so based on sacred scripture, so entwined with our theological understanding of the nature of humankind and the sexuality which proves to be both its blessing and its curse. No other attitude in the body politic is so tied to an attitude stemming from a particular Judaeo-Christian teaching. Change in no other social attitude in the secular culture is so tied to change in religious belief.

I believe that it will take religious people and religious voices to undo the harm that has been done by religious institutions. While we are seeing a decline in the number of people who experience and express their spirituality in and through a formal religious institution, it is still a powerful force within the culture, generally working against progress in the inclusion and full civil rights for gay and lesbian, bisexual and transgendered people. It is time that progressive Christians rescue the Bible from the Religious Right which has held it hostage and claimed it as its own private territory for far too long. It

is time that Christians and Jews actually read the holy scripture they claim is the basis for their beliefs, instead of simply believing what they are TOLD it says by others. It's time we use reputable scholarship, sound reason, and thoughtful exploration to understand what the words of scripture meant to the person who authored them and what it meant to the people for whom they were written, before deciding whether or not those words are binding on those outside that cultural context. It's time that progressive religious people stop being ashamed of their faith and fearful that they will be identified with the Religious Right, and start preaching the Good News of the liberating Christ which includes ALL of God's children.

But if the Religious Right has gotten it wrong in inserting their viewpoint into the public debate, what is a good, positive and appropriate way to voice one's religious convictions in public discourse. It is, I believe a simple shift in focus from the public to the private in these expressions. I am personally guided by my faith. My belief in God, my understanding of God's vision for humankind and God's will for us as children of God shapes my opinions about the way our secular culture, institutions and government should be run. I am even free to express my own personal and religious reasons for coming to the opinions I express. But the minute I start making the argument that YOU must come to those same opinions because MY religious truth is not only MY truth, but also YOUR truth, indeed THE truth, then I violate that divide between private and public. James Dobson or Pat Robertson are perfectly free to tell me about their religious beliefs which compel them to oppose acceptance of gay people; but they cannot make the claim that their beliefs are right and true for all of humankind, and therefore must be MY beliefs and guide MY thinking as well. That is to move from democracy to theocracy – a movement not at all opposed by many on the Religious Right.

Similarly, if I am going to make arguments for the full inclusion of gay, lesbian, bisexual and transgendered people in this society, I must do so on their own merits, not on any claim that my understanding of God is right and true and therefore must be compelling to everyone. I must make those arguments based on decency, compassion, democratic principles, the Constitution and a notion of the common good – not on any reading of any sacred text to which I might subscribe.

I think we need to separate, as best we can, the civil realm from the religious. This is especially important in the struggle for equal civil marriage rights for all our citizens. Clergy have long acted as agents of the State in the solemnization of marriages.<sup>44</sup> Because a priest, or rabbi, or minister acts on

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44. See, e.g., FLA. STAT. § 741.07 (2007).

behalf of the State in signing the marriage license and attesting to the proper enactment of the marriage, we have lost the distinction between what the State does, and what the religious institution does. In fact, the State effects the marriage.<sup>45</sup> Then the Church goes on to pronounce its blessing upon that union.<sup>46</sup> In France, everyone is married at the mayor's office; then those who are religious reconvene at the church for the religious blessing of that marriage.<sup>47</sup> Those who are not religious or do not desire such a blessing are, of course, are still fully married according to the laws of the State.<sup>48</sup> In such an arrangement, it is clear where the State's action ends and the Church's action begins.

I have argued that we need to make a clear distinction between civil r-i-g-h-t-s and religious r-i-t-e-s. It may take many years for religious institutions to add their blessing to same sex marriages, and no church or synagogue should be forced to do so, but that should not slow down progress toward the full CIVIL right to marriage as executed by the State for the benefit and stability of the society. Because New Hampshire will have legal civil unions beginning in January, my partner of twenty years and I will enter into such a legal union next June. On the steps of the State capitol, our legal, civil union will be solemnized by our female Jewish lawyer. That's the civil part, accountable to the State. Then we will walk across the street to St. Paul's Church for prayers of thanksgiving and blessing for that union, which is the purview of the Church. Such a separation of the roles of Church and State might be helpful in lots of ways. Perhaps it is a separation that ought to be made for all couples, heterosexual and homosexual alike.

I am actually very hopeful about the future. Christians are hopeful by nature – not because we have any special confidence in the desire of human beings to do the right thing, but because of our confidence in God to keep prodding, inspiring and calling us to do the right thing. My faith tells me that God is always working for the coming of the kind of Kingdom in which all are respected, all are valued, all are included. My faith tells me how all this is going to end: it's going to end with the full inclusion of gay and lesbian people in the society and in the life and leadership of the Church. I believe that the Holy Spirit is working within the Church and within the culture to bring that full inclusion about, and in the end, God will not be foiled. In the

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45. See, e.g., *id.* § 741.08.

46. See, e.g., *id.* § 741.07.

47. See The American Cathedral in Paris: Weddings <http://www.americancathedral.org/en/ourcath/weddings.html> (last visited May 28, 2008).

48. See Americans in France: Classic French Wedding, [http://www.americansinfrance.net/Culture/Classic\\_French\\_Wedding.cfm](http://www.americansinfrance.net/Culture/Classic_French_Wedding.cfm) (last visited May 28, 2008).

meantime, we need to work with all our might, intellect, and dollars to bring that new world into existence.

What an exciting time to be alive! What an amazing thing to have lived to see! How unimaginable all this was for that geeky gay kid growing up in rural Kentucky in the 50's. I may not see full acceptance and inclusion in my lifetime, but that's okay. It is enough to be a part of the journey.

One of my favorite places on earth is the National Civil Rights Museum in Memphis, Tennessee. It is built into the old Lorraine Hotel, where Dr. Martin Luther King, Jr., was assassinated. At the entrance to the museum is a huge, black marble monolith. As you get closer to it, you see, in *bas relief*, a spiraling procession of African-Americans rising ever upward, progressing toward their destined freedom – and every single one of them is standing on someone else's shoulders. That's the way it is with the struggle for human rights. It's a long hard journey, but we are not alone. We are always prepared for our roles by those who have gone ahead of us; and we are always making it possible for others to stand on our shoulders. But in the end, it's being in that ascending parade that counts; it's playing whatever role we can, courageously doing what we can do to move the march forward, that makes the pain bearable and life worth living. And, as a person of faith, I also know we are not alone because God is beside us, comforting, encouraging and sustaining us along the way toward a world which values ALL of God's children.

I invite you to join in this glorious march upward and forward. You will meet some astounding people, gay AND straight, who know that the love of God knows no bounds, and that ALL of us are loved beyond our wildest imagining by the God of all that is. As the chorus of the song about Harriet Tubman's underground slave railroad says, "Come on up, I've got a lifeline. Come on up to this train of mine." This train is bound for full equality and acceptance of ALL of God's children. Welcome aboard!

Thank you.

#### TRANSCRIPT OF QUESTION AND ANSWER SESSION WITH BISHOP ROBINSON<sup>49</sup>

Bishop (B): Thank you for being here.

Questioner 1 (Q1): Yep, and I don't know, I'm stunned. The number of arguments, frankly you're very articulate, I was begging to be able to respond. I hope that the institution will allow some formal or even informal

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49. The Bishop took questions from the audience after presenting his lecture. The transcript was made from an audio/video recording of the entire session, and unless otherwise noted by brackets "[ ]", represents a verbatim transcription of the entire session.

way to respond to this because there are a lot of responses to your assertions that are not being heard and for those who may not be initiated I am a minister so I, I know some of the inside stuff that you were alluding to if you go to Leviticus all of the things that you were referring to so I was a little disturbed that maybe people who are not initiated might not understand or hear some other side. I thought of a question and I'd like to, if you don't mind, make a comment, refer to a quote that you made and then ask you a question.

B: Okay

Q1: You said that the bible teaches and that the church has historically confessed that God is absolutely perfect and does not change and we call this the doctrine of immutability, everybody should know that and because of that the, the foundation of morality was built upon that the fact that because God does not change His moral law does not change so the church believes that human nature hasn't changed either we are still ostensibly the same kind of people so the answers to the bible they have for us whether it was revealed Moses for a thousand years ago or through Jesus two-thousand years ago their still applicable because God hasn't changed and human nature hasn't changed. Now this is what you said in an article in the UK Guardian dated November 4<sup>th</sup>, it said we worship a living God, not one locked up in scriptures of 2000 yrs ago, it referring to homosexuality is not something of which I should repent and I have no intention of doing so I've been led to understand that I love my God just as I am so here's my comment or question. This seems to imply that you've, you have departed and you did refer to that in your comments from the Bible and from historic Christian theology and ethics and believe that God is free, He is no longer locked up by His scripture he is free to change His moral law and if change means anything it means either progress or regression right? Change by definition means change so He's either getting more moral or He's getting more immoral so why did over 2,000 yrs ago in Christ or 4,000 yrs ago in Moses did God not get it right when He censured the act of homosexuality?

B: Hey, thanks for your question.

Q1: And maybe, a couple of follow ups if you don't mind.

B: Well, actually, we are going to give other people a chance to do that but let me try to respond. I would agree with most everything that you said if in fact I thought that humanity's comprehension of God's goodness, God's love, God's intention, God's will, were perfect. I understand Holy Scripture to be this kind of magnificent story of a love affair of God with human kind. It's not God that has changed—but I do believe that our apprehension, our comprehension, of God's will for us is constantly changing. Hopefully, as you say, we are progressing instead of regressing – that is to say, that we are able to apprehend and comprehend God's Will for us better all the time. So I would say that the law as perceived by Moses and by a countless panoply of



saints and prophets and martyrs were doing the best they could do to comprehend all that God is, and that's exactly what I'm trying to do.

Q1: How can we ignore that....

Background: One question, one question is all we can do.

B: So, you know, come see me, come see me another time, while I'm here, and we'll talk about that. My point is that God isn't changing but our ability to apprehend God and God's will for us is always flawed because we're not God. Just because God is perfect doesn't mean that we perfectly understand God and so my sense is that the church is doing the best it can. It did that 2,000 yrs ago, it did that 1,000 yrs ago before the Reformation, it did it after the Reformation and we're still working at it. Let me just add one last thing: I want to be in the church with you. I don't know if you want me to be in your church, but I want you in my church. That is to say, I am not sure that we have to agree about all of these things in order to find our unity in our faith. We are both Christians and believe in Jesus as the Christ and trust that a loving God will take care of whatever those differences are. Yes sir, wait for the microphone.

Q2: Yes, I am Father John McNeil and it's a great privilege to be on this side

B: Actually, this is one of the great hero's of my life, John McNeil.

Q2: There is a statement by the disciples of Emmaus, "were not our hearts burning within us" when we heard the words of exchange? My heart was burning tonight. I want to thank you. I have had a gay ministry for 40 years and to have you come along and do such a beautiful job, it fills my heart with gratitude just to die. Thank you.

B: Thank you. Just a personal note here, when I was struggling with whether or not I could claim who I was, I was still married, and my wife and I were talking about all this, as we had talked about it during most of our marriage. I went off to Kirkridge Conference Center, to a retreat led by Father John McNeil. You inspired me then; you continue to inspire me. Thank you for all that you've done, really.

Q3: Thanks for being here. I'm a Christian as well, I was baptized when I was 16, tutored by a Christian missionary and his wife, and I took the Bible very seriously, I obviously still do and me and my wife took it so seriously that when we dated we abstained from sexual relations until our wedding night and we did that because we have great respect for this book, the Holy Scriptures, because that's what it told us to do, and it told us that sex is between a man and a woman within marriage and anything outside of that is un-Christian that is what Christianity teaches in this book and I don't believe anyone rationalizing and saying other things.

Is there a question?

Q3: And the reason this book is so important, you talked about the Jesus event being more important than the actual Holy Bible, okay, and I'm a tell you why you're wrong.

Is there a question? Sir, is there a question?

Q3: You lay the premise, then you ask the question.

B: Sir, go ahead, go ahead.

Q3: There are a lot of things you said that I think are incorrect but I'll limit it to this and then maybe we can talk later.

B: Great.

Q3: But I'm glad you're here. Really. Thank you for coming.

B: You're welcome.

Q3: When Jesus fasted for forty days and forty nights, remember that? And as Satan took him up the mountain and three times Satan tried to get Jesus to sin.

B: mm hmm.

Q3: Each time, Jesus refuted Satan and you know how he did it? He said to Satan, in reply Jesus said, excuse me, it is written let's not live on protocol and again He said it is written, Jehovah your God, your holy God, let's not put to the test. Then Jesus said to him go away Satan for it is written as the Lord our God alone we must worship. So Jesus refuted Satan by referring to the written word which is this book okay so that's what...

B: Well that book [the Bible] didn't exist actually. But that's all right.

Q3: Well, Jesus is quoting Deuteronomy, yes the Old Testament.

B: Yes.

Q3: Now quickly...

B: No, no, you have to --- now it's time for a question.

Q3: Okay, here's my question. True Christian teachings are found in the written word okay and it says clearly in other scriptures which you won't let me finish that marriage is between a man and a woman and Jesus defined marriage as between a man and a woman in Matthew 19:45 when he quoted and Genesis 1:28 that you alluded to earlier so my question to you is, why do you know better or more than Jesus and the apostles did?

B: That is a little bit of a loaded question. Not stated quite fairly, but let me try to respond. First of all, I don't know better than anybody in this room and I would never claim that. I was invited here to tell you what I think and that's what I've tried to do. Second of all, I don't, I don't think any of us knows completely the Will of God, I mean, I would be very nervous around anyone who claimed to know what God thinks—so that's why I'm nervous around you. Let me, let me...

Q3: ...this book, that's how you know Jesus, so respect this book.

B: Listen, I owe me... listen to me, listen to me.

Q3: He does, he believes about Jesus because he knows from this book, that's why he should respect this book.

B: Would you listen to me? I owe my life to that book because when I was growing up in my quite fundamentalist church, I heard God's voice through that book despite what my church was doing with that book. My church was using that book to beat me up and demean me, and God's voice came through that book, saying to me exactly what God said to Jesus at his baptism, saying to me, "You are my beloved, in you I am well pleased." So don't make assumptions about what I do and don't think about that book. I owe my life to that book! I would probably be physically dead because I would have committed suicide were it not for God's voice coming through that book, so nobody takes that book any more seriously than I do. However, however, I do not believe that that is the only way that God reveals God's self. I believe in a living God who is constantly interacting with you, and me, and anyone else who is open to it and that is also a source of revelation. And while I believe that book to be the best witness to the perfect revelation of God in Christ Jesus, I do not believe it to be the only witness to the reality of God.

Audience: Amen.

Professor Niedwiecki: At this time, I'd like to [inaudible] . . . because at this point we've run well over our time. At this time, I'd like to continue the dialogue and everyone is welcome to the reception which is down the hallway there. Thank you very much. You're an inspiration.

B: You're welcome.

# INCORPORATING ISSUES OF SEXUAL ORIENTATION INTO A FIRST YEAR PROPERTY LAW COURSE: RELEVANCE AND RESPONSIBILITY

ANGELA GILMORE\*

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## I. INTRODUCTION

In May 2007, Stephen Dunne learned that he would not be allowed to practice law in Massachusetts because he had failed the state's bar examination.<sup>1</sup> On June 25, 2007, Mr. Dunne filed a lawsuit in the United States District Court for the District of Massachusetts naming the Massachusetts Board of Bar Examiners and others as defendants.<sup>2</sup>

According to Mr. Dunne, he failed the exam because he refused to answer a question that would have compelled him "to write an affirmative response explicitly and implicitly accepting, supporting, and promoting homo-

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\* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. I am grateful to Professor Elena Marty-Nelson for her thoughtful and helpful comments, and to Corrine Lincoln and Christine Barzola for research assistance. Finally, I thank Angela Wallace for her support.

1. Complaint for Declaratory and Injunctive Relief and Damages at 3–4, *Dunne v. Mass Bd. of Bar Exam'rs*, No. 07-11166-DPW (D. Mass. June 25, 2007) [hereinafter *Complaint*].

2. *Id.* at 1.

sexual marriage [and] homosexual parenting.”<sup>3</sup> Mr. Dunne has stated that answering the question “would have violated his Irish Catholic beliefs.”<sup>4</sup>

The question that Mr. Dunne refused to answer involved Mary and Jane, a married couple, and their children, Philip and Charles.<sup>5</sup> Applicants were asked to sort out the rights of Mary and Jane, as individuals, regarding parenting, property, and otherwise, upon the termination of their marriage.<sup>6</sup> Mr. Dunne believed that his failure to answer the Mary and Jane question, motivated by his Catholic faith, prevented him from becoming a lawyer.<sup>7</sup>

Subsequently, Mr. Dunne filed a motion to dismiss his lawsuit<sup>8</sup> which was granted by the court.<sup>9</sup>

On January 3, 2008, Bay Windows, a New England newspaper serving the gay, lesbian, bisexual, and transgender communities, published a letter from Mr. Dunne.<sup>10</sup> In the letter, Mr. Dunne apologized to the gay community for being “an instrument of bigotry and prejudice.”<sup>11</sup>

3. *Id.*

4. Donna Goodison, *Bar-exam Flunker Quits Suit over Gay-Wed Question*, BOSTON HERALD, Sept. 8, 2007, at 8.

5. Memorandum in Support of Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint at 2, *Dunne v. Mass. Bd. of Bar Exam’rs*, No. 07-11166-DPW (D. Mass. July 30, 2007).

6. Mass. Bd. of Bar Exam’rs, Massachusetts Bar Examination ¶ 4 (Mar. 1, 2007), available at <http://www.mass.gov/bbe/essayquestionsfeb2007.pdf>.

7. Complaint, *supra* note 1, at 4.

8. Motion to Voluntarily Dismiss Complaint, *Dunne v. Mass. Bd. of Bar Exam’rs*, No. 07-11166-DPW (D. Mass. Sept. 5, 2007).

9. Order of Dismissal, *Dunne v. Mass. Bd. of Bar Exam’rs*, No. 07-11166-DPW (D. Mass. Oct. 9, 2007).

10. Laura Kiritsy, ‘I’m Embarrassed at What I Did,’ BAY WINDOWS, Jan. 3, 2008, available at <http://www.baywindows.com/index.php?ch=news&sc=gblt&sc3=&id=54304&pf=1>.

11. *Id.* The letter from Mr. Dunne, titled “Apology to Gay Community” reads:

I am writing this letter to apologize to the gay community for been [sic] an instrument of bigotry and prejudice. By filing a misguided federal lawsuit against the State of Massachusetts in respect to the legitimacy of same-sex marriage, I have regrettably perpetuated intolerance and animosity towards my fellow Americans. My religiously based discrimination of gay people was callous and diametrically opposed to America’s core principles of freedom and equality.

In hindsight, my opposition to same-sex marriage based on purely religious grounds was categorically and indisputably wrong. I am deeply sorry for the hurt that I have caused the gay community as a whole and I am particularly regretful of my actions towards those gay and lesbian friends that I befriended and studied alongside during my three years of law school. You are all wonderful people and loving parents and I am profoundly sorry for having insulted you and your families. Please accept this letter as a sincere apology for my lashing out as a result of failing the bar exam. The only correct answer is to stop demonizing gay people on the grounds of religion and embrace and love all members of the American family, regardless of sexual orientation.

At the end of the day, we are all fellow citizens, we are all equals, sharing the same hopes, troubles, and dreams. I hope you have room in your heart to accept my apology.

Not discounting Mr. Dunne's religious objections to the Mary and Jane question, perhaps he was also unable to answer the question because his first opportunity to think about and discuss the intersection of sexual orientation and the law was when he was taking the Massachusetts Bar Examination. If so, that is a shame. Legal issues involving sexual orientation are present throughout the traditional law school curriculum and should be covered in the appropriate courses. This essay addresses the way I incorporate such issues into my first year property law course, and encourage other professors to do the same.

During discussion of several of the topics included on the syllabus for my property law course, I ask the students to think about the ways in which certain seemingly neutral laws may have a disparate impact on individuals who are gay, lesbian or bisexual.<sup>12</sup> I do this in an attempt to provoke discussions about the intersection of property law and sexual orientation. Some years, the attempt has been incredibly successful. Students have visited my office and e-mailed me to tell me how much they appreciated the classes. Other years, my attempts have been less successful. Students have been reluctant to participate in the discussions, and I have been unable to persuade them to do so beyond a perfunctory level.

The classes, however, are always rewarding for me. Sometimes the classes are rewarding because the students' reluctance to engage forces me to think of different ways to encourage class participation. Other times, the students' questions and comments propel me to think about the issues in ways I have not contemplated. Being forced to "think on my feet" or do additional research to address the concerns of students helps to keep the material fresh.

As this essay will show, there are several intersections between property law and sexual orientation. Accordingly, part II of the essay demonstrates how issues of sexual orientation can be incorporated into a property law course. Part III of the essay raises concerns a professor must consider when determining how to incorporate these issues into her course. Part IV of the essay explains the importance of including such issues in the law school classroom. Finally, the essay concludes.

Merry Christmas and Happy Holidays.

*Id.*

12. During the course, I also ask students to think about the ways in which property laws intersect with issues of race, class, and gender. This paper, in keeping with the theme of the Goodwin lecture series, focuses on sexual orientation issues. I have not asked my students to think about the ways that property laws intersect with the issues of gender identity and gender expression. However, as a result of writing this piece, I have realized that it is a topic that I need to include. See *infra* note 30 for how I intend to do so.

## II. INTERSECTION OF PROPERTY LAW AND SEXUAL ORIENTATION

Recently, the Task Force on Real Property Law School Curricula, created by the ABA Section on Real Property, Probate and Trust Law ("Task Force"), evaluated the basic property law course offered by most U.S. law schools.<sup>13</sup> The Task Force found that four topics are covered in nearly all of the schools that devote at least four credit hours to property law: adverse possession, concurrent ownership interests, servitudes, and possessory estates and future interests.<sup>14</sup> A substantial majority of the schools, greater than ninety percent, also allocate time to landlord-tenant law in the basic property law course.<sup>15</sup> Land use regulation, which typically includes topics such as nuisance, servitudes, zoning, and eminent domain, is covered by more than seventy-five percent of U.S. law schools.<sup>16</sup> Topics less likely to be addressed in a property law course include natural resources and intellectual property.<sup>17</sup>

When choosing which topics to address, property law professors, like all professors, have to make difficult choices regarding coverage. These decisions are generally made in light of institutional and course objectives. For example, at some schools, a primary concern is student bar passage rates.<sup>18</sup> Professors at these institutions may choose to resolve course coverage issues in favor of topics that are more likely to be tested on a bar exam.<sup>19</sup>

Preparation for legal practice may be the primary objective for other professors.<sup>20</sup> These professors may choose to include topics that students are likely to face as practitioners.<sup>21</sup> In fact, the Task Force was created in part to investigate and address concerns that new lawyers are not "sufficiently familiar with the essential concepts of real estate practice that had previously

13. Roger Bernhardt & Joanne Martin, *Teaching the Basic Property Course in U.S. Law Schools*, PROBATE & PROP., Sept./Oct. 2007 at 36.

14. *Id.* at 37.

15. *Id.* at 38.

16. *Id.*

17. *Id.*

18. Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 69 (2007).

19. *See id.* at 111. Professor Trujillo writes:

[L]aw schools should encourage students to take and master bar courses for a grade. It should be stressed that mastery of these courses is vital to passing the bar exam. In fact, students who do poorly in these courses should be advised to lighten their course load in order to master the basics of the bar courses.

*Id.*

20. *See* Suelyn Scarnecchia, *Serving the Most Important Constituency: Our Graduates' Clients*, 36 U. TOL. L. REV. 167, 167 (2005).

21. *See id.* at 169. In this article, Dean Scarnecchia tells law schools that "[o]ur programs are a vital step in the licensing process for practicing law. All of our graduates need to be competent to practice law, whether they decide to or not." *Id.*

been learned in law schools.”<sup>22</sup> Other schools may be more focused on preparing students to think critically about legal issues in preparation for advanced courses.<sup>23</sup> Regardless, however, of a particular professor’s focus or perspective, the results of the Task Force’s study show that property law professors have numerous opportunities to integrate issues of sexual orientation into the property law course. The next few sections of this essay highlight three areas where a professor can do so.

#### A. *The Law of Leaseholds*

The law of leaseholds is the law that regulates the relationship between landlords and tenants.<sup>24</sup> The landlord’s rights when selecting tenants for residential real estate is one of the key topics in this area of the law.<sup>25</sup> Historically, landlords were free to discriminate when selecting tenants.<sup>26</sup> However, the enactment of federal, state, and local fair housing acts made illegal certain discriminatory acts on the part of landlords.<sup>27</sup>

In the section of the course devoted to the law of leaseholds, I present the students with a simple hypothetical fact pattern. In the fact pattern, the students are told that a client of the law firm where they are clerking has just purchased an unoccupied, twelve-unit apartment building. The client does not have any tenants yet, but wants to know whether a lease must be entered into with every financially qualified person who wants to rent a unit. The students are then given a list of individuals that the client does not want as tenants. The list always includes a lesbian or gay man.

The Federal Fair Housing Act is clear—sexual orientation is not a protected classification.<sup>28</sup> However, I am regularly surprised by the number of

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22. Bernhardt & Martin, *supra* note 13, at 36.

23. See Press Release, Harvard Law School, HLS Faculty Unanimously Approves First-Year Curriculum Reform (Oct. 6, 2006), *available at* [http://www.law.harvard.edu/news/2006/10/06\\_curriculum.php](http://www.law.harvard.edu/news/2006/10/06_curriculum.php). For example, Harvard Law School has redesigned its first year curriculum to, among other things, provide “a foundation to enable any student who wishes to pursue an advanced Program of Study.” *Id.* The new first year curriculum devotes fewer hours to traditional first year courses such as property law and adds courses that focus on international and comparative law, legislation and regulation, and complex problem solving. *Id.*

24. See JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 437 (2d ed. 2005).

25. See *generally* JESSE DUKEMINIER ET AL., *PROPERTY* 376 (6th ed. 2006).

26. *Id.*

27. See *id.*

28. 42 U.S.C. § 3604 (2000). Subsection (a) provides:

it shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.



students who think that the landlord cannot discriminate against lesbians and gay men. The right to rent an apartment, according to some of my students, is very different from the right to marry, which they may not support for lesbians and gay men. This distinction makes it difficult for them to understand why landlords are allowed to discriminate on the basis of sexual orientation.

Discussion of the fact pattern easily segues into discussion of the policy behind the Federal Fair Housing Act, and discussion of the differences and similarities between discrimination on the basis of sexual orientation and discrimination based on the classifications protected by the Federal Fair Housing Act.<sup>29</sup> Also, because several states and many municipalities have instituted protections against housing discrimination on the basis of sexual orientation, this area provides an opportunity to review the differences between federal, state, and local laws and ordinances.<sup>30</sup>

### B. *Concurrent Ownership Interests*

“[P]roperty is [often] owned by more than one person at a time.”<sup>31</sup> In fact, many types of co-ownership, including tenancy in common, joint tenancy, and tenancy by the entirety, are recognized by modern law.<sup>32</sup> The rights and responsibilities of the co-owners depend upon the type of co-ownership that binds the co-owners together.<sup>33</sup>

In this part of the course I often read a hypothetical fact pattern to the students. The hypothetical involves two individuals who together purchase Greenacre, a piece of real property. Unfortunately, one of the two individu-

*Id.* § 3604(a). Section 3604(f)(1) makes it illegal:

[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (A) that buyer or renter; (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.

*Id.* § 3604(f)(1).

29. *See id.*

30. SINGER, *supra* note 24, at 611. At least eleven states and 100 municipalities prohibit discrimination on the basis of sexual orientation. *Id.* This is also the perfect part of the course for a discussion about discrimination on the basis of gender identity and expression. Many states and municipalities prohibit discrimination on such grounds. *See* Transgender Law & Pol’y Inst., U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression, <http://transgenderlaw.org/ndlaws/index.htm#jurisdictions> (last visited Mar. 18, 2008). In fact, on February 12, 2008, Broward County, Florida, the county where my law school is located, made it illegal to discriminate on the basis of gender identity and expression in housing. Scott Wyman, *Transgenders Gain Protection: Broward Expands Human Rights Ordinance to Include Gender Identity*, SUN-SENTINEL, Feb. 13, 2008, at 1B.

31. SINGER, *supra* note 24, at 352

32. JAMES CHARLES SMITH ET AL., PROPERTY: CASES AND MATERIALS 419 (2004).

33. *See* SINGER, *supra* note 24, at 352–53.

als dies during the hypothetical and the students are asked to sort out the resulting ownership interests in Greenacre. This exercise requires the students to determine the type of ownership interest the two individuals acquired in the property. In the hypothetical, the two individuals are identified by name. I do not, however, provide the students with the relationship of the individuals or their gender. In my notes, the individuals are named Gene and Claude. The students, at least initially, hear “Jeanne” and Claude. They then presume that “Jeanne” and Claude are married. This provides us with a wonderful opportunity to discuss the “heterosexual presumption” that so many students bring to law school.<sup>34</sup> Students who presume that “Jeanne” and Claude are heterosexual and married erroneously apply the rules of tenancy by the entirety to the ownership of Greenacre, which is a type of ownership interest available only to married couples. This discussion also provides us with an opportunity to talk about client interviewing and avoiding the pitfall of the “heterosexual presumption” in instances where the sexual orientation of the parties may affect their legal consequences.<sup>35</sup>

Furthermore, the current edition of the casebook I use<sup>36</sup> includes *Goodridge v. Department of Public Health*,<sup>37</sup> the Massachusetts same sex marriage case. The discussion of Gene and Claude, and of the different types of concurrent ownership interests, easily leads to a discussion of the property rights that are provided to married couples and the access that same sex couples have or do not have to marriage.

### C. *Land Use Controls*

Both private and public land use restrictions can be imposed upon the ownership of real property. Private restrictions, such as those imposed by a developer of a residential community, typically take the form of covenants that run with the land.<sup>38</sup> Public restrictions, on the other hand, are found in

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34. See Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 109 (2000). According to Professor Carbado, “The normativity of heterosexuality requires that homosexuality be ‘specified, pointed out.’ Heterosexuality is always already presumed.” *Id.* (quoting Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDU. 47, 48 (1983)).

35. For example, an attorney in Florida who is advising a client about adoption needs to know whether the client is a lesbian or gay man because Florida law expressly prohibits homosexuals from adopting. FLA. STAT. § 63.042(3) (2007). Section 63.042(3) of the *Florida Statutes* provides that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.” *Id.*

36. DUKEMINIER ET AL., *supra* note 25.

37. 798 N.E.2d 941 (Mass. 2003).

38. See generally SINGER, *supra* note 24, at 230.

the zoning laws adopted by local government bodies.<sup>39</sup> Both covenants and zoning ordinances can be used to restrict the use of real property to single family residential use. My casebook includes cases in both areas that require students to consider whether a collection of individuals who live together are a family.<sup>40</sup>

*Hill v. Community of Damien of Molokai*<sup>41</sup> is the case that is included in the section of the casebook devoted to covenants that run with the land.<sup>42</sup> In *Hill*, the court had to determine whether a group home for people living with AIDS and other terminal illnesses was a permitted use in Four Hills Village, a planned subdivision in Albuquerque, New Mexico.<sup>43</sup> A covenant imposed upon the homes in Four Hills Village provided in relevant part that “[n]o lot shall ever be used for any purpose other than *single family residence* purposes.”<sup>44</sup> The word “family” was not defined in the covenant.<sup>45</sup> The court rejected the claim that family members had to be related by blood or marriage<sup>46</sup> and found that the residents of the group home were a family, in part because their activities were “communal in nature” and they provided moral support and guidance for one another.<sup>47</sup>

During the zoning law portion of the course, we discuss *Village of Belle Terre v. Boraas*.<sup>48</sup> In *Boraas*, six unrelated individuals lived in a house in a village with a zoning ordinance that limited use to one-family dwellings.<sup>49</sup> The zoning ordinance defined a “family” as

[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.<sup>50</sup>

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39. See *id.* at 637.

40. See generally *DUKEMINIER ET AL.*, *supra* note 25.

41. 911 P.2d 861 (N.M. 1996).

42. *DUKEMINIER ET AL.*, *supra* note 25, at 773.

43. *Hill*, 911 P.2d at 864.

44. *Id.* at 865.

45. *Id.* at 867.

46. *Id.*

47. *Id.* at 869.

48. 416 U.S. 1 (1974).

49. *Id.* at 2–3.

50. *Id.* at 2.

The Court was asked to determine whether the ordinance's definition of family was constitutional.<sup>51</sup> The Court found that it was, and that the Village of Belle Terre could determine that no more than two unrelated individuals constituted a family.<sup>52</sup>

The two cases discussed above, plus the notes in my casebook that follow *Village of Belle Terre*,<sup>53</sup> open the door for discussion of hypothetical fact patterns involving blended families. A blended family that consists of a man, his biological children, a woman, her biological children, and the biological child of both the man and woman who are married to each other, is readily recognized as a family. However, when the collection of individuals is a woman, her biological children, her lesbian partner, and her partner's biological children, they may not be recognized as a family, at least according to traditional definitions of family. Discussing the hypothetical blended families after the class has discussed the nuts and bolts of covenants that run with the land and zoning ordinances provides an opportunity to talk about the intersection of sexual orientation and property law. The fact patterns raise issues about how zoning ordinances and covenants may disadvantage families where the adults are same sex partners. The fact patterns also encourage discussion about whether the law should be able to overrule the decision of a group of individuals to consider themselves a family. Additionally, the fact patterns raise issues about contract interpretation—what did the parties intend for the covenant to mean?—and legislative intent—what did the legislative body that enacted the zoning ordinance intend?

### III. PREPARATION FOR INCLUDING SEXUAL ORIENTATION ISSUES IN THE PROPERTY LAW COURSE

Once a professor has decided to include issues relating to sexual orientation in her property law course, she must determine how to do so. The next few sections of this essay discuss some of the issues she must consider as she prepares her course.

#### A. Considerations

One consideration regards the text selected by the professor to teach the course.<sup>54</sup> Presumably, the text allows the professor to teach the substantive

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51. *See id.* at 3.

52. *Id.* at 3, 8–9.

53. DUKEMINIER ET AL., *supra* note 25, at 908–11.

54. *See generally* Eric L. Muller, *A New Law Teacher's Guide to Choosing a Casebook*, 45 J. LEGAL EDUC. 557 (1995).

areas she considers most important. Additionally, the professor must consider whether it contains materials that will assist in the discussion of issues of sexual orientation. If it does, are the issues contained in the major cases, or in the notes that follow the cases? If the preferred text does not contain material that allows the professor to discuss property law issues that relate to sexual orientation, should she choose a different text or prepare a supplement or handouts that contain such material?

After the professor has resolved the issues regarding the materials she will use, she must also decide whether she will share personal stories or anecdotal accounts of incidents involving the intersection of property law and sexual orientation. Personal stories and narratives are often very powerful ways of making the law come alive for law students.<sup>55</sup>

The professor must also think carefully about how to involve students in the discussions.<sup>56</sup> These discussions may engage students in ways that other property law topics may not, which can lead to some very robust discussions of the material. Many students, however, do not know how to talk about the issues, especially in a legal context—something the professor must consider when determining how to conduct the class. The topic may also make some students uncomfortable and less willing to participate during class. Students may also raise religious, political, and personal concerns during the discussions, and the professor must decide how she will determine what is relevant to the class discussion and how to keep the students focused.<sup>57</sup>

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55. See, e.g., Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 953–54 (2006). Professor Barnes writes, “[i]t is also squarely within the tradition of feminist and critical legal scholars to use narrative to expose discrimination and illuminate how the law often fails to account for the voices of outsiders.” *Id.*

56. See Curtis Nyquist et. al, *Using Students as Discussion Leaders on Sexual Orientation and Gender Identity Issues in First-Year Courses*, 49 J. LEGAL EDUC. 535, 535 (1999). The authors discuss how Professor Nyquist used upper-level law students to integrate issues of sexual orientation into his first year contracts class. *Id.* at 536. Initially, Professor Nyquist intended only to bring comments from the members of his school’s lesbian, gay, bisexual, and transgender student group into the classroom. *Id.* However, he ultimately decided to bring two members of the group to his class to discuss sexual orientation issues in one of the cases he covered. *Id.* The authors noted that the participation of the upper-level students in the class “empower[ed] the [upper-level] students [who taught] the class [and] encourage[d] dialog [about LGBT issues] between students and faculty.” *Id.* at 544.

57. See Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 558 (1996).

The professor must also be prepared to deal with any discomfort she may feel when teaching the course.<sup>58</sup> Teaching issues of sexual orientation is not the same as teaching, say, the rule against perpetuities. While the professor may feel strongly about “dead hand control,” the rule is unlikely to raise the personal, religious, and political issues that sexual orientation issues may raise. When preparing the course, the professor should be clear about her positions and what, if any, bearing they will have on the class discussions.<sup>59</sup>

Perhaps most importantly, the professor must think about how to ensure that the class is ready to discuss issues that are related to sexual orientation.<sup>60</sup> Because we have gay, lesbian and bisexual students in our classes, discussions about sexual orientation may affect them personally. Therefore, as professors, we have to make sure that students, regardless of their personal opinions, will treat the discussions with respect. Worse than not including these issues in a property law course is to include them in a way that leaves students feeling vulnerable or under attack. Additionally, the professor must remember that she is teaching property law, a required course often taught to first year law students, and not an upper-class elective course that students have chosen to take.<sup>61</sup> Thus, the students’ familiarity with, and exposure to, the issues is unknown to the professor. This calls for careful thought about how to present the material and engage students in the conversation.

The professor who decides to include these issues in her course must realize that she takes a risk that the course may be criticized by colleagues,

58. *Id.* Professor Dark notes that the professor’s own feelings of vulnerability on these issues may make it difficult for the professor to have these kinds of discussions with her class. *Id.* at 559.

59. See, e.g., Angela Mae Kupenda, *On Teaching Constitutional Law When My Race Is in Their Face*, 21 LAW & INEQ. 215, 216–17 (2003). In this piece, Professor Kupenda writes movingly about teaching constitutional law after September 11, 2001. *Id.*

I knew that if I initiated the discussion, I would have to be true to myself. That meant I would have to facilitate a discussion of terror in a broader sense which would include the terror many racial minorities, and their ancestors, have experienced, and still do experience, even in America. The terror of slavery and continuing hate crimes would have to be addressed. Whether our country is ready to address all terror, or whether the racist terror of some groups will continue to be considered protected speech would have to be posed for discussion. Would not it? These topics were being discussed in many people of color circles, surely my overwhelmingly white class of future lawyers should be challenged to think more broadly.

*Id.*

60. See Dark, *supra* note 57, at 559–60. Professor Dark insightfully notes that it is crucial that a professor “pay attention to his or her relationships with individual students and the class.” *Id.* According to Professor Dark, “[i]nvesting time and energy into developing a solid, respectful, and approachable relationship with the students in the classroom will put the teacher in the best position to” ensure a supportive classroom environment. *Id.*

61. See Nyquist et al., *supra* note 56, at 544. “Issues of diversity are too important to be discussed only in Constitutional Law and upper-level specialty courses. They need to be part of the first-year curriculum.” *Id.*

deans, or students.<sup>62</sup> Property professors, especially those who teach at schools that have reduced the number of credit hours dedicated to property law, may have already made choices that eliminated or reduced coverage of topics that many may consider fundamental. Adding issues of sexual orientation to the course may subject the professor to the criticism that she is wasting time on issues that are not central to property law.<sup>63</sup> Forewarned is forearmed.

### B. *One Professor's Approach*

While not ignoring the ways in which issues of sexual orientation are different than other property law issues, I make every effort to treat them the same as I treat all of the other issues I introduce in class. My text allows me to discuss these issues with my students, so I have not prepared any additional written materials for the course. Using the text as a starting point, I present the students with hypothetical fact patterns where the sexual orientation of the parties is relevant. Because I regularly give my students hypothetical fact patterns to analyze, they do not consider it unusual when I do so in this context. Additionally, I try not to interrupt the pedagogical flow, or in any other way signal to the students that we are about to discuss something unconventional or nontraditional, when the fact patterns involve gay men or lesbians.

I am also careful not to introduce issues of sexual orientation when they are not relevant to the discussion. My goal is to show the different impact the law may have on persons who are gay, lesbian or bisexual. When the legal consequences do not change based on sexual orientation, there is no reason to make an issue of sexual orientation. This does not mean, however, that I may not have a hypothetical where some of the parties, at least in my mind, are gay and lesbian. It just means that I do not, for example, indicate whether the finder of lost property is a gay man or lesbian.<sup>64</sup> I am also no

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62. See Dark, *supra* note 57, at 558. Professor Dark notes that professors who include issues of diversity in their classes may face claims that the issues are irrelevant or that they introduce "impermissible bias and subjectivity into an otherwise objective, neutral, and reasoned discussion of the law." *Id.*

63. See generally Bernhardt & Martin, *supra* note 13 (focusing on the variety of subject matter that can be taught in a basic property law class, and examining which topics are the most relevant and popular among ABA accredited law schools). See also Dark, *supra* note 57, at 557–58.

64. In this way, I am similar to J.K. Rowling, the author of the incredibly successful Harry Potter books. After completing the last book, Ms. Rowling revealed a fact not included in any of the books: Dumbledore, Harry's mentor and the headmaster of Hogwarts, was gay. Greg Toppo, 'Harry Potter' Author: Dumbledore is Gay, USA TODAY, Oct. 20, 2007, avail-

more likely to share personal stories with respect to this area of the law, than in any other part of the course. I am always, however, on the lookout for narratives and news stories that will enrich the classroom discussion in all areas of the course.

When issues involving sexual orientation come up during the course, I expect that students will participate as they do in all other parts of the course. No student gets a pass, although I recognize and I make subtle accommodations, including exercising more control over the discussion because of the ways in which the discussion affects some students personally. I may also budget extra time for discussion because it may be the first time an issue has resonated personally for some students. Additionally, I may spend additional time after class or in my office continuing the conversation.

I make sure the class is ready to have these discussions by always treating my students with respect and requiring them to treat me and their classmates likewise. My goal is to create an environment where they are not intimidated to participate, so long as they are doing so in thoughtful and respectful ways.

#### IV. IMPORTANCE OF INCLUDING SEXUAL ORIENTATION ISSUES IN THE LAW SCHOOL CLASSROOM

We owe it to our students to include discussions of sexual orientation in our courses. A property law course is not complete if students are not required to think about these issues. Property law is a “[c]ourse introducing rights and interests in both real and personal property.”<sup>65</sup> If students have not been required to think about whether a person’s property rights and interests are affected by that person’s sexual orientation, then they have not been given the opportunity to think about one of the fundamental issues underlying property law. Additionally, the isolation and invisibility that lesbian, gay and bisexual students often feel in law school will be lessened if they feel that an integral part of who they are is not ignored by, or irrelevant to, the law school experience, especially if they have personally experienced discrimination based on their sexual orientation.<sup>66</sup> Of course, if the issues are discussed in ways that validate the discrimination and increase the margin-

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able at [http://www.usatoday.com/life/books/2007-10-20-potter-dumbledore\\_N.htm](http://www.usatoday.com/life/books/2007-10-20-potter-dumbledore_N.htm). According to Ms. Rowling, “I always saw Dumbledore as gay.” *Id.*

65. Nova Southeastern University, Shepard Broad Law Center, Course Descriptions, [http://www.nsulaw.nova.edu/students/current/course\\_descriptions.cfm?sort=txtTitle](http://www.nsulaw.nova.edu/students/current/course_descriptions.cfm?sort=txtTitle) (last visited Feb. 17, 2008). This is the first part of the description of the property law course at the law school where I teach.

66. See Nyquist et al., *supra* note 56, at 544.



alization faced by lesbian, gay and bisexual students, they should not be brought into the classroom.

Furthermore, by incorporating these discussions into the course, we provide a benefit to the public.<sup>67</sup> Our students will not always be law students. After they graduate, they will become practicing attorneys, legislators, judges, and other community leaders. They will have clients and constituents who are gay, lesbian and bisexual. Parties who appear before them will be gay, lesbian and bisexual. Those who are making decisions and policies that affect the lives, liberty, and property of others should be informed about the different impact those decisions and policies may have on others because they are gay, lesbian or bisexual.

## V. CONCLUSION

While there are risks to including these issues in a property law course, they are greatly outweighed by the benefits. Issues of sexual orientation should not be omitted from a basic property law course even if they are not included in the textbook. Encouraging students to think about traditional topics such as concurrent ownership interests, in nontraditional ways—what if the co-owners are a same sex couple?—enriches the property course in a way that benefits both the students and the professor. Discovering areas where property law intersects with issues of sexual orientation often leads to rewarding exchanges between the professor and her class. This essay focuses on property law because that is the course I teach most frequently, but professors of other subjects should also consider whether similar discussions can be incorporated into their courses.

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67. See Dark, *supra* note 57, at 542.

Discussion of diversity issues is relevant, important, challenging, and often rewarding. Those discussions belong in law schools and, at the very least, in law school classrooms. Diversity issues affect and shape legal doctrine, application of the law, and judicial and administrative processes. Consequently, students who will practice law into the next century need to be conversant with and understand the nuanced ways in which these issues affect what they will do as lawyers.

*Id.*

# JUDICIAL RECUSAL & DISQUALIFICATION: IS SEXUAL ORIENTATION A VALID CAUSE IN FLORIDA?

SANAZ ALEMPOUR\*

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## I. INTRODUCTION

An essential cornerstone of our American legal system is equality and justice to individuals under the law.<sup>1</sup> The United States Supreme Court has achieved this goal by continuously holding that “[a] fair trial in a fair tribunal is a basic requirement of due process.”<sup>2</sup> This concept has stood for the prem-

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\* J.D. Candidate 2009, Nova Southeastern University, Shepard Broad Law Center; B.S in Business Management 2005, University of Florida. The author wishes to thank: her family; her colleagues at NOVA LAW REVIEW; and the faculty of the Law Center especially Professor Olympia Duhart and Professor Debra Moss Curtis, for their inspiration and guidance.

1. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 20 (1994).

2. *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (quotations omitted).

ise that “[a] judge [will] perform judicial duties without bias or prejudice.”<sup>3</sup> This important principal has been a major cornerstone of the judiciary since the beginning of common law.<sup>4</sup> There are two fundamental principals that the law of judicial disqualification rests upon; first, “no-one should be a judge in his own cause,”<sup>5</sup> and second, “Lord Hewart’s famous maxim that justice should not only be done ‘but manifestly and undoubtedly be seen to be done,’ [which] is evidence of the intimate relationship between judicial impartiality and the legitimacy of the legal system.”<sup>6</sup>

The law of the United States has since developed and now both individualized states and the national government have created codes that govern judicial conduct.<sup>7</sup> The governing codes are the *United States Code of Judiciary and Judicial Procedure* and the *Model Code of Judicial Conduct* that was adopted by the American Bar Association (ABA) House of Delegates in 1972,<sup>8</sup> stating under what circumstances a judge shall be disqualified for his or her failure to apply the law impartially<sup>9</sup> and diligently.<sup>10</sup> In 1990, the ABA revised the *Code of Judicial Conduct* “creating a prohibition on sexual orientation bias in Canon 3,” resulting in several states specifically prohibiting judicial bias based on sexual orientation.<sup>11</sup> Although many of these rules clearly put the world on notice as to when judicial disqualification or recusal

3. FLA. CODE JUD. CONDUCT Canon 3B(5). “The Code of Judicial Conduct establishes standards for ethical conduct of judges.” *Id.* pmb1. The *Florida Code of Judicial Conduct’s* preamble states that:

[t]he Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

*Id.*

4. Kate Malleson, *Safeguarding Judicial Impartiality*, 22 LEGAL STUD. 53, 53 (2002) [hereinafter Malleson, *Judicial Impartiality*].

5. Kate Malleson, *Judicial Bias and Disqualification After Pinochet* (No. 2), 63 MOD. L. REV. 119, 120 (2000).

6. Malleson, *Judicial Impartiality*, *supra* note 4, at 53 (quoting *The King v. Sussex Justices*, (1924) 1 K.B. 256, 259).

7. See generally 28 U.S.C. § 455 (2000); FLA. CODE JUD. CONDUCT; MODEL CODE OF JUD. CONDUCT (2004).

8. William C. Duncan, *Sexual Orientation Bias: The Substantive Limits of Ethics Rules*, 11 AM. U.J. GENDER SOC. POL’Y & L. 85, 86–87 (2003); MODEL CODE OF JUD. CONDUCT pref-ace (2004). The *Model Code of Judicial Conduct* has been adopted by the vast majority of states with slight variation in certain jurisdictions. See Duncan, *supra*, at 87.

9. Impartially is defined as “without bias.” BLACK’S LAW DICTIONARY 767 (8th ed. 2004).

10. See 28 U.S.C. § 455; see also FLA. CODE JUD. CONDUCT Canon 3.

11. Duncan, *supra* note 8, at 87.

is appropriate,<sup>12</sup> one rule is not as clear, and that is whether a judge in Florida should be disqualified or recused from a case because of his or her sexual orientation, when sexual orientation is the main issue at stake.

This note will examine cases, governing rules of law, statutes, articles, and journals that have surrounded this topic, and suggest whether judicial recusal based on sexual orientation is expected or appropriate. The primary purpose of this note is to determine whether society throughout the State of Florida expects judicial recusal or disqualification based on a judge's sexual orientation. The first section of this note will begin by explaining the general laws concerning judicial disqualification and recusal. This section will explain the challenges that judges are constantly facing concerning motions for disqualification, ethical responsibilities, and the expectations placed upon each judge by the *Model Code of Judicial Conduct*. This section is separated into three subsections that thoroughly explain the rules governing automatic disqualification, motions filed by parties seeking judicial disqualification, and the legal sufficiency of these motions. The subsection concerning the sufficiency of motions filed by parties against judges explains what motions warrant disqualification and what motions are deemed insufficient by law.

Next, this note will explain the general principles of judicial disqualification and recusal throughout the nation. This section will explain the relevancy of the *Model Code of Judicial Conduct* and Title 28 of the *United States Code* concerning judicial disqualification and recusal. This section also discusses a recent challenge an Oregon Supreme Court Justice, Rives Kistler, faced when determining whether his sexual orientation presented a conflict of interest warranting recusal.

The next section in this note will thoroughly explain Florida's law concerning judicial disqualification and recusal based on case law, statutes, and the *Florida Code of Judicial Conduct*. This section is broken down into four subsections, each one explaining an important aspect of judicial recusal. The first subsection is further broken down in order to more thoroughly explain what is deemed as judicial bias towards an individual person, compared to what is deemed as judicial bias towards a subject matter. Next, this note will provide the author's closing remarks on judicial disqualification and recusal based on the research concerning this topic. Finally, it will be concluded that based on case law, statutes, articles, and journals concerning the topic of judicial recusal and disqualification, Florida does not expect a judge to be disqualified nor recused based on a judge's sexual orientation, even when sexual orientation is the main issue in the proceeding.

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12. *See id.* at 88.

## II. DISQUALIFICATION OF JUDGES

The issue of judicial bias is continuously leveled at judges, whether in the form of an attorney filing for judicial disqualification, or the media writing about a judge's bias towards a person, subject matter, or case.<sup>13</sup> When an attorney decides to move for judicial disqualification based on a valid allegation concerning the potential violation of a particular judicial cannon, there are many serious consequences that can result in the handling of the attorney's case.<sup>14</sup> The "attorney moving for judicial disqualification on the ground of bias risks alienating a judge before whom [he or] she must present [his or] her case should the motion be denied."<sup>15</sup> "[R]ecusal motion[s] present[] difficult challenges for" attorneys involved, parties, and the judge who has been accused of being incapable of acting impartially.<sup>16</sup> By filing this motion, the moving party seeking disqualification of a judge, on the basis of bias or prejudice, will ultimately bear the burden of persuasion.<sup>17</sup>

In Florida, the procedures for filing a motion for judicial disqualification, for both civil and criminal cases, are outlined in Rules 2.310<sup>18</sup> and 2.330<sup>19</sup> of the *Florida Rules of Judicial Administration*. The other bodies of law that govern judicial disqualification are *Florida Statutes* section 38.10<sup>20</sup> and the *Florida Code of Judicial Conduct* Canon 3.<sup>21</sup> There are several other statutory provisions that provide a mechanism for judicial disqualification, such as *Florida Statutes* sections 38.01,<sup>22</sup> 38.02,<sup>23</sup> and 38.05.<sup>24</sup> Florida laws

13. See Charles Malarkey, Note, *Judicial Disqualification: Is Sexual Orientation Cause in California?*, 41 HASTINGS L.J. 695, 695 (1990).

14. *Id.*

15. *Id.* at 696.

16. Frank M. McClellan, *Judicial Impartiality & Recusal: Reflections on the Vexing Issue of Racial Bias*, 78 TEMP. L. REV. 351, 355 (2005). When a motion for judicial disqualification is filed by an attorney "[t]he judge's first reaction . . . is likely to be one of indignation . . . [which can insult] someone who has taken an oath to resolve disputes impartially [by alleging that he or] she cannot fulfill the oath in a particular case." *Id.*

17. *City of Hollywood v. Witt*, 868 So. 2d 1214, 1217 (Fla. 4th Dist. Ct. App. 2004) (noting that the moving party will have the burden of proving that he or she has a "well-founded fear of not receiving a fair trial" and that bias is legally sufficient to disqualify the judge from the case).

18. FLA. R. JUD. ADMIN. 2.310 (stating the rules regarding "Judicial Discipline, Removal, Retirement, and Suspension" of judicial officers).

19. FLA. R. JUD. ADMIN. 2.330. Rule 2.330 was formerly Rule 2.160. *Id.*

20. FLA. STAT. § 38.10 (2007). Section 38.10 provides the process for judicial disqualification. *Id.*

21. FLA. CODE JUD. CONDUCT Canon 3E.

22. FLA. STAT. § 38.01 (stating disqualification of a judge is appropriate when a judge is a party to the pending action).

on judicial disqualification are similar to other jurisdictions, except for one way “in which Florida is very different.”<sup>25</sup> “Whereas judges in most jurisdictions are not penalized for commenting on, or responding to, motions which have been brought to disqualify them, when a Florida judge has been challenged, he or she may generally do no more than rule upon the legal sufficiency of the disqualification motion.”<sup>26</sup> If the judge violates this rule “by taking issue with the moving party’s allegations, [judicial] disqualification . . . may be mandated even when . . . disqualification would not have been warranted otherwise.”<sup>27</sup>

### A. Automatic Disqualification

Prior to automatic disqualification, “[d]iscretion is confided in the . . . judge in the first instance to determine whether [or not] to disqualify himself.”<sup>28</sup> Once a judge has acted in such a manner where his or her impartiality may be questioned, that judge is required to be immediately recused from the proceeding.<sup>29</sup> This category of automatic disqualification indicates that the courts strictly apply the definition of impartiality.<sup>30</sup> While each state has different statutes governing the disqualification of judges, several principals concerning when a judge should automatically be disqualified are consistent.<sup>31</sup> However, when a judge is not automatically disqualified for his or her bias or prejudice, a party can file a motion seeking judicial disqualification.<sup>32</sup>

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23. *Id.* § 38.02 (stating when a party may show by a suggestion that the challenged judge, or judge’s relative, is a party or is otherwise interested in the result of the case, that the judge is related to one of the attorneys, or that the judge is a material witness). This section states that if the truth of the suggestion appears from the record, the judge shall disqualify himself or herself. *Id.*

24. *Id.* § 38.05 (authorizing a judge to “disqualify himself or herself” on his or her own motion when the judge knows of any appropriate grounds for recusal).

25. Richard C. Flamm, *Judicial Disqualification in Florida*, FLA. B.J., Feb. 1996, at 59.

26. *Id.*

27. *Id.*

28. *Jones v. Hirschfeld*, 348 F. Supp. 2d 50, 57 (S.D.N.Y. 2004) (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)).

29. FLA. CODE JUD. CONDUCT Canon 3E(1).

30. Malleon, *Judicial Impartiality*, *supra* note 4, at 55.

31. *See* FLA. CODE JUD. CONDUCT Canon 3E(1)–(2).

32. *See* FLA. R. JUD. ADMIN. 2.330(b).

## B. Motion for Disqualification

The disqualification of a judge is appropriate as provided by the *Model Code of Judicial Conduct*,<sup>33</sup> the applicable states' code of judicial conduct, and the states' statutes.<sup>34</sup> The motion to disqualify a judge must: "(1) be in writing; (2) specifically allege the facts [that indicate] . . . the grounds for [judicial] disqualification; and 3) be *sworn* to by the party by signing the motion under oath or by a separate affidavit."<sup>35</sup> The filing of this motion must be within a reasonable amount of time, not exceeding "[ten] days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling."<sup>36</sup> Motions made during the course of a trial are based on the facts discovered throughout the trial.<sup>37</sup> Failure of a party to comply with the requirements of Rule 2.330 is a sufficient ground for denying a party's motion for disqualification.<sup>38</sup>

## C. Sufficiency of Motion

Once the motion has been properly filed, according to the statutory procedures required, the "sufficiency of the motion" will be closely examined in order to determine whether judicial disqualification is appropriate.<sup>39</sup> Florida law measures the legal sufficiency of a motion based on whether "a reasonably prudent person [would] have a well-grounded fear that he or she will not receive a fair and impartial trial from the judge."<sup>40</sup> The grounds for judicial disqualification must present:

- (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

33. See MODEL CODE JUD. CONDUCT Canon 3E (2004).

34. See FLA. STAT. § 38.01 (2007).

35. FLA. R. JUD. ADMIN. 2.330(c)(1)–(3) (emphasis added). Case law clearly indicates that if the motion is not signed by the party seeking disqualification, the motion will be deemed as legally insufficient. *Gaines v. State*, 722 So. 2d 256, 256 (Fla. 5th Dist. Ct. App. 1998).

36. FLA. R. JUD. ADMIN. 2.330(e).

37. *Id.* (stating that such trial motions "may be stated on the record," filed in writing, and immediately ruled upon).

38. See Douglas J. Glaid, *Judicial Disqualification: What Every Practitioner (and Judge) Should Know*, FLA. B.J., Oct. 2000, at 28, 32.

39. See FLA. R. JUD. ADMIN. 2.330(f).

40. Flamm, *supra* note 25, at 58.

(2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity . . . is a party thereto or interested in the result thereof, or that said judge is related to an attorney or counselor of record . . . or that said judge is a material witness for or against one of the parties to the cause.<sup>41</sup>

The legal sufficiency of a motion to disqualify a judge is a pure question of law, meaning that if the motion is legally sufficient, then the truth of the substance alleged is irrelevant.<sup>42</sup> This requires the court to view the motion from the perspective of the litigant, rather than from the perspective of the judge.<sup>43</sup> What the judge feels is not a question that is taken into consideration when examining the sufficiency of the motion, and rather, it is the “feeling [that] resides in the *affiant’s* mind, and the basis for such feeling.”<sup>44</sup>

Once an initial motion for disqualification has been filed against a judge, the judge must then only determine “the legal sufficiency of the motion and shall not pass on the truth of the facts alleged.”<sup>45</sup> This may require a judge to “immediately enter an order granting disqualification and proceed no further in the action;” however, if the motion is insufficient, the judge must immediately enter “an order denying the motion.”<sup>46</sup> If a recommendation has been made to the Judicial Qualifications Commission, rather than a litigant filing a motion for disqualification, the commission will then determine whether or not the recommended action is appropriate.<sup>47</sup> If the commission determines that removal is appropriate, an order shall be issued “directing the justice or judge to show just cause in writing why the recommended action should not be taken.”<sup>48</sup> This process allows a judge to respond to the commission by filing his or her response showing why he or she

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41. FLA. R. JUD. ADMIN. 2.330(d).

42. See *Jimenez v. Ratine*, 954 So. 2d 706, 708 (Fla. 2d Dist. Ct. App. 2007). The legal sufficiency is based on the premise of “whether the facts alleged would place a *reasonably prudent person* in fear of not receiving a fair and impartial trial.” *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1335 (Fla. 1990) (quoting *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983)) (internal quotations omitted).

43. *Jimenez*, 954 So. 2d at 708 (explaining that the judge’s impartiality is questioned rather than his or her ability to act impartially and fairly).

44. *Wargo v. Wargo*, 669 So. 2d 1123, 1124 (Fla. 4th Dist. Ct. App. 1996) (quoting *State v. Dewell*, 179 So. 695, 697–98 (Fla. 1938)) (emphasis added).

45. FLA. R. JUD. ADMIN. 2.330(f).

46. *Id.*

47. See FLA. R. JUD. ADMIN. 2.310(b).

48. *Id.*



should not be removed from the proceeding before the commission makes its final decision.<sup>49</sup>

### III. PRINCIPLES OF JUDICIAL RECUSAL & DISQUALIFICATION

“The Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers or other persons in society.”<sup>50</sup> This higher standard that judges are held to has led to the enactment of statutes concerning judicial conduct and numerous guides to judicial ethics.<sup>51</sup> Congress’ goal when enacting judicial recusal statutes was to, first, preserve the role of judges as neutral parties, and second, to preserve society’s perception of judges as neutral parties.<sup>52</sup> The purpose of these statutes requiring judicial recusal and disqualification are “to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.”<sup>53</sup> The importance of a judge remaining a neutral party was based on “[t]he basic tenet for [judicial] disqualification [that] ‘justice must satisfy the appearance of justice.’”<sup>54</sup> This basic tenet has been the backbone of our judicial branch of government, and “must [still] be followed even when the record lacks any actual bias or prejudice.”<sup>55</sup>

Currently, every state has different statutes governing judicial recusal and disqualification for state and federal judges within that state.<sup>56</sup> Many of the concepts used by various state statutes are reflected in the *Model Code of Judicial Conduct*, which was “designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies.”<sup>57</sup> There are currently two conditions for judicial disqualification that have been established by Title 28 section 455 of

49. *Id.* (stating that “the commission may serve a reply [to the judge’s written response] within 20 days from service of the response”).

50. *State v. Pattno*, 579 N.W.2d 503, 506 (Neb. 1998).

51. *See generally* FLA. CODE JUD. CONDUCT; 28 U.S.C. § 455 (2000).

52. Jay Hall, *The Road Less Traveled: The Third Circuit’s Preservation of Judicial Impartiality in an Imperfect World*, 50 VILL. L. REV. 1265, 1278 (2005). Congress has sought to maintain impartial judges by requiring judicial disqualification in various situations. *See* 28 U.S.C. § 455(a)–(c).

53. *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)).

54. *Bethesda Mem’l Hosp. v. Cassone*, 807 So. 2d 142, 143 (Fla. 4th Dist. Ct. App. 2002) (quoting *Atkinson Dredging Co. v. Henning*, 631 So. 2d 1129, 1130 (Fla. 4th Dist. Ct. App. 1994)).

55. *See id.* at 143.

56. *See generally* FLA. CODE JUD. CONDUCT pmbl.

57. MODEL CODE OF JUD. CONDUCT pmbl. (2004); *see also* FLA. CODE JUD. CONDUCT pmbl.

the *United States Code*.<sup>58</sup> First, section 455(a) provides that a judge “shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned.”<sup>59</sup> Under section 455(a), judicial recusal is only appropriate if “an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge’s impartiality.”<sup>60</sup> Next, section 455(b) provides that a judge shall also be disqualified “[w]here he [or she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.”<sup>61</sup> In order for this bias to qualify as a sufficient basis for judicial recusal, “[t]he judge’s bias [or prejudice] must be personal and extrajudicial,” meaning that it must have derived from something besides what “the judge [has] learned by participating in the case.”<sup>62</sup>

Judicial recusal is required, based on the *Code of Judicial Conduct*, in cases where a judge is proven to be biased or when failure of a judge to recuse himself or herself would result in a void decision being rendered.<sup>63</sup> A party moving for judicial disqualification “on the basis of bias or prejudice [has] the heavy burden of [rebutting] the presumption of judicial impartiality.”<sup>64</sup> Rebuttal of this presumption is especially difficult because this motion is purely a question of law; therefore, all allegations made are taken to be true and only the judge’s impartiality is questioned.<sup>65</sup> Ultimately, in order for a motion for judicial disqualification to be deemed appropriate, the facts alleged “must be ‘germane to the judge’s undue bias, prejudice or sympathy.’”<sup>66</sup>

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58. 28 U.S.C. § 455(a)–(b) (2000).

59. *Id.* § 455(a).

60. *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (quoting *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988)).

61. 28 U.S.C. § 455(b)(1).

62. *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990).

63. *See* MODEL CODE JUD. CONDUCT Canon 3E(1) (2004); *see also* FLA. CODE JUD. CONDUCT Canon 3E(1).

64. *State v. Pattno*, 579 N.W.2d 503, 506 (Neb. 1998).

65. *See MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1334–35 (Fla. 1990) (questioning the legal sufficiency of whether a reasonable person would fear receiving an impartial trial).

66. *Hous. Auth. of Tampa v. Burton*, 873 So. 2d 356, 358 (Fla. 2d Dist. Ct. App. 2004) (quoting *Dragovich v. State*, 492 So. 2d 350, 352 (Fla. 1986)).

### A. *When Disqualification or Recusal Is Inappropriate*

The *Code of Judicial Conduct*, statutes, and case law state under what circumstances judicial recusal and disqualification are appropriate and under what circumstances judicial recusal and disqualifications are inappropriate.<sup>67</sup> The case law concerning judicial disqualification and recusal tends to demonstrate clearly under what circumstances the court should deny a party's motion for judicial disqualification.<sup>68</sup> Case law indicates that a judge's rulings or opinions are insufficient to justify recusal, absent clear judicial bias or favoritism that would render a fair decision impossible.<sup>69</sup> Generally, a judge's manifestation of annoyance, impatience, and even anger is not enough to constitute bias sufficient to warrant a recusal motion.<sup>70</sup> In Florida, a judge is also allowed to form opinions and mental impressions throughout a proceeding without being disqualified from the case, so long as the judge's opinions do not lead to prejudgment of the case.<sup>71</sup> The objective person standard that is used by courts throughout the nation, including Florida, requires all doubts to be resolved in the favor of judicial disqualification or recusal.<sup>72</sup> Meaning that even if the factors do not clearly indicate there have been substantial grounds for disqualification, courts tend to use the safer approach in order to protect the parties involved and the integrity of the judiciary.<sup>73</sup>

A judge has no "duty to recuse himself [or herself based] on unsupported speculation."<sup>74</sup> The fact that a judge may also be familiar with the facts of a case is also insufficient grounds for recusal or disqualification.<sup>75</sup> Recusal has also been inappropriate when "characterizations and gratuitous comments" that can, or have been, offensive to litigants have been made by judges during a proceeding.<sup>76</sup> These instances, where a judge's comments or

67. See generally FLA. CODE JUD. CONDUCT.

68. See *Pennsylvania v. Local Union 542*, Int'l Union of Operating Eng'rs, 388 F. Supp 155, 158–59 (E.D. Pa. 1974). This case outlines the law of judicial disqualification, also explaining the importance of examining the legal sufficiency of parties' motions for judicial disqualification. *Id.*

69. See *Jones v. Hirschfeld*, 348 F. Supp. 2d 50, 57 (S.D.N.Y. 2004).

70. *Id.*

71. *Wargo v. Wargo*, 669 So. 2d 1123, 1124 (Fla. 4th Dist. Ct. App. 1996).

72. See *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003).

73. See *id.*

74. *Tonkovich v. Kansas Bd. of Regents*, 924 F. Supp. 1084, 1087 (D. Kan. 1996).

75. *Id.* at 1088.

76. *Wargo*, 669 So. 2d at 1124. The court has also held that remarks made by judges during trial that are disapproving, hostile, or critical to any party or witness involved in the proceeding are generally insufficient grounds for judicial disqualification. *United States v. Bertoli*, 854 F. Supp. 975, 1118 (D.N.J. 1994).

behavior have been insufficient grounds for recusal or disqualification, indicate that the *Code of Judicial Conduct*, case law, and statutes strictly govern what a judge can say or do in the courtroom; however, there are certain circumstances where a judge's actions may offend a particular party in a proceeding, but fall short of satisfying the reasonable person standard required for judicial recusal and disqualification.<sup>77</sup>

*B. Recent Issues Within the Courtroom: Judicial Recusal Based on Sexual Orientation*

The issue of a judge's sexual orientation and judicial recusal was a question that one of Oregon's Supreme Court Justices recently faced when a case concerning same-sex marriage was brought before the court in 2004.<sup>78</sup> Oregon Supreme Court Justice Rives Kistler, an openly homosexual member of Oregon's highest court, did not want to jeopardize the future judgment of the case and, therefore, decided to stop all of his involvement and determine whether there was a potential conflict of interest.<sup>79</sup> Justice Kistler consulted with both a judicial ethics book and the judicial ethics panel in order to determine whether being homosexual presented a conflict of interest.<sup>80</sup> After being advised that there was no conflict of interest, he joined the majority decision ruling "that same-sex marriages were not allowed" in Oregon.<sup>81</sup> The outcome of these circumstances proved that, in Oregon, a judge's sexual orientation was not ground for judicial recusal even when sexual orientation was the premise of the proceeding.<sup>82</sup> This principal became more clear when the citizens of Oregon supported that notion by electing Justice Kistler the following year in a statewide election.<sup>83</sup> The premise of this situation exemplified the issue that a homosexual judge may have to question whether or not by ruling on a case concerning sexual orientation, the appearance of a bias decision or a conflict of interest may be presented.<sup>84</sup>

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77. See *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1334–35 (Fla. 1990).

78. Joan Biskupic, *Amid Debate over Rights, Number of Gay Judges Rising*, USA TODAY, Oct. 18, 2006, at A5.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Biskupic, *supra* note 78.

84. See *id.* (suggesting that a judge may have to question whether the public will perceive his or her decision as bias or prejudice based on his or her sexual orientation).

#### IV. FLORIDA LAW: CURRENT POLICIES CONCERNING JUDICIAL RECUSAL & DISQUALIFICATION

Currently, *Florida's Code of Judicial Conduct* requires judicial recusal when a judge discriminates "on the basis of race, sex, religion, or national origin. [However, m]embership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed to be a violation."<sup>85</sup> Therefore, in Florida, a judge's involvement or membership in certain groups, such as ethnic heritage organizations, will not be sufficient grounds for judicial disqualification although a case may involve the rights of that group.<sup>86</sup>

*Florida's Code of Judicial Conduct* currently does not mention what a judge is expected to do when faced with a potential conflict of interest based on his or her sexuality.<sup>87</sup> Over the recent years, the number of homosexuals seeking enforcement of their civil rights has dramatically increased, leading to more cases concerning the issue of sexual orientation being heard throughout courtrooms worldwide.<sup>88</sup> The recent increase of homosexual judges throughout the nation suggests that the issue of judicial recusal and disqualification based on sexual orientation will also increase throughout the state.<sup>89</sup>

##### A. *Actual Bias and Prejudice*

The *Florida Code of Judicial Conduct*, clearly states that one of its primary goals is to "avoid . . . impropriety and the appearance of impropriety" in all of the judge's activities,<sup>90</sup> further stating that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>91</sup> Canon 3 of the *Code of Judicial Conduct* stresses the importance of an un-biased judiciary by providing that "[a] judge shall perform the [d]uties of [j]udicial [o]ffice [i]mpartially and [d]iligently."<sup>92</sup> This canon stresses the importance of a judge's judicial duties and adjudicative responsibilities to the court of law in which the judge represents.<sup>93</sup> Canon 3B(5) states that:

85. FLA. CODE JUD. CONDUCT Canon 2.

86. *See id.*

87. *See generally* FLA. CODE JUD. CONDUCT.

88. *See generally* Biskupic, *supra* note 78.

89. *See id.*

90. FLA. CODE JUD. CONDUCT Canon 2.

91. *Id.* Canon 2A.

92. *Id.* Canon 3.

93. *See id.*

[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.<sup>94</sup>

The *Florida Code of Judicial Conduct* also provides a list of instances when "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned,"<sup>95</sup> for example, when "the judge has a personal bias or prejudice concerning a party or a party's lawyer . . . ."<sup>96</sup> Statements made by judges can also be sufficient grounds for disqualification if the remarks or statements demonstrate that a judge may have or has prejudiced the case.<sup>97</sup>

In addition to the *Florida Code of Judicial Conduct*, the *Florida Statutes* and case law provide that a judge shall be disqualified if "the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge."<sup>98</sup> These bodies of law stress the importance of judges performing judicial duties fairly and impartially in order to prevent "bring[ing] the judiciary into disrepute."<sup>99</sup> These ethical standards imposed on judges have been tremendously stressed at the state and federal level, requiring recusal in cases where a judge is actually biased towards the parties involved, or the subject matter of the proceeding.<sup>100</sup> Case law clearly indicates that in order for a judge to not be deemed biased, the judge must not only be impartial but also leave an impression of impartiality to all who attended court.<sup>101</sup>

Although on its face it may seem that only one type of judicial bias exists, there are several types of bias that can occur throughout a proceeding that would require immediate disqualification.<sup>102</sup> Before taking a closer ex-

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94. *Id.* Canon 3B(5).

95. FLA. CODE JUD. CONDUCT Canon 3E(1).

96. *Id.* Canon 3E(1)(a).

97. Glaid, *supra* note 38, at 32.

98. FLA. R. JUD. ADMIN. 2.330(d)(1).

99. *See* FLA. CODE JUD. CONDUCT Canon 3B(5) cmt.

100. *See generally* FLA. CODE JUD. CONDUCT.

101. *See* Hayslip v. Douglas, 400 So. 2d 553, 556 (Fla. 4th Dist. Ct. App. 1981).

102. *See generally* FLA. CODE JUD. CONDUCT.

amination of the concept of judicial bias based on a judge's sexual orientation, a distinction should be made between the various types of bias.

### 1. Bias Toward the Party

In *State v. Pattno*,<sup>103</sup> the defendant filed an appeal alleging that the ruling judge was biased against his sexual orientation as evidenced by the judge expressing his religious views when reading a passage from the Bible during the defendant's sentencing.<sup>104</sup> On appeal, the court found that "because the trial judge interjected his own religious views immediately prior to sentencing, a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge."<sup>105</sup> The biblical passage that was read prior to the defendant's sentencing clearly indicated that the judge considered the defendant's sexual orientation when reaching the sentence.<sup>106</sup> The appellate court ruled that the defendant was deprived of both due process and the impartiality of the judge when the judge imposed a sentence that was based on his prejudice of the defendant's sexual orientation.<sup>107</sup>

Judicial bias ordinarily must be directed towards a specific individual; however, certain jurisdictions do not require that the alleged bias be personal or directed towards a specific person.<sup>108</sup> In these jurisdictions, such as Florida, a judge's negative feelings towards a specific class, such as an ethnic or religious group, may constitute bias towards individual parties that belong to that specific class.<sup>109</sup> In *Baskin v. Brown*,<sup>110</sup> the contrary perspective to jurisdictions like Florida was established, here the court made it clear that "[a] judge cannot be disqualified merely because he believes in upholding the law . . . [a] [p]ersonal bias against a party must be shown."<sup>111</sup>

The critical question surrounding whether a judge or justice is biased toward a person or class of persons is whether there is sufficient bias that

103. 579 N.W.2d 503 (Neb. 1998).

104. *Id.* at 506.

105. *Id.* at 509 (holding that a judge who injects his or her personal beliefs as a basis for a ruling "injects an impermissible consideration in the [ruling] process").

106. *Id.*

107. *Id.* at 508.

108. CTR. FOR CONTINUING EDUC., DISQUALIFICATION FOR BIAS OR ITS APPEARANCE: SELF STUDY ARTICLE & SELF ASSESSMENT TEST § 4.5, <http://www.cce-mcle.com/tests/ss6014a.htm> (last visited Feb. 17, 2008).

109. *Id.*

110. 174 F.2d 391 (4th Cir. 1949).

111. *Id.* at 394 (holding that the defendants' grounds to disqualify a judge after the judge refused to recuse himself from a case was not sufficient because the judge did not have a personal bias against the defendants or the particular class of persons in this case).

would prevent the judge from being fair and impartial when ruling on the case as outlined by the *Code of Judicial Conduct*.<sup>112</sup> This critical question of “whether the statements or activities [of the judge] would suggest to the reasonable man that the judge’s bias against a class would give rise to a personal bias against a party in court who is a member of that class” must be determined prior to deciding whether a judge should recuse himself or herself or be disqualified from a case.<sup>113</sup>

There are many cases where the bias of a judge is based on “the judges’ conduct, specifically, statements made by the judges themselves indicating a bias against the classes to which the parties [or party] belonged.”<sup>114</sup> This varies significantly with bias that is based on a judge’s sexual orientation, sex, race, religion, or ethnicity.<sup>115</sup> Florida’s current *Code of Judicial Conduct* specifically prohibits a judge from being biased or prejudiced based on a party’s race, sex, sexual orientation, religion, ethnicity, age, national origin, or disability.<sup>116</sup> With this concept in mind, the same consideration should also be given to a “judge’s sexual orientation, which, in the absence of conduct or other circumstances to indicate bias toward a party, similarly should not be a ground for disqualification.”<sup>117</sup>

## 2. Bias Toward the Subject Matter

“[B]ias, as to the subject matter of a case, can [also] compromise the impartiality of a judge” and may also be sufficient grounds for judicial disqualification.<sup>118</sup> “The concept of bias toward [the] subject matter, as used here, poses difficult questions regarding the types of preconceptions that are permissible in the mind of the trial judge, and those that are not.”<sup>119</sup> Generally, judges can develop mental impressions and personal opinions throughout the course of evidence presentations, so long as the judge “does not prejudge the case.”<sup>120</sup> In *Williams v. Reed*,<sup>121</sup> the defendant filed for appeal challenging the judge’s decision after ordering a transfer of primary physical

112. See FLA. CODE JUD. CONDUCT Canon 3B(5).

113. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 756 (1973).

114. Malarkey, *supra* note 13, at 706.

115. *Id.*

116. FLA. CODE JUD. CONDUCT Canon 3B(5).

117. Malarkey, *supra* note 13, at 706.

118. *Id.* at 706.

119. *Id.* at 706–07.

120. *Wargo v. Wargo*, 669 So. 2d 1123, 1124 (Fla. 4th Dist. Ct. App. 1996) (quoting *Brown v. Pate*, 577 So. 2d 645, 647 (Fla. 1st Dist. Ct. App. 1996)).

121. 6 S.W.3d 916 (Mo. Ct. App. 1999).



custody of the party's minor child to defendant's former husband/plaintiff.<sup>122</sup> The defendant appealed the judge's ruling, claiming that the trial court erred when denying her motion for judicial disqualification.<sup>123</sup> The defendant argued that the judge's comments and conduct throughout the proceeding toward the defendant, based on her sexual orientation, clearly demonstrated grounds for disqualification.<sup>124</sup> The judge's comments and conduct were argued to have stemmed from his own personal bias towards the subject matter of same-sex relationship child custody issues.<sup>125</sup> This type of subject matter bias clearly demonstrates how a fixed anticipatory judgment can taint or prejudice a proceeding, resulting in an impartial decision being made based on a fixed belief regarding the subject matter of a case.<sup>126</sup>

The argument of a judge being biased toward a subject matter often is based on a judge's membership in a minority group; however, "membership in a minority group [should] not, in itself, indicate [a] greater likelihood" of a judge deciding on a particular issue in any particular manner.<sup>127</sup> A judge who abides by the rules outlined in the *Code of Judicial Conduct* should disqualify himself or herself in the event that he or she feels they would be "incapable of detached judgment."<sup>128</sup> Ultimately, a judge's religion, race, sex, ethnicity, or sexual orientation is not sufficient grounds to infer the appearance of bias or actual bias, and therefore should not warrant disqualification.<sup>129</sup> An attorney seeking judicial disqualification based on a judge's "sexual orientation should be required to show specific examples of the judge's conduct or other circumstances to support [his or] her charge."<sup>130</sup>

Stereotyping judges based on the preconception that a judge will be more likely to have bias or prejudice towards a litigant, attorney, or witness, based on his or her memberships, damages society's confidence in the judiciary.<sup>131</sup> The judiciary as a whole includes members of various minorities, including heterosexual, and homosexual judges; therefore, if we are to clas-

122. *Id.* at 918.

123. *Id.*

124. *Id.* ("[The] judge's conduct and statements during the hearing on Ms. Reed's motion for change of judge would give a reasonable person a factual basis to doubt the judge's ability to thereafter preside as a neutral arbiter . . .").

125. *See id.* at 919 (explaining that the judge in this case was personally involved in a similar situation regarding same-sex relationships and child custody issues concerning his ex-wife and minor child).

126. *See Williams*, 6 S.W.3d at 918-19.

127. Malarkey, *supra* note 13, at 708.

128. *Id.* at 709.

129. *Id.*

130. *Id.*

131. *Id.* at 714.

sify judges as being bias or prejudice because of their involvement in a minority group, such as alternative sexual orientation, that premise would have to be applied fairly across all groups, meaning that a judge's involvement in a minority group, such as ethnicity, should also be grounds for disqualification.<sup>132</sup>

## B. *Appearance of Bias*

Ethical standards and statutory law require a judge to not only remove himself or herself from "any proceeding in which his [or her] impartiality might reasonably be questioned," but also to avoid any appearance of bias.<sup>133</sup> The premise of avoiding the appearance of any bias also comes from "[t]he basic tenet for [judicial] disqualification [that] '[j]ustice must satisfy the appearance of justice.'"<sup>134</sup> In order for judges "[t]o maintain public confidence in the judicia[ry]," judges must not only apply the law impartially but must also appear to do so as well.<sup>135</sup> The appearance of impartiality must be used as the general standard for judicial recusal and when applying this standard judges should determine whether their impartiality may be questioned from the perspective of a reasonable person.<sup>136</sup> Although this standard varies slightly by each jurisdiction, the implications of its appropriateness are consistent.<sup>137</sup>

The appearance of bias or impropriety may derive from a judge's conduct during an issue or proceeding, or remarks made to parties involved or to witnesses.<sup>138</sup> This appearance of impropriety can also come from judicial frustration, such as when a judge chooses to speak, "[a] judge's attitude to-

132. See Malarkey, *supra* note 13, at 713–14.

133. 28 U.S.C. § 455(a) (2000). Society and the governing rules of law demand that a judge not only recuse himself or herself when there is reason to do so, but judges also have an equal responsibility to do so when a reasonable person would harbor doubts concerning the judges impartiality. *Tonkovich v. Kansas Bd. of Regents*, 924 F. Supp. 1084, 1087 (D. Kan. 1996).

134. *Bethesda Mem'l Hosp. v. Cassone*, 807 So. 2d 142, 143 (Fla. 4th Dist. Ct. App. 2002) (quoting *Atkinson Dredging Co. v. Henning*, 631 So. 2d 1129, 1130 (Fla. 4th Dist. Ct. App. 1994)).

135. Malarkey, *supra* note 13, at 710.

136. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) (explaining that when a judge is facing possible disqualification, the judge should consider how his impartiality appears "to the average person on the street," meaning that disqualification is appropriate if a reasonable person were "to know all the circumstances" and would doubt the judge's impartiality). *Id.*

137. *Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 526 (S.D. Fla. 1977).

138. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 76 (2000).

ward an attorney practicing in the judge's court[room]," and a judge's business or personal relationships.<sup>139</sup> In *United States v. Salemm*,<sup>140</sup> the court reiterated the standard for recusal concerning the appearance of impartiality as an objective standard, as outlined in section 455 of the *United States Code*.<sup>141</sup> The court also stated that the decision of disqualification can even occur when a "judge is not actually biased or prejudiced," as long as his "impartiality might reasonably be questioned."<sup>142</sup> This concept is seen throughout many cases both on the state and federal level, highlighting the importance of an impartial and fair judiciary.<sup>143</sup> In *Salemm*, the court thoroughly explained the importance of this standard and why:

[t]he disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.<sup>144</sup>

This concept of "judge-shopping"<sup>145</sup> is frequently used by parties and attorneys when an argument can be made as to the appearance of impropriety and a new judge would be more favorable to one or more of the parties involved.<sup>146</sup> Courts disfavor this use of disqualification and recusal motions because these motions cannot be used by litigants as strategies to "judge-shop" and rather should only successfully be used when there is the appearance of or actual judicial impropriety.<sup>147</sup>

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139. *Id.* at 85. The comment to Canon 3B(5) states:

A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

FLA. CODE JUD. CONDUCT Canon 3B(5) cmt.

140. 164 F. Supp. 2d 49 (D. Mass. 1998).

141. *Id.* at 80; *see also* 28 U.S.C. § 455 (2000).

142. *Salemm*, 164 F. Supp. 2d at 80.

143. *See id.* at 81.

144. *Id.* at 52.

145. *United States v. Bertoli*, 854 F. Supp. 975, 1120 (D.N.J. 1994).

146. *See Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. 776, 779–80 (D.N.M. 1989) ("Litigants are entitled to an unbiased judge; not to a judge of their choosing").

147. *Bertoli*, 854 F. Supp. at 1120 (explaining that the defendant's previous attempts to disqualify the judge for insufficient reasons evidenced his attempt to judge-shop). The balancing test used to determine whether judicial recusal is appropriate involves balancing two key factors. *Idaho v. Freeman*, 478 F. Supp. 33, 35–36 (D. Idaho 1979). First, the right for all litigants to have their case heard and "decided by an impartial tribunal." *Id.* at 35. Second,

“[T]he appearance of bias standard theoretically would apply to a judge’s sexual orientation regardless of whether it was a matter of public knowledge . . . .”<sup>148</sup> “Clearly, the goal of [section 455] is to foster the *appearance* of impartiality . . . [this concern] also pervades the *Code of Judicial Conduct* and the ABA Code of Professional Responsibility, [which] stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence.”<sup>149</sup> Thus, one can argue that because undisclosed facts such as a judge’s sexual orientation can become public knowledge at any time, “consideration of facts of which the public may be unaware is proper under a standard emphasizing appearance.”<sup>150</sup> One can also argue that the *Code of Judicial Conduct* should not apply to a judge’s sexual orientation because doubts based on a “homosexual judge’s impartiality are reasonable and would be widely held by members of the public of which homosexuals comprise a decided minority.”<sup>151</sup> The reasonableness of doubts concerning a homosexual judge’s impartiality requires subjective determination; however, the premise that a vast majority of people or even a large minority of people would harbor such thoughts is supported by fact that a small majority or large minority of society fears homosexuality.<sup>152</sup>

### C. *Extrajudicial Activities*

Canon 5 of the *Code of Judicial Conduct* clearly states that “[a] [j]udge [s]hall [r]egulate [e]xtrajudicial [a]ctivities to [m]inimize the [r]isk of [c]onflict with [j]udicial [d]uties.”<sup>153</sup> This Canon not only restricts the extrajudicial activities a judge can participate in, but also helps preserve the “[e]xpression[] of bias or prejudice by a judge” based on the activities he or she participates in.<sup>154</sup> Some of these restrictions imposed on judges by the Code of Judicial Conduct involve avoiding activities that “cast reasonable

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“the presumption of qualification and the policy against allowing litigants to engage in judge-shopping.” *Id.* at 36.

148. Malarkey, *supra* note 13, at 711.

149. Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980). The case discussed the fact why the issue of judicial disqualification is such a sensitive issue by explaining that when a motion for judicial disqualification is filed, the court must assess all of the facts surrounding the circumstances before determining whether a judge’s failure to properly recuse himself or herself from the proceeding “was an abuse of sound judicial discretion.” *Id.*

150. Malarkey, *supra* note 13, at 711.

151. *Id.* at 713.

152. *See id.*

153. FLA. CODE JUD. CONDUCT Canon 5.

154. *Id.* Canon 5A–B cmt.

doubt on the judge's . . . impartiality,"<sup>155</sup> regulating activities in order to minimize a risk of conflict with judicial duties,<sup>156</sup> practicing law,<sup>157</sup> and refraining from inappropriate political involvement.<sup>158</sup> "A [j]udge is [e]ncouraged to [e]ngage in [extrajudicial] [a]ctivities to [i]mprove the [l]aw, the [l]egal [s]ystem, and the [a]dministration of [j]ustice."<sup>159</sup> A judge's involvement in extrajudicial activities is encouraged so long as they don't demean the judiciary, interfere with judicial responsibilities, or cast doubt on a judge's impartiality.<sup>160</sup>

Although the *Code of Judicial Conduct* suggests that a judge's sex, religion, ethnicity, or race is not sufficient grounds for disqualification alone,<sup>161</sup> case law suggests otherwise.<sup>162</sup> A question worth considering is whether public self-acknowledgement of a judge's sexual orientation "is [a] type of extrajudicial activity that is discouraged by the *Code of Judicial Conduct*."<sup>163</sup> Unlike race, sex, religion, national origin, and ethnicity, "sexual orientation has not" historically been characterized as warranting special legal protection.<sup>164</sup> If our "system of judicial ethics [must] distinguish between extrajudicial activit[ies]" that promote a promising judiciary and those that adversely interfere with judicial responsibility, the consideration of a judge's personal life in relation to his or her sexual orientation and which group of extrajudicial activities that falls under must be determined.<sup>165</sup>

It has been held that through the First Amendment's "application to the judiciary, . . . a judge's right to freedom of expression and association must

155. *Id.* Canon 5A(1).

156. *Id.* Canon 5A(3).

157. *Id.* Canon 5G.

158. FLA. CODE JUD. CONDUCT Canon 5C(2).

159. *Id.* Canon 4.

160. *Id.* Canon 4A(1)–(3). The commentary following Canon 4A states:

A judge is encouraged to participate in activities designed to improve the law, the legal system, and the administration of justice. In doing so, however, it must be understood that expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

*Id.* Canon 4A cmt.

161. *See id.* Canon 3B(5).

162. *See generally* *Idaho v. Freeman*, 478 F. Supp. 33, 35–36 (D. Idaho 1979); *Pennsylvania v. Local Union 542*, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 157–58 (E.D. Pa. 1974). In *Freeman*, the court addressed the factor of judicial reasonableness by explaining that a judge must not only be alert in order "to avoid the possibility" of having his impartiality questioned, but also to avoid having litigants fear a judge's impartiality. *Freeman*, 478 F. Supp. at 36.

163. Malarkey, *supra* note 13, at 721 (emphasis added).

164. *Id.* at 699.

165. *Id.* at 722.

be balanced against the public's right to an impartial judiciary."<sup>166</sup> Although there are some situations "where a judge's right to freedom of expression and association outweighs the need to regulate the conduct in question," such as when the appearance of judicial impartiality is not threatened.<sup>167</sup> "Certainly, a restriction on a judge's ability to express himself [or herself] regarding so personal a matter as sexual orientation raises serious first amendment concerns."<sup>168</sup> Although judges are far more restricted in forming certain social relationships that may rise to the appearance of impropriety, it is highly unlikely that a judge will be required to distance himself or herself from social and family networks based on his or her sexual orientation in order to protect public confidence in an impartial judiciary.<sup>169</sup> Therefore:

[t]o hold that a homosexual judge's public acknowledgement of his [or her] sexual orientation is the type of activity discouraged by the Code of Judicial Conduct would, in effect, impose a requirement of secrecy on the judge, potentially far more damaging to public confidence in the integrity of the judiciary than the open admission of one's sexual orientation.<sup>170</sup>

## V. AUTHOR'S CLOSING REMARKS

America is a society that places high expectations on the impartiality of its judicial branch of government as a mechanism for protecting the integrity of the law and also to ensure equality for all citizens. As a country that prides itself for standing behind the premise of equal protection and civil rights, we take a step backward when we ask ourselves whether judicial impartiality is affected by a judge's personal and private sexual orientation. If the law places expectations on our judges through Codes of Judicial Conduct, ethical regulations, and state and federal statutes, why is it that we don't assume the same expectation, by accepting the fact that sexual orientation should not raise sufficient grounds for claiming judicial disqualification?

Ultimately, "[t]he rule of necessity arises from the obvious requirement that, in a legal proceeding, some judge must sit."<sup>171</sup> If we are to question whether a homosexual judge is prejudiced or biased solely based on his or her sexual orientation, one should also question a black judge's impartiality

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166. STEVEN LUBET, *BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES* 42 (1984).

167. *Id.* at 43.

168. Malarkey, *supra* note 13, at 722–23.

169. *Id.* at 723.

170. *Id.*

171. *Id.* at 717.

on the basis of race in a proceeding concerning racial discrimination. In *Pennsylvania v. Local Union 542, International Union of Operating Engineers*,<sup>172</sup> this very issue was addressed when the defendants filed a motion for judicial disqualification based on the racial prejudice of the judge.<sup>173</sup> Ultimately, the court denied the defendant's motion concluding that just because "one is black does not mean . . . that he is anti-white."<sup>174</sup> The court also noted that:

[i]f America is going to have a total rendezvous with justice so that there can be full equality for blacks, . . . minorities, and women, it is essential that the "instinct" for double standards be completely exposed and hopefully, through analysis, those elements of irrationality can be ultimately eradicated.<sup>175</sup>

Therefore, with this rationale in mind, it cannot be said with certainty that a homosexual judge will more likely be partial than a heterosexual judge in a case, involving a homosexual plaintiff and a heterosexual defendant.

Not only is it impractical and insulting to presume that judges are unable to set aside their personal beliefs and private views when deciding a case but it also undermines the strength of the judiciary. It is unfair to question a homosexual judge's capability of applying the law fairly and impartially—a principal so embedded in our judiciary—simply because issues concerning sexual orientation may be raised during the proceeding. If we demand our judiciary to be blind of our race, sex, ethnicity, sexual orientation, national origin, and age, why is it that society should be allowed to openly support a double standard by not providing our judge's that very same right.

"The sexual orientation of *any* judge may or may not give him [or her] insight into the sexual orientation of a party;"<sup>176</sup> however, being bias toward the possibility of a homosexual judge having insight into the sexual orientation of a party is prejudicial and unfair. It has been noted that "[g]ay and lesbian judges do not appear to have had a particular impact on gay-rights

172. 388 F. Supp. 155 (E.D. Pa. 1974).

173. *Id.* at 162–63. The defendants in this proceeding claimed that the judge was biased based on a speech the judge had given to a group of black individuals, although the speech contained no references to the defendant's case. *See id.* at 157.

174. *Id.* at 163. The court held that although the judge spoke to the Association for the Study of Afro-American Life and History, a judge's background and association are insufficient grounds to sustain a motion for judicial disqualification based on bias or prejudice. *Id.* at 182.

175. *Local Union 542*, 388 F. Supp. at 181.

176. Malarkey, *supra* note 13, at 725.

issues;”<sup>177</sup> therefore, society should not expect that by entrusting in our homosexual judges, they are inadvertently impacting gay-rights issues. Ultimately, society should expect a fair and impartial judiciary free of personal and professional bias; meaning that we should not question the impartiality of judges based on discriminatory beliefs such as a judge’s sexual orientation, race, age, or ethnicity.

## VI. CONCLUSION

When considering the question of whether the citizens of Florida expect judicial recusal or disqualification of a state or federal judge simply based on the judge’s sexual orientation, society should consider whether the law allows a judge’s personal beliefs or views to affect his or her decision making. Based on the *Model Code of Judicial Conduct*, the *Florida Code of Judicial Conduct*, statutes, case law, and ethical regulations, the answer is clearly no. A judge should never allow his or her own personal beliefs or views, including a judge’s sexual orientation, to affect his or her decision making once a judge is dressed in his or her judicial robe, which represents to all in his or her presence that he or she will uphold the law fairly and impartially.

The *Florida Code of Judicial Conduct* currently requires judicial recusal or disqualification in circumstances where a “judge’s impartiality might reasonably be questioned.”<sup>178</sup> The rules behind preserving judicial impartiality are supported by the important principal that a judge must at all times act in such “a manner that promotes public confidence in the integrity and impartiality of the judiciary.”<sup>179</sup>

It would be unfortunate if the citizens of the State of Florida based the impartiality of a state or federal judge on such a personal matter such as sexual orientation. Individuals that have filed motions for judicial disqualification claiming judicial bias based solely on a judge’s race have continuously been unsuccessful.<sup>180</sup> Similarly, individuals that claim judicial bias solely based on judges religion or age have also been unsuccessful; therefore, those individuals who wish to file motions for judicial disqualification solely based on a judge’s sexual orientation should also fail.

Ultimately, the best approach towards eliminating judicial bias based on sexual orientation is through education.

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177. Biskupic, *supra* note 78.

178. FLA. CODE JUD. CONDUCT Canon 3E(1).

179. *Id.* Canon 2A.

180. See generally *Local Union 542*, 388 F. Supp. at 155.



United States Supreme Court Justice Felix Frankfurter stated that “on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline, and that fortunate alchemy by which men [and women] are loyal to the obligation with which they are entrusted.” As long as the judiciary continues to be made up of men and women of different sexual orientations, the suggestion that a judge’s sexual orientation is likely to affect his impartiality damages the public’s confidence in the judicial system and places little faith in a judge’s ability to perform his [or her] duties in an impartial manner independent of personal considerations.<sup>181</sup>

Society must be educated as to what constitutes actual prejudice and bias that would adversely affect a judge’s duty to be impartial and fair in all proceedings. This concept must then be compared to the notion of molding the judicial branch to reflect the personal beliefs society has towards what they believe is morally right and wrong.

If society was to require judicial recusal based on a judge’s sexual orientation, we would be sending the negative message to our judges that in order to preserve the appearance of impartial decision making, judges are required to keep secret all aspects of their personal life society may shun upon. Imposing this burden on our judiciary would not only be unfair, cruel, and against the notion of equality, but would also send a message to other states and countries that Florida expects their judiciary to fit a particular mold and those who do not fit that mold will be subjected to silence and secrecy or face disqualification. The disqualification and recusal of judges should be decided based on a rational application of governing law and ethical codes “and the same considerations that lead one to conclude that a judge’s race, sex, ethnicity, or religion is not a sufficient basis, in itself, to infer bias, apply with equal validity to a judge’s sexual orientation.”<sup>182</sup>

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181. Malarkey, *supra* note 13, at 714 (quoting Pub. Utils. Comm’n of the Dist of Columbia v. Pollak, 343 U.S. 451, 466 (1952) (Frankfurter, J., declining to participate)).

182. *Id.* at 725.

# **LITTLE TO BE GAY ABOUT: FEW PROTECTIONS IN FLORIDA AGAINST DISCRIMINATION BASED UPON SEXUAL ORIENTATION**

B. GEORGE WALKER\*

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## I. INTRODUCTION

Fred Phelps is the pastor of the Westboro Baptist Church, whose members frequently protest at events across the United States which they perceive to be sympathetic to gay and lesbian rights, because they believe that the United States has become overly supportive of such rights.<sup>1</sup> The following is a poem written by Fred Phelps, entitled “God Hates America,”<sup>2</sup> which is sung to the tune of “God Bless America.”

God hates America  
Home of the fags  
He abhors them  
Deplores them  
Day and night, all his might, all his days  
From her mountains

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1. See generally GodHatesAmerica.com, <http://www.godhatesamerica.com/index.html> (last visited Apr. 20, 2008).

2. FRED PHELPS, GOD HATES AMERICA (Westboro Baptist Church, Topeka, Kan.), available at <http://www.godhatesamerica.com/pdf/lyrics/godhatesamerica.pdf>.

To her prairies  
 To her oceans  
 White with foam  
 God hates America!  
*The perverts' home!*<sup>3</sup>

This homophobic attitude, held by individuals and segments of society that are sympathetic to Mr. Phelps' viewpoint, is one of the catalyzing forces behind the efforts of homosexual rights advocates. Sexual orientation is defined as "[a] person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality, or bisexuality."<sup>4</sup> Generally, "[t]here has been a trend in recent years to make sexual orientation a protected class."<sup>5</sup> With regard to Florida, there have been muted efforts in sporadic areas since the 1970s, which have met with little success.<sup>6</sup> Part II of this article will examine how these efforts have played out on a local scale, by reviewing the minority of municipalities in Florida which have enacted ordinances relating to sexual orientation. Part III examines the dearth of case law that exists which provides protections against discrimination based upon sexual orientation in the *Florida Constitution*; Part III also examines whether or not the *United States Constitution* may be used to strike down Florida laws, which discriminate based upon a person's sexual orientation. Part IV examines the Florida Civil Rights Act of 1992, a proposed amendment to the Florida Civil Rights Act of 1992, which would grant explicit protections to gays and lesbians currently lacking in the statute, and innovative legal theories which have unsuccessfully attempted to find protections against discrimination based upon sexual orientation in the existing Florida Civil Rights Act of 1992. Part V discusses a proposed amendment to the *Florida Constitution* which would place a significant obstacle to the right of homosexual couples to enter into a marriage, or even legal relationships resembling a marriage. Part VI is a conclusion as to what the state of the law is in Florida with regard to protections existing against discrimination based upon sexual orientation and a recommendation as to what the status of the law should be.

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3. *Id.* (emphasis added).

4. BLACK'S LAW DICTIONARY 1407 (8th ed. 2004).

5. *Id.*

6. See generally Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 NOVA L. REV. 793 (2000). Terl provides a historical perspective on the development of gay and lesbian rights in Florida, including chronological information on when a number of ordinances were enacted. *Id.*; see also William E. Adams, Jr., *A Look at Lesbian and Gay Rights in Florida Today: Confronting the Lingering Effects of Legal Animus*, 24 NOVA L. REV. 751, 756 (2000).

## II. A SURVEY OF FLORIDA MUNICIPALITIES AND THEIR LEGISLATIVE EFFORTS TO EITHER SUPPORT OR HINDER THE ENACTMENT OF ORDINANCES WHICH PREVENT DISCRIMINATION BASED ON SEXUAL ORIENTATION

There are 301 listed municipalities in Florida, including counties, cities, villages, towns, and other similar affiliations.<sup>7</sup> Beginning in the late 1970s, a small number of Florida municipalities began to enact ordinances against discrimination.<sup>8</sup> Unfortunately for the gay and lesbian community, the subsequent decades bore out sporadic efforts meeting with limited success, rather than a concerted statewide push.<sup>9</sup> During this time period, there have been occasional backlashes against gay and lesbian activists, and thus, legislative efforts with regard to sexual orientation can be divided into legislation that promotes gay and lesbian rights, or hinders gay and lesbian rights.<sup>10</sup>

### A. *Ordinances Enacted to Protect Against Discrimination in Specific Areas*

After conducting a survey of the ordinances of all 301 listed Florida municipalities, which includes counties, cities, towns, villages, and similar incorporations, it appears that only seventy-one have enacted ordinances<sup>11</sup> that are intended to prevent or discourage discrimination based upon sexual orientation in very specific areas of concern, not merely generalized policies of non-discrimination.<sup>12</sup> The distinction of being the first municipality in Florida to pass such an ordinance belongs to Miami-Dade County, which passed a protective ordinance on January 18, 1977.<sup>13</sup> The number of municipalities offering protective legislation, while amounting to a sizeable percentage of the number of municipalities, is misleading if taken out of context because among the seventy-one that have enacted protective legislation, there is a splintering of priorities in all facets of life, with some municipalities enacting protective ordinances in multiple areas, and others enacting ordinances in only one area.<sup>14</sup> Additionally, while any ordinance offering protections based upon sexual orientation benefits the gay and lesbian com-

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7. Municipal Code Corp., Online Library: Florida, [http://www.municode.com/Resources/code\\_list.asp?stateID=9](http://www.municode.com/Resources/code_list.asp?stateID=9) (last visited Apr. 20, 2008).

8. Terl, *supra* note 6, at 804.

9. Municipal Code Corp., *supra* note 7.

10. See *infra* notes 16–28, 38–39 and accompanying discussion.

11. See *infra* notes 16–28 and accompanying discussion.

12. See *infra* notes 12–28 and accompanying discussion.

13. Terl, *supra* note 6, at 804; see also Adams, *supra* note 6, at 757–58, 759 n.58. Adams lists several Florida cities which had enacted laws, and municipalities which had enacted ordinances banning discrimination by the year 2000. *Id.*

14. See generally *infra* notes 16–28 and accompanying discussion.

munity, many of the municipalities have enacted protections in relatively obscure areas which have little practical effect on the lives of gays and lesbians; while the communities which have enacted protections should be lauded for their efforts, the thin patchwork of existing Florida ordinances offers little in terms of a practical solution to discrimination against gays and lesbians.<sup>15</sup>

### 1. Employment, Housing, and Public Accommodations

Eighteen Florida municipalities have enacted policies against discrimination based upon sexual orientation with regard to employment practices.<sup>16</sup> Thirty-one Florida municipalities offer some form of protection against discrimination based upon sexual orientation in the acquisition of housing, securing of credit, or a mortgage.<sup>17</sup> Ten Florida municipalities prohibit dis-

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15. See generally *infra* notes 16–28 and accompanying discussion.

16. KEY WEST, FLA., CODE OF ORDINANCES § 38-221 (2008); BROWARD COUNTY, FLA., CODE § 16½-21(f)(1) (2007); COCONUT CREEK, FLA., CODE OF ORDINANCES § 21-5.1 (2007); GAINESVILLE, FLA., CODE OF ORDINANCES § 8-48 (2007); GULFPORT FLA., CODE OF ORDINANCES § 26-20 (2007); JUPITER, FLA., CODE § 15-21(a) (2007); LAUDERDALE LAKES, FLA., CODE OF ORDINANCES § 66-36(a) (2007); MIAMI BEACH, FLA., CODE § 62-32 (2007); MIAMI-DADE COUNTY, FLA., CODE § 11A-34(1) (2007); MIRAMAR, FLA., CODE § 16-2(2) (2007); MONROE COUNTY, FLA., CODE § 13-103(a) (2007); OAKLAND PARK, FLA., CODE OF ORDINANCES § 2-81(5) (2007); PALM BEACH COUNTY, FLA., CODE § 2-262 (2007); S. FLA. WATER MGMT. DIST., POLICIES & PROCEDURES § 220-3(c)(1) (2007); SARASOTA, FLA., CODE § 18-36(2) (2007); ST. PETERSBURG, FLA., CODE § 15-96(a)(2) (2007); TAMPA, FLA., CODE OF ORDINANCES § 26.5-176(a) (2007); W. PALM BEACH, FLA., CODE OF ORDINANCES § 42-31 (2007).

17. KEY WEST, FLA., CODE OF ORDINANCES § 38-28(1) (2008); LEVY COUNTY, FLA., CODE OF ORDINANCES § 70-36(e)(3) (2008); ORLANDO, FLA., CODE § 57.36(1)(b) (2008); WALTON COUNTY, FLA., CODE OF ORDINANCES § 12-59(e) (2008); BROWARD COUNTY, FLA., CODE § 16½-23.1(e) (2007); CHARLOTTE COUNTY, FLA., CODE OF LAWS & ORDINANCES § 1-8-63(c)(3) (2007); COCOA, FLA., CODE § 7-35(d)(3) (2007); FORT PIERCE, FLA., CODE OF ORDINANCES § 8.5-26(3) (2007); FRANKLIN COUNTY, FLA., CODE OF LAWS AND ORDINANCES § 9-47(e)(3) (2007); GAINESVILLE, FLA., CODE OF ORDINANCES § 8-86 (2007); GILCHRIST COUNTY, FLA., CODE OF ORDINANCES § 47-6(c)(2) (2007); GULFPORT, FLA., CODE OF ORDINANCES § 26-30 (2007); LEON COUNTY, FLA., CODE OF LAWS § 9-27 (2007); MANATEE COUNTY, FLA., CODE OF ORDINANCES § 2-17-76(d)(3) (2007); MIAMI BEACH, FLA., CODE § 62-32 (2007); MIAMI-DADE COUNTY, FLA., CODE § 11A-12(1) (2007); MONROE COUNTY, FLA., CODE § 13-115(1) (2007); OCALA, FLA., CODE OF ORDINANCES § 106-136(e)(3) (2007); ORANGE COUNTY, FLA., CODE OF ORDINANCES § 22-33(a)(1) (2007); PALM BEACH COUNTY, FLA., CODE § 15-36 (2007); PALM COAST, FLA., CODE OF ORDINANCES § 17-25 (2007); PANAMA CITY, FLA., MUNICIPAL CODE § 14-93(c)(3) (2007); SARASOTA, FLA., CODE § 18-41(b) (2007); ST. PETERSBURG, FLA., CODE § 15-66(a)(2) (2007); SUWANNEE COUNTY, FLA., CODE OF ORDINANCES § 42-97(3) (2007); TAMPA, FLA., CODE OF ORDINANCES § 12-71(2) (2007); WINTER HAVEN, FLA., CODE OF ORDINANCES § 7.5-30D(3) (2007); OKALOOSA COUNTY, FLA., CODE OF ORDINANCES § 11.5-59(e) (2006); SANTA ROSA, FLA., CODE OF ORDINANCES § 2-139(e) (2006); WAKULLA COUNTY,

crimination based upon sexual orientation in the realm of public accommodations.<sup>18</sup>

## 2. Telecommunications and Gas

Daytona Beach Shores has an ordinance protecting against discrimination based upon sexual orientation with regard to access to gas lines.<sup>19</sup> Twenty-one municipalities have enacted ordinances which preclude telecommunications or cable television companies from discriminating against clients based upon their sexual orientation.<sup>20</sup>

## 3. The Sale and Procurement of Goods and Services

It is illegal in Miami-Dade County to discriminate based upon sexual orientation in the sale of goods, or to condone tipping based upon sexual orientation.<sup>21</sup> Four municipalities in Florida have enacted statutes which protect against discrimination based upon sexual orientation from occurring in the procurement of goods and services by the municipality.<sup>22</sup>

FLA., CODE § 13.056(e)(3) (2006); HILLSBOROUGH COUNTY, FLA., CODE OF LAWS AND ORDINANCES § 16½-96(e)(3) (2003).

18. KEY WEST, FLA., CODE OF ORDINANCES § 38-225 (2008); ORLANDO, FLA., CODE § 57.36(1)(b) (2008); BROWARD COUNTY, FLA., CODE § 16½-22(a)(1) (2007); GAINESVILLE, FLA., CODE OF ORDINANCES § 8-67(a) (2007); GULFPORT FLA., CODE OF ORDINANCES § 26-40 (2007); MIAMI BEACH, FLA., CODE § 62-32 (2007); MIAMI-DADE COUNTY, FLA., CODE § 11A-19 (2007); SARASOTA, FLA., CODE § 18-46(2) (2007); ST. PETERSBURG, FLA., CODE § 15-81 (2007); TAMPA, FLA., CODE OF ORDINANCES § 12-61(2) (2007).

19. DAYTONA BEACH SHORES, FLA., CODE OF ORDINANCES App. D § 19 (2006).

20. BAL HARBOUR, FLA., CODE § 7-11(13)(a) (2007); BELLEAIR BEACH, FLA., CITY CODE § 39(a) (2007); BOCA RATON, FLA., CODE OF ORDINANCES § 25-471 (2007); BROWARD COUNTY, FLA., CODE § 20-465(a) (2007); CORAL SPRINGS, FLA., CODE OF ORDINANCES § 20-4(7) (2007); DANIA BEACH, FLA., CODE OF ORDINANCES § 22-156(a) (2007); GAINESVILLE, FLA., CODE OF ORDINANCES § 14.5-157(b) (2007); HOMESTEAD, FLA., CODE § 8-39(a) (2007); LAUDERDALE-BY-THE-SEA, FLA., CODE OF ORDINANCES § 26-24(g)(1) (2007); NEW PORT RICHEY, FLA., CODE § 13-539(a) (2007); ORANGE PARK, FLA., CODE § 27-33(a) (2007); PALM BEACH, FLA., CODE OF ORDINANCES § 116-11 (2007); PALM BEACH COUNTY, FLA., CODE § 8-15(e)(3) (2007); PASCO COUNTY, FLA., CODE OF ORDINANCES § 26-39(a) (2007); RIVIERA BEACH, FLA., CODE OF ORDINANCES § 10-51(c) (2007); SURFSIDE, FLA., CODE § 22-17(b) (2007); WILTON MANORS, FLA., CODE OF ORDINANCES § 5.5-104(g)(1) (2007); MARCO ISLAND, FLA., CODE OF ORDINANCES § 46-50(a) (2006); N. LAUDERDALE, FLA., CODE OF ORDINANCES § 20-4(g)(1) (2006); BAY HARBOR ISLANDS, FLA., CODE OF ORDINANCES § 5½-11(13)(a) (2006); PORT RICHEY, FLA., CODE OF ORDINANCES § 22-39(a) (2005).

21. MIAMI-DADE COUNTY, FLA., CODE § 8A-110.1(3) (2007).

22. LAKE PARK, FLA., CODE OF ORDINANCES § 2-255(a) (2007); MIRAMAR, FLA., CODE § 2-260.1 (2007); W. PALM BEACH, FLA., CODE OF ORDINANCES § 66-8 (2007); WILTON MANORS, FLA., CODE OF ORDINANCES § 2-268(q) (2007).

#### 4. Ordinances Relating to Forms of Speech

There are two municipalities within the state of Florida that have enacted ordinances precluding discrimination based upon sexual orientation in the disbursement of parade permits.<sup>23</sup>

Three municipalities have enacted ordinances which specifically declare that graffiti with messages that display prejudices based upon sexual orientation are unlawful.<sup>24</sup> Three Florida municipalities have codified nonbinding campaign pledges to refrain from making sexual orientation an issue in political campaigns.<sup>25</sup>

#### 5. Ordinances Relating to Vehicular Services

Broward County has enacted barriers against discrimination based upon sexual orientation by taxi companies.<sup>26</sup> North Miami prohibits towing companies from discriminating based upon sexual orientation.<sup>27</sup>

#### 6. Miscellaneous

Lake Worth, Florida has taken the unique approach of incorporating Florida's state civil rights protections into a civil rights ordinance covering only the city of Lake Worth, but has explicitly included sexual orientation as a protected status.<sup>28</sup>

#### B. *Ordinances Enacted Which Negatively Impact Efforts Against Discrimination*

Occasionally, attitudes unsupportive of homosexual rights that are held by lawmakers and their constituents are expressed through legislation.<sup>29</sup> Two methods through which this can be accomplished are by enacting definitions

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23. CORAL GABLES, FLA., CODE § 62-192 (2008); BELLE GLADE, FLA., CODE OF ORDINANCES § 17.5-4 (2007).

24. S. MIAMI, FLA., CODE OF ORDINANCES § 15-100 (2007); PEMBROKE PARK, FLA., CODE OF ORDINANCES § 5-206 (2004); PARKER, FLA., CODE OF ORDINANCES § 26-101 (2000).

25. BROWARD COUNTY, FLA., CODE § 11-4(e)(1) (2007); FORT MYERS, FLA., CODE OF ORDINANCES § 18-536 (2007); N. MIAMI, FLA., CODE OF ORDINANCES § 6-111(d)(1) (2007); PASCO COUNTY, FLA., CODE OF ORDINANCES § 115-6 (2007).

26. BROWARD COUNTY, FLA., CODE § 22½-7(g) (2007).

27. N. MIAMI, FLA., CODE OF ORDINANCES § 11-220 (2007).

28. LAKE WORTH, FLA., CODE OF ORDINANCES § 20-2 (2007).

29. AMY D. RONNER, *HOMOPHOBIA AND THE LAW* 3 (2005).



which explicitly exclude homosexual persons from protection,<sup>30</sup> or through legislation actually attacking the rights of gays and lesbians.<sup>31</sup> Perhaps the most famous example of the latter is the amendment to the *Colorado Constitution* which was passed in order to ban “all legislative, executive, or judicial action at any level of state or local government designed to protect gay men and lesbians.”<sup>32</sup>

The amendment was subsequently struck down by the United States Supreme Court in *Romer v. Evans*,<sup>33</sup> because the Court found it unconstitutional that:

[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres, [and t]he amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.<sup>34</sup>

The Court concluded that the amendment “classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A [s]tate cannot so deem a class of persons a stranger to its laws. [The amendment] violates the Equal Protection Clause.”<sup>35</sup>

Two Florida municipalities have included definitional clarifications which are intended to prevent ordinances from being construed to offer protections based upon sexual orientation,<sup>36</sup> and one municipality, in what could be considered Florida’s mini-replay of *Romer*, enacted legislation hostile to the enactment of ordinances that would offer greater protections based upon a person’s sexual orientation.<sup>37</sup>

### 1. The Definitional Clarifications of Pinellas County and Bradenton

Two municipalities in Florida, seemingly in order to avoid any possible misconstruing of their ordinances, have provided to the reader that the term “handicap” does not apply to a person because of their sexual orientation;

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30. See *infra* note 38 and accompanying discussion.

31. See *infra* notes 32–35, 39–46 and accompanying discussion.

32. RONNER, *supra* note 29, at 10.

33. 517 U.S. 620 (1996).

34. *Id.* at 627.

35. *Id.* at 635.

36. See *infra* note 38 and accompanying discussion.

37. See *infra* notes 32–35, 39–46 and accompanying discussion.

this effectively prevents courts from interpreting imprecise ordinances as granting such protections.<sup>38</sup>

## 2. The Tumultuous Case of Alachua County

Alachua County is unique among Florida municipalities in that it attempted to create a barrier to the enactment of protective ordinances by enacting an amendment to its county charter stating, "the board of county commissioners shall not adopt any ordinance creating classifications based upon sexual orientation, sexual preference, or similar characteristics, except as necessary to conform county ordinances to federal or state law."<sup>39</sup> The impetus for passing the amendment began, ironically, with the attempt to pass a nondiscrimination ordinance which included protections against sexual orientation discrimination, which succeeded in March of 1993.<sup>40</sup> After this occurred, there was a backlash among Alachua County residents, and "[t]he Alachua County ordinance was repealed by the voters . . . in the Republican landslide general election of November 8, 1994."<sup>41</sup> The amendment prohibiting the enactment of protective ordinances was also enacted in 1994 after a county referendum on the issue passed with fifty-seven percent of the vote.<sup>42</sup>

The amendment prohibiting the enactment of protections based upon sexual orientation was challenged in a case filed in the Eighth Circuit Court of Florida, *Morris v. Hill*.<sup>43</sup> A final disposition was entered on the case in a summary judgment proceeding on November 22, 1996.<sup>44</sup> In *Morris*, the court considered the then recently decided *Romer* to be the controlling case law, stating that "[t]he issue presented to this court is whether Amendment 1, the 1994 amendment to . . . the Alachua County Home Rule Charter, violates the Equal Protection [C]lause of the Constitution of the United States as interpreted by the United States Supreme Court in *Romer v. Evans*."<sup>45</sup> The court found that it was, explaining that:

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38. PINELLAS COUNTY, FLA., CODE § 70-101 (2007); BRADENTON, FLA., CODE OF ORDINANCES § 46-2 (2006).

39. ALACHUA COUNTY, FLA., CODE OF ORDINANCES § 2.2(D) (2007).

40. Terl, *supra* note 6, at 839.

41. *Id.* at 840; *see also* Adams, *supra* note 6, at 757-58.

42. ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS 145 (2005).

43. Final Judgment at 1, *Morris v. Hill*, No. 94-2084-CA (Fla. 8th Cir. Ct. Nov. 22, 1996).

44. *Id.* at 3.

45. *Id.* at 1.

Amendment 1 to the Alachua County Home Rule Charter, though narrower in many respects, suffers from the same constitutional infirmities as the Colorado amendment struck down in *Romer*. Amendment 1 singles out one characteristic, sexual orientation, [as] the basis for discrimination against homosexuals and bisexuals, and prevents the Alachua County Commission from passing any laws without a referendum, to provide protection against discrimination. It effectively restructures the local government so that those of homosexual and bi-sexual orientation are disabled from seeking safeguards that others may seek without constraint, placing homosexuals and bi-sexuals on an unequal footing from anyone else when it comes to seeking protection. . . . Under the analysis employed by the United States Supreme Court in *Romer*, there is no legitimate governmental interest that can support Amendment 1. Amendment 1's focus on sexual orientation cannot be explained on any rational basis other than . . . a manifestation of the majority's condemnation of homosexuality . . . and the desire to disable homosexuals and bi-sexuals from seeking protective legislation from the county commission.<sup>46</sup>

C. *A Possible Explanation for the Disinclination of Municipalities to Enact Protective Ordinances*

Beyond the outright hostility displayed in some legislative enactments against gays and lesbians, there is a potentially more damaging attitude towards homosexual rights that a legislature can adopt; this attitude is that their enactment will have no beneficial effects upon the rights of gays and lesbians, and therefore, there is no purpose in making such an enactment. The City of Hallandale Beach, Florida has displayed such an attitude with regard to discrimination ordinances in general, which may be one of the reasons it has not enacted an ordinance which grants protections based upon sexual orientation.<sup>47</sup> In a meeting of the City Commission on April 2, 2002, there was a discussion relating to the creation of a Community Relations Board which would "foster harmony, work to improve communication, and address discrimination based [upon] race, religion, economic status, and other factors."<sup>48</sup> The proposed Community Relations Board was struck down because members of the City Commission felt that Hallandale Beach was too small, it

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46. *Id.* at 2-3.

47. See Hallandale Beach, Fla. City Comm'n, Minutes of Regular Meeting (April 2, 2002) (on file with City Comm'n).

48. *Id.*

would impede the work of the police, and it was believed that citizens would be uninterested in such an effort.<sup>49</sup>

### III. FLORIDA CASE LAW AND FEDERAL CASE LAW RELATING TO FLORIDA: A DISCUSSION OF CONSTITUTIONAL PROTECTIONS AGAINST DISCRIMINATION BASED UPON SEXUAL ORIENTATION

The *Florida Constitution* offers protections to citizens of Florida in areas of privacy, as well as in equal protection areas.<sup>50</sup> Furthermore, advocates of homosexual rights have argued in court proceedings that the *United States Constitution* precludes Florida from taking certain actions.<sup>51</sup> One example of this is the attack on Florida statutory enactments using the *United States Constitution*.<sup>52</sup> Generally, however, advocates of homosexual rights have met with extremely limited success in advancing protections based upon sexual orientation through cases advocating protections under the *Florida Constitution*, or attacking actions taken by Florida with the *United States Constitution*.<sup>53</sup>

#### A. *Privacy Rights and Protection from Discrimination Based upon Sexual Orientation*

The *Florida Constitution* states in Article I, section 23 that “[e]very natural person has a right to be let alone and free from governmental intrusion into [his] private life.”<sup>54</sup> When adopted in 1980, it was thought that privacy protections would be substantially bolstered.<sup>55</sup> For those advocating extending privacy protections to protect gays and lesbians from discrimination, it has been disappointing that Florida courts have shown an “overabundance of caution . . . [and] seem reluctant to take section 23's straightforward command at face value.”<sup>56</sup>

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49. *Id.*

50. See discussion *infra* Part III.

51. See discussion *infra* Part III.A1, B.

52. See discussion *infra* Part III.A2, B2.

53. See discussion *infra* Part III.

54. FLA. CONST. art. I, § 23.

55. John Sanchez, *Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow*, 18 NOVA L. REV. 775, 776 (1994).

56. *Id.*

## 1. Florida Cases Exploring Florida Constitutional Protections

One of the few Florida cases which discuss constitutional protections against discrimination based upon sexual orientation is a trial court case which extends limited protection from workplace discrimination based upon sexual orientation, *Woodard v. Gallagher*.<sup>57</sup> In *Woodard*, a deputy sheriff was fired by the Sheriff of Orange County for homosexual conduct undertaken before the deputy sheriff began employment with the Sheriff's office.<sup>58</sup> The Sheriff became aware of the conduct only through an "accidental discovery of [the plaintiff's] homosexual conduct prior to [the plaintiff] becoming a deputy sheriff and [the plaintiff's] honest answers . . . posed to him by agents of the Sheriff about his sexual conduct and preference."<sup>59</sup> The court considered several constitutional arguments and determined that the Sheriff had violated the deputy sheriff's right to privacy granted by the *Florida Constitution*.<sup>60</sup>

In finding that the actions of the Sheriff violated the privacy rights of the plaintiff, the court in *Woodard* explained:

[t]here was no evidence that his job or public life was affected in any respect by [the plaintiff's homosexual] conduct. Such conduct was not unlawful and there was no public rumor as to his involvement in any sexual conduct. Also, he stated that he . . . would even abstain from any personal homosexual relationships if that was required to keep his job.<sup>61</sup>

The appropriate standard of review for analyzing Article I, section 23 claims is articulated in *Winfield v. Division of Pari-Mutuel Wagering*.<sup>62</sup> In *Winfield*, the court stated that:

[s]ince the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged

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57. 59 Empl. Prac. Dec. (CCH) ¶ 41,652, at 71,730-32 (Fla. 9th Cir. Ct. 1992).

58. *Id.* at 71,731.

59. *Id.*

60. *Id.*

61. *Id.*

62. 477 So. 2d 544, 547 (Fla. 1985).

regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.<sup>63</sup>

In *Woodard*, while finding that the Sheriff had a legitimate, but not compelling interest in gaining knowledge about the sexual orientation of deputies so that he could “make use of the deputies’ aptitudes,” he could not use this knowledge to punish the deputies.<sup>64</sup>

In *Florida Department of Health and Rehabilitative Services v. Cox*<sup>65</sup> (*Cox I*), a case involving Florida’s refusal to allow the adoption of a child by two homosexual men, a Florida appellate court had the opportunity to address the issue of sexual orientation and privacy rights,<sup>66</sup> but chose not to decide directly as to whether or not sexual orientation is protected by the *Florida Constitution*.<sup>67</sup> Instead, when the court examined the facts of the case and noted that the plaintiffs had voluntarily given the information that they were homosexual,<sup>68</sup> the court stated that “[the plaintiffs] voluntarily admitted that they are homosexual. They cannot claim an expectation of privacy concerning a fact that they have willingly disclosed.”<sup>69</sup> The problem with this logic is that:

[b]y putting the question on the form, the state demanded private information about the applicants’ background. Further, if Cox and Jackman had not answered the question, one of two things would have happened—they would have been presumed to be homosexual, or HRS would have specifically inquired as to their sexual orientation.<sup>70</sup>

On appeal, in *Cox v. Florida Department of Health & Rehabilitative Services*<sup>71</sup> (*Cox II*), the Supreme Court of Florida affirmed the lower court’s ruling with respect to the decision on whether the *Florida Constitution* grants privacy protections to persons based upon their sexual orientation.<sup>72</sup>

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63. *Id.*

64. *Woodard*, 59 Empl. Prac. Dec. (CCH) ¶ 41,652, at 71,731.

65. 627 So. 2d 1210 (Fla. 2d Dist. Ct. App. 1993) (en banc).

66. *See id.* at 1215–17.

67. *Id.* at 1217–18.

68. *Id.* at 1212.

69. *Id.* at 1215.

70. Tiffani G. Lee, Case Note, *Cox v. Department of Health and Rehabilitative Services: A Challenge to Florida’s Homosexual Adoption Ban*, 51 U. MIAMI L. REV. 151, 161 (1996).

71. 656 So. 2d 902 (Fla. 1995).

72. *Id.* at 903.

## 2. The Federal Refusal to Strike down a Florida Law Under United States Constitutional Privacy Rights

In 2004, the Eleventh Circuit Court of Appeals heard *Lofton v. Secretary of the Department of Children and Family Services*,<sup>73</sup> in which a challenge to Florida's refusal to allow homosexual persons to adopt children was again asserted.<sup>74</sup> The plaintiffs, in challenging a Florida statute prohibiting adoption by homosexual persons,<sup>75</sup> relied on *Lawrence v. Texas*,<sup>76</sup> a case in which the United States Supreme Court wrote an opinion reflecting the proposition that "the state cannot criminalize private, consensual, homosexual behavior."<sup>77</sup> The statute which the plaintiffs challenged in *Lofton* reads "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."<sup>78</sup> In *Lofton*, the plaintiffs argued that *Lawrence* "identified a hitherto unarticulated fundamental right to private sexual intimacy."<sup>79</sup> The Eleventh Circuit did not address whether the *Florida Constitution* grants privacy protections based upon sexual orientation; instead, it distinguished *Lawrence*, and rejected the plaintiffs' argument, stating:

[w]e conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right. Accordingly, we need not resolve the second prong of appellants' fundamental-rights argument: whether exclusion from the statutory privilege of adoption because of appellants' sexual conduct creates an impermissible burden on the exercise of their asserted right to private sexual intimacy.<sup>80</sup>

While ultimately deciding that the plaintiffs' interpretation of *Lawrence* was incorrect, the court did not definitively state that sexual orientation was not protected by constitutional privacy rights.<sup>81</sup> Instead, the court stated that "the holding of *Lawrence* does not control the present case . . . [and] cannot be extrapolated to create a right to adopt for homosexual persons."<sup>82</sup> This

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73. 358 F.3d 804 (11th Cir. 2004).

74. *Id.* at 808.

75. FLA. STAT. § 63.042(3) (2007).

76. 539 U.S. 558 (2003).

77. Kerry Abrams, *Immigration Law and the Regulation of Marriage* 17 (Univ. of Va. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper 56, 2007), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1096&context=uvalwps>.

78. FLA. STAT. § 63.042(3).

79. *Lofton*, 358 F.3d at 815.

80. *Id.* at 817.

81. *Id.*

82. *Id.*

should be interpreted not as a definitively negative outcome for homosexual persons, but rather as a decision which reflects cautious judicial restraint, a sentiment expressed earlier in the opinion.<sup>83</sup>

B. *The Florida Equal Protection Clause: A Dead End for Those Advocating the Extension of Heightened Protections Based upon Sexual Orientation*

The *Florida Constitution* states: “[a]ll natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, [and] to pursue happiness.”<sup>84</sup> Florida courts have not designated sexual orientation as a suspect class; if they did so, it would offer a heightened level of protection.<sup>85</sup> Florida courts interpret Article I, section 2 of the *Florida Constitution* as being equivalent to the Equal Protection Clause of the *United States Constitution*.<sup>86</sup> Federal courts have declined to raise sexual orientation to the level of a suspect class.<sup>87</sup> Florida courts have followed this example, and discrimination based upon sexual orientation receives rational basis review.<sup>88</sup>

1. *Woodard* and *Cox*: Indications of Judicial Reluctance

The court in *Woodard*, while extending privacy protections against discrimination based upon sexual orientation, balked at extending suspect class status based upon sexual orientation, stating that:

because of the turmoil in this area, I . . . shift the equal protection issue in this case and [do] not reach the decision of finding that homosexually oriented persons are entitled to heightened scrutiny as a class and that the Sheriff's actions are unconstitutional under equal protection standards. In light of [the extension of privacy protections to the plaintiff], the issue of heightened [equal] protec-

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83. *Id.* at 815.

84. FLA. CONST. art. I, § 2.

85. Fla. High Sch. Activities Ass'n, Inc. v. Thomas, 434 So. 2d 306, 308 (Fla. 1983).

86. Sasso v. Ram Prop. Mgmt., 431 So. 2d 204, 211 (Fla. 1st Dist. Ct. App. 1983) (citing Schreiner v. McKenzie Tank Lines & Risk Mgmt. Servs., Inc., 408 So. 2d 711, 714 (Fla. 1st Dist. Ct. App. 1982)).

87. *E.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990).

88. Woodard v. Gallagher, 59 Empl. Prac. Dec. (CCH) ¶ 41,652, at 71,732 (Fla. 9th Cir. Ct. 1992).



tion [rights] to homosexually oriented persons as a class need not be reached.<sup>89</sup>

Despite this outcome, the court engaged in a lengthy discussion in dicta regarding discrimination based upon sexual orientation, in what reads as an indictment of higher courts and society:

[t]his case brings into focus the fact that persons, both individually and as a class, can presently be . . . discriminated against by our government because of their homosexual orientation unless those persons can show [under the rational basis test] that such discrimination is completely arbitrary or irrational . . . [despite it being shown that] a rational basis test can be easily abused and used to hide prejudice behind constructed or pretextual reasons . . . [i]t appears that the only reason [homosexual persons] have not been granted heightened equal protection rights is because the difference in them touches most peoples' deeply ingrained heterosexual orientation both personally and culturally.<sup>90</sup>

The court in *Cox I* also addressed the issue of equal protection rights and sexual orientation, but in contrast to the hesitant language in *Woodard*, its decision squarely opposed granting equal protection rights based upon sexual orientation.<sup>91</sup> The court explained that "neither the statutory privilege to adopt nor the choice to engage in homosexual activity involves a fundamental right. Thus, strict scrutiny can apply in this case only if homosexual activity creates a suspect classification."<sup>92</sup> The court then concluded that there was no basis to create a new suspect class based upon sexual orientation, and declined to apply strict scrutiny to the case, applying instead rational basis review.<sup>93</sup> Interestingly, the decision seems to suggest that the court may have been receptive to an argument for granting intermediate level review based upon sexual orientation, but "[t]he trial court did not rely upon an intermediate review [and] [t]he parties have neither argued for such a review nor provided case law from other courts adopting such an approach to homosexual activity."<sup>94</sup>

While *Cox I* provides insight into how one Florida appellate court approaches questions of sexual orientation from an equal protection standpoint,

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89. *Id.* (dictum).

90. *Id.* at 71,731–32 (dictum).

91. *Cox I*, 627 So. 2d at 1218–19.

92. *Id.* at 1218.

93. *Id.* at 1219.

94. *Id.* at 1218.

unfortunately for those seeking authoritative law on the subject, it is no longer binding authority on this point of law because it was reversed on appeal in *Cox II*.<sup>95</sup> In *Cox II*, the Supreme Court of Florida did not attack the legal reasoning of the court in *Cox I*, but instead found that the factual record was insufficient to come to a decision on the issue, stating that “[t]he record is insufficient to determine that this statute can be sustained against an attack as to its constitutional validity on the rational basis standard for equal protection under article I, section 2 of the *Florida Constitution*. A more complete record is necessary in order to determine this issue.”<sup>96</sup> The “case was voluntarily dismissed before the” case could be heard again to more thoroughly address the equal protection claims under the *Florida Constitution*.<sup>97</sup> Because of this outcome, the question of whether or not sexual orientation demands a higher level of review than rational basis remains undetermined.<sup>98</sup>

## 2. The Role of Judicial Deference

Because decisions extending constitutional protections based upon sexual orientation are embroiled in cultural controversy,<sup>99</sup> it is unsurprising that decisions are often reached which avoid discussions of extending such protections. This reluctance is displayed when courts fall back on the philosophy of judicial restraint to avoid deciding cases on particular grounds, such as in *Woodard*, where the court stated that the decision to grant heightened levels of protection based upon sexual orientation “is best left to a higher court or our legislature.”<sup>100</sup> The Second District Court of Appeal expressed similar reservations in *Cox I*, stating that:

[t]he debate over the nature of homosexuality and the wisdom of the strictures that our society has historically placed upon homosexual activity cannot and should not be resolved today in this court. For purposes of governance, the legislature is the proper forum in which to conduct this debate so long as its decisions are permitted by the state and federal constitutions.<sup>101</sup>

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95. See *Cox II*, 656 So. 2d at 903.

96. *Id.*

97. Terl, *supra* note 6, at 824; see also, Adams, *supra* note 6, at 766.

98. See Lee, *supra* note 70, at 167.

99. See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 95–96 (2003).

100. *Woodard v. Gallagher*, 59 Emp. Prac. Dec. (CCH) ¶ 41,652, at 71,732 (Fla. 9th Cir. Ct. 1992).

101. *Cox I*, 627 So. 2d at 1212.

The court also pointed out that rational basis review is the test which is the most deferential to the legislature, stating that “[t]his test is intended to permit the legislature to make most public policy decisions without interference from the courts.”<sup>102</sup> In concluding, the court again made reference to the legislature by stating that “[i]t may be that the legislature should revisit this issue . . . but we cannot say that the limited research reflected in this record compels the judiciary to override the legislature’s reasoning.”<sup>103</sup>

*Lofton*, decided by a federal circuit court, also demonstrates an unwillingness to stray away from a position of judicial deference with regard to sexual orientation and constitutional protections.<sup>104</sup> In *Lofton*, the court states that “[t]here is no precedent for appellants’ novel proposition . . . we decline appellants’ invitation to recognize a new fundamental right . . . [s]uch an expansion . . . would well exceed our judicial mandate as a lower federal court.”<sup>105</sup> Thus, because the Eleventh Circuit Court of Appeals has taken the position that they are too low of a court to recognize a new fundamental right, they have also taken the position that the United States Supreme Court is the only Court which may properly recognize new fundamental rights.<sup>106</sup>

#### IV. THE FLORIDA CIVIL RIGHTS ACT OF 1992: A PROPOSED AMENDMENT AND ATTEMPTS BY ADVOCATES OF HOMOSEXUAL RIGHTS TO GAIN PROTECTIONS UNDER THE FLORIDA CIVIL RIGHTS ACT OF 1992 THROUGH THE COURT SYSTEM

Florida has codified a number of protections against discrimination based upon a person’s characteristics or status in what is known as the “Florida Civil Rights Act of 1992.”<sup>107</sup> The Florida Civil Rights Act of 1992 was “patterned after Title VII of the Civil Rights Act of 1964.”<sup>108</sup>

The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in

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102. *Id.* at 1219.

103. *Id.* at 1220.

104. *See Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 815 (11th Cir. 2004).

105. *Id.*

106. *See id.*

107. FLA. STAT. § 760.01(1) (2007).

108. *Fla. Dep’t of Cmty. Aff. v. Bryant*, 586 So. 2d 1205, 1209 (Fla. 1st Dist. Ct. App. 1991).

personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.<sup>109</sup>

Recently, an amendment was proposed which would enlarge the scope of statuses protected by the Florida Civil Rights Act of 1992.<sup>110</sup> On March 20, 2007, Florida State Senator Ted Deutch proposed an amendment which would add “sexual orientation” and “familial status” to the list of protected statuses, and replace the term “handicap” with the term “disability” throughout the Florida Civil Rights Act of 1992,<sup>111</sup> and other sections relating to civil rights. The amendment would offer protections against discrimination based upon sexual orientation “in the areas of education,<sup>112</sup> employment,<sup>113</sup> housing,”<sup>114</sup> public accommodations,<sup>115</sup> the affording of public lodging,<sup>116</sup> rental housing,<sup>117</sup> access to loans,<sup>118</sup> and development decisions.<sup>119</sup>

#### A. *Innovative Efforts to Protect Against Discrimination Based upon Sexual Orientation*

Because the Florida Civil Rights Act of 1992 does not currently contain explicit protections against discrimination based upon sexual orientation, homosexual persons have attempted to find protections using innovative legal theories.<sup>120</sup> These legal theories have met with mixed success, and have forced homosexual persons to take positions that are often unpalatable.<sup>121</sup> Two legal theories which proponents of homosexual rights have attempted to use to extend protections, or could be argued to extend protections to homosexual persons, is arguing that homosexuality is a legal handicap, and argu-

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109. FLA. STAT. § 760.01(2).

110. Fla. SB 2628 (2007); *see also* Fla. HB 639 (2007). HB 639 is the identical version of SB 2628 in the Florida House of Representatives.

111. Fla. SB 2628, § 1.

112. *Id.* § 4.

113. *Id.* § 6.

114. *Id.* § 9.

115. *Id.* § 5.

116. Fla. SB 2628, § 7.

117. *Id.* § 9.

118. *Id.* § 11.

119. *Id.* § 12.

120. *See infra* discussion Part IV A.

121. *See infra* notes 129–32 and accompanying discussion.

ing that social stereotypes of HIV/AIDS afflictions among the homosexual community causes discrimination against homosexual persons.<sup>122</sup>

### 1. The Perception of Homosexuality as a Handicap or Disability

The proposed amendment strikes the definition of “handicap” and replaces it with the word “disability,” and defines disability similarly to handicap.<sup>123</sup> The definition of “disability” in the amendment is “[a] physical or mental impairment that a person has, has a record of having, or is regarded as having, that substantially limits one or more major life activities; or . . . [a] developmental disability.”<sup>124</sup> The definition of “handicap” being stricken is “a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment.”<sup>125</sup> These are somewhat expansive definitions, and it is foreseeable that some people may consider homosexuality to fall within them.<sup>126</sup> Indeed, “[a]lthough most homosexuals likely would resist being considered disabled, some segments of society continue to view homosexuality as a handicap.”<sup>127</sup> It is not outside the realm of possibilities that a clever attorney could argue that homosexuality is a legally protectable handicap; perhaps this is why Pinellas County and Bradenton, Florida, have enacted ordinances explicitly excluding homosexuality from the definition of “handicap.”<sup>128</sup> The definition of “handicap” in Pinellas County, as an illustrative example, provides that “reference to ‘an individual with a handicap’ or to ‘handicap’ does not apply to an individual because of that individual’s sexual orientation or because that individual is a transvestite.”<sup>129</sup>

Case law exists which demonstrates attempts to make a link between homosexuality and suffering from a handicap.<sup>130</sup> In *Blackwell v. United*

122. See *infra* discussion Part IV A1–A2.

123. Fla. SB 2628, § 8.

124. *Id.*

125. FLA. STAT. § 760.22(7)(a) (2007).

126. See Louis P. Nappen, *Why Segregated Schools for Gay Students May Pass a ‘Separate but Equal’ Analysis but Fail Other Issues and Concerns*, 12 WM. & MARY J. WOMEN & L. 101, 111 (2005).

127. *Id.*; see also Alan Medinger, *Narrowing the Homosexual Problem*, REGENERATION NEWS (Regeneration Ministries, Baltimore, Md.) March–April 2005, at 2, <http://www.regenerationministries.org/newsletters/200503.pdf> (stating that “[u]nresolved homosexuality is a handicap, but others with far worse handicaps get on with productive lives,” and making further claims that homosexual persons have feelings of inadequacy).

128. PINELLAS COUNTY, FLA., CODE § 70-101 (2007); BRADENTON, FLA., CODE OF ORDINANCES § 46-2 (2006).

129. PINELLAS COUNTY, FLA., CODE § 70-101.

130. See, e.g., *Blackwell v. U.S. Dep’t of Treasury*, 830 F.2d 1183, 1184 (D.C. Cir. 1987).

*States Department of Treasury*,<sup>131</sup> a transvestite sued for unlawful discrimination based upon his perceived sexual orientation when an interviewer perceived him to be homosexual based upon his status as a transvestite.<sup>132</sup> Judge Ruth Bader Ginsburg, a judge for the United States District Court for the District of Columbia at the time, authored the court's opinion and stated that:

plaintiff-appellant . . . suffered discriminatory denial of a government employment opportunity because the supervisory officer who served as second interviewer, Mr. Strange, perceived Blackwell to be a homosexual. . . . [T]here is no precedent for holding that one's sexual orientation or preference [is protected as a handicapped status, and furthermore] . . . the liability of a government department . . . should not turn on the level of sophistication or ability to classify of the particular interviewing officer—in this case, on whether that officer knows that homosexuality and transvestism are not one and the same.<sup>133</sup>

If Florida legislators do not pass an amendment to the Florida Civil Rights Act of 1992 in order to include sexual orientation as a protected category, it is possible that a homosexual person may attempt to argue that homosexuality is a “a physical or mental impairment [that] substantially limits one or more major life activities,”<sup>134</sup> in an argument similar to the one made in *Blackwell*.<sup>135</sup> While the Florida Civil Rights Act of 1992 is generally interpreted similarly to Title VII claims,<sup>136</sup> it is possible that Florida could diverge from federal courts that do not classify homosexuality as a handicap and allow protections to be extended based upon sexual orientation.<sup>137</sup> According to the Fourth District Court of Appeal, which was interpreting the Florida Human Rights Act—the previous name of the Florida Civil Rights Act of 1992<sup>138</sup>—

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131. *Id.* at 1183.

132. *Id.* at 1183–84.

133. *Id.*

134. FLA. STAT. § 760.22(7)(a) (2007).

135. *Blackwell*, 830 F.2d at 1183–84.

136. *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 2d 1005, 1009 (Fla. 1989) (stating that “Florida’s Human Rights Act appears to be patterned after Title VII of the federal Civil Rights Act of 1964”).

137. *See Andujar v. Nat’l Prop. & Cas. Underwriters*, 659 So. 2d 1214, 1216 (Fla. 4th Dist. Ct. App. 1995).

138. *Speedway SuperAmerica, LLC v. Dupont*, 933 So. 2d 75, 100 n.35 (Fla. 5th Dist. Ct. App. 2006) (Thompson, J., dissenting).

[t]he United States is a land of dual sovereigns. Citizens are subject to the sovereign power of the United States, but they are also subject to the sovereign power of the state in which they reside. Although designed to play different roles in our governmental scheme, the two sovereigns sometimes legislate on the same subject. If Congress does not intend for its legislation to displace state laws on the same subject, a citizen of a state may have rights under the federal law, and at the same time she may have rights under the state law.<sup>139</sup>

The court concluded by stating, "it is clear that a claim made under the one statute is not the same cause of action as a claim made under the other."<sup>140</sup>

Further support for the possibility of homosexuality being interpreted as falling under the definition of "handicap" can be found in *Smith v. City of Jacksonville Correctional Institution*<sup>141</sup> where the Florida Division of Administrative Hearings found that transsexualism was a handicap.<sup>142</sup> Homosexual persons are considered to have a handicap by some portions of society.<sup>143</sup> "Homosexuality and transsexuality [both] subvert norms and expectations about how women and men should live their lives as sexual beings, [and] [t]raditional notions of sex and gender are transgressed by both homosexuals and transsexuals."<sup>144</sup> Additionally, some Florida judicial bodies have extended protections against discrimination to transsexuals,<sup>145</sup> and therefore it should not seem outside the realm of possibility that judicial bodies in Florida may extend protections from discrimination based upon sexual orientation to homosexuals.

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139. *Andujar*, 659 So. 2d at 1216.

140. *Id.* at 1217.

141. No. 88-5451, 1991 WL 833882 (Fla. Div. Admin. Hr'gs Oct. 2, 1991); *but see* Order Dismissing Petition for Relief at 2, *Fishbaugh v. Brevard County Sheriff's Dep't*, No. 22-02697 (Fla. Comm'n on Hum. Rel. Aug. 23, 2004), *available at* <http://www.doah.state.fl.us/ros/2003/03-1139%20Agency%20Final%20Order.pdf>.

142. *Smith*, 1991 WL 833882, at \*14.

143. Nappen, *supra* note 126, at 111.

144. Melinda Chow, Note, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination under Title VII*, 28 HARV. J.L. & GENDER 207, 215 (2005).

145. *Smith*, 1991 WL 833882, at \*14.

## 2. Social Stereotypes of HIV/AIDS, the Homosexual Community, and Efforts to Use Such Stereotypes to Advance Protections for Homosexual Persons Under Florida Law

*Florida Statutes* section 760.50 offers protections against discrimination based upon a person's HIV/AIDS status.<sup>146</sup> It states in part that "[a]ny person with or perceived as having acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human immunodeficiency virus shall have every protection made available to handicapped persons."<sup>147</sup> The Florida legislature found that such protections were necessary because:

persons infected or believed to be infected with human immunodeficiency virus have suffered and will continue to suffer irrational and scientifically unfounded discrimination. The [l]egislature further finds and declares that society itself is harmed by this discrimination, as otherwise able-bodied persons are deprived of the means of supporting themselves, providing for their own health care, housing themselves, and participating in the opportunities otherwise available to them in society.<sup>148</sup>

Unfortunately, negative stereotypes about homosexual persons pervade society, including the "stereotype that links homosexual orientation with AIDS."<sup>149</sup> Because negative stereotypes linking HIV/AIDS to homosexual persons exist,<sup>150</sup> and because discrimination against HIV/AIDS exists in society,<sup>151</sup> homosexual persons have been discriminated against because of the belief that they have HIV/AIDS and have challenged this discrimination based upon this perceived status.<sup>152</sup> In *Cordero v. AMR Services Corp.*,<sup>153</sup> the

146. FLA. STAT. § 760.50(2) (2007).

147. *Id.*

148. FLA. STAT. § 760.50(1).

149. Lawrence Kent Mendenhall, Note, *Misters Korematsu and Steffan: The Japanese Internment and the Military's Ban on Gays in the Armed Forces*, 70 N.Y.U. L. REV. 196, 225 (1995). The dissent in *Steffan v. Perry* rejects this stereotype. 41 F.3d 677, 720 (D.C. Cir. 1994) (en banc) (Wald, J. dissenting) (noting that "[h]omosexual orientation cannot spread the AIDS virus. Homosexual, or heterosexual, *conduct* can—if one participant carries the virus."); see also Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 157 (1992). "The word 'homosexual' itself raises the negative imagery and characteristic stereotyping that society has imputed to the term. Common negative images and stereotypes include: homosexuals are loathsome sex addicts who spread AIDS and other venereal diseases." Mison, *supra*, at 157.

150. *Id.*

151. FLA. STAT. § 760.50(1).

152. See, e.g., *Cordero v. AMR Servs. Corp.*, 7 A.D. Cases 98, 98 (S.D. Fla. 1995).



[homosexual] [p]laintiff allege[d] that Defendant's stated reason for his discharge was pretextual. Plaintiff claims that Defendant terminated his employment in contravention of Florida Statutes §760.50 because he was perceived to carry . . . [HIV/AIDS] . . . or to have undergone HIV testing. Plaintiff has been tested for HIV, but does not carry the virus.<sup>154</sup>

In *Kaufman v. Checkers Drive-In Restaurants, Inc.*,<sup>155</sup> a claim was filed under *Florida Statutes* section 760.50 because an employee of Checker's Restaurant had anti-homosexual insults directed at him and references were made that implied the employee had contracted HIV/AIDS.<sup>156</sup> *Cordero* and *Kaufman* both attempt to make a link between the perception of HIV/AIDS infection and discrimination based upon sexual orientation.<sup>157</sup> If the Florida Legislature were to pass an amendment to the Florida Civil Rights Act of 1992—which granted explicit protections against discrimination based on sexual orientation—such an attempt would not be necessary because litigants could file suits based solely upon sexual orientation-based discrimination instead of attempting to make an attenuated link through HIV/AIDS discrimination.<sup>158</sup>

## V. A PROPOSED CONSTITUTIONAL AMENDMENT ON MARRIAGE

Recently, a vocal minority of Florida's populace succeeded in a years-long effort to place a referendum to amend the *Florida Constitution*; the aim of this referendum is to prevent any legislature in Florida from passing laws which allow homosexuals to marry, or even to enter into a substantially equivalent relationship.<sup>159</sup> The proposed amendment states that "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."<sup>160</sup> By including the words "substantial equivalent," the proponents of the amendment seek to go further than banning only gay marriage; under an explanation section on their website entitled "The Amendment, Domestic Partnerships and Civil Unions," the

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153. *Id.*

154. *Id.* at 98.

155. 122 F.3d 892 (11th Cir. 1997).

156. *Id.* at 893.

157. *See Kaufman*, 122 F.3d at 893; *see also Cordero*, 7 A.D. Cases at 98.

158. *See generally* FLA. STAT. § 760.50 (2007).

159. Alex Leary, *Gay Marriage on Ballot*, ST. PETE. TIMES, Feb. 2, 2008, at 1A.

160. *Id.*

proponents explain that they intend the amendment to invalidate “any other legal union that is treated as marriage.”<sup>161</sup>

Broward County has codified a procedure in which gays and lesbians may obtain a domestic partnership, which provides numerous protections within Broward County.<sup>162</sup> West Palm Beach has codified a similar domestic partnership ordinance.<sup>163</sup> Besides the fact that Broward County and West Palm Beach refer to domestic partnership agreements, these domestic partnerships would seem to fall within the boundaries of the proposed constitutional amendment that seeks to ban the substantial equivalent of marriage otherwise; Broward County, for example, describes a relationship that certainly sounds akin to marriage, stating that “there are many individuals who establish and maintain a significant personal, emotional, and economic relationship with another individual. Individuals forming such domestic partnerships often live in a committed family relationship.”<sup>164</sup> The constitutional amendment, therefore, has extremely important repercussions for those that have registered as living in a domestic partnership; their rights may be stripped. One organization that is campaigning against the amendment states that:

[t]he ballot language is written in very broad terms that will be interpreted by our courts. Possible scenarios can include the termination of all domestic partner registries in the state. Domestic Partner registries provide for hospital visitation rights. When the state of Michigan passed similar language, the Michigan Court of Appeals ruled that the state’s constitutional amendment banning same-sex marriage prevents public institutions from providing benefits to domestic partners employed by those institutions. In our own state, the Florida Legislature Office of Economic and Demographic Research clearly denotes the possibility of losing domestic partner registries, the loss of recognized common law marriages and other consequences affecting both same-sex and opposite sex couples.<sup>165</sup>

The proponents of the amendment have sought to preempt arguments that the amendment will strip benefits granted through domestic partnership

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161. Florida Coal. to Protect Marriage, Frequently Asked Questions (Jan. 2008), <http://www.florida4marriage.org/faqs.html> [hereinafter Frequently Asked Questions].

162. BROWARD COUNTY, FLA., CODE §§ 16½-151 to 16½-162 (2007).

163. W. PALM BEACH, FLA., CODE OF ORDINANCES §§ 42-47 to 42-50 (2007).

164. BROWARD COUNTY, FLA., CODE § 16½-151.

165. Florida Red & Blue, FAQs, <http://www.floridaredandblue.com/faqs> (last visited Apr. 20, 2008).

laws, by stating that “our amendment will not invalidate benefits granted from domestic partnerships or any other source.”<sup>166</sup> Explaining further, the proponents state that “[t]he [a]mendment does not affect benefits offered or contracted in the private sector . . . [or] prohibit the state or local government from passing laws which confer rights to unmarried persons.”<sup>167</sup> There is a glaring problem with their explanation that the amendment will not limit benefits or laws granting rights to unmarried persons, though; the proponents of the amendment accept a Government Accounting Office assessment that there are some 1134 rights conferred by marriage.<sup>168</sup> Even if existing Domestic Partnerships are recognized as valid, while the proponents of the amendment helpfully inform the reader that the amendment will not strip privately bargained for contractual benefits, or prevent governments from passing laws which would grant rights to unmarried persons, they fail to acknowledge the obvious repercussion; if the amendment were ratified, there would need to be some combination of 1134 laws and contracts to grant the same amount of rights that one marriage certificate grants to heterosexual spouses.<sup>169</sup>

## VI. CONCLUSION

Clearly, the state of the law in Florida, with regard to existing protections against discrimination based upon sexual orientation, is both inconsistent and inadequate; some actions have been taken which are openly hostile to the rights of gays and lesbians. Across Florida, a few municipalities are enacting ordinances protecting against discrimination, while some have cho-

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166. Fla. Coal. to Protect Marriage, Know Your Opponents Arguments, <http://www.florida4marriage.org/defenders.html> (last visited Apr. 20, 2008) [hereinafter Know Your Opponents Arguments].

167. Frequently Asked Questions, *supra* note 161.

168. Know Your Opponents Arguments, *supra* note 166.

169. Additionally, the language of the amendment portends further ominous possibilities: the denial of rights to those not only in same-sex domestic partnerships, but also to heterosexuals who do not wish to marry, but enter into a domestic partnership or similar union. *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 155 (Mich. Ct. App. 2007). The Michigan Court of Appeals, in interpreting a ratified state constitutional amendment with similar language to the proposed Florida amendment, stated that “[i]t is undisputed that under the marriage amendment, heterosexual couples who have not married *also* may not obtain employment benefits *as a couple* on the basis of an agreement.” *Id.* Former United States Representative and Florida gubernatorial candidate Jim Davis opined that as applied to Florida, “[i]f [the amendment] passes, unmarried Floridians in committed relationships—especially seniors who may remain unmarried by choice—could lose their ability to share healthcare coverage.” Jim Davis, ‘Marriage Protection’ an Unnecessary Burden, *MIAMI HERALD*, Mar. 11, 2008, at A18.

sen not to; among the municipalities that have, there is a decided lack of homogeneity in the extent of protections offered.<sup>170</sup> Florida courts offer weak and inconsistent protections depending upon the level of court, and the portion of the *Florida Constitution* being examined.<sup>171</sup> Federal courts have not offered a clear guideline as to what legislative enactments by the states are unconstitutional under the *United States Constitution*.<sup>172</sup> The Florida legislature has thus far refused to enact explicit protections in the Florida Civil Rights Act of 1992;<sup>173</sup> as a result, advocates of homosexual rights have attempted to find protections in innovative, but unsuccessful legal theories.<sup>174</sup> Perhaps most disconcerting of all is the placement on the ballot of a proposed amendment to the *Florida Constitution*, which would effectively ban gay marriage or substantial equivalents in Florida.<sup>175</sup>

Because of the uneven application of protections through the court system, the Florida legislature should not ignore the issue of discrimination based upon sexual discrimination, and should take one of two positions. The legislature should either enact the proposed amendment to the Florida Civil Rights Act of 1992, and explicitly grant protections against discrimination based upon sexual orientation in order to avoid unexpected and uneven applications of protections by the court system; or take a different tack, and follow the examples of Pinellas County and Bradenton, Florida and explicitly define the terms in the Florida Civil Rights Act of 1992 to prevent protections from being granted based upon sexual orientation in order to achieve the same result as those counties. While this may strike some as unpalatable, it would provide a clear signal to the judiciary of the intent of the legislature, and would also provide a clear signal to municipalities that feel it is not an issue that is within their purview. Ideally, the legislature would pass the proposed amendment to the Florida Civil Rights Act of 1992, because it would provide protections much more evenly and quickly than indicating to the municipalities that they should pass ordinances on the issue. This, however, is not an ideal world; most likely, the issue will stagnate in the legislature, and the trend extending protections against discrimination based upon sexual orientation will continue in sporadic enactments of municipal ordinances. Unfortunately, the most enthusiastic groups involved in the issue of gay and lesbian rights seem to be those that oppose them; it remains to be seen whether the proposed amendment to the *Florida Constitution* will result in a

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170. See discussion *supra* Part II.

171. See discussion *supra* Part III.

172. See *id.*

173. See discussion *supra* Part IV.

174. See *id.*

175. See discussion *supra* Part V.

step backwards for gay and lesbian advocates, or the bittersweet victory of maintaining the status quo.

He added, [t]hat . . . [t]here was another Point which a little perplexed him at present. . . . I had already explained the Meaning of the Word; but he was at a Loss how it should come to pass, that the Law which was intended for every Man's Preservation should be any Man's Ruin.<sup>176</sup>

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176. JONATHAN SWIFT, *GULLIVER'S TRAVELS* 281 (1940).

# **EXTREME MAKEOVER—SURROGACY EDITION: REASSESSING THE MARRIAGE REQUIREMENT IN GESTATIONAL SURROGACY CONTRACTS AND THE RIGHT TO REVOKE CONSENT IN TRADITIONAL SURROGACY AGREEMENTS**

JAMIE L. ZUCKERMAN\*

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## **I. INTRODUCTION**

Traditional reproduction is no longer the sole means of procreation. Developments in reproductive technology have forced society to confront traditional assumptions about the family and how the law should regard these new technological advancements. Assisted reproductive technology has afforded the possibility of procreation to persons who once thought that procreation was impossible.<sup>1</sup> Although society should encourage and reinforce

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individual choices to nurture children, certain states have placed statutory limits on who may qualify for reproductive technological advancements. In Florida, the gestational surrogacy statute requires that the intended parents be legally married.<sup>2</sup> States have also adopted diverse approaches regarding the presumption of parentage in custody disputes. In traditional surrogacy agreements, Florida focuses on protecting the rights of the surrogate by allowing her to revoke her consent at any time during her pregnancy and up to forty-eight hours after the child is born.<sup>3</sup>

This article will address the constitutionality of the marriage requirement in Florida's gestational surrogacy statute and the repercussions of the right to revoke consent in traditional surrogacy agreements. Part two of this article will provide a background of gestational surrogacy and traditional surrogacy. Part three will examine the different theories states adopt in order to determine legal parentage. Part four will compare Florida's gestational surrogacy statute to Florida's traditional surrogacy statute. Part five of this article will present constitutional challenges on restricting surrogacy based on procreative liberty and the fundamental right to marry. This section will also examine whether Florida's surrogacy statutes are over or under-inclusive. Part six will conclude with the premise that the increase of non-traditional families makes it necessary for Florida to restructure its surrogacy statutes. In addition, this section will explain how Florida should change its surrogacy statutes so that its laws will no longer infringe on any of its residents' procreative rights.

## II. BACKGROUND OF GESTATIONAL SURROGACY AND TRADITIONAL SURROGACY

Every year, millions of couples learn that they are incapable of bearing children.<sup>4</sup> "For these individuals, alternative reproduction methods are the

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with a B.S. in Accounting from the A.B. Freeman School of Business. She would like to thank her mother Candy, father Steve, and sister Taryn, as she is extremely grateful for their continuous support and unconditional love. She would also like to thank her colleagues on *Nova Law Review* and the faculty of the Law Center, extending special recognition to Professor Phyllis Coleman and Professor Carolyn Nygren.

1. See Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 597 (2002).

2. FLA. STAT. § 742.15(1) (2007).

3. *Id.* § 63.213(2)(a), (i).

4. Michael E. Eisenberg, Comment, *What's Mine Is Mine and What's Yours Is Mine—Examining Inheritance Rights by Intestate Succession from Children Conceived Through Assisted Reproduction Under Florida Law*, 3 BARRY L. REV. 127, 127 (2002).

only means by which they are able to have [genetically related] children.”<sup>5</sup> Surrogacy has readily become a popular option for infertile couples.<sup>6</sup> There are two main types of surrogacy: traditional surrogacy and gestational surrogacy.<sup>7</sup>

Traditional surrogacy, referred to in Florida as preplanned adoption,<sup>8</sup> is a pregnancy in which the surrogate “provides her own egg, which is fertilized [through] artificial insemination,” and then gestates the fetus for another individual.<sup>9</sup> The most common traditional surrogacy arrangement involves the surrogate being artificially inseminated with the intended father’s semen.<sup>10</sup> The surrogate then carries the fetus to term and gives birth to the child for another person.<sup>11</sup> In traditional surrogacy, the surrogate is genetically linked to the child because she is the biological contributor of the egg.<sup>12</sup> Therefore, the intended mother is never “considered the natural mother of the child” when the child is born.<sup>13</sup>

The second type of surrogacy, gestational surrogacy, is a pregnancy where one woman—the intended mother—supplies the egg, which is then fertilized, and another woman—the surrogate—gestates the fertilized egg and gives birth to the child.<sup>14</sup> Gestational surrogacy can occur in several

5. *Id.*

6. Amy Garrity, Comment, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain—A Proposed Model Statute for Louisiana*, 60 LA. L. REV. 809, 809 (2000).

7. *Id.*

8. Eisenberg, *supra* note 4, at 140. Although Florida uses the term preplanned adoption, most jurisdictions use the term traditional surrogacy. Florida’s gestational surrogacy statute uses the term commissioning couple while Florida’s preplanned adoption statute uses the term intended parents. Compare FLA. STAT. § 742.15 (2007), with *id.* § 63.213. Florida’s preplanned adoption statute uses the term volunteer mother while Florida’s gestational surrogacy statute uses the term gestational surrogate. Compare *id.* § 63.213, with *id.* § 742.15. For purposes of this article, the term traditional surrogacy will be used in place of preplanned adoption. The term intended parents will be used to refer to the intended parents in traditional surrogacy agreements and the commissioning couple in gestational surrogacy contracts. The term surrogate will be used to refer to the volunteer mother in traditional surrogacy agreements and the gestational surrogate in gestational surrogacy contracts. For purposes of clarity, this article will use the same terms that are used by most jurisdictions. See Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1233 (1997) (stating the common confusion between “the two types of surrogacy”).

9. BLACK’S LAW DICTIONARY 1485 (8th ed. 2004).

10. Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interest of Children?*, 26 WHITTIER L. REV. 429, 435 (2004).

11. *Id.*

12. Garrity, *supra* note 6, at 809.

13. Storrow, *supra* note 1, at 609.

14. BLACK’S LAW DICTIONARY 1485 (8th ed. 2004).



ways.<sup>15</sup> “The inten[ded] mother can use her own egg and the inten[ded] father [can] use his own sperm,” to create an embryo which will then be “fertilized outside of the womb.”<sup>16</sup> The embryo is then “transplanted into the uterus of the surrogate” and there is no genetic link between the surrogate and the child because the surrogate is not the biological contributor of the egg.<sup>17</sup> Other forms of gestational surrogacy include “the inten[ded] father’s sperm and the egg of an anonymous donor,” or the intended mother’s egg and the sperm of an anonymous donor, in order to create an embryo that will be transplanted into the uterus of the surrogate.<sup>18</sup> Many persons using assisted reproductive technologies prefer gestational surrogacy over traditional surrogacy “because it allows both the intended mother and father to have a biological connection to the child.”<sup>19</sup>

In 1987, national news coverage of the case *In re Baby M*,<sup>20</sup> drew public attention to the question of where parental rights lie when an infertile married couple contracts with another woman to bear a child on their behalf.<sup>21</sup> The case arose when Mary Beth Whitehead, the surrogate mother, repudiated the surrogacy contract after giving birth and finding herself unable to part with the child.<sup>22</sup> This was a case of traditional surrogacy, where the child was conceived by artificial insemination.<sup>23</sup> The child was genetically related to both the intended father, William Stern, and the surrogate, Ms. Whitehead, with the understanding that Mr. Stern and his wife would raise the child as their own.<sup>24</sup> The court denied the parental rights claimed by Mr. and Mrs. Stern under the surrogacy contract by declaring such contracts void and against public interest.<sup>25</sup> The court recognized Mr. Stern, the intended father, and Ms. Whitehead, the surrogate mother, as the natural parents based on their biological relationship to the baby.<sup>26</sup> The court granted custody to Mr. Stern and visitation rights to Ms. Whitehead.<sup>27</sup> This case led to “an intense

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15. Garrity, *supra* note 6, at 809.

16. *Id.* at 809–10.

17. *Id.* at 810.

18. *Id.*

19. Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Agreements*, 51 DRAKE L. REV. 605, 606 (2003).

20. 537 A.2d 1227 (N.J. 1998).

21. See Alice Hofheimer, Note, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. L. & SOC. CHANGE 571, 574 (1992).

22. *Baby M*, 537 A.2d at 1237.

23. See *id.* at 1235.

24. *Id.*

25. *Id.* at 1240.

26. See *id.* at 1247 n.9.

27. *Baby M*, 537 A.2d at 1259, 1263–64.

national debate and a flurry of legislative activity” with numerous states enacting legislation to address surrogate parenting agreements.<sup>28</sup>

### III. DIFFERING APPROACHES TO THE PROBLEM OF LEGAL PARENTAGE

Congress has not enacted federal legislation to deal with the problem of legal parentage in cases that involve surrogacy.<sup>29</sup> Thus, state legislatures and state courts have adopted different tests to determine legal parentage based on intent, genetic contribution, gestation, and the best interests of the child.<sup>30</sup> The conventional surrogacy agreement involved “a fertile husband, an infertile wife, and a fertile [surrogate]” who agreed to use her egg and the husband’s sperm to create an embryo and bear the child for the couple.<sup>31</sup> Advances in assisted reproductive technologies, however, have made it possible to have many potential parents: the intended mother, the intended father, the sperm donor, the egg donor, and the surrogate.<sup>32</sup>

When a court or legislature adopts the intent based theory, legal parentage is determined based on the party who “intended to bring the child into the world” or the one who “orchestrated the reproduction.”<sup>33</sup> Following this line of reasoning, the legal parents are the ones who planned to raise the child.<sup>34</sup> The intent theory was originated in California, which was one of the initial states forced to face gestational surrogacy maternity issues.<sup>35</sup> In *Johnson v. Calvert*,<sup>36</sup> the Supreme Court of California was confronted with the task of determining maternity between the gestational surrogate and the intended mother.<sup>37</sup> Because both of these women had a valid claim for maternity, the court was forced to create a new theory of maternity and felt the case could not “be decided without [i]nquiring into the parties’ intentions.”<sup>38</sup> The court looked at the surrogacy contract to determine the parties’ intentions regarding maternity and held that “she who intended to procreate the

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28. Hofheimer, *supra* note 21, at 574.

29. Flavia Berys, Comment, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321, 333 (2006).

30. Lascarides, *supra* note 8, at 1227 n.19.

31. Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 702 (2001).

32. *Id.*

33. *Id.*

34. *Id.*

35. Larkey, *supra* note 19, at 622.

36. 851 P.2d 776 (Cal. 1993).

37. *Id.* at 778.

38. *Id.* at 782.

child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”<sup>39</sup> The court’s reasoning was based on the premise that the child would not have come into being if it was not for the intended parents.<sup>40</sup> Thus, the intended mother had a more natural claim to the child.<sup>41</sup>

The genetic contribution test determines parentage based on the genetic relationship between the child and the person who contributed genetic material.<sup>42</sup> This theory contends that when the child is biologically linked to the intended parents, the couple will be recognized as the legal parents of the child.<sup>43</sup> In *Belsito v. Clark*,<sup>44</sup> the couple entered into a gestational surrogacy agreement whereby the intended mother’s sister would gestate the fertilized genetic material derived from the couple.<sup>45</sup> The hospital informed the intended mother that Ohio law required that the birth certificate list her sister’s name as the natural mother.<sup>46</sup> Therefore, the intended parents sought a declaratory judgment naming them as the legal parents of the child.<sup>47</sup> The court held that since the intended parents provided the genetic material for the child, they were the child’s legal and natural parents.<sup>48</sup>

Before the “emergence of assisted reproductive technologies, most jurisdictions [adhered to] the common law rule,” which presumed that any woman who gestates and gives birth to a child is that child’s legal mother.<sup>49</sup> Advocates of this theory rely on the significance of the gestational mother’s contribution to the child’s existence.<sup>50</sup> The jurisdictions that adopted this theory felt that “[t]he gestational mother . . . establishes a unique physical and emotional bond with the child during the nine months prior to birth, a bond that the [intended parents] simply cannot attain.”<sup>51</sup> Essentially, states that follow the gestational mother theory invalidate gestational surrogacy contracts because the surrogate and her spouse, not the intended parents, will always be recognized as the legal parents of the child.<sup>52</sup> When a jurisdiction

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39. *Id.*

40. *Id.*

41. *Johnson*, 851 P.2d at 782.

42. *Larkey*, *supra* note 19, at 624.

43. *Id.*

44. 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994).

45. *Id.* at 761.

46. *Id.* at 762.

47. *Id.*

48. *Id.* at 762, 767.

49. *Larkey*, *supra* note 19, at 625.

50. *Id.*

51. *Id.*

52. *Id.* at 626.

adopts this theory, “it discredits the constitutionally protected decision of the intended parents and the decision of the surrogate who voluntarily participates in the arrangement.”<sup>53</sup>

The last theory on legal parentage is the best interests of the child standard, where the court will grant legal parentage to the party that will best assume the responsibilities of parentage.<sup>54</sup> Proponents of this theory feel that it allows courts to consider aspects of all theories before deciding who should be declared the legal parents of the child.<sup>55</sup> Currently, surrogacy statutes usually apply the best interests of the child standard in child custody disputes as opposed to legal parentage determinations.<sup>56</sup> Many feel that the best interests standard is too problematic because “[i]n some instances, determining the child’s best interests is just not feasible” and “[r]anking adults by their parenting ability would be a bureaucratic nightmare.”<sup>57</sup>

#### IV. COMPARING FLORIDA’S GESTATIONAL AND TRADITIONAL SURROGACY STATUTES

No federal legislation has been passed to regulate surrogacy and “[t]he differing state of the law in this area demonstrates the nation’s struggle with the moral and philosophical considerations involved.”<sup>58</sup> Due to the lack of federal legislation, it is necessary to examine gestational surrogacy on a state statutory basis.<sup>59</sup> Florida law explicitly authorizes gestational surrogacy contracts but the statute imposes strict requirements on the contract.<sup>60</sup> First, a binding and enforceable contract must be made between the intended parents and the surrogate.<sup>61</sup> In order for the contract to be binding and enforceable, the gestational surrogate must be “[eighteen] years of age or older” and the intended parents must be legally married and “[eighteen] years of age or older.”<sup>62</sup> Second, before entering into a surrogacy contract, a licensed physician must determine that: 1) the intended mother is unable to gestate the fetus to term; 2) “[t]he gestation will cause a risk to the physical health” of the intended mother; or 3) “[t]he gestation will cause a risk to the health of the

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53. *Id.* at 625.

54. Larkey, *supra* note 19, at 626.

55. *Id.*

56. *Id.* at 627 n.177.

57. Gillers, *supra* note 31, at 694.

58. Berys, *supra* note 29, at 333.

59. *See id.*

60. Browne-Barbour, *supra* note 10, at 450.

61. FLA. STAT. § 742.15(1) (2007).

62. *Id.*

fetus.”<sup>63</sup> Third, the surrogacy contract must include a provision that the gestational surrogate will surrender her parental rights at the birth of the child, unless it is determined that the child is genetically unrelated to the intended parents.<sup>64</sup>

Florida law also allows individuals to enter into traditional surrogacy agreements.<sup>65</sup> Although Florida limits gestational surrogacy to married couples, traditional surrogacy is available to an unmarried couple.<sup>66</sup> The traditional surrogacy statute refers to the “intended mother” and the “intended father,” but nowhere in the statute does it say that the couple must be married.<sup>67</sup> The statute requires the agreement to include, “[t]hat the [surrogate] agrees to become pregnant by the fertility technique specified in the agreement, to bear the child, and to terminate any parental rights and responsibilities to the child.”<sup>68</sup> In traditional surrogacy, however, the surrogate has up to forty-eight hours after the child is born to revoke her consent, whereas the gestational surrogate has no right to revoke her consent.<sup>69</sup> In gestational surrogacy, one of the intended parents must be biologically linked to the child, while no genetic connection is required for traditional surrogacy agreements.<sup>70</sup> Furthermore, in traditional surrogacy the intended mother has to adopt the child because she and the child are not genetically linked.<sup>71</sup> Before she can adopt the child, the surrogate must terminate parental rights because it is usually the surrogate’s egg that is used.<sup>72</sup> If the father’s sperm was not used via artificial insemination, then he would have to adopt the child as well.<sup>73</sup>

In traditional surrogacy, “the agreement may be terminated at any time by any of the parties.”<sup>74</sup> Essentially, this could mean that the surrogate could terminate the contract and then turn around and sue the biological and in-

63. *Id.* § 742.15(2)(a)–(c).

64. *Id.* § 742.15(3)(c), (e).

65. *See id.* § 63.213.

66. *Compare* FLA. STAT. § 742.15(1) (stating that the intended parents must be married to qualify for gestational surrogacy), *with id.* § 63.213 (containing no provision requiring a couple to be married in order to qualify for traditional surrogacy).

67. *See generally id.* § 63.213.

68. *Id.* § 63.213(2)(a).

69. *Compare id.* (stating that the surrogate has the right to revoke consent “any time within [forty-eight] hours after the birth of the child”), *with* FLA. STAT. § 742.15(3)(c) (stating that the surrogate must agree to surrender parental rights upon the birth of the child).

70. *See id.* §§ 742.15(3)(e), 63.213.

71. *See id.* § 63.213.

72. *See id.* § 63.213(6)(i).

73. *See id.* § 63.213.

74. FLA. STAT. § 63.213(2)(i).

tended father for support.<sup>75</sup> Due to the lack of cases in Florida focusing on surrogacy, it is necessary to examine an earlier surrogacy case in another state and a current custody battle in Florida.<sup>76</sup> In the case of *In re Moschetta*,<sup>77</sup> a California court considered for the first time whether traditional surrogacy contracts, where the surrogate is both the woman who gives birth to the child and the child's biological contributor of the egg, are enforceable.<sup>78</sup> The intended parents and surrogate signed an agreement which stated that the surrogate would be artificially inseminated with the intended father's semen so that the child would be biologically linked to the father.<sup>79</sup> Although there was clear evidence that the surrogate conceived the child with the intent to facilitate the adoption to an infertile woman, the surrogate was entitled to rescind the agreement and keep the child.<sup>80</sup> The court held that the child had one mother and that no tie-breaker was required because the genetic mother and the gestational mother were the same person.<sup>81</sup> The intended mother had no claim to motherhood because she was not "equally" the mother of the child.<sup>82</sup> The court made it clear that couples "who resort to traditional surrogacy . . . have no assurance their intentions will be honored in a court of law" and "[f]or them and the child, biology is destiny."<sup>83</sup> Four years later, however, the court ruled that the intended mother does have a claim in gestational surrogacy cases because the surrogate is not biologically linked to the embryo.<sup>84</sup> Thus, the intended mother in a gestational surrogacy contract, not the surrogate or egg donor, is the lawful mother of the child.<sup>85</sup>

Presently, a baby battle is occurring in Florida between the intended parents of a traditional surrogacy agreement and the surrogate they hired.<sup>86</sup>

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75. See *id.* § 63.213(2)(d) (stating that if the intended father has a biological link to the child "he will assume parental responsibilities for the child"); see also Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487, 524 (1991).

76. See Lascarides, *supra* note 8, at 1258. The author states that there are "few court decisions on surrogacy contracts" and "far more law review articles discussing this topic than court decisions." *Id.*

77. 30 Cal. Rptr. 2d 893 (Ct. App. 1994).

78. *Id.* at 895.

79. *Id.*

80. *Id.* at 895, 901.

81. *Id.* at 896.

82. *Moschetta*, 30 Cal. Rptr. 2d at 896.

83. *Id.* at 903.

84. *In re Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).

85. *Id.*

86. O'Reilly Factor: Bitter Baby Battle (FOX television broadcast July 20, 2007), available at 2007 WLNR 13850188 [hereinafter O'Reilly Factor].

Gwyn and Tom Lamitina paid a surrogate to gestate their baby because they were unable to reproduce on their own.<sup>87</sup> The couple, who reside in Orlando, decorated a bedroom for their baby girl, but their “biggest fear is that [they] may not be able to bring her home.”<sup>88</sup> The surrogate has decided that “she wants to keep the [baby]”<sup>89</sup> and is suing the intended father for child support.<sup>90</sup> As a result of a prior positive surrogacy experience, the Lamitinas signed a contract with a surrogate in 2006.<sup>91</sup> The surrogate accepted all the benefits of the contract, such as a \$1500 deposit.<sup>92</sup> The couple trusted that the surrogate would carry out the contract and focused their concerns on<sup>93</sup> the health of both the baby and the surrogate.<sup>94</sup> The fact that these parties entered into a traditional surrogacy agreement is a crucial part of this case because Florida law only safeguards the intended parents in a gestational surrogacy agreement.<sup>95</sup> Despite the intent of the parties and “as unfortunate as it may be, [the surrogate] was within her Florida rights to rescind the contract when she did.”<sup>96</sup> As a result, it seems that there is no legal recourse for the intended parents<sup>97</sup> and the “baby may never lay its head in [the] crib” the couple built for her.<sup>98</sup>

Allowing the surrogate every opportunity to retract the traditional surrogacy agreement at any time leaves the parties whom the “agreement was meant to protect” constantly worrying about the uncertainty of the outcome.<sup>99</sup> “The intended parents must suffer throughout the pregnancy,” fully aware that they may never “become the child’s parents.”<sup>100</sup> Traditional surrogacy agreements contain a clause that allows the surrogate to cancel the agreement during the pregnancy as well as forty-eight hours after the birth of the

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87. Grayson Kamm, *Birth Battle: Couple Says Surrogate Mom Won't Give up Baby*, FIRST COAST NEWS, May 23, 2007, <http://www.firstcoastnews.com/news/florida/news-article.aspx?storyid=82698>.

88. *Id.*

89. O'Reilly Factor, *supra* note 86.

90. Kamm, *supra* note 87.

91. *Id.*

92. O'Reilly Factor, *supra* note 86.

93. Kamm, *supra* note 87.

94. O'Reilly Factor, *supra* note 86.

95. *Id.*

96. *Id.*

97. *Id.*

98. Kamm, *supra* note 87.

99. Eric A. Gordon, Comment, *The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology*, 6 ST. THOMAS L. REV. 191, 207 (1993).

100. *Id.* at 209.

child.<sup>101</sup> Thus, the intended mother and father “fear that, at any time during and immediately following the birth of their intended [child], the surrogate [could] exercise her option [and choose] to maintain custody of the child.”<sup>102</sup> Opponents of surrogacy feel that unmarried persons still have an option because they are able to enter into traditional surrogacy agreements, but they just have to “take their chances that the surrogate [will] relinquish custody of the child at birth.”<sup>103</sup> However, if the surrogate exercises her option to maintain custody, the intended parents would have “no [legal] recourse”<sup>104</sup> and the infertile couple could, in essence, become an embryological donor for the surrogate’s child.<sup>105</sup>

Florida provides an expedited procedure to affirm the child’s parentage for couples participating in gestational surrogacy.<sup>106</sup> “Within [three] days after the birth of a child,” the intended parents can request “an expedited affirmation of parental status” from the court.<sup>107</sup> If the court determines that the intended parents and the gestational surrogate entered into “a binding and enforceable” contract, and at least one of the intended parents is a “genetic parent of the child,” an order is issued stating that the intended parents are the child’s legal<sup>108</sup> and natural parents.<sup>109</sup> The Department of Health then releases a new birth certificate identifying the intended parents as the legal parents of the child.<sup>110</sup> For individuals who enter into traditional surrogacy agreements, expedited affirmation of parental status is not an option.<sup>111</sup>

Traditional surrogacy agreements create a “high risk of conflict” because surrogate mothers may regret their decision and refuse to surrender custody of the child after the child is born.<sup>112</sup> Currently, “Florida’s [traditional] surrogacy policy is geared toward protecting the surrogate, . . . not the intended parents nor the child—the parties for whom the surrogacy agreement was meant to protect at its inception.”<sup>113</sup> Gestational surrogacy affords infertile couples the opportunity to create a biological child because the woman could have her “ovum artificially fertilized by the sperm of [her]

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101. FLA. STAT. § 63.213(1)(b), (2)(i) (2007).

102. Gordon, *supra* note 99, at 209.

103. Massie, *supra* note 75, at 524.

104. *Id.*

105. Gordon, *supra* note 99, at 209.

106. FLA. STAT. § 742.16 (2007).

107. *Id.* § 742.16(1).

108. *Id.* § 742.16(6).

109. *Id.* § 742.16(7).

110. *Id.* § 742.16(8).

111. *See* FLA. STAT. § 742.16.

112. Larkey, *supra* note 19, at 610.

113. Gordon, *supra* note 99, at 207.



husband . . . and implanted in the uterus of the surrogate.”<sup>114</sup> Due to the fact that the gestational surrogate is not biologically linked to the child, the intended parents, who are also the biological parents, are in “a stronger legal position . . . in the event of a . . . custody battle.”<sup>115</sup> Thus, most individuals favor gestational surrogacy over traditional surrogacy.<sup>116</sup>

## V. CONSTITUTIONAL CHALLENGES

Florida requires that the intended parents in a gestational surrogacy agreement be legally married.<sup>117</sup> The marriage requirement “may be viewed by some as discriminatory and close-minded in our modern society.”<sup>118</sup> Even though unmarried persons may not want to be involved in a romantic relationship, or even if involved, may not want to marry, “they may still [possess] the desire to become [a] parent[.]”<sup>119</sup>

Single persons wishing to assert constitutional challenges against a legislative restriction limiting parenthood through surrogacy to married couples have two available arguments: (1) that such a restriction violates their fundamental right of privacy protected by the Due Process Clause of the Fourteenth Amendment because it infringes on their right to decide whether to bear or beget a child; and (2) that this legislative classification based on marital status is invidious discrimination which violates their rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>120</sup>

### A. *The Due Process Argument: Procreative Liberty*

“The United States has a longstanding tradition of procreative liberty and each state is responsible for protecting this constitutional liberty granted to its citizens.”<sup>121</sup> Protections afforded under the substantive due process doctrine are established in the Fifth and Fourteenth Amendments of the United States Constitution.<sup>122</sup> The substantive due process doctrine provides that the right to privacy protects individuals against unlawful government inva-

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114. Larkey, *supra* note 19, at 610–11.

115. *Id.* at 611.

116. *Id.* at 606.

117. FLA. STAT. § 742.15(1) (2007).

118. Becky A. Ray, Comment, *Embryo Adoptions: Thawing Inactive Legislatures with a Proposed Uniform Law*, 28 S. ILL. U. L.J. 423, 442 (2004).

119. *Id.*

120. Massie, *supra* note 75, at 499 (footnotes omitted).

121. Garrity, *supra* note 6, at 812.

122. See generally U.S. CONST. amends. V, XIV.

sion.<sup>123</sup> Although not explicitly stated in the Constitution, the United States Supreme Court has declared the right to privacy a fundamental right because it falls under the penumbra of rights that coincide with those in the Bill of Rights.<sup>124</sup>

Although the United States Supreme Court “has not [yet] addressed” whether there is a constitutional right of access to assisted reproductive technology, “it has recognized an individual’s right to be free from government intrusion” concerning matters relating to procreation, family relationships, and child-rearing.<sup>125</sup> In *Eisenstadt v. Baird*,<sup>126</sup> the Court extended the protection of privacy to every individual regarding the decision of whether to bear a child.<sup>127</sup> In regard to family relationships, the Court has held that the family is unique to society and that constitutional principles must be applied with sensitivity and flexibility to meet the needs of a parent and child.<sup>128</sup>

### 1. The Interests of Parents

In *Skinner v. Oklahoma*,<sup>129</sup> the Court stated that the right to procreate is “one of the basic civil rights of man” and “fundamental to the very existence and survival of the race.”<sup>130</sup> Advocates of surrogacy argue that, “if the right to procreate through the traditional, coital method is a protected right, then procreation through surrogacy or other medically available options should also be protected.”<sup>131</sup> There are a growing number of infertile couples who desperately desire to have and raise a child and “[i]t is the duty of the legislature to pass laws to protect the[se] citizens . . . and ensure that all of the benefits of reproductive technology are available to every member of . . . society.”<sup>132</sup> Surrogacy supporters contend that “the liberty interests protected by the Constitution do not change definition because of the presence or absence of reproductive technology.”<sup>133</sup> After all, a woman has a fundamental right

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123. See *Griswold v. Connecticut*, 381 U.S. 479, 481–83 (1965).

124. *Id.* at 483.

125. Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 563 (1999).

126. 405 U.S. 438 (1972) (plurality opinion).

127. *Id.* at 453.

128. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

129. 316 U.S. 535 (1942).

130. *Id.* at 541.

131. Gordon, *supra* note 99, at 200.

132. Garrity, *supra* note 6, at 832.

133. Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?*, 12 WIS. WOMEN’S L.J. 113, 121 (1997).

to control her body and the choice of becoming a surrogate or hiring a surrogate is a woman's reproductive choice.<sup>134</sup> Furthermore, assisted conception is still a form of conception, "and arguably no more 'artificial' than the contraceptive devices" the United States Supreme Court recognized in *Griswold v. Connecticut*<sup>135</sup> and *Eisenstadt*.<sup>136</sup> Therefore, the due process argument is that "the fundamental right to 'bear or beget a child' [must] include[] access to any [legal] means of procreation."<sup>137</sup>

Proponents of a narrow interpretation of the fundamental right to procreate argue that procreative liberty "simply means the right to have natural children."<sup>138</sup> These proponents argue that the Court's definition of a right to privacy does not extend to untraditional means of reproduction because these means "are beyond the scope of the constitutionally recognized procreative liberty."<sup>139</sup> While advocates of surrogacy acknowledge the procreative rights of both the intended mother and the gestational surrogate, opponents feel "that the procreative choice of a gestational surrogate in conceiving, delivering, and transferring a child to its genetic parents is not the constitutional equivalent of exercising her procreative choice to bear her own child."<sup>140</sup> Opponents of surrogacy suggest that because the right to have a third party serve as a surrogate is not "deeply rooted in tradition," the parties do not have the constitutional right to have a child if it means that the child will be conceived through surrogacy.<sup>141</sup> Further, some caution that bringing a third party—the surrogate—into the procreative relationship will put a strain upon the traditional notions of parenthood and family.<sup>142</sup>

In the case of surrogacy, however, none of the state's arguments regarding religious and moral "concerns are justified by harm to another individual."<sup>143</sup> "[S]tate concerns that do not pose a tangible threat of harm to others cannot justify the government's intrusion on fundamental rights."<sup>144</sup> Restricting gestational surrogacy to a certain class of persons, therefore, would infringe upon the rights of infertile couples to engage in procreation in situa-

134. *Id.* at 166.

135. 381 U.S. 479 (1965).

136. Kerian, *supra* note 133, at 121.

137. *Id.* at 121–22.

138. Browne-Barbour, *supra* note 10, at 469.

139. Kerian, *supra* note 133, at 121.

140. Browne-Barbour, *supra* note 10, at 469.

141. *Id.*

142. *See id.*

143. Krista Sirola, Comment, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 153 (2006).

144. *Id.* at 153 n.150.

tions where the intended parents want to both be biologically linked to the child.<sup>145</sup>

## 2. The Best Interest of the Child

The United States Supreme Court has stated that children are entitled to “constitutionally protected rights and liberties” and that “[a] child has a natural right . . . to be nurtured” just as parents have the right to conceive.<sup>146</sup> Although preconception agreements affect the substantive rights of the unborn child, “no one represents the interests of the [unborn] children in these contracts.”<sup>147</sup>

In order to justify limiting gestational surrogacy to a certain class of persons, “the state must meet the [extremely] high burden of strict scrutiny.”<sup>148</sup> The state is required to show that the regulation is necessary to achieve a compelling state interest.<sup>149</sup> Often times, a state will argue that it limits surrogacy in order to protect the best interests of the child.<sup>150</sup> It could be difficult to prove, however, that a child raised by its biological parents as opposed to its intended parents is “a compelling interest because there is no identifiable harm in placing [a child] with [its] intended parents.”<sup>151</sup> Opponents of surrogacy believe in limiting the number of people who can qualify for this procedure because they feel surrogacy will ultimately have an adverse effect on the unborn child.<sup>152</sup> Rather, the beneficiaries of surrogacy agreements are the ones who would most probably become reliable and devoting parents.<sup>153</sup>

The people who have struggled so hard to conceive their own child are probably the best candidates to be good parents and not the worst. It hardly seems likely that a couple that endured so much grief to have its own child would embark on a course of abuse and neglect with a surrogate child. . . . After all, children conceived by normal means often run a far greater risk of abuse. There is surely a risk of abuse even in apparently stable families. The risk is greater for children born of troubled marriages that end in divorce,

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145. *Id.* at 153; *see also* Garrity, *supra* note 6, at 809–10.

146. Browne-Barbour, *supra* note 10, at 468.

147. *Id.*

148. Sirola, *supra* note 143, at 151–52.

149. *Id.* at 152; *see also* Massie, *supra* note 75, at 490–91.

150. Sirola, *supra* note 143, at 152.

151. *Id.*

152. *See* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2320 (1995).

153. *See* Lascarides, *supra* note 8, at 1251.

and still greater for illegitimate children, especially if the mother's new boyfriend moves in. In these cases, [the legislature does] not think that the risk of harm to children constitutes a powerful reason to license, limit, or ban procreation: it seems hard to believe that these concerns rise to this level in a surrogacy context.<sup>154</sup>

## B. *The Equal Protection Argument*

The Equal Protection Clause of the Fourteenth Amendment requires equal treatment for individuals who are similarly situated.<sup>155</sup> Thus, "[s]tatutes that discriminate between married and unmarried individuals and between men and women's reproductive rights may . . . violate the Equal Protection Clause."<sup>156</sup> In states that prohibit same-sex marriage, such as Florida,<sup>157</sup> "[a] gay man or a lesbian's equal protection rights may be violated because many states provide statutory protection of assisted reproductive technologies only to married individuals."<sup>158</sup>

The Supreme Court has determined that the right to procreate [is] fundamental, and any ban on that right is subject to strict scrutiny. With strict scrutiny, a state must show that it had a compelling interest in creating its ban, and that the statute was narrowly drawn. With assisted reproductive technology, a state would have to allege differences between unmarried and married individuals, or between men and woman [sic], sufficient to demonstrate a compelling interest in denying unmarried individuals . . . statutory protection with assisted reproductive technologies. The second step would require a state to demonstrate that the ban was neither over nor under-inclusive.<sup>159</sup>

### 1. Married and Unmarried Individuals

Gestational surrogacy permits married couples, who choose to utilize assisted reproductive technologies, to be recognized "as the legal parents of [the] child."<sup>160</sup> However, unmarried couples are deprived of this privilege.<sup>161</sup>

154. Epstein, *supra* note 152, at 2320–21 (footnote omitted).

155. U.S. CONST. amend. XIV.

156. Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 180 (2000).

157. See FLA. STAT. § 741.212(1) (2007).

158. DeLair, *supra* note 156, at 180.

159. *Id.* at 181 (footnotes omitted).

160. Storrow, *supra* note 1, at 639.

Requiring marriage as a prerequisite for gestational surrogacy contracts “is unfortunate, as it perpetuates the law’s failure to recognize the many non-traditional forms of the family that exist in society today.”<sup>162</sup> It is important to recognize that being born into a two-parent traditional family certainly does not guarantee that the child will grow up in that environment.<sup>163</sup> Currently, “[a]n increasingly large number of children” are raised by single parents, and just because a child is born to a single parent does not mean that is how the child will grow up.<sup>164</sup> Single parents often find companions with whom they are able to form a new, two-parent family unit.<sup>165</sup> There is a strong argument that it is better for a child to grow up in a loving environment with a single parent as opposed to the child being raised in an argumentative and stressful two-parent household.<sup>166</sup> Several states have enacted pro-surrogate legislation and “the marital status of the biological father and/or the intended mother is typically irrelevant in determining a presumption of parenthood.”<sup>167</sup> Although Florida has enacted surrogacy legislation, the Florida statute restricts unmarried couples from participating in gestational surrogacy.<sup>168</sup>

In *Griswold*, the United States Supreme Court invalidated a state statute that banned the use of contraceptives by married couples.<sup>169</sup> The Court held that the penumbra of rights stemming from the Bill of Rights guarantee a parent’s right to be free from governmental interference when making decisions pertaining to conception and child rearing.<sup>170</sup> In *Eisenstadt*, the Court emphasized that “the right to privacy means . . . the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>171</sup> It can be inferred from several United States Supreme Court decisions, when looked at comprehensively, that the Court stands for a

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161. *Id.*

162. *Id.* at 639–40.

163. Massie, *supra* note 75, at 511 (internal quotations omitted).

164. *Id.* at 511–12.

165. *Id.* at 512.

166. *Id.* at 511–12.

167. Daniel Rosman, *Surrogacy: An Illinois Policy Conceived*, 31 LOY. U. CHI. L.J. 227, 248 (2000).

168. See FLA. STAT. § 742.15(1) (2007) (requiring that a couple be legally married in order to qualify for gestational surrogacy).

169. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

170. *Id.* at 482–83, 485.

171. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (plurality opinion) (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

constitutional right to procreate regardless of marital status.<sup>172</sup> “Although it is permissible to limit the procreative [rights] of prisoners and probationers, it is inconsistent with the American constitutional tradition to condition procreative liberty upon marital status.”<sup>173</sup> Thus, to survive strict scrutiny, a state’s regulation must be narrowly tailored to further a compelling state interest.<sup>174</sup> However, “[t]he language of *Eisenstadt* suggests that the state has no compelling interest in limiting procreative rights to married couples.”<sup>175</sup> As such, “a legislative requirement that only married couples” meet the definition of intended parents in Florida’s gestational surrogacy statute may not pass heightened scrutiny.<sup>176</sup>

According to the Equal Protection Clause, persons who are similarly situated must be treated equally.<sup>177</sup> Therefore, “unmarried persons become a class who are otherwise similarly situated but treated differently.”<sup>178</sup> Unmarried persons who cannot naturally procreate are similarly situated to married persons who cannot naturally procreate because both are only able to procreate through the use of assisted reproductive technology.<sup>179</sup> However, unmarried persons are not treated equally because many state statutes will only allow married persons legal access to gestational surrogacy.<sup>180</sup> Although financial security and maturity are listed as reasons behind the marriage requirement, “[e]vidence of marital status . . . is neither necessary nor sufficient for establishing these traits.”<sup>181</sup> “A more liberal surrogacy policy in this country would allow all infertile couples, not just the ones who are deemed worthy by their state legislature, the opportunity to become a family.”<sup>182</sup>

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172. See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that a woman has the right to terminate a pregnancy); *Eisenstadt*, 405 U.S. at 453–55 (plurality opinion) (stating that unmarried couples have a constitutionally protected right of privacy to use contraceptives); *Griswold*, 381 U.S. at 485–86 (invalidating the state’s ban on the use of contraceptives for married couples).

173. Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 327 (2006).

174. Massie, *supra* note 75, at 490–91.

175. *Id.* at 491.

176. See *id.* at 512.

177. U.S. CONST. amend. XIV.

178. DeLair, *supra* note 156, at 180..

179. *Id.*

180. See FLA. STAT. § 742.15(1) (2007).

181. Storrow, *supra* note 173, at 323.

182. Gordon, *supra* note 99, at 202.

## 2. Men and Women's Reproductive Rights: Gay Men and Lesbian Women

"[A]pproximately four million gay men and lesbian women [are] raising between eight and ten million children."<sup>183</sup> Comparable to heterosexual couples, countless gay men and lesbian women also possess the desire to both bear and raise children.<sup>184</sup> Many of these individuals want to form a family unit and provide a child the benefit of their love and dedication.<sup>185</sup> After all, "[t]hey too have been brought up in families and in a society that identifies having and rearing children as an important source of meaning and fulfillment."<sup>186</sup> Florida prohibits marriage between persons of the same sex and defines the term "marriage" as "only [the] legal union between [a] man and [a] woman."<sup>187</sup> Florida also explicitly states that it will not *for any purpose* recognize same-sex marriages entered into in another jurisdiction.<sup>188</sup> Due to the fact that Florida bans same-sex marriage, these couples are unable to marry and thus, unable to qualify for gestational surrogacy.<sup>189</sup>

By continuing to advocate vociferously for favored treatment of married couples in matters of legal parenthood, the heterosexuals-only marriage movement not only works against our legal traditions and values, but also ultimately undermines the welfare of many children whose best hope lies with parents the law does not allow to marry.<sup>190</sup>

Because gay men and lesbian women do not engage in the traditional means of reproduction, they must utilize "assisted reproductive technologies in order to produce genetically related children."<sup>191</sup>

Although assisted reproductive technology is now available that would enable homosexuals to have children, gays and lesbians are still confronted with numerous barriers.<sup>192</sup> Statutory and case law both create obstacles for homosexuals utilizing reproductive technology because they "will not have

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183. DeLair, *supra* note 156, at 147.

184. *Id.* at 148.

185. *Id.*

186. John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 330 (2004).

187. FLA. STAT. § 741.212(1), (3) (2007).

188. *Id.* § 741.212(1) (emphasis added).

189. *See id.* § 742.15(1) (stating a gestational surrogacy contract will not be binding and enforceable unless the intended parents are legally married).

190. Storrow, *supra* note 173, at 306 (emphasis omitted).

191. DeLair, *supra* note 156, at 148.

192. *Id.*



equal legal standing in defending a parental or custodial challenge.”<sup>193</sup> In states such as Florida, where same-sex couples are prevented from legally marrying, “their family unit[] [is] not recognized as [a] legal entit[y].”<sup>194</sup> Second-parent adoption law has the ability to remedy this situation because the non-biological parent can “petition the court to adopt the child” in order to establish legal parentage.<sup>195</sup> However, same-sex couples are confronted with additional legal barriers because second-parent adoption is not an option for gays and lesbians living in states that ban homosexuals from adopting.<sup>196</sup> For example, Florida’s adoption statute explicitly prohibits adoption by gay and lesbian persons.<sup>197</sup> As such, in Florida, since a child is unable to be adopted by a homosexual second-parent, the child will “never have two legal parents.”<sup>198</sup> Gay and lesbian couples want access to assisted reproductive technology for this exact reason.<sup>199</sup>

Opponents of gay and lesbian access to assisted reproduction assert that it is unnatural.<sup>200</sup> However, it is no more unnatural than interfering with nature and assisting infertile individuals with the ability to reproduce.<sup>201</sup> Opponents also feel that gay or lesbian parents would negatively impact a child.<sup>202</sup> Yet, many studies show that gay and lesbian parents are equally capable parents and “their children are as well-adjusted as . . . children” raised by heterosexual parents.<sup>203</sup> “Conventional notions of homosexuality and its perceived effect on children is [sic] antiquated and scientifically unfounded” and “[n]o study has ever conclusively linked homosexuality to poor parentage.”<sup>204</sup>

It is clear that states are free to deny gays and lesbians the right to be adoptive parents.<sup>205</sup> In fact, Florida’s statute clearly states, “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.”<sup>206</sup> But “[i]n situations in which gays and lesbians seek to bring a child into the world, claims that children are best raised in a heterosexual married family

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193. *Id.* at 162.

194. *Id.* at 171.

195. *Id.*

196. DeLair, *supra* note 156, at 171–73.

197. See FLA. STAT. § 63.042(3) (2007).

198. Storrow, *supra* note 173, at 341.

199. DeLair, *supra* note 156, at 171.

200. Robertson, *supra* note 186, at 330.

201. *Id.* at 331.

202. *Id.*

203. *Id.* at 332.

204. Eisenberg, *supra* note 4, at 147.

205. See FLA. STAT. § 63.042(3) (2007).

206. *Id.*

have no logical relevance to protecting the child's welfare, because the child in question would not otherwise have existed."<sup>207</sup> Children who otherwise would not have existed are not harmed by being born to gays and lesbians.<sup>208</sup> "Because a life with a gay or lesbian parent is still a meaningful life, those children are hardly protected by preventing their birth altogether."<sup>209</sup> Thus, harm to future offspring would not satisfy a compelling state interest test or even a rational basis test by denying gays or lesbians the right to reproduce, whether by traditional means or with the help of reproductive technology.<sup>210</sup> "Rather than undermine families or harm offspring, access to [assisted reproductive technologies] for gays and lesbians will promote parenting and family values, just as it does for heterosexuals."<sup>211</sup>

### 3. Are Florida's Surrogacy Statutes Over or Under-Inclusive?

In order to justify the restrictions placed on gestational surrogacy, a state could argue "that it has a compelling interest in [protecting] public morals" and unmarried persons or homosexual persons procreating would tarnish the concept of traditional family.<sup>212</sup> The weakness in that argument, however, is a substantial decrease in the amount of children growing up in a traditional family household.<sup>213</sup> In *Troxel v. Granville*,<sup>214</sup> the United States Supreme Court recognized that "[t]he composition of families varies greatly from household to household" and "demographic changes of the past century make it difficult to speak of an average American family."<sup>215</sup> Nevertheless, even if protecting the notion of the traditional family was deemed a compelling interest, "any statute that sought to protect notions of traditional family by barring access to assisted reproductive technology would be over-inclusive."<sup>216</sup>

The state might also argue that restricting gestational surrogacy to certain persons is permissible because it has a compelling interest in protecting the health, or more specifically the psychological welfare of its citizens.<sup>217</sup>

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207. Robertson, *supra* note 186, at 333.

208. *Id.* at 347.

209. *Id.*

210. *Id.*

211. *Id.* at 372.

212. DeLair, *supra* note 156, at 182.

213. *Id.*

214. 530 U.S. 57 (2000) (plurality opinion).

215. *Id.* at 63.

216. DeLair, *supra* note 156, at 182.

217. *Id.*

A surrogacy arrangement can psychologically harm the surrogate mother who must relinquish a child she gestated and gave birth to. The intended parent(s) could suffer psychologically if a surrogate were to challenge custody. A child could be harmed if he knew he was conceived by artificial means and then given up by his mother. Even if the state's argument was sound, a ban against surrogacy is under-inclusive because it fails to consider other practices that would have a similar emotional impact on all parties.<sup>218</sup>

It seems ironic that Florida would use the psychological health of the child as a compelling interest when courts are aware that their rulings are inconsistent with the child's best interests.<sup>219</sup> In *Wakeman v. Dixon*,<sup>220</sup> two women lived together and were domestic partners.<sup>221</sup> Thereafter, they "jointly entered into a[n] . . . agreement with a sperm donor."<sup>222</sup> The agreement made reference to both parties and described each of them using the terms "mother" and "co-parent."<sup>223</sup> "[T]he sperm donor relinquished [all of his] parental rights" in the agreement and agreed that the "'co-parents' [would] be responsible for all decisions regarding [the] child conceived through sperm donation."<sup>224</sup> After Ms. Dixon twice became pregnant, the couple entered into a co-parenting agreement where both parties recognized that each parent would "jointly parent the child."<sup>225</sup> Subsequently, the couple separated, Ms. Dixon relocated with the two children, and Ms. Wakeman sought "a declaration of parental rights to the two children born to [Ms.] Dixon" based on their agreement.<sup>226</sup> The court granted Ms. Dixon's petition to dismiss and found that it did not have the authority to grant custody or compel visitation by a person who was not a natural parent.<sup>227</sup> Although "the trial court noted that . . . the guardian ad litem . . . made a compelling argument that it [was] in the best interest[] of the children to enforce the co-parenting agreement[],"<sup>228</sup> the court found the agreement unenforceable.<sup>229</sup>

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218. *Id.*

219. *See Wakeman v. Dixon*, 921 So. 2d 669, 674 (Fla. 1st Dist. Ct. App. 2006) (Van Nortwick, J., concurring).

220. *Id.* at 669 (majority opinion).

221. *Id.* at 670.

222. *Id.*

223. *Id.*

224. *Wakeman*, 921 So. 2d at 670.

225. *Id.*

226. *Id.* at 671.

227. *Id.*

228. *Id.*

229. *Wakeman*, 921 So. 2d at 673.

In his concurring opinion, Judge Van Nortwick explained that even though it “would be in the best interests of the . . . children” to enforce the co-parenting agreement, “Florida law does not provide a remedy” which allows the court to make such a ruling.<sup>230</sup> He acknowledged that “[t]he number of children in Florida raised in . . . non-traditional households” is escalating and he is “concerned that . . . Florida law ignores the needs of those children.”<sup>231</sup> His purpose of writing a concurring opinion was “to urge the Florida Legislature to address the needs of the children born into or raised in these non-traditional households”<sup>232</sup> because this case was evidence that “Florida law does not protect the interests of the child produced by assisted reproduction.”<sup>233</sup> In Florida, the reality is that a child growing up in a non-traditional household “is not protected either by statutory rights or by the ability of courts to secure the best interests of the child.”<sup>234</sup>

## VI. CONCLUSION

Surrogacy provides an attractive reproductive alternative to the large number of couples suffering from infertility. As a result of the rapid advancement of reproductive technology, non-traditional family units now have the ability to raise children. Medical technology should be obtainable by all persons, regardless of an individual’s gender, marital status, or sexual orientation. Moral values alone should not dictate how a person exercises his or her right of procreative liberty. “Disapproval of single parenthood or homosexuality would not provide . . . a justification”<sup>235</sup> for denying some persons access to assisted reproductive technology while granting those services to others.

States such as Florida, which follow a more traditional interpretation of parentage, family, and marriage, preclude many deserving individuals the chance to raise a child. As a consequence of this conventional interpretation, there is a dual failure. Both children, who could have been brought into this world, and good parents, yearning for positive family units, are denied such opportunities. In Florida, the only couples who qualify for gestational surrogacy are those that are both married and incapable of having a child through traditional means. This exclusionary prerequisite, however, results in the infringement of procreative rights for many individuals who are prohibited

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230. *Id.* at 674 (Van Nortwick, J., concurring).

231. *Id.*

232. *Id.*

233. *Id.* at 674–75.

234. *Wakeman*, 921 So. 2d at 675.

235. Robertson, *supra* note 186, at 349.

from participating in this miraculous technology. Florida's gestational surrogacy statute does not allow unmarried individuals or same-sex couples to participate in gestational surrogacy.<sup>236</sup> This statute does not reflect the reality that the number of non-traditional families is rapidly increasing. Additionally, the number of children conceived by reproductive technology is also escalating. If the public continues to perpetuate negative views of surrogacy, it could lead to children questioning their existence if they were to find out how they were conceived. Surely, that result would not be in the best interest of the child. With the composition of current family units shifting, it is crucial for society to focus on the advantageous aspects of surrogacy:

[T]he impact on the child who learns that her genetic parents wanted her so much that they went through many medical procedures and spent thousands of dollars in order to bring her into this world, that she was not an accident but, instead, the miracle child for which her parents prayed for years; the impact on the birth mother who realizes that she gave to an infertile couple the miracle of birth and the joy of family life; and the impact on the [intended] parents once they hold the child in their arms and acknowledge that she is theirs to raise and love.<sup>237</sup>

With society's recognition of this stance, the accompanying result would be beneficial to all parties involved in surrogacy arrangements.

In view of the increase of non-traditional families coupled with advancements in reproductive technologies, Florida needs to re-evaluate its traditional definitions of family and parentage. Florida should provide equal and uniform opportunities to married heterosexuals, unmarried heterosexuals, and homosexuals who wish to participate in surrogacy. By adopting California's surrogacy provisions, individuals employing surrogate mothers would be able to obtain pre-birth judgments of parentage regardless of their marital status, sexual orientation, or genetic contribution to the child.

In both traditional surrogacy agreements and gestational surrogacy contracts, the "intended parent" should be defined as a single adult man, a single adult woman, or an adult couple, regardless of gender or sexuality, who agree, in writing, to be the legal parents of the child conceived through assisted reproductive technology. In traditional surrogacy custody disputes, Florida should consider both the best interests of the child and the intentions

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236. See FLA. STAT. § 742.15(1) (2007) (stating that the intended couple must be legally married in order to qualify for gestational surrogacy); see also *id.* § 741.212(1) (stating that "[m]arriages between persons of the same sex" are not recognized in Florida).

237. Lascarides, *supra* note 8, at 1234.

of the contracting parties. In cases where both parties are deemed fit, courts should concentrate on the parties' intentions. The adjudication of legal parentage should be in favor of the party who intended to raise the child.

Thus, the Florida Legislature should strike the marriage requirement in the gestational surrogacy statute as well as the right to revoke consent in the traditional surrogacy statute. Florida residents who are deemed fit to raise a child should not be denied the right to access any kind of assisted reproductive technology. Once a surrogate signs a traditional surrogacy agreement, she should be held to fulfilling her intentions of gestating a child for a couple who is unable to do so without her help. Citizens are entitled to a sense of legal predictability when they make constitutionally protected decisions regarding their procreative lives. Florida must revise its surrogacy statutes to reflect modern times.