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Abstract

Homosexual conduct has existed for many years, but it has become a politically and morally controversial topic in today's society. Debates rage over the unnaturalness of sexually deviant behavior and one's right to enjoy freedom of sexual choice and expression.

KEYWORDS: homosexual, activity, fitness

PRIVATE HOMOSEXUAL ACTIVITY AND FITNESS TO PRACTICE LAW: Florida Board of Bar Examiners, In re N.R.S.

Introduction

Homosexual conduct has existed for many years, but it has become a politically and morally controversial topic in today's society. Debates rage over the unnaturalness of sexually deviant behavior and one's right to enjoy freedom of sexual choice and expression.

Laws imposing criminal sanctions on consenting adults who engage in private homosexual behavior are historically longstanding[1] and most have withstood constitutional attack.[2] Despite the constitutionality of statutes prohibiting this conduct, courts have recognized the countervailing right of privacy which, although not *explicitly* provided for in the United States Constitution, is considered an implicit and substantive right.[3]

In this emotionally charged, and often misunderstood area, courts reluctantly confront and resolve the legal issues. First, this comment considers the legal issues presented when noncommercial homosexual acts occur privately between consenting adults. Second, this comment focuses particularly on the legitimacy of the Florida Board of Bar Examiners' inquiry into the private sexual behavior of a bar applicant as part of the process in which his fitness to practice law in Florida is

1. Doe v. Commonwealth's Attorney for the City of Richmond, 403 F. Supp. 1199, 1202-03 (E.D. Va. 1975). In *Doe,* the court observed the Virginia statute has its ancestry in Judaic and Christian law, and is immediately traceable to the Code of Virginia of 1792. *Id.* at 1202-03.

2. *Id.* at 1203. *See also* Witherspoon v. State, 278 So. 2d 611 (Fla. 1973). *See generally* 81 C.J.S. *Sodomy* § 3 (1977).

3. An in-depth discussion of the right of privacy and the recognition of privacy as a fundamental right under the United States Constitution is beyond the scope of this comment. *But see* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct,* 72 MICH. L. REV. 1613 (1974).

determined.

Background of *In re: N.R.S.*

The Florida Supreme Court's power and authority to regulate admission of persons to the practice of law in Florida is derived from the Florida Constitution.[4] The Florida Board of Bar Examiners (Board), serving as an administrative arm of Florida's Supreme Court performs regulatory and supervisory functions over Florida's practicing attorneys. The Board is answerable solely to the Florida Supreme Court,[5] and its authority may neither usurp nor exceed the court's power under the Florida Constitution.[6]

As part of its duty to regulate admission of persons to the Florida bar, the Board is empowered to schedule informal hearings in order to question the applicant's qualifications. Thus, the Board insures that all applicants fully comply with the Florida Supreme Court's qualification criteria before being admitted to practice law in Florida.[7]

Recently, the Florida Supreme Court, in *Florida Board of Bar Examiners, In re N.R.S.*,[8] explicitly denied the Board authority to question an applicant regarding his proclivity towards private homosexual conduct. N.R.S., a member of the New York State Bar, had completed all parts of the Florida Bar examination successfully. His application for admission to the Bar revealed he had been classified 4-F by the military "either because of a physical problem or because of his homosexuality."[9] The Board conducted an informal hearing at which N.R.S. refused to answer questions about his past sexual conduct. He admitted a "continuing sexual preference for men but . . . indicated that he had no present intention regarding future homosexual acts."[10]

4. FLA. CONST. art V, § 15: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

5. *In re* Fla. Bd. of Bar Examiners, 353 So. 2d 98 (Fla. 1977).

6. *Id.*

7. FLA. SUP. CT. R. RELATING TO ADMISSIONS TO THE BAR, Art. II, § 12 (1977).

8. 403 So. 2d 1315.

9. *Id.* at 1316.

10. *Id.*

He further stated he would obey all the laws of Florida.[11]

Following a review of N.R.S.'s testimony, the Board requested he return for further questioning. This, he refused to do. Ultimately, the Board refused to certify his admission to the Florida Bar, conceding "that, except for the issue of sexual conduct, it (the Board) has no adverse information concerning petitioner's fitness."[12] N.R.S. subsequently petitioned the Florida Supreme Court seeking its order that the Board certify his admission to practice.

The issue presented by the case was whether questioning a Florida Bar applicant about private homosexual activity was rationally related to proving fitness to practice law.[13] The issue is a delicate one,[14] and one recently addressed by other jurisdictions in the context of other employment areas.[15] After reconciling the competing arguments, the Florida Supreme Court refused to sanction the Board's inquiry into the applicant's private sexual conduct, even though the applicant admitted a continuing sexual preference for men.[16]

N.R.S.'s Constitutional Arguments

Florida Statute § 800.02 prohibits "unnatural and lascivious acts,"[17] and has been construed to include homosexual acts between

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11. *Id.*
12. *Id.*
13. *Id.* at 1317.
14. *Id.* at 1316.
15. Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969)(discharge of homosexual employed by the National Aeronautics and Space Administration for immoral conduct and possession of unsuitable personality traits held violative of substantive due process); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969)(male teacher who engaged in non-criminal relationship with another male cannot be subject to disciplinary proceedings absent showing behavior indicated unfitness to teach). *But see* Gaylord v. Tacoma School Dist. No. 10, 88 Wisc. 2d 286, 559 P.2d 1340, *cert. denied,* 434 U.S. 879 (1977) (public knowledge of male teacher's homosexuality impaired his academic efficiency thus constituting sufficient cause for discharge).
16. 403 So. 2d at 1315. The court did sanction further inquiry by the Board, if the Board in good faith, felt the conduct was other than private, noncommercial and consensual.
17. FLA. STAT. § 800.02 (1981) reads in part: "Unnatural and lascivious act. Whoever commits any unnatural and lascivious act with another person shall be guilty of a misdemeanor of the second degree. . . ."

consenting adults.[18] In the instant case, N.R.S. alleged the statute could not be constitutionally applied to private consensual activity between adults,[19] but in a footnote the court declined to answer this assertion, stating the statute had previously withstood constitutional attack.[20]

In *Witherspoon v. State,*[21] applicants challenged the constitutional validity of section 800.02, contending the words "unnatural and lascivious" contained within the statute were "so vague as to make an ordinary person guess at their meaning, and so broad as to invade the right to privacy and the constitutional rights of individuals guaranteed by the First and Fourteenth Amendments to the United States Constitution and Declaration of Rights of the State of Florida."[22] Florida's Supreme Court answered that the words "unnatural and lascivious" were not vague, but rather were "of such a character that an ordinary citizen can easily determine what character of act is intended, and are thus secure from constitutional attack."[23] Similar statutes in other states have also withstood constitutional attack.[24]

Florida statutes set forth guidelines as to who may not practice law in Florida. The category of excludable applicants includes those persons "not of good moral character."[25] Florida courts have struggled with the interpretation of the words "good moral character,"[26] as has the United States Supreme Court.[27]

In *Konigsberg v. State Bar of California,*[28] an applicant was denied admission to the California Bar because he had failed to show he was a person of good moral character. There was some evidence appli-

18. 278 So. 2d 611.
19. *See infra* notes 41-53 and accompanying text.
20. 403 So. 2d 1315.
21. 278 So. 2d 611.
22. *Id.* at 612.
23. *Id.*
24. *See generally* 81 C.J.S. *Sodomy* § 3 (1977).
25. Florida statutes provide that "[n]o sheriff or clerk of any county or deputy of either, shall practice [law] in this state, *nor shall any person not of good moral character . . . be entitled to practice.*" FLA. STAT. § 454.18 (1981) (emphasis added).
26. Florida Bd. of Bar Examiners Re: G.W.L., 364 So. 2d 454 (Fla. 1978); State *ex rel.* Tullidge v. Hollingsworth, 146 So. 66 (Fla. 1933).
27. Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957).
28. *Id.*

cant had once been connected with the Communist Party, but the applicant refused on First Amendment grounds to answer questions about his political associations and beliefs. The United States Supreme Court sustained the denial of admission,[29] but described the term *good moral character* as *unusually ambiguous.*[30] The Court warned that such ambiguity could "be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."[31] In order to prevent arbitrary denial of applicants' admission to the Bar, the United States Supreme Court held that the standards imposed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution must be met.[32]

Petitioner in *In re N.R.S.* advanced the argument that he had been denied due process and equal protection of the law.[33] Under the Fourteenth Amendment of the United States Constitution, government cannot take away a person's life, liberty, or property without due process of law.[34] There are two aspects of the due process guarantee: procedural and substantive. Procedural due process involves an individual's right to a fair decision-making process, including notice.[35] N.R.S. argued he had been denied procedural due process of law because Florida Bar forms did not give notice that homosexual persons applying for admission to practice would be subject to questioning about their private sex lives.[36]

Petitioner also asserted that he had not been afforded equal pro-

29. Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961).

30. *Id.* at 263.

31. *Id.*

32. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); U.S. CONST. amend. XIV, § 1.

33. *See* Brief for Petitioner at 18, 23; 403 So. 2d 1315.

34. U.S. CONST. amend. XIV, § 1. A discussion on the Court's interpretation of the phrase "life, liberty, and property" is beyond the scope of this comment. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 383, 478 (1978) [hereinafter cited as NOWAK].

35. NOWAK, *supra* note 34 at 383, 499.

36. *See* Brief for Petitioner at 18; 403 So. 2d 1315. Substantive due process is "[t]he right to be free from irrational and capricious government conduct resulting in deprivation of life, liberty or property." J. Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation,* 64 IOWA L. REV. 527, 533 (1979).

tection of the laws.[37] The equal protection clause of the Fourteenth Amendment[38] guarantees that similarly situated individuals will be afforded equal treatment by the government.[39] N.R.S. argued that "similarly situated individuals" described all applicants to the Florida Bar, whether heterosexual or homosexual. Since the Florida statute proscribing "unnatural and lascivious acts"[40] had been applied to heterosexuals as well as homosexuals,[41] N.R.S. asserted that equal protection prohibited the Board from inquiring into his private sexual behavior since the Board did not delve into the private sex lives of heterosexuals.[42]

In addition to the procedural due process and equal protection constitutional challenges, petitioner asserted that inquiry into his private sexual behavior violated his right to privacy under the United States Constitution.[43] Commentators recognized a right of privacy as early as 1890, when Samuel Warren and Louis D. Brandeis wrote a person's privacy should be protected from intrusion by newspapers.[44] Articulating what would later become a foundation for today's right of privacy, Brandeis dissented in 1928 from the majority's view and wrote that a person should be prohibited from government intrusion into his private life.[45]

While the United States Constitution does not *explicitly* guarantee the right of privacy, the Supreme Court has recognized a right of privacy implicit in the express guarantees of the Constitution.[46] The right of privacy has been viewed by the Court as an element of "liberty"

37. *See* Brief for Petitioner at 23; 402 So. 2d 1315; U.S. CONST. amend. XIV, § 1.

38. U.S. CONST. amend. XIV, § 1.

39. NOWAK, *supra* note 32, at 519.

40. FLA. STAT. § 800.02 (1981).

41. Thomas v. State, 326 So. 2d 413 (Fla. 1975).

42. *See* Brief for Petitioner at 22-23; 403 So. 2d 1315.

43. *Id.* at 16.

44. S. Warren and L. Brandeis, *The Right of Privacy,* 4 HARV. L. REV. 193 (1890).

45. Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

46. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973) (right of women during some stages of pregnancy to have an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of unmarried individuals to obtain contraceptives).

guaranteed by the Fourteenth Amendment.[47] In the landmark decision, *Griswold v. Connecticut,* the Court found that the "specific guarantees in the Bill of Rights have penumbras . . . various guarantees create zones of privacy."[48] *Griswold's* "zones of privacy" emerged from such fundamental constitutional guarantees as the First Amendment, limiting forced disclosure of speech and association; the Third Amendment, protecting a person from forced quartering of a soldier during peacetime; the Fourth and Fifth Amendments limiting the extent to which the government may demand information from a person; and the Ninth Amendment, which guarantees that enumerated constitutional rights shall not be construed as limiting other rights of the people.[49] Thus, by interpreting the specific constitutional guarantees as creating zones of privacy, the extrapolated right of privacy was recognized as a fundamental right.[50]

It is interesting to note that on November 4, 1980, Floridians voted to amend the state Constitution,[51] adding Article I, section 23, which provides that every person has "[t]he right to be let alone and free from government intrusion into his private life."[52] Had petitioner brought his cause of action after the general election, he could have asserted an explicit right of privacy under the Florida Constitution, and that the Board's investigation constituted an unreasonable intrusion into his private life. This argument was not raised in petitioner's brief, presumably because the brief was filed prior to passage of the privacy amendment. The court's opinion followed the amendment. While it cannot be conclusively determined from the language of the N.R.S. opinion, it is possible that the court foresaw the impact of Florida's new section 23 and on that ground determined petitioner's right of privacy

47. Meyer v. Nebraska, 262 U.S. 39 (1923) ("liberty" includes right to marry, establish a home, bring up children, and in general, enjoy those privileges essential to an orderly pursuit of happiness); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (recognizing "liberty" includes parents' right to direct their children's upbringing and education).

48. 381 U.S. 479, 484.

49. *Id.*

50. *Id.*

51. G. Cope, *A Quick Look At Florida's New Right of Privacy,* 55 FLA. B.J. 12 (1981).

52. FLA. CONST. art. I, § 23.

warranted protection from intrusion by the Florida Board of Bar Examiners. By resting its decision on the grounds that private noncommercial sexual acts between consenting adults are not relevant to fitness to practice law, the court apparently protected petitioner's right of privacy as explicitly written in the new Florida Constitution.

The constitutional arguments asserted by petitioner are not new. It has been suggested by other courts that prohibition of homosexual behavior, even private homosexual behavior, may infringe on the right of privacy,[53] deny equal protection,[54] and impair due process requirements regarding liberty.[55] The Florida Supreme Court did not, however, address petitioner's arguments asserted on these constitutional grounds. Apparently, the court avoided the constitutional issues in keeping with its rule[56] to dispose of cases, where possible, without adjudication of constitutional issues.[57]

Fitness to Practice Law

In addition to constitutional arguments, N.R.S. claimed the Board's inquiry into his private consensual sexual behavior was not rationally related to prove fitness to practice law.[58] Traditionally, states grant bar examiners wide powers to regulate bar admission, but these powers are not without restriction.[59]

As early as 1889, courts recognized that where an attorney's conduct did not affect his professional integrity, a board of bar examiners could not suspend an attorney, even though that conduct might be "irregular."[60] Similary, "if the act does not disclose moral turpitude in the perpetrator rendering him unfit to be entrusted with the confidences

53. Acanfora v. Board of Educ. of Montgomery County, 259 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir. 1974), *cert. denied,* 419 U.S. 836 (1974); 417 F.2d 1161.

54. 359 F. Supp. 843 (D. Md. 1973).

55. *Id.*

56. Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970).

57. *Id.*

58. *See* Brief for Petitioner at 6; 403 So. 2d 1315.

59. 353 U.S. 232.

60. State v. McClaugherty, 33 W. Va. 25, 28, 10 S.E. 408, 410 (1889) (conduct of attorney who published false and libelous charge against judge in newspaper held insufficient misconduct to disbar).

and duties of the profession, it cannot appropriately be made the basis of disbarment."[61]

According to the United States Supreme Court in *Schware v. Board of Bar Examiners*[62] "[a] State can require . . . good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness . . . to practice law."[63] In *N.R.S.*, petitioner asserted that homosexual activity was "hardly dishonorable conduct relevant to the legal profession,"[64] and that such conduct cast no doubt on his integrity, honesty, and fairness.[65]

The Florida Board of Bar Examiners' Position

The Board defended its inquiry into possible homosexual conduct as an appropriate means of protecting the public and of maintaining the integrity of the legal profession. The Board noted that it is an attorney's sworn duty to uphold the laws of the state in which he practices, including sodomy statutes and laws proscribing homosexual conduct. Florida, along with twenty-two other states, has a criminal statute prohibiting homosexual conduct.[66]

The Board argued that questioning the applicant about his private sexual conduct was relevant to determine "whether the applicant intends to disobey the laws of Florida which he seeks to be be sworn to uphold."[67] The Board suggested "that an applicant's past homosexual acts are relevent to determine whether past conduct will prevent him from achieving the social acceptance necessary to enable him to discharge his professional responsibilities."[68]

In response to petitioner's privacy argument, the Board asserted that the Florida Supreme Court had followed the United States Su-

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61. Bartos v. United States Dist. Court, 19 F.2d 722, 726 (8th Cir. 1927).
62. 353 U.S. 232.
63. *Id.* at 239.
64. *See* Brief for Petitioner at 5-6; 403 So. 2d 1315.
65. *Id.* at 6.
66. FLA. STAT. § 800.02 (1981). *See generally* K. Lasson, *Homosexual Rights: The Law in Flux and Conflict*, 9 BALT. L. REV. 47 (1979).
67. 403 So. 2d 1315.
68. *Id.* at 1317.

preme Court in limiting the right to privacy[69] and that the right did not extend to homosexuals.[70]

The Court's Disposition

The Florida Supreme Court in *In re N.R.S.* stated: "Private noncommercial sex acts between adults are not relevant to prove fitness to practice law,"[71] but did not specifically address the constitutional issues raised by petitioner. However, the court used constitutional due process language in reaching its decision. Holding that unless the Board demonstrated, in good faith, a need to question further the petitioner about other sexual conduct (i.e., conduct that was commercial, public or nonconsensual), inquiries were to be limited to those "bear[ing] a rational relationship to an applicant's fitness to practice law."[72]

The words, "rational relationship" are trademarks of the oft-quoted minimal scrutiny test employed by the courts in assessing whether due process and equal protection of the law have been violated.[73] The means chosen under this test must be reasonably correlated to the ends sought, and *in N.R.S.*, the court concluded the Board's inquiry failed to meet even this standard. Presumably then, no reason existed for applying the "strict scrutiny" standard which is invoked only when a suspect class or fundamental right is involved.[74]

The argument could be made, however, that because the right of privacy was, at least to some extent, involved in *In re N.R.S.*, and because the right of privacy has been recognized as a fundamental right, that is, a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[75] the stricter standard

69. *See* Brief for Respondent at 3; 403 So. 2d 1315. *See also Doe,* 403 F. Supp. 1199; Laird v. State, 342 So. 2d 962 (Fla. 1977).

70. *See* Brief for Respondent at 3; 403 So. 2d 1315.

71. 403 So. 2d at 1317.

72. *Id.*

73. United States v. Carolene Prods., 304 U.S. 144 (1938); Ferguson v. Skrupa, 372 U.S. 726 (1963) (Harlan, J., concurring). For a discussion of the minimal scrutiny test employed by the Court, see generally NOWAK, *supra* note 34; Friedman *supra* note 36.

74. *Griswold,* 381 U.S. 479. For a discussion of the strict scrutiny test employed by the Court, see generally NOWAK *supra* note 34; Friedman, *supra* note 36.

75. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (footnotes omitted).

of review[76] should have been invoked. Petitioner did not advance this argument, nor did the court apply the stricter test, choosing instead to hold implicitly the inquiry by the board failed to meet the rational relationship test, the lowest standard of review.

The court's opinion gives very little basis for its decision other than the lack of a rational relationship between the Board's inquiry and attorney's fitness to practice law. The court considered the issue carefully, obviously recognizing its delicacy.[77] In the words of the court: "A lawyer should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession."[78] The court stressed the importance of lawyers leading law abiding lives in order to maintain the dignity associated with the legal profession and in keeping with the attorney's sworn duty to uphold the law.

The Board's concern is that the applicant for bar admission be morally, as well as legally, responsible. Thus, good moral character must be demonstrated before an applicant is admitted to the bar.[79] The definition given the term "good moral character" is considered unusually ambiguous, and the United States Supreme Court has warned against its arbitrary use.[80]

Included in the Florida Supreme Court's definition of *good moral character* are "conduct or acts which historically [do not] constitute an act of moral turpitude."[81] "Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. . . ."[82] "The sole purpose of these requirements is to protect the public."[83] Additionally, "[t]he layman must have confidence that he has employed an attorney who will represent his interests . . . [and] if an applicant has committed certain illegal acts in the past, he may represent a future peril to society which

76. 381 U.S. 479.
77. 403 So. 2d 1315.
78. FLA. CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1978).
79. Florida Bd. of Bar Examiners, Re: G.W.L., 364 So. 2d 454 (Fla. 1978).
80. 353 U.S. 252.
81. 364 So. 2d 454.
82. *Id.* at 458.
83. *Id.*

would justify denying the applicant admission."[84]

All attorneys are not of impeccable background, nor are they infallible. Recognizing this, the Board has admitted persons to practice who have violated laws,[85] or engaged in unethical conduct[86] at some point in their lives. Similarly, attorneys who have been suspended from practice for illegal conduct have subsequently been re-admitted to practice.[87] Thus, conduct that may be unethical or illegal may not involve an offense of moral turpitude for which a person should be excluded from the practice of law.

In a 1978 advisory opinion requested by the Florida Board of Bar Examiners, *Florida Board of Bar Examiners v. Eimers,*[88] the Florida Supreme Court considered the relationship between homosexuality and fitness to practice law. In *Eimers,* the applicant for admission had passed all parts of the Florida Bar Examination, but had admitted his preference for homosexuality during questioning at a hearing before the Board. The applicant was not asked about any specific acts he may have engaged in nor was there any evidence proving the applicant had acted or planned to act on his sexual preference. The court stated that in order to determine the reasonableness of the relationship between homosexual orientation and fitness to practice law, consideration must be given the purpose for ostracizing the morally unfit.[89] The court stated that an attorney's mere preference for homosexuality did not constitute a threat to the Board's objective of protecting the public

84. Florida Bd. of Bar Examiners, *In re* Eimers, 358 So. 2d 7, 9 (Fla. 1978).

85. Florida Bd. of Bar Examiners, *re* Groot, 365 So. 2d 164 (Fla. 1978) (debts incurred later discharged by bankruptcy are not basis for denial of admission to Bar where not incurred with reckless disregard for payment); *In re* Florida Bd. of Bar Examiners, 183 So. 2d 688 (Fla. 1966) (conviction of petty larceny does not deprive individual of right to be admitted to the practice of law, if otherwise qualified).

86. 365 So. 2d 164; 183 So. 2d 688.

87. The Fla. Bar v. Davis, 361 So. 2d 159 (Fla. 1978) (issuance of worthless checks constitutes unethical conduct by an attorney warranting suspension for twelve months); The Fla. Bar v. Blalock, 325 So. 2d 401 (Fla. 1976) (attorney suspended for misappropriating funds will be reinstated when restitution made); *In re* Hill, 298 So. 2d 161 (Fla. 1974) (one year suspension for issuance of worthless checks and alcohol problems).

88. 358 So. 2d 7, 9.

89. *Id.*

from those morally unfit to practice law,[90] and further, that homosexual behavior among consenting adults did not render a person unable to "live up to and perform . . . professional duties and responsibilities assigned to members of The Bar."[91]

In addition, the *Eimers'* court found the record devoid of evidence which suggested a preference for homosexual behavior among consenting adults was "indicative of character baseness."[92] Implicit in this statement is the message that homosexual conduct, while proscribed by Florida's criminal law is moral turpitude of the degree which renders a person unfit to practice law. Since under *Eimers,* private consensual homosexual conduct was not deemed an offense of moral turpitude for which a person should be denied admission to the bar, it follows that *inquiry* into such conduct is not rationally related to fitness to practice law.

Two strong dissents in *N.R.S.* present the competing arguments.[93] As stated by Justice Boyd, "[h]omosexual acts are prohibited by the criminal law."[94] The state legislature is not prohibited "by any constitutional principle of due process, equal protection, or privacy"[95] from enacting laws intended to "protect the public health, welfare, safety, and morals."[96]

Since the issue in *N.R.S.* was not whether the Board can deny admission to someone who *admits* an orientation towards homosexual lifestyle, but rather whether the Board can *question* the applicant as to his private sexual activity, Justice Boyd stated that "[e]ven without evidence of actual conduct, I am opposed to the admission of any person whose admitted 'orientation' indicates a lifestyle likely to involve routine violation of a criminal statute."[97] Although the mere "likelihood" of routine violation of the law is arguably weak grounds for denying an applicant admission to the bar, Justice Boyd felt further inquiry into petitioner's past and planned conduct would have been useful and

90. *Id.*
91. *Id.* at 10.
92. *Id.*
93. 403 So. 2d 1315.
94. *Id.* at 1317.
95. *Id.*
96. *Id.*
97. *Id.* at 1318.

proper. Justice Boyd also stated that he would deny admission to anyone whose lifestyle involved routine violation of legislatively defined standards of moral conduct,[98] and believed the court had invaded the province of the legislature.[99]

The majority made no attempt to reconcile this viewpoint with their decision. Ignoring the competing argument, the court held that inquiry into an applicant's "orientation" to private consensual homosexual conduct was beyond the Board's purview, even though, as Justice Boyd stated, such conduct is violative of a criminal statute.[100] The majority denied the Board authority to determine through further questioning, whether petitioner's past conduct involved violation of a criminal statute.[101] Instead, the court seemed to rely on petitioner's assertion that he would obey the laws of Florida and that he had no present intention regarding future homosexual conduct. Thus, the possibility exists that an applicant who *may* have violated a Florida criminal law will be admitted to practice in Florida, *without further determination* of the frequency or seriousness of the past behavior.

Justice Alderman's separate dissent in *N.R.S.* addressed the danger of admitting to the bar persons who may have violated the law. He stated that further inquiry was relevant in the area of homosexual conduct just as it would be into any other area of illegal or immoral conduct.[102] Without futher inquiry into petitioner's private homosexual conduct, Alderman argued the Board would be unable to determine with certainty the applicant's moral fitness. Further investigation by the Board may well have revealed the nature and extent of petitioner's past and planned conduct. However, since in the majority's view orientation or proclivity towards a homosexual lifestyle is not grounds for denial of admission to the Bar, any inquiry with regard to such private consensual homosexual behavior is not rationally related to fitness to practice law.

98. *Id.*
99. *Id.*
100. FLA. STAT. § 800.02 (1981).
101. *Id.*
102. 403 So. 2d 1315.

Implications

The Florida Supreme Court has refused to sanction questioning of a Florida Bar applicant regarding his or her private, noncommercial sexual conduct even though their behavior may be in violation of Florida law.[103] Such private conduct, the court held, is not rationally related to fitness to practice law in Florida.

The court's refusal to grant the Board authority to further inquire into petitioner's private sexual behavior is apparently grounded in the belief that orientation or mere preference for a homosexual lifestyle is not an offense of moral turpitude or behavior which renders a person unable to meet the standard of good moral character.

Arguably, some conduct which is illegal is not conduct demonstrating moral turpitude. Current Florida law deems cohabitation to be a violation of the law.[104] Despite this status of the law, no applicant has been denied admission to the Florida Bar in recent years because of cohabitation. Apparently, although this conduct is illegal in Florida, it is not conduct involving moral turpitude nor conduct which fails to meet the standard of good moral character, and thus, not grounds for denial of admission to the bar.

The dissenters' opinions are grounded in Florida's criminal law. The dissenters were concerned about past and possible future violations of the criminal statute by petitioner. While at first blush the reasoning of the dissent appears practical, a closer examination reveals the impracticality of the position. The dissenters apparently would have the definition of *good moral character* narrowed to *law abiding*. Such reasoning in effect would allow admission to the bar only to those individuals who could evidence a strict compliance with Florida's criminal statutes. Anyone who had violated *any* law in Florida would be subject to Board inquiry and investigation regardless of whether the offense met with the Board's definition of conduct involving moral turpitude. However, since moral turpitude is the standard which the Board applies in screening candidates for admission, inquiry into an area for which admission cannot be denied would be irrelevant and not rationally related to fitness to practice law.

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103. FLA. STAT. § 800.02 (1981).
104. FLA. STAT. § 798.02 (1981).

Conclusion

The court in *N.R.S.* apparently felt the petitioner's preference for a homosexual lifestyle was not conduct demonstrating moral turpitude such that it warranted denying his admission to the bar. Consequently, the court concluded any inquiry into his private sexual behavior would be irrelevant. However, since no clear rationale for its conclusion is stated, one must surmise and draw inferences regarding the reasoning and logic underlying the result. The majority opinion denied the Board authority to further question N.R.S. about his private homosexual behavior since this was not rationally related to his fitness to practice law, but the opinion fails to explain why such inquiry is not rationally related.

While the dissenters' view appears legally sound in that homosexual behavior is violative of Florida's criminal law, their approach is fraught with impracticalities because their inquiry would extend into areas for which an applicant cannot be denied admission. The majority's opinion takes the more practical approach but leaves unanswered the assertion that such inquiry violates due process, equal protection, and the right to privacy. Without elaborating why private homosexual behavior is unrelated to fitness to practice law, the court denied the Board authority to inquire into this area.

Leslie J. Roberts