NOVA LAW REVIEW

FESTSCHRIFT IN MEMORY
OF ALLAN H. TERL

Introduction ........................................................................................................ Fran L. Tetunic

ARTICLES
A Look at Lesbian and Gay Rights in Florida
Today: Confronting the Lingering Effects of Legal Animus ......................................................... William E. Adams, Jr.

Loving, Baehr, and the Right to Marry:
On Legal Argumentation and Sophistical Rhetoric ......................................................... Mark Strasser

An Essay on the History of Lesbian
and Gay Rights in Florida ................................................................................ Allan H. Terl

NOTES AND COMMENTS
Brennan v. State: The Constitutionality of Executing Sixteen-Year-Old Offenders in Florida .................................................................................. Andrew F. Garofalo


There’s Nothing Psychological About It: Defining a New Role for the Other Mother in a State that Treats Her as Legally Invisible ........................................ Stacy A. Warman

VOLUME 24 SPRING 2000 NUMBER 3

Published by NSUWorks, 2000
FESTSCHRIFT IN MEMORY OF ALLAN H. TERL

Introduction ................................................................. Fran L. Tetunic  xi

ARTICLES

A Look at Lesbian and Gay Rights in Florida Today: Confronting the Lingering Effects of Legal Animus ................................................................. William E. Adams, Jr.  751

Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric ....................... Mark Strasser  769

An Essay on the History of Lesbian and Gay Rights in Florida................................................................. Allan H. Terl  793

NOTES AND COMMENTS

Brennan v. State: The Constitutionality of Executing Sixteen-Year-Old Offenders in Florida ............ Andrew F. Garofalo  855


There’s Nothing Psychological About It: Defining a New Role for the Other Mother in a State that Treats Her as Legally Invisible...................................................... Stacy A. Warman  907
A Look at Lesbian and Gay Rights in Florida Today: Confronting the Lingering Effects of Legal Animus

William E. Adams, Jr.*

TABLE OF CONTENTS

I. INTRODUCTION ............................................................................. 751
II. CRIMINAL LAW—SODOMY AND HATE CRIME LAWS ............... 753
III. ANTIDISCRIMINATION LAWS/BALLOT INITIATIVES .................. 756
IV. "FAMILY" LAW ISSUES .......................................................... 760
V. FUTURE TRENDS ........................................................................ 767

I. INTRODUCTION

As summarized by the late Allan Terl in this issue,¹ the history of the treatment of lesbian, gay, bisexual, and transgendered ("LGBT")² persons in Florida has been marked by "witch hunts" for lesbian and gay teachers,³ political attacks through voter initiatives,⁴ overtly discriminatory laws,⁵ and

* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. A.B., 1975, Indiana University; J.D., 1978, Indiana University.


² It must first be acknowledged that the legal treatment of lesbians and gays sometimes raises different issues than it does for bisexual and transgendered persons. For example, Florida's ban on "homosexual" adoptions would apparently not prevent a bisexual person from adopting as long as that person was not currently engaged in a sexual relationship with a person of the same sex. Because transgendered persons are discriminated against due to their gender and sexual orientation, the application of laws, primarily aimed at homosexuals, is not always clear. See generally Kristine W. Holt, Comment, Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgendered Jurisprudence, 70 TEMP. L. REV. 283 (1997) (discussing the current public policy against transgendered persons and how the policy has manifested itself under federal antidiscrimination case law). However, for the most part, the laws and cases in Florida, which have addressed the issue of homosexuality, also have relevance to bisexuals and transgendered persons, even if they are not usually discussed directly in those cases and statutes.

³ See Terl, supra note 1, at 796.

case law that has been mixed in the recognition of equal rights.\textsuperscript{6} This article will address what has happened since Terl’s untimely death in 1997, describing the current legal and political climate for LGBT persons in Florida, analyzing recent trends and suggesting future directions. As a strong advocate for equal rights for LGBT persons, Terl would no doubt feel encouraged by some of the political and legal developments in the last few years, but he undoubtedly would still be concerned about some of the issues that continue to be contested in the political and judicial spheres. Expanding upon his excellent summary of the history of Florida’s treatment of its LGBT residents, this article shall attempt a critical analysis of the case law generated by Florida courts and compare its treatment to that of other jurisdictions in this country.

To maintain consistency with the scope of the historical article by Terl and to keep this summary manageable, this article will focus on areas of the law highlighted in the Terl article.\textsuperscript{7} This approach is also consistent with the areas of the law that have generated the predominant amount of attention from both advocates for equality for LGBT persons and their opponents in the legislative and judicial arenas in the last three years.\textsuperscript{8} This emphasis means that a few areas where some legal action has taken place will not be discussed. Thus, for example, this article will not address case law in the area of defamation in relation to homosexuality.\textsuperscript{9} In addition, this article will not address issues concerning lesbians and gays in the school setting, which, although important, has not seen any significant change in the law since the Terl article was written.\textsuperscript{10}

\textsuperscript{5} See, e.g., \textsc{Fla. Stat.} § 63.042(3) (1999) (Florida’s statute banning “homosexual” adoptions); \textit{Id.} § 741.212 (Florida’s statute banning same-sex marriage); \textit{Id.} § 800.02 (Florida’s “sodomy” statute).

\textsuperscript{6} See Terl, \textit{supra} note 1, at 821–31.

\textsuperscript{7} \textit{Id.} at 793.

\textsuperscript{8} See \textit{id.} at 821–51.

\textsuperscript{9} For an approach to the area of defamation, see Hoch v. Rissman, 742 So. 2d 451, 455–57 (Fla. 5th Dist. Ct. App. 1999) (reversing summary judgment in favor of defendants in an action concerning statements made at a law firm seminar discussing “inside” information about the tendencies and proclivities of lawyers and judges working in the area of workers compensation, and holding that the statement “if you wanted to prevail... before Rand Hoch, you should send a boy in short pants” constitutes slander per se as it “imputes conduct or a condition incompatible with the proper exercise of his judgeship”).

\textsuperscript{10} Allan Terl’s article was written in 1997. The last major development concerning gays and lesbians in the school setting is discussed in Terl, \textit{supra} note 1, at 810–15, 832.
II. CRIMINAL LAW—SODOMY AND HATE CRIME LAWS

Historically, the criminal law has been used as a weapon against members of sexual minority groups, usually through the enactment of laws outlawing sodomy or similar sexual practices. This type of criminal statute still exists in a number of states. On the other hand, the criminal law is beginning to be used in a positive fashion to protect lesbians and gays from violence motivated by animus against them. These laws, popularly referred to as “hate crime” laws, are increasingly including sexual orientation in the list of protected categories.

As has been noted elsewhere, the battle for the rights of lesbians and gays is often dependent upon a state’s position concerning the criminalization of same-sex sexual conduct. Even though sodomy laws are often not enforced against adults engaged in the prohibited sexual acts in private, the laws have had a pernicious impact upon gays and lesbians in a wide variety of legal contexts. Litigants in cases in jurisdictions with sodomy laws in which homosexuality is an issue often are required to discuss the impact of existing sodomy laws upon the legal issue before the court. Thus, the cases concerning the recognition of the existence of lesbian and gay student organizations have often had to address arguments that the organization could lead to the violation of criminal laws.

11. See, e.g., Act of Aug. 6, 1868, ch. 1637, § 7, 1881 Fla. Laws 8, 374–76, repealed by Ch. 74-121, § 1, 1974 Fla. Laws 371, 372. This section of the Florida Statutes, § 800.01, was held unconstitutional in Brinson v. State, 278 So. 2d 317 (Fla. 1st Dist. Ct. App. 1973), and then repealed by the Florida Legislature in 1974.

12. See, e.g., ARK. CODE ANN. § 5-14-122 (Michie 1997); KAN. CRIM. CODE ANN. § 21-3505 (West 1995); OKLA. STAT. ANN. tit. 21, § 886 (West 1999); TEX. PENAL CODE ANN. § 21.06 (West 1998). See also infra notes 23–27.

13. See, e.g., FLA. STAT. § 775.085(1)(a) (1999) (stating that “[t]he penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on ... sexual orientation ... of the victim”).

14. See, e.g., id.


16. Dan Hawes, National Gay and Lesbian Task Force, 1999 Capital Gains and Losses: A State by State Review of Gay, Lesbian, Bisexual, Transgender, & HIV/AIDS-Related Legislation in 1999 9 (1999). See also Gay Student Servs. v. Texas A&M Univ., 737 F.2d 1317 (5th Cir. 1984) (holding that university’s justifications for refusing to officially recognize homosexual student group were insufficient to justify infringement of the group’s First Amendment rights); Gay Lib v. University of Mo., 558 F.2d 848 (8th Cir. 1977) (holding that reliance on opinions by psychiatrists that homosexual student organization as campus
were sometimes cited as a reason for denying incorporation to groups.\textsuperscript{17} As noted in the Terl article, the right of gays and lesbians to be admitted to practice law in Florida was placed in issue because of Florida’s sodomy law.\textsuperscript{18}

In Florida, the criminal statute outlawing “unnatural and lascivious acts”\textsuperscript{19} is deemed to outlaw sexual conduct between members of the same sex,\textsuperscript{20} although the Supreme Court of Florida has never stated definitively that it covered private consensual same-sex conduct between adults.\textsuperscript{21} Although some have believed that the state’s broad Privacy Amendment\textsuperscript{22} would negate this law’s application to homosexual conduct, it has not yet been so construed. If the statute does still outlaw private consensual same-sex sexual activity, it places Florida in a minority of states.\textsuperscript{23} Presently,
sixteen states\textsuperscript{24} outlaw some types of private consensual sexual activity between adults with four\textsuperscript{25} of these states limiting the bans to sexual acts between members of the same sex.\textsuperscript{26} Florida is one of the thirteen states that ban such activity between opposite-sex as well as same-sex couples.\textsuperscript{27} Although \textit{Bowers v. Hardwick} \textsuperscript{28} rejected a challenge to the constitutionality of such laws under the Due Process Clause of the Fourteenth Amendment to the United States Constitution,\textsuperscript{29} a growing number of states have recognized challenges pursuant to their state constitutions.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{24} Alabama, Arizona, Arkansas, Florida, Idaho, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Utah, and Virginia. \textit{State-by-State Sodomy Update, supra} note 23.
\item \textsuperscript{25} Arkansas, Kansas, Oklahoma, and Texas. \textit{Id.}
\item \textsuperscript{27} \textit{See FLA. STAT.} § 800.02 (1999).
\item \textsuperscript{29} \textit{But see} Romer v. Evans, 517 U.S. 620, 638 (1996) (Scalia, J., dissenting) (disputing the denial of equal protection of homosexuals under the law).
\item \textsuperscript{30} \textit{See} Powell v. State 510 S.E.2d 18 (Ga. 1998) (holding sodomy statute violates privacy guarantees in due process clause of state constitution); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (holding sodomy statute violates privacy and equal protection guarantees of state constitution); Gryczan v. State, 942 P.2d 112 (Mont. 1997) (holding sodomy statute violates privacy guarantees in state constitution and state’s interest in promoting either public health or morals was not a compelling state interest to warrant the infringement of privacy rights); People v. Onofre 72 A.D.2d 268 (N.Y. 1980) (holding sodomy statute violates federal constitution); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (holding sodomy statute violates equal protection clause of state constitution); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (holding sodomy statute violates privacy guarantees in state constitution). In 1999 a Baltimore circuit court found the Maryland statute to be unconstitutional, and the Maryland Attorney General agreed to stop enforcing the statute rather than appeal the decision. \textit{See Lambda Legal States: Maryland} (visited Apr. 10, 2000) <http://www.lambdalegal.org/cgi-bin/pages/states/record?record=20>. \textit{See also HAWES, supra} note 16, at 10, 75. \textit{But see} State v. Baxley, 655 So. 2d 973 (La. 1995) (holding that a statute punishing solicitation of oral or anal sex for compensation did not violate the state constitution’s equal protection guarantee); State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (upholding sodomy statute); State v. Morales, 826 S.W.2d 201 (Tex. App. Ct.)
\end{itemize}
Turning to the use of the criminal law to protect LGBT persons, Florida is one of the states that provides increased penalties for and collects data concerning crimes motivated by a bias against a person because of his sexual orientation. \(^{31}\) The federal government requires the United States Department of Justice to collect and report information concerning violent crimes related to a number of categories, including sexual orientation, under the Hate Crime Statistics Act. \(^{32}\) "Twenty-three states and the District of Columbia have established some sort of mechanism to respond to and/or record information about hate crimes related to sexual orientation." \(^{33}\) Although there are some criticisms of these types of statutes, \(^{34}\) there appears to be a trend for their passage. \(^{35}\)

Florida therefore finds itself in regard to its approach to LGBT persons in the criminal law area with one foot in the past and one tentatively stepping out towards the future. Finding itself in a dwindling number of states, mostly southern, that still criminalizes consensual same-sex sexual conduct between adults, it remains tied to a tradition that most other states have either chosen to abandon or are seriously reconsidering. On the other hand, the legislature's inclusion of sexual orientation in its hate crimes legislation places the state clearly within the trend toward this type of protective legislation during the past decade.

### III. ANTIDISCRIMINATION LAWS/BALLOT INITIATIVES

Currently, eleven states and the District of Columbia ban discrimination on the basis of sexual orientation in private employment through legislation. \(^{36}\) One hundred six municipalities and eighteen counties ban

---


35. See Kahan, supra note 34, at 462–63.

sexual orientation discrimination in private employment. 37 Eighteen states and the District of Columbia prohibit such discrimination in public employment. 38 Nine states and the District of Columbia prohibit sexual orientation discrimination in public accommodations and housing. 39 With the addition of local government ordinances, it is estimated that approximately thirty-eight percent of the population of the United States is therefore protected against discrimination on the basis of sexual orientation in private employment. 40 Most of these protections have been passed during the 1990s, including ten of the twelve states that have enacted such legislation. 41

In Florida, the cities of Gainesville, Key West, Miami Beach, Tampa, and West Palm Beach and the counties of Broward, Monroe, and Palm Beach have passed laws banning discrimination on the basis of sexual orientation. 42 Alachua County passed such an ordinance in 1993, but it was

repealed by a voter referendum in November 1994. A similar ordinance was passed in 1998 in Gainesville, which is in Alachua County. Hillsborough County passed an ordinance in 1991, but the County Commission repealed it in 1995. As was noted in the Terl article, Dade County passed an ordinance, which was repealed by a voter referendum in 1977, and the Miami-Dade County Commission again considered amending its antidiscrimination law to include sexual orientation more than twenty years later. After first rejecting the amendment on a perfunctory first reading, the Commission reversed itself and passed the ordinance in December, 1998. Approximately a year after its passage, opponents have received permission to seek signatures to place a referendum before the voters to repeal the protection. As has been true of similar measures attempted across the state, this effort has been supported by the Florida Family Association, based in Tampa. Thus, as this article goes to press,


45. HILLSBOROUGH COUNTY, FLA., ORDINANCE § 88-9, amended by ORDINANCE §§ 88-26, 90-2, 99-1. The repeal was reported in County Kills Gay Rights Law, MIAMI HERALD, May 18, 1995, at 5B.

46. Terl, supra note 1, at 803–04.

47. DADE COUNTY, FLA., CODE OF ORDINANCE, § 11A-1 (1977) (formerly Ordinance § 77-4).

48. Carl Hiaasen, Gay Rights Law is Defeated, MIAMI HERALD, June 8, 1997, at 1A.


50. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES, ch. 11A (1999). Thirty complaints were filed during the first year the ordinance was in effect, with one quarter of those complaints being settled. Don Finefrock, Foes of Gay-Rights Law Starting Drive for Repeal, THE MIAMI HERALD, Feb. 9, 2000, at B2.

51. Finefrock, supra note 50, at B2. Because the county’s referendum laws require signatures from only four percent of the registered voters, many observers felt that the group would be able to get the measure placed on the ballot. Id.

52. The Florida Family Association has twice unsuccessfully attempted to repeal the antidiscrimination ordinance in Tampa, but successfully helped to repeal an Alachua County ordinance. Don Finefrock, New Fight Nears as Foes Target Rights of Gays, Lesbians, MIAMI HERALD, Feb. 3, 2000, at 1B. The same group also attempted to place a statewide referendum on the Florida ballot that would have banned the passage of such laws in Florida. The referendum is similar to Amendment 2 in Colorado, which was declared unconstitutional by the United States Supreme Court in Romer v. Evans. 517 U.S. 620, 635 (1996). The Florida measure was declared a violation of the single-subject matter requirement respecting ballot measures. In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1019 (Fla. 1994). See Terl, supra note 1, at 841–42.
Miami-Dade County is confronted with the possibility of a repeat of the Anita Bryant campaign.

The threat of the ballot initiative against the LGBT community continues across the country. In spite of the Romer v. Evans decision by the Supreme Court of the United States, repeal efforts aimed at antidiscrimination provisions that cover sexual orientation continue. In addition, the approval by voters on March 7, 2000 of California's Proposition 22, the so-called "Knight Initiative" that seeks to limit marriage to opposite sex couples, may spur more voter initiatives that limit the rights of lesbians and gays in relation to marriage and other family issues. Although these other initiatives pose threats to lesbians and gays, most involve passage of laws as opposed to constitutional amendments like the Florida process, so the harm is arguably less serious from a legal structure perspective.

In summary, in regard to antidiscrimination laws, Florida has seen passage of local ordinances in most of its largest urban centers, although not without controversy and debate. The state legislature has not seriously considered the issues.


56. 2000 Cal. Leg. Serv. Prop. 22 (West) (codified at CAL. FAM. CODE § 308.5 (West 2000)) (enactnig the California Defense of Marriage Act which states "[o]nly marriages between a man and a woman is valid or recognized in California").

57. See Vanden Meide, supra note 33, at 8.

considered such protection, however, unlike over half of the nation. As has been indicated in this and the Terl article, the ballot initiative process has successfully been used in Florida to repeal protections in various localities. These campaigns are often divisive, frequently appealing to fear and prejudice.

IV. "FAMILY" LAW ISSUES

Whereas the antidiscrimination battles have mostly been waged in the political arena, the fight for equality in the family law area has seen more battles in the judicial arena. One notable exception is Florida's legislation forbidding the recognition of same-sex marriage. The Florida statute is similar to those passed in twenty-nine other states, and is also similar the federal government's Defense of Marriage Act. The relevance of this on sexual orientation in public and private employment, public accommodations, and housing).

59. In addition to the states that have passed antidiscrimination measures, 19 other states considered such legislation in 1999, with bills making significant progress in at least five of them. Hawes, supra note 16, at 7. In Hawaii, Maryland, and New York, one of the two legislative bodies passed a nondiscrimination bill. Id. In Illinois a similar bill failed by two votes in its House of Representatives. Id. In Delaware, the failure was by three votes in its House of Representatives. Id.

60. See Terl, supra note 1, at 839.

61. See, e.g., Adams II, supra note 53, at 467-77.


64. 1 U.S.C.A. § 7 (West 1999).
legislation has been brought to the foreground again with the recent decision of the Supreme Court of Vermont in *Baker v. Vermont*, which ruled that LGBT couples are entitled to rights and benefits similar to those granted to heterosexual spouses. The Supreme Court of Vermont left it to the legislature to devise a remedy, which it is currently debating. The article by Mark Strasser in this volume addresses the same-sex marriage issue across the country in more detail.

The movement to provide benefits to same-sex couples similar to those provided to married heterosexual couples has recently gained momentum across the nation. Several states presently offer some type of benefit for same-sex domestic partners. Sixty-four cities and nineteen counties across the country do as well. In addition, thirty-seven cities and four counties offer some type of registry for same-sex couples who want to register as domestic partners. The State of California has recently passed such a registry.

By comparison, as in the criminal law area, Florida finds itself following some trends and behind others in the battles to recognize the long-term relationships of same-sex couples. In spite of Florida's ban on same-sex marriage, a bill to create a domestic partner registry with the extension of health insurance and other benefits to the registrants was introduced in 1999 and similar legislation is proposed for the 2000 legislative session.

On the local government level, Broward County has passed one of the most progressive domestic partnership laws in the country, although it has been challenged in court. Along with the cities of San Francisco,
Sacramento, Davis, and Seattle, Broward County is one of the few jurisdictions to require or encourage private employers to extend benefits to the domestic partners of employees. Broward’s program offers a bidding preference equivalent to one percent to those employers that offer such benefits to domestic partners to the same extent that they are offered to legally married partners. There are also more limited registries and benefits offered in Key West, Miami Beach, and Monroe County. The city of West Palm Beach permits bereavement leave for domestic partners. Furthermore, a bill to provide benefits on a statewide basis is being proposed for the 2000 legislative session. At this point, seven states offer some type of domestic partner employment benefits to same-sex partners. California has a domestic partnership registry. In addition, forty-one municipal governments have domestic partnership registries and eighty-three offer some type of employment benefit to the domestic partner of their employees. Seventeen percent of the population in the United States now live in a state, county, or city with a domestic partner registry.

Without legal recognition of their relationships, same-sex couples find themselves forced to attempt to fit themselves into existing legal categories.

503 (17th Cir. Ct. Apr. 30, 1999) (entering summary judgment in favor of Broward County and finding that the County’s Domestic Partnership Act neither recognized a new marital relationship nor encroached upon an area exclusively reserved to the state). See also Hawes, supra note 16, at 51. Lowe is currently on appeal to the Fourth District Court of Appeal in Florida under case number 99-1664. Florida Courts (visited Apr. 13, 2000) <http://www.lambdelegal.org/cgi-bin/pages/cases/record?record=117>.

78. Broward County, Fla., Code of Ordinances § 16½-157 (1999) (stating “[e]xcept where federal or state law mandate to the contrary, in the purchase of personal property, general services, or professional services... by means of competitive bid or proposal procedure, a preference in an amount of one (1) percent of the bid or proposal price may be given to a Contractor providing for nondiscrimination of benefits for Domestic Partners”).

79. Id. See also van der Meide, supra note 33, at 17.

80. Key West, Fla., Code § 72.32-34 (1999); Miami Beach, Fla., Code § 62-127 (1999); Monroe County, Fla., Code § 14 (1999). See also van der Meide, supra note 33, at 40-42.


83. Van der Meide, supra note 33, at 85. The seven states are California, Delaware, Hawaii, Massachusetts, New York, Oregon, and Vermont. Id. See, e.g., Cal. Gov’t Code § 22873 (West 1999) (permitting employers to offer health benefits to employees’ domestic partners).


86. Id.
when those relationships end. There are three reported appellate cases where Florida courts expressly address the legal rights between same-sex couples who have dissolved their relationship. In Posik v. Layton, the Fifth District Court of Appeals upheld a cohabitation agreement between a lesbian couple in which one of the parties, a physician, agreed to provide “support” in the form of liquidated damages should she engage in any of a number of specified acts that would in essence cause the relationship to end. Although the court was careful to note that Florida recognizes no rights arising from a nonmarital relationship merely because it is similar to a marriage in most relevant respects, it was willing to enforce a contract between two parties who sought to undertake rights and obligations between each other, as long as the agreement was not “inseparably based upon illicit consideration of sexual services.” The court held that, pursuant to the Statute of Frauds, the contract must be in writing. In a custody dispute between a “biological” mother and a “psychological” mother, the Fourth District Court of Appeals argued that the latter lacked standing to obtain custody, or force visitation from the biological mother when the relationship between the two lesbian partners ended. The court noted that the Supreme Court of Florida had recognized in Von Eiff v. Azicri, that Florida’s constitutional right to privacy precluded intervention into the parent’s fundamental rights absent a showing of demonstrable harm to the child. Prior to this case, the First District Court of Appeals rejected the claim of a nonbiological lesbian parent that there is a right to shared parental responsibility or visitation. The concurrence in Kazmierazak noted that the problem for the lesbian co-parent was primarily a result of the statutory ban against homosexual adoptions.

In addition to ruling on disputes between same-sex partners, Florida appellate courts have also considered cases between lesbian mothers and their heterosexual partners. As noted in the Terl article, a series of three

---

88. Id. at 760–63.
89. Id. at 762.
91. Posik, 695 So. 2d at 762.
93. 720 So. 2d 510 (Fla. 1998).
94. Kazmierazak, 736 So. 2d at 107.
96. See Kazmierazak, 736 So. 2d at 111 (Gross, J., concurring).
97. See Terl, supra note 1, at 826–28.
cases from the Panhandle region of the state generated concern in the LGBT community across the state and nation. In Ward v. Ward, the trial court removed custody of a child from a lesbian mother to a father who had murdered his former wife. The appellate court, however, went to some length to deny that its decision was based upon the sexual orientation of the mother. The other two cases, Maradie v. Maradie and Packard v. Packard, also involved trial court decisions that awarded custody to the nongay parent because of the sexual orientation of the lesbian mother. The Maradie case resulted in reversal because the trial court had judicially noticed that "a homosexual environment is not a traditional home environment, and can adversely affect a child." The court specifically rejected the opportunity to determine "whether trial courts can deprive a mother of custody of her child solely because the mother is a lesbian." In Packard, the appellate court reversed a trial court finding in favor of the husband based upon the fact that he would provide "a more traditional family environment" without more specific factual findings to demonstrate upon what this conclusion was based. Unfortunately, without a more direct admonition to the trial court, it reinstated its original order, but was more careful in its opinion on remand. Despite the controversy and attention given to these cases, the narrowly-drawn opinions have made it difficult to measure their ultimate impact. Although all three refused to let stand decisions unsupported by little more than conclusory declarations that arguably demonstrated homophobic thinking, the appellate courts in each did not explicitly reject the consideration of sexual orientation as a factor in custodial fitness or clarify its relevance in a custodial dispute. A new case is currently awaiting decision from the Second District Court of Appeal. In

100. 742 So. 2d 250 (Fla. 1st Dist. Ct. App. 1996).
101. Id. at 252.
102. Id. “Although this case involves the modification of primary residential custody from a mother who is a lesbian, the focus of this case is not on the mother’s sexual orientation, but on the best interests of the child.” Id.
104. 697 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1997). This case is also interesting because the wife had engaged in a sexual menage a trios with her husband and her lesbian lover during the marriage. Id. at 1293. The trial court apparently did not discuss this aspect of the father’s sexual conduct in determining which household was more “traditional.” Id.
105. Maradie, 680 So. 2d at 541; Packard, 697 So. 2d at 1293.
106. Maradie, 680 So. 2d at 541.
107. Id.
108. Packard, 697 So. 2d at 1293.
109. Id.
Doe v. Doe,110 the trial court, amongst other findings, felt that the stigma and insults that a child of a lesbian mother would suffer in fact justified placement of the children with the father.111 This case oddly parallels another Florida case, Palmore v. Sidoti,112 in which the United States Supreme Court rejected this "stigma" argument in a race discrimination context.113

In the adoption area, challenges to Florida's ban against adoption by homosexuals continue.114 At this point, Florida is the only state that bans homosexuals from adopting by statute,115 although some other states are currently contemplating similar measures.116 New Hampshire, the only other state to have a statutory ban on homosexual adoptions, repealed its measure in 1999.117 The Florida statute has been challenged in court a number of times. A trial court in Key West found the statute unconstitutional, but the state neither defended nor appealed the decision.118 The next case to challenge the statute was HRS v. Cox,119 which denied the Due Process and Privacy claims of the petitioners, but remanded the Equal Protection Claim

110. See Lambda Legal Case: Doe v. Doe (visited Apr. 10, 2000) <http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=102>. At the request of the litigant in this case, the names of Doe have been used to preserve anonymity.
111. Id.
113. Id. at 433.
115. See FLA. STAT. § 63.042(3) (1999) (providing "No person eligible to adopt under this statute may adopt if that person is a homosexual.").
116. HAWES, supra note 16, at 9. During 1999, nine states considered some type of ban on "homosexuals' or unmarried couples from adopting... becoming foster parents, or gaining custodial rights." Id. In addition, Arkansas has banned homosexuals from being foster parents through the child welfare regulatory process and Utah has used the same type of process to prohibit unmarried couples from adopting or serving as foster parents. Id. at 6.
119. 656 So. 2d 902 (Fla. 1995).
for trial.\textsuperscript{120} Weary from the delays and harassment resultant from this litigation, Cox decided to voluntarily dismiss the case after the remand. This case was followed by a challenge in Broward County filed by June Amer. In \textit{Amer v. Johnson},\textsuperscript{121} the trial court found the statute to be constitutional.\textsuperscript{122} The decision has not been appealed. Another case has been filed in the Southern District of Florida more recently by the American Civil Liberties Union and the Children First Project at Nova Southeastern University.\textsuperscript{123}

A number of things are noticeable in the family law area. Florida has joined the trend to explicitly express opposition to same-sex marriage.\textsuperscript{124} A number of local governments within the state have adopted measures, however, that provide various types of recognition to same-sex couples.\textsuperscript{125} Pending the signature of Utah’s governor to legislation banning adoption by homosexuals,\textsuperscript{126} Florida is alone in its statutory ban. Its decisions in the child custody area are not unlike those in a number of other states. One of the things most striking about the child custody area of the law is the near invisibility of LGBT families in the reported opinions. Not only is the number of opinions small, they are all from the last decade. If one were to base one’s conceptualization of reality by looking at the Southern Reporter, one might think that lesbian and gay families did not exist until the 1990s. The failure to recognize parental rights for LGBT parents in the adoption and second parent cases have a seriously detrimental impact upon the formation and continuation of LGBT families in Florida. Aside from the adoption challenges and the refusal to recognize the rights of nonbiological parents, the other reported appellate opinions in recent years have arguably been more helpful, but they have been cautious, and it is therefore difficult to measure their ultimate impact.

\textsuperscript{120} Id. at 903. For a lengthier critique of this case, see William E. Adams, Jr., \textit{Whose Family Is It Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children}, 30 NEW ENG. L. REV. 579 (1996).

\textsuperscript{121} Amer v. Johnson, No. 92-14370 (11) (Fla. 17th Cir. Ct. Sept. 5, 1997) (final order upholding constitutionality of statute).

\textsuperscript{122} Id.


\textsuperscript{124} See FLA. STAT. § 741.212 (1999) (providing “Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction . . . are not recognized for any purpose in this state”).

\textsuperscript{125} See, e.g., MIAMI BEACH, FLA., CODE §§ 62-126 to 62-129 (1999); MONROE COUNTY, FLA., CODE § 14 (1999). See also supra notes 76, 80, 81.

V. FUTURE TRENDS

According to one organization that studies trends in the states concerning legislation effecting LGBT persons, the number and percentage of favorable bills for such persons in state legislatures has increased over the last few years. In addition, there is evidence of a trend toward the favorable legislation actually being passed or moving farther in the process than in previous years. Part of this has arguably been the result of the election of lesbian or gay state legislators. On the other hand, the increased pressure to pass legislation to protect the free exercise of religion also may pose problems as some may interfere with existing civil rights protections for the LGBT community. Florida considered such a bill in 1999.

If the rights of LGBT persons are to advance in Florida, some of the protections must undoubtedly emerge through the legislative process. Not only have Florida courts seemed reluctant to take bold steps to recognize rights for LGBT persons, it is also questionable whether rights gained through the judicial process without popular support can endure. If the experience of other states is applicable, legislative progress may be accelerated by the election of legislators who are openly lesbian, gay, bisexual, or transgendered, although this should not be deemed a necessary prerequisite. At present, Florida has four openly lesbian or gay elected judges and two city council persons.

However, for significant progress to be made within the near future, the judiciary also has a role to play. This is particularly true in areas of the law,
such as the family law, where judges are granted broad discretion. As can be seen from the Packard case above, an overly cautious opinion may permit trial judges to make decisions without having to justify their possible biases with careful, considered factual findings supported by recognized scientific evidence, as opposed to stereotypical fears and misgivings.

Such unlimited discretion should not avoid serious scrutiny where the discretion is used to the disadvantage of a group that has been subjected to a long history of state-supported legal animus. As the Terl article makes clear, such is the history of the treatment of lesbians and gays in Florida in social, political, and legal spheres. Despite the pockets of progress in its urban centers, the state itself remains remarkably unfriendly to its LGBT citizens. Except for its hate crimes provisions, Florida’s state laws are mostly hostile or unsupportive. One of thirty states to ban same-sex marriages, Florida remains in the minority on other issues. It is nearly alone in its statutory ban on adoptions, and it is also one of a shrinking number of states with its ban on adult consensual same-sex activity. Its failure to seriously consider an antidiscrimination statute finds the state once again trailing most of the country in considering an issue that could assist LGBT persons.

This history and current state of affairs should cause the courts to seriously consider the role that the state’s past practices have on current legal doctrine. Whether it is considering the “sodomy” statute, the adoption ban, or the consideration of the wide variety of family issues that courts will most likely be facing as the numbers of lesbian and gay families continues to grow, the courts should contemplate the impact of its history in regard to LGBT litigants. This is especially true of the adoption statute, which was passed during the height of the Anita Bryant campaign. The prejudice and resultant stigmatization of LGBT Floridians is one that must not be ignored if the state is to transcend its past. Although its laws and judicial interpretations do not make its approach particularly unusual for a southern state, one must ask whether such an increasingly urban, cosmopolitan state, which would like to portrayed as a trend-setter and center of culture and commerce, wants to find itself so situated in the twenty-first century.

134. See ch. 77-140, § 1, 1977 Fla. Laws 466, 466 (codified at FLA. STAT. § 63.042(3) (1977)).
Loving, Baehr, and the Right to Marry: On Legal Argumentation And Sophistical Rhetoric

Mark Strasser*

TABLE OF CONTENTS
I. INTRODUCTION ................................................................. 769
II. THE LOVING ANALOGY ...................................................... 770
   A. Making Marriage a Crime ............................................... 771
   B. On Using the Courts to Vindicate Rights ......................... 778
   C. Classifications Based on Race and Sex .......................... 780
III. INCEST AND POLYGAMY .................................................. 787
   A. The Slippery Slope Argument ....................................... 787
   B. Equal Protection ........................................................ 789
IV. CONCLUSION ........................................................................ 790

I. INTRODUCTION

Over thirty years ago, the United States Supreme Court held, in Loving v. Virginia, that states were precluded from prohibiting an individual from marrying someone of a different race. In Baehr v. Lewin, a plurality of the Supreme Court of Hawaii held that the Hawaii same-sex marriage ban implicated equal protection guarantees, remanding the case to give the state an opportunity to establish that it had a compelling interest in maintaining such a ban. Commentators have criticized Baehr, claiming that: 1) the plurality’s reliance on Loving was misplaced because that case allegedly had no bearing on the issue before the court; and 2) the plurality’s reasoning would suggest that the state was precluded from enacting any marital restrictions, for example, prohibitions on incestuous or polygamous marriages. Yet, a consideration of several cases in which interracial

* Professor of Law, Capital University Law School. B.A., Harvard College; M.A., Ph.D., University of Chicago; J.D., Stanford Law School.
1. 388 U.S. 1 (1967).
2. Id. at 12.
4. Id. at 68.
5. See, e.g., Mary Coombs, Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage, 8 UCLA WOMEN’S L.J. 219 (1998); David Orgon Coolidge, Playing the
marriage bans have been challenged helps to illustrate why cases involving such challenges are much more relevant than commentators are willing to admit, and why a state's being required to recognize same-sex marriages would not entail that incestuous or polygamous marriages would also have to be recognized.

Part II of this article discusses some of the various respects in which Loving and Baehr are in fact analogous, commentators' claims to the contrary notwithstanding. Part III discusses the rhetorical claim that recognition of same-sex marriages would entail that no marital prohibitions are constitutionally permissible, concluding that this involves a misunderstanding of the relevant law and is only a repetition of the kinds of false claims that were made when theorists argued that interracial marriages should not be recognized. The cases involving interracial marriage are important to consider because they illustrate both how marital laws can invidiously discriminate to deny people their fundamental rights and how existing marital laws can be struck down without thereby establishing that no marital restrictions are constitutionally permissible.

II. THE LOVING ANALOGY

In Loving v. Virginia, the United States Supreme Court struck down Virginia's ban on interracial marriage because it violated the Fourteenth Amendment's Equal Protection and Due Process Clauses. Realizing that Loving might carry great "rhetorical punch" in the same-sex marriage debate, commentators discuss respects in which the statutory scheme in Loving was different from the statutory scheme in Baehr. Yet, many of the differences trumpeted by commentators are legally irrelevant, and those differences that are legally relevant are often misrepresented either in how or in why they are important. These exaggerations and misrepresentations only serve to underscore the strength of the Loving analogy. While there of course are differences between the Loving and Baehr cases, those differences are much less legally significant than commentators are willing to admit.


7. Id. at 12.
8. See Coolidge, supra note 5.
A. Making Marriage a Crime

Commentators rightly point out that *Loving* involved a criminal conviction, while *Baehr* did not.\(^9\) Thus, at issue in *Loving* was not only the refusal of the State of Virginia to recognize the marriage of Mildred Jeter and Richard Loving,\(^10\) but also the state’s having convicted each of them of attempting to marry a partner of a different race.\(^11\) In contrast, in *Baehr*, the plaintiffs had sought a declaration of the unconstitutionality of the Hawaii statute, but had neither been charged with nor convicted of having committed any crime.\(^12\)

Surprisingly, commentators fail to explain why that difference is important and why it should have any role in determining whether *Loving* casts any light on the issues implicated in the same-sex marriage debate. Yet, to point to differences without explaining how or even whether they are important\(^13\) is to offer rhetoric rather than legal argument.\(^14\) Indeed, when the claim is that cases are *analogous* rather than identical, it is of course possible to identify differences between the cases and, thus, the essential part of the analysis is in explaining why the identified differences are legally significant.\(^15\) When this essential element is left undone, no headway can be

---


10. *Loving*, 388 U.S. at 4 (discussing the statutory scheme which “automatically voids all marriages between ‘a white person and a colored person’ without any judicial proceeding”) (citing VA. CODE ANN. § 20-57 (1960)).

11. See id. at 4 n.3.

12. *Baehr*, 852 P.2d at 48–49 (plaintiffs were seeking a declaration of unconstitutionality and an injunction prohibiting the future withholding of marriage licenses on that basis).

13. See Coolidge, supra note 5, at 220 (discussing “important differences between *Loving* and *Baehr*” without explaining how many of those differences are legally significant).

14. Ironically, some commentators fail to explain the legal significance of their points and, at the same time, claim that their opponents are failing to offer legal argumentation. See generally id. at 201–04 (stating that those advocating “same-sex marriage” are not making a legal argument).

15. It is for this reason, among others, that much of the natural law debate about same-sex marriage is disappointing. Not only do theorists like Professors Finnis, George, Bradley, and others offer arguments which are internally inconsistent, but many of these commentators seem to ignore that these discussions have very little to do with the laws that states actually have enacted. See generally Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DEPAUL L. REV. 51 (1998); Mark Strasser, *Marital Acts, Morality, and the Right to Privacy*, 30 N.M. L. REV. (forthcoming 1999). Other commentators also do not seem to appreciate that the discussions of natural law should be made in light of existing laws and
made in determining whether one case casts light on how another case should be decided.

Consider what the argument focusing on the fact of criminal conviction in one case and not the other might look like and how it might be supported. Commentators might suggest that the fatal weakness in Loving was that Ms. Jeter and Mr. Loving had been charged with and convicted of having attempted to marry each other when the law had precluded their marrying. However, if this argument is to have import for the discussion at issue, these commentators must argue that the conviction was the fatal weakness rather than a fatal weakness. Otherwise, for example, the fact that Virginia unconstitutionally limited the right to marry and in addition unconstitutionally criminalized the attempt to marry someone of a different race would hardly undermine a claim that a different state's limitation on the right to marry was unconstitutional, even if that latter state did not, in addition, criminalize the attempt. Thus, those pointing out that Loving involved a conviction and Baehr did not, are implicitly suggesting that the fact of criminalization is somehow essential and that Virginia’s laws may not have been held unconstitutional if only the state had not criminalized the attempt to marry. Were that an accurate description of the law, commentators might claim with plausibility that Hawaii’s refusal to permit same-sex marriages was constitutionally permissible, given that the state did not also criminalize the attempt to marry. However, that is a misinterpretation of the relevant case law and thus cannot be used to support the constitutionality of same-sex marriage bans.

To understand why, it is be helpful to consider the arguments that may be offered to support the claim that Loving’s fatal weakness involved the convictions. Commentators may claim to find implicit support for that interpretation when examining two cases involving Virginia’s anti-miscegenation statutes. In Naim v. Naim, the Supreme Court refused to hear a challenge to Virginia’s holding that an interracial marriage was void because, the Court suggested, the case was “devoid of a properly presented federal question.” In Naim, no criminal charges had been filed and the only issue was whether the court below had erred when holding that the interracial marriage at issue was void. However, in Loving, where a

See, e.g., Andrew Koppelman, Forum: Sexual Morality and the Possibility of “Same-Sex Marriage” Is Marriage Inherently Heterosexual?, 42 AM J. JURIS 51 (1997). Professor Koppelman spends remarkably little time discussing why these natural law arguments (regardless of their internal benefits and drawbacks) have anything to do with existing laws and policies. Id.

17. Id. at 985.
conviction was at issue, the Court heard the case and invalidated the statutory scheme that had not been disturbed in *Naim*. It might be thought that the distinguishing feature of the two cases is that a criminal conviction was involved in one and not the other, and that it was this feature that mandated the result in *Loving*.

Support for such a view might be found in Justice Stewart's *Loving* concurrence where he emphasized that the Constitution prohibits making the *criminality* of an act depend upon the race of the actor. Thus, were one only to consider the Court's claim in *Naim* that no federal question had been presented by the state's refusal to recognize an interracial marriage, the fact that there was a federal issue presented in *Loving*, and Justice Stewart's concurrence, one might conclude that the Lovings' having been convicted was legally significant. However, there are fatal weaknesses in such an interpretation, since it neither accounts for the *Loving* opinion itself nor for the Court's subsequent right to marry jurisprudence. Indeed, Justice Stewart's having only concurred in the judgment is a strong signal that the above interpretation simply misrepresents the propositions for which *Loving* stands.

Justice Stewart's *Loving* concurrence is better understood in light of his concurrence in *McLaughlin v. Florida*. At issue in *McLaughlin* was Florida's making interracial fornication and adultery a separate crime which was to be more severely punished than intra-racial fornication and adultery. The Court struck down Florida's statutory scheme. In his concurrence, Justice Stewart made clear that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." The State of Florida had argued that its criminal statute bolstered its anti-miscegenation statute, that its interracial marriage ban was "immune from attack under the Equal Protection Clause," and that the state's interracial cohabitation law was "ancillary to and serve[d] the same purpose as the miscegenation law itself." Basically, the State of Florida argued that it prohibited interracial marriage, that the state's prohibition of such unions

20.  *Id.* at 13 (Stewart, J., concurring) (citing *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring)).
21. The Court's actual claim had been that no federal question had properly been presented, perhaps leaving room for an eventual challenge, although that possibility will not be explored here.
22.  379 U.S. 184, 198 (1964) (Stewart, J., concurring).
23.  *See id.* at 185 n.1 (specifying different crimes and penalties).
24.  *Id.* at 196.
25.  *Id.* at 198 (Stewart, J., concurring).
26.  *Id.* at 195.
was clearly constitutional, and that the state’s prohibiting non-marital interracial sexual relations served the same purposes as did the state’s prohibiting such marriages.27

The United States Supreme Court rejected Florida’s argument, although in doing so, the Court neither said that states were precluded from prohibiting interracial marriage28 nor that states were precluded from using criminal statutes to bolster their marriage laws.29 The Court instead took a different tack, suggesting that the state’s goals could be as well served by other existing laws.30 The Court pointed out that other statutory provisions “which are neutral as to race express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not,” and that the existing statutes, “if enforced, would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State, including what is claimed to be a valid ban on interracial marriage.”31 Thus, the Court suggested that Florida could serve its goals of deterring interracial marriages, assuming for the sake of argument that such a goal was legitimate,32 by enforcing its “neutral” statutes prohibiting non-marital relations and its marriage laws, making it impossible for interracial couples to have marital relations.33 The McLaughlin Court struck down the statute at issue because the state had failed to establish that the statute was “a necessary adjunct to the State’s ban on interracial marriage,” given the existing laws which might have been used to deter the non-marital conduct.34

The McLaughlin Court’s ruling made it clear that Florida would be able to punish interracial couples who had married and then had sexual relations, since the state’s anti-miscegenation law35 would make the marriage null and of no legal effect, and the sexual relations might then be treated as either fornication or as lewd and lascivious behavior.36 Further, on at least one

27. See McLaughlin, 379 U.S. at 195.
28. See id. at 196. The Court expressly refused to express “any views about the State’s prohibition of interracial marriage.” Id.
29. Id.
30. Id.
32. See id. at 195 (noting hypothetically that “even if we posit the constitutionality of the ban against the marriage of a Negro and a white . . . ”).
33. Id.
34. Id. at 196.
35. Ch. 59, § 13, 1832 Fla. laws 374, 376, repealed by, ch. 69-195, § 1, 1969 Fla. Laws 770, 771.
36. See McLaughlin, 379 U.S. at 185 n.1 for a specification of the elements of each crime.
reading of *McLaughlin*, Florida could have adopted a different tack to achieve its goals without offending constitutional guarantees.

Suppose that Florida had feared that its existing punishments of fornication and adultery were not sufficiently severe to deter individuals from having interracial sexual relations. Presumably, this was at least one of the reasons that the state had made such relations a separate crime subject to a more severe penalty. Suppose further that the state had expanded the range of possible punishments for committing fornication or adultery to include the possible penalties that might have been imposed under the statute criminalizing interracial relations at issue in *McLaughlin*. By taking the above steps, the state would have been able to impose the same penalties as it did under the statutory scheme found unconstitutional in *McLaughlin* and, according to one formulation of Justice Stewart’s view, might nonetheless not have violated the Constitution.

Bracketing Justice Stewart’s comments for a moment, the statutory scheme described above would have been much more difficult to challenge than the one at issue in *McLaughlin*, since this amended scheme would not have involved facial discrimination. Certainly, if under that modified scheme the only individuals charged with and convicted of these crimes were married to someone of another race, then the Court *might* have held that equal protection guarantees had been violated because the law had been “applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights.”

However, because the imposition of particular penalties might seem so fact-dependent and because many types of couples might be convicted of such crimes, it would be harder to establish that there had been selective prosecution if the state was less blatant with respect to its prosecution choices. Even if, for example, it could be established that interracial couples were receiving more severe penalties than were intra-racial couples for having committed adultery or fornication, the Court might turn a blind eye to such evidence. In any event, Justice Stewart’s articulated worry that the criminality of the act cannot depend upon the race of the actor would not be at issue in this modified statutory scheme, since adultery, fornication, and lewd and lascivious behavior would all be prohibited regardless of the races of the parties. If his sole constitutional worry was that the criminal statute explicitly incorporated race, then the same invidious results might have been achieved more subtly without implicating his constitutional concerns.

---

37. See id. (discussing the penalties).
39. *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987) (stating “[t]hus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty”) (footnote omitted).
It is, of course, not suggested that Florida should have adopted the above scheme but merely that Justice Stewart's stated objection would be easy for a state to avoid, while both preventing interracial marriage and punishing those who attempted to contract such marriages. Yet, the _Loving_ opinion precluded far more than did Justice Stewart's concurrence. Not only does the opinion preclude a state's explicitly criminalizing the attempt to marry someone of a different race, but it also precludes a state's barring interracial couples from marrying. Thus, while both _McLaughlin_ and _Loving_ struck down criminal statutes, _Loving_ did far more than that, since it also invalidated the laws barring interracial marriage then existing in several states.

The _Loving_ Court offered two bases upon which the Virginia anti-miscegenation law would have been struck down even had there not in addition been statutes criminalizing the attempt to marry someone of a different race. The Court wrote that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” suggesting that the state’s denial of the Lovings’ right to marry violated due process guarantees and that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”

Arguably, the proper interpretation of _Loving_ can only be established upon an examination of subsequent decisions concerning the right to marry generally or, perhaps, the _Loving_ decision specifically. Yet, the subsequent case law also establishes that _Loving_ was about more than merely preventing states from criminalizing the attempt to marry a partner of a different race, since in subsequent case law _Loving_ stands for the proposition that “the right to marry is of fundamental importance.” Thus, while it is true that _Loving_ involved criminal convictions and _Baehr_ did not, and it is of course true that a year's imprisonment is not to be treated lightly, it is simply wrong to

---

40. See _Loving_, 388 U.S. at 1.
42. See _id._ at 1207–08 (suggesting that several states had anti-miscegenation laws).
43. _Loving_, 388 U.S. at 12.
44. _Id._ (stating that “[t]hese statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment”).
45. _Id._
47. The Lovings were sentenced to one year in jail. _Loving_, 388 U.S. at 3.
suggest that the fatal weakness of the Virginia statutory framework was that
criminal penalties were involved. If Virginia had merely refused to
recognize the Lovings' relationship, the state's law would still have been
unconstitutional. Thus, while it is true that criminal penalties were at issue
in Loving but not in Baehr, that has nothing to do with whether Loving is
instructive with respect to how Baehr should be decided.

Ironically, had the difficulty presented by Loving been that there is
something wrong with using criminal statutes to buttress the marriage laws,
this would have had implications for other state statutes. Consider state
statutes that preclude marriages between individuals closely related by blood
and that also criminalize the violation of those incest statutes. Were states
precluded from passing criminal laws to bolster their marriage statutes, then
it would seem that those laws would be unconstitutional. The point here, of
course, is neither that incest and anti-miscegenation laws are analogous nor
that the Constitution precludes states from using criminal statutes to bolster
their marriage laws, but merely that a blanket rule suggesting that criminal
laws could not be used to bolster such laws would have wider implications
than originally thought.

sentences were suspended for a period of 25 years on the condition that they leave the state
and not return together during that time. Id.

48. See Kohm, supra note 9, at 256–57 (suggesting that an important distinction was
that in Loving, state proceedings were instituted against the couple, whereas in Baehr, the
state had merely refused to "sanction certain relationships"); see also Coolidge, supra note 5,
at 219 (distinguishing between Loving and Baehr by suggesting that in Hawaii "the marriage
law is positive, not prohibitory"). Professor Coolidge implies that nothing was amiss in the
Hawaii case because "[i]n Hawaii, no one was charged with a felony; the State simply sent
them a polite letter and returned their marriage applications." Coolidge, supra note 5, at 219.

49. Ironically, Professor Kohm recognizes that Loving is about the right to marry
rather than about the right to have state proceedings instituted against one when one does
marry. See Kohm, supra note 9, at 254 (noting that the Loving Court held that "liberty and
freedom to marry is indeed a fundamental right"). She nonetheless distinguishes between
Baehr and Loving by discussing whether proceedings had been instituted against the couple.
See id.

50. See, e.g., ALA. CODE § 13A-13-3(a), (c) (1975) (specifying the family members
whom individuals cannot marry and the kind of felony that would be committed for attempting
to contract such a marriage); ARK. CODE ANN. § 9-11-106 (a), (b) (Michie 1987) (specifying
which marriages would violate the incest prohibition and specifying the criminal penalty for
attempting to contract such a marriage); MO. ANN. STAT. § 568.020 (West 1999) (specifying
the marriages that would violate incest prohibition and the type of felony involved in the
attempt to contract that marriage).

51. For a discussion of the historical claim that they were analogous, see infra notes
125–28 and accompanying text.
B. On Using the Courts to Vindicate Rights

Some commentators imply that there is something illicit in using the courts to vindicate one’s right to marry, suggesting that those who want the right to marry a same-sex partner should try to convince their legislators that the marriage laws should be changed rather than thwart the democratic process by making use of the courts. Thus, these commentators imply that would-be married same-sex couples who are currently unable to convince the legislature of the wisdom of recognizing same-sex marriage should simply keep trying until they ultimately are successful or, perhaps, until they are no longer interested in marrying. These commentators fail to mention that the same argument might be offered in all of the cases challenging marital regulations and is no more correct in this context than it was in those.

Ironically, those who claim that Loving and Baehr are so different fail to mention that this is a respect in which the cases may be thought to be analogous. Thus, it could be argued that the Lovings were trying to circumvent the democratic process by using the courts to have their marriage validated. Indeed, one of the arguments offered by the State of Virginia was that the “Court should defer to the wisdom of the state legislature.” The United States Supreme Court wisely rejected the invitation to do so, notwithstanding the view offered by the Supreme Court of Virginia that striking down an anti-miscegenation law “would be judicial legislation in the

52. See Coolidge, supra note 5, at 235 (complaining that same-sex marriage proponents want “to use Loving to remove the current debate about marriage from the democratic process”); Lynn D. Wardle, Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage, 39 S. TEX. L. REV. 735, 739–40 (1998) (implying that there is something illicit in having the courts recognize same-sex marriage because they are not “politically accountable to the people”); and Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 BYU L. REV. 1, 5 (1996) (“[c]onstitutionalizing same-sex marriage raises serious concerns about the delicate balance of federalism, about judicial overreaching, and about principles of representative government, in addition to concerns about the revolutionary effects of same-sex marriage”).

Cf. Anita K. Blair, Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law, 47 CATH. U. L. REV. 1231, 1239 (1998) (complaining that if the Hawaii Supreme Court were to uphold the trial court’s having found that the state same-sex marriage ban was unconstitutional on state constitutional grounds, the court might thereby “foreclose an important public debate”).

53. Cf. Lynn D. Wardle, A Critical Analysis of Constitutional Claims for Same-Sex Marriage, 1996 BYU L. REV. 1, 57 (1996) (suggesting that such marriages should not be recognized because a majority of Americans have not been persuaded that such unions should be legalized).

54. Loving, 388 U.S. at 8.
rawest sense of that term." The Court further rejected the view that the arguments against such marriage bans "are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."

The United States Supreme Court decided that it was appropriate for the judiciary to examine the statutory scheme at issue in Loving, given the fundamental nature of the interest at stake. The Court made clear that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women]." Furthermore, this freedom was simply too important to be withheld until the legislature could be convinced to change the anti-miscegenation law.

Zablocki v. Redhail involved a challenge to a Wisconsin statute precluding noncustodial parents from marrying under certain conditions. One infers that these commentators would suggest that Mr. Redhail should not have tried to vindicate his right to marry his pregnant fiancee through the courts, but instead should simply have spoken to the members of the legislature. After all, to make use of the courts to establish one's right to marry is to suggest that "citizens [are] too dangerous to be trusted with . . . judgments about the common good."

At least one of the difficulties with these commentators' position is that it undervalues the importance of the right at issue. As the Loving Court suggested, challenges to marriage regulations should not be viewed as if they were cases involving mere economic regulation in which "the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures." The Loving Court described marriage as involving a "fundamental

56. Id.
57. See Loving, 388 U.S. at 12 (stating "[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law").
58. Id.
59. Id.
60. 434 U.S. 374 (1978).
61. Id. at 374-75.
62. See id. at 379 (appellee and the woman he desired to marry were expecting a child in March of 1975 and wished to be lawfully married before that time).
63. Coolidge, supra note 5, at 236.
64. Loving, 388 U.S. at 9.
freedom"65 and, as the Zablocki Court subsequently made clear, "the right to marry is of fundamental importance for all individuals."66 Were individuals precluded from making use of the courts to vindicate their marriage rights, one of the checks built into our legal system would be destroyed, namely, making sure that when a statutory classification "interfere[s] directly and substantially with the right to marry,"67 the classification will not be upheld "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

It is, at the very least, surprising and disappointing that commentators would suggest that it is somehow hypocritical to vindicate one's right to equal treatment through the courts.69 In a country in which the electorate of one state recently tried to amend their state constitution to include a provision adversely affecting lesbians, gays, and bisexuals "not to further a proper legislative end but to make them unequal to everyone else,"70 it is nothing short of amazing that commentators would nonetheless suggest that members of that group who make use of the courts to protect their rights are somehow doing something hypocritical and inappropriate.

C. Classifications Based on Race and Sex

Commentators make a variety of disingenuous arguments when comparing Loving and Baehr.71 Nonetheless, it is not argued here that there are no important differences between the two cases. On the contrary, differences do exist, although they tend to be represented by commentators in a way that obscures rather than clarifies the issues. For example, Loving involves a classification based on race,72 whereas Baehr involves a classification based on sex.73 That difference is not necessarily important—in some states, sex-based classifications are subjected to the same degree of

65. Id. at 12.
67. Id. at 386-87.
68. Id. at 388.
69. See Coolidge, supra note 5, at 236 (noting "[t]he plaintiffs claim that their goal is to be treated as equal citizens, yet their attorneys want to withdraw the resolution of the question from their fellow citizens").
71. See, e.g., supra notes 9-51 and accompanying text (discussing the importance of whether a conviction is a issue, given that Loving precludes anti-miscegenation statutes even if there are no criminal statutes to bolster that law); supra notes 52-70 and accompanying text (discussing the claim that same-sex couples circumvent the political process when the same claim might have been made in Loving and other cases).
73. Baehr, 852 P.2d at 49.
scru}
sity as are race-based classifications because of state constitutional protections. However, the United States Constitution imposes a lower level of scrutiny on statutes incorporating sex-based classifications than it does on statutes incorporating race-based classifications. Thus, a statute incorporating the former might pass constitutional muster, even if an analogous statute incorporating the latter would not. However, even the above difference is often characterized in a misleading, if not simply inaccurate, way.

Consider the claim that same-sex marriage bans classify on the basis of sex because the sexes of the respective parties is what precludes them from marrying—a man may marry a woman, but not a man; and a woman may marry a man, but not a woman. A separate question is whether the state interest in classifying on the basis of sex is sufficiently important for such a classification to withstand constitutional scrutiny. Thus, it is one thing to say that a statute classifies on the basis of sex and a different one to say that a statute invidiously discriminates on the basis of sex, but it should not be difficult to understand how a statute which says that a marriage may only be between a man and a woman at the very least does the former.

Nonetheless, some commentators reject that contention. For example, Professor Duncan suggests that “[d]ual-gender marriage laws do not classify on the basis of gender,” since they “merely define marriage as a relationship between one man and one woman and apply the same neutral rules to both men and women.” He suggests that “[p]roperly understood, the same-sex marriage issue is about an eminently reasonable distinction drawn on the basis of sexual orientation.”

74. See id. at 67 (holding that the state constitution requires that sex-based classifications, like race-based classifications, be subjected to strict scrutiny).

75. See Kohm, supra note 9, at 260–61 (stating “[t]he central problem in making the Loving analogy to same-sex marriage petitions is that race is afforded the strictest scrutiny for constitutional protection, while gender or sex is not and has never been afforded the strictest scrutiny under the federal constitution”); see also Wardle, supra note 53, at 83 (“[i]n terms of the history, purpose, and application of the Fourteenth Amendment, race and gender are not fungible categories because race triggers the strictest standard of judicial scrutiny, whereas gender discrimination invokes an intermediate, albeit heightened, standard of judicial review”).

76. See Baehr, 852 P.2d at 60; see also Wardle, supra note 53, at 83 (describing the argument that “since conventional marriage laws allow a man, for example, to marry a woman but not a man, they discriminate on the basis of sex in violation of the Equal Protection Clause”). Professor Wardle does not subscribe to that argument. See Wardle, supra note 53, at 83 (describing the argument as “flawed”).

77. See HAW. REV. STAT. § 572-1 (Supp. 1998).


79. Id.
Professor Duncan's view seems to conflate the two questions that the *Baehr* plurality was keeping separate: 1) whether the classification was sex-based; and 2) whether the sex-based classification was legitimate.\(^80\) Surprisingly, he realizes that the classification focuses on whether the parties who wish to marry are of the same-sex—dual-gender laws are at issue.\(^81\) However, because the classification is allegedly reasonable, the nature of the classification itself somehow changes from being sex-based to being orientation-based instead.\(^82\) Yet, whether a classification is sex-based rather than orientation-based has nothing to do with whether the classification is wise or even constitutional, and thus the implicit suggestion that the reasonableness of the classification determines its *nature* is simply mistaken.

Suppose that two heterosexuals wished to marry because they wished to secure particular government benefits that they might not otherwise be able to secure.\(^83\) The question for Professor Duncan would be whether these individuals could marry. If not, for example, because the statute expressly states that only a man may marry a woman and only a woman may marry a man, then it seems clear that the statute is sex rather than orientation-based. Further, if that couple could marry, notwithstanding the explicit textual requirement that they be of different sexes, then a different problem would be presented—a statute allegedly “fair on its face and impartial in appearance,”\(^84\) because it would “prohibit same sex marriages on the part of professed or nonprofessed heterosexuals, homosexuals, bisexuals, or asexuals,”\(^85\) would nonetheless have been “applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights.”\(^86\)

Consider a different example. Suppose that a gay man and a lesbian wished to marry each other, perhaps as a way of securing government benefits. The dual-gender law would not preclude their marrying, notwithstanding their having the ‘wrong’ sexual orientation and

---

80. *Baehr*, 852 P.2d at 67 (pointing out that the dissent has misunderstood the opinion, since the plurality has merely said that the statute involves a sex-based classification and is remanding the case for a determination of whether that classification is invidious).
81. *See* Duncan, *supra* note 78.
82. *See* id.
85. *Baehr*, 852 P.2d at 71 (Heen, J., dissenting).
86. *See* *Yick Wo*, 118 U.S. at 373–74.
notwithstanding the allegedly "eminently reasonable distinction drawn on the basis of sexual orientation."\(^{87}\)

Two issues should not be conflated: 1) the nature of the classification; and 2) the purpose behind the statute. The purpose behind the adoption of a sex-based classification may be to disadvantage individuals with a particular sexual orientation. In that event, the constitutional issue requiring analysis would be whether it is acceptable to employ a sex-based classification to achieve the allegedly important goal of, for example, establishing or reinforcing the societal view that heterosexuals are superior to lesbians, gays, and bisexuals.\(^{88}\) While many would argue that this is exactly the sort of societal goal that \textit{Romer} suggests is illegitimate,\(^{89}\) Professor Duncan seems to disagree.\(^{90}\)

To determine whether the sex-based classification implicated in dual-gender statutes promotes sufficiently important goals, the asserted state interests must be subjected to judicial scrutiny. However, as the Supreme Court made clear in \textit{United States v. Virginia},\(^{91}\) "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."\(^{92}\) Thus, even though heightened scrutiny is not as stringent as strict scrutiny, it should not be thought that it involves a standard that is easy to meet.

Commentators deny that the sex-based classification implicated in same-sex marriage bans involves an invidious distinction.\(^{93}\) After all, the

---

\(^{87}\) Duncan, \textit{supra} note 78, at 243.

\(^{88}\) \textit{See id.} at 239–40. (discussing the "radical and dangerous agenda" which seeks to "reflect the alleged equal goodness of homosexuality and heterosexuality").

\(^{89}\) \textit{See} Matthew Coles, \textit{The Meaning of Romer v. Evans}, 48 HASTINGS L.J. 1343, 1361 (1997) (noting "[t]o the Court, sexual orientation discrimination is the moral (if not the legal) equivalent of race and sex discrimination"); Joseph S. Jackson, \textit{Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection}, 45 UCLA L. REV. 453, 454 (1997) (stating that "[i]n striking down Colorado's Amendment 2 for seeking to impose second-class status on gays and lesbians, the Supreme Court illuminated the core of equal protection: government must respect the principle that all persons have equal intrinsic worth").

\(^{90}\) \textit{See} Duncan, \textit{supra} note 78, at 246 (claiming that \textit{Romer} did not "hold that laws that make distinctions on the basis of sexual orientation or relationships are tainted by animus or dislike for a politically unpopular group," and that Amendment 2 was unconstitutional "only because no legitimate state interest came close to fitting the Amendment's nearly infinite path of disadvantage").

\(^{91}\) 518 U.S. 515 (1996).

\(^{92}\) \textit{Id.} at 531 (citations omitted).

\(^{93}\) \textit{See Coolidge, supra} note 5, at 208 (suggesting that the distinction is not invidious); \textit{see also} Wardle, \textit{supra} note 53, at 62 (arguing that "laws permitting only heterosexual marriage could survive strict judicial scrutiny").
statutes treat men and women in precisely the same way, since each is precluded from marrying someone of the same sex. Yet, that alone will not suffice to establish the permissibility of the statute, since the Court has already made clear that “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities,” and, in fact, the Court rejected the analogous argument in Loving. Thus, the State of Virginia argued that while its anti-miscegenation statutes employed racial classifications, the “reliance on racial classifications, [did] not constitute an invidious discrimination based upon race” because they applied equally to whites and blacks. Because the classification (allegedly) was not invidious, the state claimed that “the question of constitutionality . . . [was] whether there was any rational basis for a state to treat interracial marriages differently from other marriages.” However, the Court rejected “the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.”

One way to understand the difference between the views expressed by the Court and the State of Virginia in Loving helps illuminate one of the points of disagreement between the plurality and the dissent in Baehr. Basically, the State of Virginia had argued that because the classification was not invidious, the Court should defer to the legislature. The Court rejected that analysis because of the type of classification at issue.

Consider the disagreement between the plurality and the dissent in Baehr. The Baehr plurality determined that the statute incorporated a sex-based classification and then remanded the case for a determination of whether the classification was invidious. Judge Heen, in dissent, decided

94. Blair, supra note 52, at 1238 (arguing that “[s]ex discrimination simply does not enter into Hawai’i’s marriage law: women and men are treated precisely the same”).
95. See Jay Alan Sekulow & John Tuskey, Sex and Sodomy and Apples and Oranges—Does the Constitution Require States to Grant a Right to Do the Impossible? 12 BYU J. Pub. L. 309, 323 (1998) (stating that “[t]he obvious rejoinder to this argument is that state marriage laws treat men and women alike: Billy may no more marry Bobby than Sue may marry Linda. Thus, these laws discriminate against neither men nor women.”).
97. Allison Moore, Loving’s Legacy: The Other Antidiscrimination Principles, 34 Harv. C.R.-C.L. L. Rev. 163, 163 (1999) (noting that “Loving involved a law that was in fact neutral as between black and white persons who married interracially—punishing them equally for miscegenation”).
98. Loving, 388 U.S. at 8.
99. Id.
100. Id.
101. Id.
102. Id.
103. See Baehr, 852 P.2d at 68.
that the classification was not invidious and thus saw no reason to remand the case for an examination of the state's asserted interests. Judge Heen was determining whether heightened scrutiny was appropriate in light of whether he believed the classification invidious instead of imposing heightened scrutiny to determine whether an invidious distinction had been made. Yet, as the Baehr plurality recognized, the relevant jurisprudence requires that when a statute incorporates a sex-based classification, the court should impose heightened scrutiny to determine whether that classification is invidious. The court should not decide whether the classification is invidious, and then decide what level of scrutiny to impose.

Certainly, Judge Heen is not the first to claim that same-sex marriage bans do not violate equal protection guarantees. Of course, the same might be said of the view expressed by the Supreme Court of Virginia regarding whether interracial marriage bans violated equal protection guarantees. For example, about eighty years before Loving was decided, the Supreme Court of Alabama addressed whether the Equal Protection Clause precluded states from prohibiting interracial marriages. The court considered the state's anti-miscegenation statute, which read:

If any white person and any negro, or the descendant of any negro to the third generation inclusive, though one ancestor of each generation was a white person, intermarry, or live in adultery or fornication, with each other, each of them must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county for not less than two, nor more than seven years.

The court wrote:

What the law declares to be a punishable offense, is, marriage between a white person and a negro. And it no more tolerates it in one of the parties than the other—in a white person than in a negro or mulatto; and each of them is punishable for the offense prohibited, in precisely the same manner and to the same extent.

104. Id. at 70.
105. Id.
106. Id.
107. Id.
110. See Green v. State, 58 Ala. 190 (1877).
111. Id. at 191.
There is no discrimination made in favor of the white person, either in the capacity to enter into such a relation, or in the penalty.\footnote{112} Basically, the court suggested that because both whites and blacks were prohibited from intermarrying and because whites and blacks would be subjected to the same penalties for violating the statute at issue, there was no equal protection violation.\footnote{113}

It is not as if such reasoning would only have been offered in the 1800s. The Supreme Court of Virginia manifested its approval of such reasoning in \textit{Naim v. Naim} in 1955.\footnote{114} \textit{Pace v. Alabama}\footnote{115} was cited in \textit{Naim} with approval.\footnote{116} The \textit{Pace} Court had denied that equal protection guarantees were violated by a statute punishing interracial fornication or adultery more severely than intra-racial fornication, suggesting, “[w]hatever discrimination is made in the punishment prescribed . . . is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.”\footnote{117}

The Supreme Court of Virginia expressed its approval of its own \textit{Naim} decision in \textit{Loving v. Virginia},\footnote{118} expressly stating that it could “find no sound judicial reason . . . to depart from [its] holding in the \textit{Naim} case.”\footnote{119} Further, notwithstanding the United States Supreme Court’s claim in \textit{McLaughlin} that the “narrow view of the Equal Protection Clause [articulated in \textit{Pace}] was soon swept away,”\footnote{120} the Court refused to hear a case in 1954 in which Alabama’s anti-miscegenation statute was at issue and in which the court specifically cited \textit{Pace} to support its upholding the statute.\footnote{121}

\begin{footnotes}
\item[112] \textit{Id.} at 192.
\item[113] \textit{See id.} at 197 (stating that “[n]o amendment to the Constitution, nor any enactment thereby authorized, is in any degree infringed by the enforcement of the section of the Code, under which the appellant in this cause was convicted and sentenced”); \textit{see also State v. Gibson}, 36 Ind. 389, 405 (Ind. 1871) (noting that “[i]t is quite clear to us, that neither the fourteenth amendment nor the civil rights bill has impaired or abrogated the laws of this State on the subject of marriage of whites and negroes”).
\item[114] 87 S.E.2d 749 (Va. 1955), \textit{vacated}, 350 U.S. 891 (1955), \textit{on remand} 90 S.E.2d 849 (Va. 1956) (adhering to previous decision in 87 S.E.2d 749 (Va. 1955) (lacking a properly presented federal question)).
\item[116] \textit{Naim}, 87 S.E.2d at 754.
\item[117] \textit{Pace}, 106 U.S. at 585.
\item[118] 147 S.E.2d 78 (Va. 1966).
\item[119] \textit{Id.} at 82.
\item[120] \textit{McLaughlin}, 379 U.S. at 190.
\end{footnotes}
The Supreme Court of Virginia was probably as surprised by the *Loving* Court’s holding that the anti-miscegenation statute at issue involved invidious discrimination, as were a variety of commentators by the *Baehr* plurality’s holding that Hawaii’s same-sex marriage ban implicated equal protection guarantees and hence might be invidious.\(^{122}\) Nonetheless, commentators distinguish between *Loving* and *Baehr* by claiming that the former obviously was invidious and the latter obviously is not. It was not obvious at the time how *Loving* would be decided and, more importantly for purposes here, at best premature to have decided the question in *Baehr* before the state’s interests had even been articulated. The point here of course is not that *Loving* was wrongly decided, but that the whole point of the remand in *Baehr* was to find out whether in fact the distinction was invidious.\(^{123}\) To conclude that the Hawaii statute was constitutional, without even examining whether Hawaii could identify important legitimate interests is simply to ignore the applicable test. It simply will not do merely to assert that such laws are permissible or, perhaps, that such legitimate state interests exist or that the statutes are sufficiently closely tailored, since that kind of analysis is merely rhetoric and the antithesis of legal argument.\(^{124}\)

III. INCEST AND POLYGAMY

Some commentators suggest that if the Constitution precludes states from enacting same-sex marriage bans, then the Constitution precludes states from prohibiting any marital unions including incestuous or polygamous ones. However, this involves a misunderstanding both of why the state might be precluded from enacting same-sex marriage bans and of what arguments might be made to justify particular marital restrictions.

A. *The Slippery Slope Argument*

A variety of commentators seem to believe that if the Constitution requires the recognition of same-sex marriages, then it requires the

---

\(^{122}\) The plurality remanded the case to give the state an opportunity to demonstrate that the ban “further[s] compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.” *See Baehr*, 852 P.2d at 68.  

\(^{123}\) *See* Coolidge, *supra* note 5, at 208 (discussing with approval Judge Heen’s *Baehr* dissent in which Judge Heen suggested that the Virginia law was based on invidious racial discrimination and the Hawaii law was not based upon invidious sex discrimination).  

\(^{124}\) For an extensive analysis of some of the legal issues surrounding same-sex marriage, see *Mark Strasser*, *Legally Wed: Same-Sex Marriage and the Constitution* (1997) and *Mark Strasser*, *The Challenge of Same-Sex Marriage: Federalist Principles and Constitutional Protections* (1999).
recognition of all marriages. Yet, such a claim involves a variety of misconceptions, as becomes apparent when one considers how the argument has been used in the past.

It should not be surprising that slippery slope concerns were articulated when the issue was whether interracial marriages should be recognized. The Supreme Court of Tennessee suggested that if interracial marriages validly celebrated in other states were recognized by Tennessee, "we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited" and, further, that the "Turk or Mohammedan, with his numerous wives [could] establish his harem at the doors of the capitol, and we [would be] without remedy." Thus, the court apparently believed that the recognition of interracial marriages would dictate that incestuous or polygamous marriages would also have to be recognized.

Worries of the Supreme Court of Tennessee notwithstanding, the Constitution's requiring the recognition of interracial marriages does not imply that all marriages must be recognized and, in fact, has not led to the abolition of all marital restrictions. The questions at hand whenever a marital regulation is challenged are simply whether there are sufficiently important state interests promoted by banning the union at issue and whether the statute is sufficiently tailored to promote those interests. Where no important state interests are implicated or the statute at issue is not sufficiently tailored to promote important interests, the marital prohibition will not pass constitutional muster. Where the interests are sufficiently important and the statute sufficiently tailored, the Constitution will not stand in the way, even if the Constitution does provide a bar with respect to other marital classifications.

125. See Coombs, supra note 5, at 231 (describing the claim offered by others that recognition of same-sex marriage "sends us down a slippery slope that would also protect incest or polygamy"); Linda C. McClain, Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage, 66 FORDHAM L. REV. 1241, 1249 (1998) (discussing the "familiar invocation of the slippery slope: recognizing same-sex marriage would open the door to the recognition of all manner of relationships, including incest, polygamy, and bestiality").

126. See State v. Bell, 66 Tenn. 9, 11 (1872).

127. Id.

128. Different issues are implicated when the question is whether to recognize a marriage validly celebrated elsewhere rather than whether to allow the celebration of the marriage locally. See generally Mark Strasser, For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages, 66 U. CIN. L. REV. 339 (1998). However, that is not relevant for the point being made here.
B. Equal Protection

It is especially ironic that the specter of incestuous and polygamous unions has been raised in light of the Baehr decision. The Baehr plurality *denied* that the same-sex marriage ban implicated substantive due process guarantees.129 According to the Baehr plurality, the reason that same-sex marriage bans should receive heightened scrutiny is that they involve sex-based classifications.130 If the recognition of same-sex marriages is to challenge marital restrictions of incestuous or polygamous relationships, then it must be established how the recognition that same-sex marriage bans classify on the basis of gender somehow establishes (or at least makes more likely) a similar claim about incest or polygamy regulations. Of course, even if such a case could be made, that would merely imply that the state’s reasons for prohibiting polygamous or incestuous marriages would have to be examined with heightened scrutiny.131

It might be thought that polygamy restrictions implicate equal protection guarantees on the basis of religion and, thus, should be subjected to strict scrutiny.132 Whether the Constitution requires the recognition of same-sex marriages on equal protection grounds would hardly affect either whether strict scrutiny would be imposed when polygamy restrictions were at issue, or whether such restrictions would be struck down were such scrutiny imposed.133

Arguably, the recognition of same-sex marriages would affect whether polygamous or incestuous unions will be permitted because the latter are no more offensive than the former and, thus, if the former must be recognized then the latter must be as well. However, even were that an accurate description of public opinion, more would have to be asserted, namely, that there should be a new criterion for whether marriages should be recognized—the offensiveness criterion. It would not matter what legitimate state interests were supported by a particular regulation or how closely

129. See Baehr, 852 P.2d at 57 (stating that “[a]ccordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise”).
130. See id. at 67.
131. For a discussion of why polygamous marriages should not be recognized, see Maura I. Strassberg, Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. REV. 1501 (1997).
133. See, e.g., Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985) (suggesting that the state has a compelling interest in maintaining its ban on polygamy), cert. denied, 474 U.S. 849 (1985).
tailored the relevant law was. The only question would be how offensive that union was to the general populace, perhaps as determined by a Gallup Poll. Yet, if this purports to represent current law or even what the law should be, "the statement carries its own refutation." 134 This is a constitutional democracy in which the will or tastes of the majority are subject to limitations imposed by the United States Constitution.

The offensiveness criterion has been suggested in the past. When justifying the refusal to recognize an interracial marriage, the Supreme Court of Tennessee described certain incestuous and polygamous relationships and then suggested that "none of these are more revolting, more to be avoided, or more unnatural than the case before us [an interracial marriage]." 135 That court's analysis should sound a cautionary note, since the recognition or adoption of an offensiveness criterion would mean that a whole host of potential marital unions might be at risk, those involving individuals of different races, religions, or generations might all be found too offensive (according to the tastes of some) to be permitted. 136 The right to marry is simply too important to be left to the whims of the general populace.

IV. CONCLUSION

Some commentators suggest that Loving and Baehr are not analogous. However, the differences they cite are often irrelevant and, even when relevant, are often misrepresented in importance or implication. Certainly, bans of interracial and same-sex marriages can be differentiated. The important question is whether those distinctions are relevant to the issues at hand and a surprising number of commentators seem to believe that such a basic element of the analysis need not be offered when same-sex marriage is at issue.

The history of this country's treatment of interracial marriage bans has many important lessons, including how equal protection guarantees can be distorted beyond recognition and how permitting states to enact marriage regulations without having to articulate the interests thereby served can lead to the perpetuation of invidious distinctions. Many of the arguments currently offered in an attempt to establish that same-sex marriages should not be recognized echo the kinds of fallacious arguments that were used in attempts to prevent the recognition of interracial marriages. Those

135. Bell, 66 Tenn. at 11.
136. A separate issue is whether marriages that were already contracted could be invalidated. That involves a separate question which is beyond the scope of the current discussion. For a discussion of that issue, see generally Mark Strasser, Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice, 29 Rutgers L.J. 271 (1998).
arguments were rightly rejected as invalid decades ago and they have not somehow acquired validity over the intervening years.\textsuperscript{137}

The constitutionality of same-sex marriage bans can only be determined once states assert their reasons for enacting such statutes. One of the benefits of subjecting these statutes to even heightened scrutiny is that the state is forced to articulate the interests allegedly thereby served, and both the importance of the interests and the methods for attaining them are then subjected to examination. The Court has made clear that when sex-based classifications are at issue, the "justification must be genuine, not hypothesized or invented \textit{post hoc} in response to litigation."\textsuperscript{138} Further, those justifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,"\textsuperscript{139} and the differences between men and women must not be cause for "denigration of the members of either sex or for artificial constraints on [their] opportunit[ies]."\textsuperscript{140}

If a justification is to be genuine rather than merely hypothesized, one would expect that the asserted state interest in preventing same-sex partners from marrying would also play a role in preventing others from marrying. If a state interest asserted in cases involving same-sex couples, for example, the alleged importance of the parties’ being able to procreate through their union,\textsuperscript{141} plays no role in other marital regulations, then one has reason to believe that the interest asserted is not a genuine interest of the state. Of course, an interest can be genuine but nonetheless impermissible because not legitimate. If, for example, the real reason for same-sex marriage bans is to impose a stigma on lesbians, gays, and bisexuals, then the statute may well be closely tailored to promote an illegitimate end, but is nonetheless unconstitutional. If the reasons offered for same-sex marriage bans are invented rather than genuine or are genuine but illegitimate, the Equal Protection Clause will not allow these marital restrictions to stand. If the arguments against same-sex marriage currently put forward are the best that can be offered, then there is reason to believe that same-sex marriage bans should be found unconstitutional and to hope that such marital unions will soon be recognized.

\textsuperscript{137} Id.
\textsuperscript{138} See Virginia, 518 U.S. at 533.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} For such an argument, see generally John Finnis, \textit{Law, Morality, and “Sexual Orientation},” \textit{69 Notre Dame L. Rev.} 1049 (1994).
An Essay on the History of Lesbian and Gay Rights in Florida*

Allan H. Terl**

TABLE OF CONTENTS

I. INTRODUCTION .............................................................................. 794
II. BEFORE 1970 ................................................................................ 794
III. THE DECADE OF THE 1970s ........................................................... 801
IV. THE DECADE OF THE 1980s ........................................................... 809
V. THE DECADE OF THE 1990s ........................................................... 821
   A. Litigation ................................................................................ 821

* This article deals with the development of substantive legal rights for lesbians and gay men as a group. This does not, however, minimize the importance of: individual criminal or discrimination cases; allegations of abuse by law enforcement officers and agencies; efforts to train or otherwise sensitize law enforcement officers and agencies; most zoning controversies; the multitude of raids on lesbian/gay-oriented bars, bookstores and baths; the multitude of raids on college campuses, roadside rest stops, parks and other "cruising" areas; the sad abundance of gay-bashings; federal immigration and military (including ROTC) issues; union recognition of the rights of lesbians and gay men; estate litigation; failures to fund lesbian/gay groups at Florida's colleges and universities; the denial of rally permits; progress on rights recognition by Florida businesses; attempts to lure gay tourism; advances made in media coverage of lesbians and gay men; the rise and fall of various lesbian/gay political clubs and movements; lesbian/gay progress within the respective political parties; the appointment and election of lesbians and gay men to offices of public trust; and other such activities with a less than direct impact on the general rights of lesbians and gay men as a class.

** B.A., University of Maryland, 1967; J.D. University of Maryland School of Law, 1970.

The manuscript of this article, incomplete at the time of Allan Terl's untimely death, has received editorial attention from Professors William E. Adams, Jr. and Michael L. Richmond of the Shepard Broad Law Center, Nova Southeastern University. They would like to thank Jesse Monteagudo for his assistance and Arlene Simon, Esq. for her earlier attention to the manuscript. Many of the sources used by Mr. Terl might not be readily available, but are included in the papers held by Mr. Terl's estate. Many of The Weekly News articles were able to be verified by accessing the archived collection at The Stonewall Library and Archives in Fort Lauderdale. We would like to thank Fred Searcy, Jr. for assisting us in this endeavor. The editors would also like to recognize the yeoman contribution made by the editorial staff of the Nova Law Review in preparing this paper for publication. Needless to say, any history is inevitably incomplete even at the moment of its publication. The history of lesbian and gay rights in Florida continues to be written, as indicated by references within the footnotes to Professor Adams' updating article also in this issue.
I. INTRODUCTION

Sodomy laws, which criminalize private consensual behavior between adults, engender the irrational prejudice that underlies all discrimination against gay men and lesbian women. As long as these laws exist, gay men and lesbians are labeled as criminals because they are violating the law whenever they engage in the very acts that define them as gay men and lesbians. Contemporary practice has extended their application to lesbian mother child-custody cases, challenges to the validity of the will of a gay man or lesbian, and even to contract disputes.

II. BEFORE 1970

The American colonies imported their sodomy laws from English common and statutory law. Florida's original sodomy law, phrased in terms of "crimes against nature," dates back to 1868. In 1917, the legislature modified the statutes to include an additional prohibition against "unnatural and lascivious" acts. Each time rights for lesbians and gay men come into question, those opposed to such rights quickly remind us of the statutory criminality of such behavior, as though it were the exclusive domain of lesbians and gay men. Because of the breadth of the definition, such statutes cover the sexual practices of many heterosexuals as well as gays and lesbians.

2. Id. at 60.
3. Id. at 60–61.
5. See Franklin v. State, 257 So. 2d 21, 22 (Fla. 1971).
6. Ch. 17-7361, § 1, 1917 Fla. Laws 211, 211. Although "unnatural and lascivious" acts were added to the Florida Statutes in 1917, the sodomy statute containing the "crimes against nature" language existed until 1974, when it was finally repealed. See ch. 74-121, § 1, 1974 Fla. Laws 372, 372.
7. Prior to 1956, the Supreme Court of Florida had dealt with 13 cases involving the "crime against nature." Of these, six dealt with heterosexual encounters and two with older men and younger boys. The first case in Florida involving the "crime against nature" contained the brutal language, "[t]he creatures who are guilty are entitled to a consideration of their case because they are called human beings and are entitled to the protection of the laws."
Apart from Florida's sodomy law, the documentation history of the rights of lesbians and gay men in Florida began in 1954.8 The City of Miami in Dade County enacted an ordinance prohibiting alcoholic beverage licensees either from knowingly employing "a homosexual person, lesbian or pervert" or from selling or serving alcoholic beverages to homosexuals or allowing them to congregate or remain in the licensee's place of business.9 Mayor Abe Aronovitz urged passage of the ordinance to halt the gathering of "perverts" along what had become known as "Powder Puff Lane."10

In 1955, civil rights attorney Harris L. Kimball was arrested for lewd and lascivious conduct after having sex with another man on a deserted stretch of lakefront late at night in Orlando.11 Within thirty days, disbarment proceedings began against him on the ground that he had violated a state law prohibiting homosexual relations12 and thereby engaged in behavior contrary to good morals and Florida law.13 His conduct was deemed unprofessional, and the Supreme Court of Florida disbarred him in 1957.14

In 1956, the Florida Legislature, not content with its sodomy statute, started down a long road of repression the first of several Florida Legislative Investigative Committees ("Investigative Committee").15 Initially, under the chairmanship of Representative Henry Land,16 the seven-member Investigative Committee dealt primarily with race relations. However the chairmanship of the Investigative Committee later changed to Senator Charley Johns.17 When the Investigative Committee "became mired in legal battles with the determined members of the NAACP, with people who fought the intrusion with everything they had, the [Investigative Committee]

Ephraim v. State, 89 So. 344, 344 (Fla. 1921), overruled in part by Franklin v. State, 257 So. 2d 21 (Fla. 1971). There were numerous other cases that dealt with the issue of criminalizing same-sex behavior between consenting adults. See Floyd v. State, 79 So. 2d 778 (Fla. 1955) (reversing denial of appellate bond); State v. White, 68 So. 2d 397 (Fla. 1953) (reversing quashing of the information); English v. State, 164 So. 848 (Fla. 1935), overruled in part by Franklin v. State, 257 So. 2d 21 (Fla. 1971); Jackson v. State, 94 So. 505 (Fla. 1922), overruled in part by Franklin v. State, 257 So. 2d 21 (Fla. 1971).

8. MIAMI, FLA., ORDINANCE 5135 (1954) (codified at MIAMI, FLA., CODE § 4-13 (1967)).
9. Id.
11. See Florida Bar v. Kimball, 96 So. 2d 825 (Fla. 1957).
13. Kimball, 96 So. 2d at 825.
14. Id.
16. Democrat, Orange County.
17. Democrat, Starke.
turned its attention elsewhere—to people without recourse. To people who could not fight back. To gays.”

The Investigative Committee “employed a network of spies...[and] informants... Traveling undercover, the spies went to parties, parks, public restrooms—anywhere and everywhere homosexual men and women were known to socialize.” Informants “lured people to places where the [Investigative Committee] staff waited, hidden, with cameras... At the appropriate moment, the [Investigative Committee] staff person would step out of his hiding place with a flashbulb and camera.” Investigative Committee members, targeting college students and educators, rented hotel rooms near campuses in Gainesville and Tampa, and a Investigative Committee informant hosted parties in Tallahassee. “At the parties, the conversations in the back bedroom were bugged... All the information the guests gave—believing the host was sexually interested himself in one of their friends—was recorded, then turned over to campus police. After the parties, people were summoned...” by the campus security chief and, after questioning, expelled from college.

An analysis of the Johns Investigative Committee concluded that “[i]t is impossible to know how many people, exactly, the [Investigative Committee] forced from Florida schools.” In the Spring of 1959, the Investigative Committee “forced 16 faculty and staff from the University of Florida... Over the next five years, the Johns [Investigative Committee] hunted out homosexual men and women in schools throughout the state.” The Investigative Committee turned its attention to professors’ ideas as well as their personal lives. It focused specifically on “the use of beatnik literature in the classroom. And that, in turn, caught Florida’s attention.”

By April 1963, seventy-one teachers had their teaching certificates revoked, and the Investigative Committee forced the removal of thirty-nine deans and professors from universities. Interviews of between 200 and 250

19. Id.
20. Id.
21. Id.
22. Id.
24. Id.
25. Id.
26. Id.
27. Id.
teachers resulted in the Investigative Committee turning over a list of 123 suspect teachers to the Florida Department of Education. 29

In 1963, the Florida Legislature authorized continuation of the Investigative Committee, with a legislative mandate including the "direction to investigate and report on 'the extent of infiltration into agencies supported by state funds by practicing homosexuals, the effect thereof on [those] agencies and the public, and the policies of various state agencies in dealing therewith.'" 30 Although Representative Richard O. Mitchell 31 chaired the Investigative Committee, its membership still included Senator Johns.

The reconstructed Investigative Committee issued its report in January 1964. 32 The first few pages featured a photograph of two naked men embracing and kissing, and another of a young man wearing only a pouch G-string while in rope restraint. 33 The final page before the bibliography featured twenty photographs of one or more naked or virtually naked boys apparently no more than ten years old. 34

The report recited that "'[s]ince 1959, [Investigative Committee]s have been amassing information on homosexual activities within the state." 35 Under the heading "Who and How Many Are the Homosexuals?," the report made "informed guesses" and then concluded that "the Biblical description of homosexuality as an 'abomination' has stood well the test of time." 36 Under the heading "The Special World of Homosexuals," the report described "'gay' society" as "well organized . . . extending from homosexual hangouts in public rest rooms to the offices of several national organizations through which articulate homosexuals seek recognition of their condition as a proper part of our culture and morals and appreciation of their role in our history and heritage." 37

The report described "gay marriages," noting that while male/male unions rarely lasted over a prolonged period, female/female "marriages" have been known to remain stable over long periods of time, perhaps because women have an "inborn desire" for a more settled existence and

29. Id.
31. Democrat, Leon County.
32. FLIC REPORT, supra note 30.
33. Id.
34. Id.
35. Id.
36. Id.
37. FLIC REPORT, supra note 30.
“because two women living together are less apt to cause comment within a community than would two men.”

Under the heading “Why Be Concerned?,” the report spoke of “those afflicted with homosexuality.” It advised of several courses which those “entangled in the web of homosexuality” may take. They may “come out” by becoming “full-fledged homosexuals . . . who [go] out for chickens by becoming an active recruiter of extremely young boys.” The report also suggests that “willingness to be a passive partner in homosexual acts can be the key to an ever-available flow of money and gifts.”

Under the heading “What to Do About Homosexuality?,” the report advised that “[i]n Florida, homosexuality is not treated as an entity by existing laws, but rather individual acts are specified as illegal in those sections of the Statutes dealing with sex offenses.” It disclosed that “[m]any homosexuals are picked up and prosecuted on vagrancy or similar nonspecific charges,” with incarceration not a satisfactory answer in many cases “for indeed prison life produces its own specialized brand of deviates, known as ‘institutional homosexuals,’ who would not, in freedom, consider homosexual activity, but in prison turn to it in search of escape from sexual tensions.”

Summarizing recent legislative activity on the issue at that time, the report advised that “[t]he Florida Legislature in 1963 . . . enacted legislation directing the Division of Mental Health and Division of Corrections . . . to plan for the construction of facilities at the prison system’s new receiving and treatment center ‘for the care of child molesters and criminal sexual psychopaths.’” It went on to report that “[t]he same legislative session revised the Statutes relating to the revocation of teaching certificates to make more certain the withdrawal of teaching privileges from those against whom homosexual charges have been verified.”

One of the Investigative Committee’s recommendations included that “the closet door must be thrown open and the light of public understanding cast upon homosexuality in its relationship to the responsibilities of sound citizenship.” It recommended that the State Board of Education retain at the earliest practicable time qualified personnel “for the purpose of refuting

38. Id.
39. Id.
40. Id.
41. Id.
42. FLIC REPORT, supra note 30 (emphasis added).
43. Id.
44. Id.
45. Id.
46. Id.
47. FLIC REPORT, supra note 30.
or affirming allegations of homosexuality involving teachers in the public schools." It also recommended and initiated the formulation of legislation providing for "[a] Homosexual Practices Control Act for Florida..." recognizing that "the problem today is one of control and that established procedures and stern penalties will serve both as encouragement to law enforcement officials and as a deterrent to the homosexual hungry for youth."49

The Investigative Committee even consulted with several Floridians to elicit their opinions on the formulation of effective legislation, including consideration of,

1. Mandatory psychiatric examination prior to sentencing of every person convicted of a homosexual act with a minor and discretionary pre-sentence examination of others;

3. Providing for the confidentiality of information relating to the first arrest of a homosexual similar to that now in effect in juvenile cases....

4. Creation of a central records repository for information on homosexuals arrested and convicted in Florida [with] such records [being] open to public employing agencies.

5. Placing sole jurisdiction of a second homosexual offense in a felony court and providing appropriate penalties upon conviction.50

The Investigative Committee concluded that a law embodying such elements would

serve to radically reduce the number of homosexuals preying upon the youth of Florida, would stiffen the state's hand in dealing with those homosexuals apprehended and would provide an element of protection for those homosexuals whose first public venture is relatively mild and whose ability to earn a living or provide for a family would be destroyed by exposure.51

The 1964 report invited and received public outrage, particularly because of the inflammatory nature of its photographs.52 It was "hurriedly
withdrawn [from public distribution] by Gov. Farris Bryant."53 The state attorney in Dade County banned the pamphlet from general distribution.54

In 1965, the Investigative Committee ceased operation.55 "Its staff walked out after members—led by Johns—ordered an investigation of Gov. Bryant’s handling of a racial crisis . . . [clearly intending] to use the [Investigative Committee] to brand Bryant as an integrationist."56 That same year, the legislature "simply declined to renew funding for the [Investigative Committee]—without much fanfare or public debate."57

Almost thirty years later, a journalist who had been a reporter in Tallahassee during the height of the Johns Investigative Committee’s work summarized its work as "[a] war on privacy, human rights and fair play. . . . They ruled lives, destroyed careers, poisoned institutions. They casually employed police-state tactics, browbeating victims with threats and coercion."58

The Investigative Committee did not stand alone, even from the early days of its work. The City of Miami and even the media trampled on lesbians’ and gays’ privacy rights and undertook steps to publicly identify homosexuals.59 The Miami News listed the names and addresses of those arrested in raids for operating an establishment for deviates.60 Metro-Dade police admitted that they maintained a list of 3000 local persons suspected of being "practicing homosexuals."61

In February 1966, the American Civil Liberties Union ("ACLU") of Florida filed suit challenging the 1954 City of Miami ordinance prohibiting all involvement by homosexual persons in selling or buying alcoholic beverages.62 Only four months later, Dade Circuit Judge Carady Crawford found the ordinance had a rational relation to public health, morals, safety and general welfare.63

The next year, the Third District Court of Appeal affirmed Judge Crawford, noting that the “object of the ordinance as a whole is to prevent

54. Id.
56. Id.
57. Id.
58. Frank Trippett, Gay-Bashing by Florida’s Good Ol’ Boys, MIAMI HERALD, July 25, 1993, at 1C.
60. Trail Bar Raided as Deviates’ Den, supra note 59.
62. City Bar Law is Challenged, MIAMI NEWS, Feb. 12, 1966, at 3A.
63. Homosexual Law OK, Court Says, MIAMI HERALD, June 11, 1966, at 2B.
the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been declared illegal by the Legislature." The appeal to the United States Supreme Court failed when the Court declined to review the case.

III. THE DECADE OF THE 1970S

The overt repressiveness of the 1960s continued well into the next decade, but some tempering influences began to surface. In 1970, the Florida Board of Regents adopted a policy of prohibiting recognition of gay organizations at any state university "on the grounds that it violates the spirit of the Board of Regents and the Florida statutes." Between 1970 and 1974, a group calling itself the "People's Coalition for Gay Rights" petitioned for recognition at the Florida State University ("FSU"). Upon reviewing applicable case law, the FSU attorney issued a recommendation, echoed by the FSU President, that the gay group be recognized, yet we have no record of any implementation of their recommendations.

In December 1970, Hillsborough County Court Judge William C. Brooker denied the petitions of two lesbian couples for marriage licenses. He noted that Florida law did not specifically prohibit homosexual unions, but he reasoned that "[t]he main object of marriage is the procreation of progeny, and it would therefore be contrary to public policy to grant them the licenses applied for."

In 1971, the Florida Legislature made the "abominable and detestable crime against nature" a second-degree felony, and an "unnatural and lascivious act" a second-degree misdemeanor. Later that year, the Supreme Court of Florida declared void on its face that aspect of Florida's sodomy statute which proscribed the commission of the "abominable and detestable

64. Inman v. City of Miami, 197 So. 2d 50, 52 (Fla. 3d Dist. Ct. App. 1967) (discussing FLA. STAT. §§ 800.01-.02 (1967)).
65. Fred Bruning, Top Court Upholds Miami Law, MIAMI HERALD, Jan. 16, 1968, at 8B.
67. Id.
68. Id. (discussing Memorandum from FSU Attorney to FSU President (July 31, 1974)).
69. Id. (discussing Letter from FSU President to Chancellor of the State University System (Sept. 17, 1974)).
71. Id.
72. Ch. 71-136, §§ 777-78, 1971 Fla. Laws 552, 858 (codified at FLA. STAT. §§ 800.01-.02 (1971)).
crime against nature,” holding it unconstitutional for vagueness and uncertainty in its language and, thus, a denial of due process to a criminal defendant.73 Careful to state with specificity that it did not sanction historically forbidden sexual acts, homosexuality or bestiality, the Supreme Court of Florida found that the statutory language did not meet the recognized constitutional test “that it inform the average person of common intelligence” what conduct the statute prohibited.74 The court anticipated and recommended a legislative study of the subject and pointed out that pending further legislation on the subject, society would continue to have protection from “this sort of reprehensible act” under the “unnatural and lascivious” provision.75

In August 1971, a Dade Circuit Court held a Miami or, more likely, Miami Beach ordinance prohibiting the wearing of clothing of the opposite sex unconstitutional in a case in which the defendant spent six months in jail awaiting trial.76 Circuit Court Judge Thomas Testa found the law unconstitutionally vague and indefinite, but the ruling was of little impact due to lack of an appeal.77

In December 1971, Judge Donald B. Barnack declared the 1954 Miami liquor control ordinance unconstitutional in a criminal case against four bartenders accused of serving drinks to homosexuals.78 The court said that the ordinance “prohibited the presence and consumption of alcoholic beverages by alleged homosexuals regardless of whether their public behavior was proper and lawful.”79

During the 1972 legislative session, Florida lawmakers introduced bills to replace Florida’s voided “crime against nature” law with a slightly milder prohibition,80 exempting persons married to each other.81 The legislature adjourned without reconciling the differing language between the House and

73. Franklin v. State, 257 So. 2d 21, 24 (Fla. 1971).
74. Id. at 22.
75. Id. at 24.
77. Id.
79. Id.
80. Sponsored by Representative Jeff Gautier (Democrat, Miami) and Senator T. Truett Ott (Democrat, Tampa), respectively.
Senate versions of the bills and, thus, the effort to strengthen Florida’s laws against sodomy failed for that year. 82

In June 1972, shortly before the Democratic and Republican National Conventions, which were held in Miami Beach that year, the ACLU of Florida challenged two Miami Beach anti-gay ordinances. 83 The first ordinance made it illegal for a man to impersonate a woman. 84 The second ordinance outlawed a person wearing “a dress not becoming to his sex.” 85 United States District Judge William Mehrtens found the ordinance vague and overly broad. 86 In March 1973, Hillsborough County Judge Arden Merckle found unconstitutional the proscription against “unnatural and lascivious” acts, which then represented Florida’s only sodomy statute. 87 Later in 1973, the string of court decisions against Florida’s sex laws ended abruptly with a decision from the Supreme Court of Florida holding that policing authorities could prosecute an act of sodomy under a misdemeanor statute proscribing “unnatural and lascivious acts.” 88 The court said that an ordinary citizen could easily determine what character of act those words described. 89

In 1974, the Florida Legislature repealed the “crimes against nature” provision which had already been declared unconstitutional, but it left intact the “unnatural and lascivious act” provision. 90 That manner of sodomy remains a second-degree misdemeanor today, punishable by imprisonment not to exceed sixty days or a fine not to exceed $500. 91 During the same session, the legislature considered revisions to the state’s Human Rights Act. As a result of a series of five public hearings held around the state, “sexual
preference” was added to the draft “bill of rights” as a basis for prohibiting discrimination. However, the Human Rights Commission later deleted the provision.92

In May 1975, Dade County Court Judge Morton Perry declared unconstitutional that part of the state’s 100-year-old sodomy law that proscribed “unnatural and lascivious” behavior which had remained even after earlier rulings by the Supreme Court of Florida and the legislature’s revision of the state’s sodomy laws.93 The state originally charged sixty-four men with “attending a party where homosexual activities were taking place . . .” but dropped the charges against forty-three of them before trial.94 The court said that the legislature “should redefine . . . ‘unnatural and lascivious’ behavior.”95

In July 1975, perhaps in deference to Judge Barmack’s ruling three and one-half years earlier, or perhaps as an early sign of changing attitudes toward lesbians and gay men, Miami finally repealed its 1954 ordinance.96 On January 18, 1977, after the second reading before a packed, decidedly anti-ordinance crowd,97 the Dade County Commission adopted an ordinance prohibiting discrimination based on sexual orientation98 by a vote of five-to-three.99 It extended Dade’s nondiscrimination protections in the areas of employment and housing, and public accommodations.100 By mid-April, Circuit Court Judge Sam I. Silver had found the new ordinance constitutional.101

The subject of a massive petition drive, the ordinance suffered bitter attacks from the religious right and, most notably, from singer Anita

92. Rights Bill May Take Another Year to Pass, ADVOCATE, Apr. 10, 1974, at 7 (on file with author’s estate).
93. Joe Oglesby, Homosexual Charges Tossed Out, MIAMI HERALD, May 9, 1975, at 6B.
94. 43 Charges Dropped in Homosexual Case, MIAMI HERALD, Apr. 9, 1975, at 4B.
95. Oglesby, supra note 93, at 6B.
96. MIAMI, FLA., ORDINANCE 5135 (1954) (codified at MIAMI, FLA., CODE § 4-13 (1967), repealed by MIAMI, FLA., ORDINANCE 8426 (1975)).
97. The initial introduction came in the waning days of 1976. One Year After: Dade County—History of an Ordinance, THE WEEKLY NEWS, June 6, 1978, at 3 [hereinafter One Year After].
98. DADE COUNTY, FLA., ORDINANCE ch. 11A, § 1 (1977) (formerly Ordinance No. 77-4).
99. One Year After, supra note 97, at 3.
101. James Buchanan & John Arnold, Gay Law is Constitutional, MIAMI HERALD, Apr. 16, 1977, at 1B.
Bryant, who adopted the slogan "save our children." Pursuant to provisions of the Metro Charter, the Metro Commission either had to repeal the new provision or submit it to the voters at referendum. The same five member majority of the Metro Commission who voted for the ordinance in the first place voted to send the issue to referendum rather than repeal it. In early May, a three judge panel of the Third District Court of Appeal refused, without comment, to stay the referendum then scheduled for June 7.

There followed one of the most bitter campaigns ever to face an electorate. Public officials and religious leaders lined up on both sides of the issue. Local media took editorial positions. Charges of lies and deception abounded. Violence against gays increased noticeably. Voters repealed the ordinance by a margin of better than two-to-one in a June 7, 1977, special election. Bryant called it a victory for "God and decency" and praised the vote for the "normal majority."

Seemingly as an outgrowth of the state and national attention to Dade County that year, the Florida Legislature enacted a change to Florida's marriage laws, adding, as a requirement for the issuance of a marriage license, that one party be male and the other party female. From the same legislature came a prohibition against adoption by homosexuals. "No

102. Id.
103. Robert Hooker, Askew Would Vote ‘No' on Gay Rights; Miami Gays Seethe, MIAMI HERALD, Apr. 30, 1977, at 1A.
104. John Arnold, Ruvin Swing Vote May Throw Gay-Rights Issue to Voters, MIAMI HERALD, Apr. 17, 1977, at 2D.
106. Gayle Pollard, Court Won’t Delay Gay Rights Vote, MIAMI HERALD, May 3, 1977, at 4B.
107. See generally Hooker, supra note 103, at 1A.
108. Hooker, supra note 103, at 1A. Taft, supra note 100, at 1D.
110. See generally Editorial, An Unneeded Ordinance, MIAMI HERALD, June 5, 1977, at 2E.
111. Andy Rosenblatt, Campaign to Find Gays’ Attackers Stepped Up, MIAMI HERALD, July 20, 1977, at 1B.
112. Carl Hiaasen, Gay Rights Law is Defeated, MIAMI HERALD, June 8, 1977, at 1A.
113. Id. Carl Hiaasen, ‘Decency' is Winner,' Anita Says, MIAMI HERALD, June 8, 1977, at 1A.
114. Ch. 77-139, § 1, 1977 Fla. Laws 465, 465 (codified at Fla. STAT. § 741.04 (1977)).
115. Ch. 77-140, § 1, 1977 Fla. Laws, 466, 466 (codified at Fla. STAT. § 63.042 (1977)).
person eligible to adopt under this statute may adopt, if that person is a homosexual."116 State Senator Alan Trask117 sponsored both the marriage and adoption laws.

Almost in tandem, the Florida Board of Bar Examiners questioned the "good moral character" of openly gay applicant Robert F. Eimers, active in the Dade County effort, for admission to The Florida Bar.118 Florida’s first supreme court ruling that homosexuals have any manner of rights against discrimination, notwithstanding their sexual orientation, sprang from this action.119 The Board deadlocked and "informed the Supreme Court of Florida that after months of ‘tortuous debate’ it could not reach a decision."120

The Board submitted to the Supreme Court of Florida the question of

[w]hether an applicant with an admitted homosexual orientation who is fully qualified for admission to The Florida Bar in all other respects can qualify for admission under the provisions ... [which place] a strict prohibition against any recommendation by the Board ... for a person not determined to be of good moral character.121

The court found that the Fourteenth Amendment required an examination "whether there is a rational connection between homosexual orientation and fitness to practice law."122 Although responding affirmatively, the court limited its response "to situations in which the applicant’s sexual orientation or preference is at issue ... [without addressing] the circumstance where evidence establishes that an individual has actually engaged in homosexual acts."123

Succeeding months brought with them a sequence of proposed ordinances—both repealing and granting rights—which never achieved passage. Also in 1977, the Board of County Commissioners in Broward County had before it a proposed “cabaret” amendment to the ordinance regulating establishments serving alcoholic beverages.124 The amendment would have prohibited the operation of such an establishment “to become a

---

116. Id.
118. In re Florida Bd. of Bar Exam’rs, 358 So. 2d 7, 8 (Fla. 1978).
119. See id. at 8.
121. In re Florida Bd. of Bar Exam’rs, 358 So. 2d 7, 8 (Fla. 1978).
122. Id. at 9.
123. Id. at 8.
place of habitation for thieves, prostitutes, homosexuals or other disorderly persons." The Board of County Commissioners apparently failed to enact the amendment.

In August 1977, just two months after the repeal of the Dade County civil rights ordinance, the media reported an indirect effort to establish sexual orientation nondiscrimination in Palm Beach County. It came through an ordinance proposed to "assure equal opportunity in employment to all persons regardless of race, sex, color, age, handicaps, religion, national origin, marital status or political affiliation." The report continued that "buried deep in the ordinance... is a six-line provision that may endanger the entire proposal," making it unlawful to discriminate in employment "for any reason, except where such reason is directly related to the job being applied for or being performed." The proposed ordinance did not mention the word "homosexual" and one otherwise supportive county commissioner questioned whether the proposal extended to sexual orientation. The proposal failed, but not before the deletion of the original draft's inclusion of lesbians and gay men, because members of the Human Resources Committee were "unwilling to become embroiled in a Dade-like gay rights" controversy. Also in 1977, activists in Gainesville, in Alachua County, asked the City Commission to add the words "sexual and affectional preference" to the city's antidiscrimination ordinance, but commissioners voted down the proposal by a vote of four-to-one.

In June 1978, one of the leaders of the failed effort to retain the 1977 Dade County ordinance raised the possibility of a rerun of that battle. The new proposal was included within a larger package to provide nondiscrimination protections on not only "affectional and sexual preferences" but also on other bases such as creed, political affiliation, pregnancy, personal appearance, and lifestyle. It further proposed free bus

125. Id.
127. See Mary Voboril, Gay Rights May Be Secured by Proposal in Palm Beach, MIAMI HERALD, Aug. 4, 1977, at 14A.
128. Id.
129. Id.
130. Id.
131. Letter from Tammy K. Fields, Assistant County Attorney for Palm Beach County, to Alan Terl (Nov. 21, 1996) (on file with author's estate).
134. Sam Jacobs, New Vote Sought on Gay Rights, MIAMI HERALD, June 7, 1978, at 1B.
135. Id.
service for the elderly, the disabled, and those on welfare, and would have established several nude beaches in Dade County, all in a rather awkward effort to generate wider support for the proposals.\(^{136}\)

Community response clearly differed from 1977. The county commissioner who authored the 1977 ordinance refused to support the new effort.\(^{137}\) Fund-raising and other supportive efforts failed.\(^{138}\) Approval of the petitions did not come for four months on the ground that the county had yet to see and approve the wording.\(^{139}\) However, on October 3, 1978, Dade County election officials advised that they had verified the necessary signatures to put the "Full Equality Ordinance" on the ballot, and the Metro Commission placed the issue on the November 1978 ballot.\(^{140}\)

Circuit Judge John Gale dismissed a suit to remove the revised, proposed ordinance from the ballot, finding it not sufficiently confusing to require its removal from the ballot.\(^{141}\) The Catholic Archdiocese of Miami publicly announced its opposition to the ballot proposal, taking the same anti-lesbian/gay rights position it had for the 1977 election.\(^{142}\) The measure was defeated by a vote of fifty-eight-to-forty-two percent,\(^ {143}\) a significantly closer margin than that by which the voters rejected the 1977 proposal.\(^ {144}\)

Proponents publicly spoke of yet a third effort,\(^ {145}\) yet the Dade County Coalition for Human Rights ("DCCHR"), which with others had effectively led the 1977 effort, refused by unanimous vote of its general membership to support the proposed referendum effort.\(^ {146}\) By mid-November 1979, the Dade County Attorney had not yet approved the proposed wording of the petitions, and promoters accused the Dade County Public Attorney of trying

\(^{136}\) Id.
\(^{137}\) Paul Kaplan, 'Closetitis' Blamed for Failure of Gay Rights Party, MIAMI NEWS, June 8, 1978, at 5A.
\(^{138}\) Id.
\(^{139}\) Morton Lucoff, Drive to Put New Gay Rights Law On Ballot is Delayed, MIAMI NEWS, June 7, 1978, at 5A.
\(^{141}\) Gay Rights on Ballot, MIAMI HERALD, Oct. 28, 1978, at 1B.
\(^{142}\) Charmayne Marsh, Catholic Church Again Opposes Gay-Rights Law, MIAMI NEWS, Oct. 21, 1978, at 1A.
\(^{143}\) Letter to the Editor, THE WEEKLY NEWS, Nov. 28, 1978, at 23.
\(^{144}\) Joanne Hooley, Voters Nay the Gays But Both Sides Call It a Victory, MIAMI NEWS, Nov. 8, 1978, at 1A (on file with author's estate).
\(^{146}\) See Mike Chase, Coalition Won't Support Kunst, THE WEEKLY NEWS, Nov. 7, 1979, at 1.
to sabotage the referendum effort.\textsuperscript{147} Within a matter of weeks, the County Attorney approved the language of the petition.\textsuperscript{148} DCCHR reluctantly reversed its position at a meeting of January 31, 1980, yet clearly its endorsement of the referendum effort came despite opposition by the same individuals who had led the unsuccessful 1977 and 1978 efforts.\textsuperscript{149} No one seems to have gathered the signatures necessary to place the issue back on the ballot, and the issue did not resurface in Dade County for the next seventeen years.

In 1979, the decade ended on a bleak note. Relying on evidence that society condemns homosexuality, Circuit Judge R.A. Green, Jr., awarded custody of a lesbian's three daughters to their father, a Washington State resident living with a woman outside of wedlock.\textsuperscript{150} Judge Green did this notwithstanding the fact that the mother had asserted that she would leave her lover in order to gain custody.\textsuperscript{151}

\section*{IV. THE DECADE OF THE 1980S}

The 1980s opened with one of the most significant advances for human rights in the history of Florida's jurisprudence. In 1980, Florida voters approved the "Right of privacy" amendment to the state constitution.\textsuperscript{152} The amendment provides in pertinent part that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's life except as otherwise provided herein..."\textsuperscript{153} Both the legal and the lesbian and gay communities saw the privacy amendment as a potential source for future protection from police harassment for victimless crimes, including consensual sex between adults in private.\textsuperscript{154} Until a few weeks before the election, the amendment generated little controversy; several people then identified it as a gay issue and campaigned around the state opposing it, apparently becoming at least in part responsible for opposition

\begin{flushleft}


\textsuperscript{150} Lesbian's Daughters Awarded to Father, \textit{Advocate}, July 12, 1979, at 7 (on file with author's estate).

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Fla. Const.} art. I, § 23.

\textsuperscript{153} \textit{Id.}

\end{flushleft}
by some of the state's major newspapers. Ultimately, the amendment passed comfortably.

In February 1981, United States District Judge Ben Krentzman issued a temporary restraining order prohibiting Polk Community College from refusing to recognize a gay student group. The court stated that it is "very nearly always in the public interest to permit the free expression of constitutional rights." 

Despite the Privacy Amendment, the 1981 session of the Florida Legislature saw new efforts at restricting the rights of lesbians and gay men. State Senator Alan Trask, who had sponsored the 1977 bills to prohibit homosexuals from marrying and adopting, introduced legislation which would have prohibited establishing gay organizations on the campuses of the state's community colleges. The bill was withdrawn later in the session. However, later in the session, Senator Trask also introduced an anti-gay amendment to an appropriations bill. The amendment would have denied state funding to schools which "recommend or advocate sexual relations between unmarried persons." In remarks accompanying the filing of the amendment, the sponsor specifically referred to Lesbian and Gay Awareness Week, celebrated at FSU. The final version of the Senate's appropriations bill that year did include the "Trask Amendment" and another amendment sponsored by Senator Jack Gordon directing that $50,000 of the amount appropriated be "used, if necessary, to defend the State of Florida against any lawsuits arising from any proviso which may be declared in violation of the Florida Constitution or the United States Constitution." By raising the

155. Id.
157. Wall v. District Board of Trustees of Polk Community College, Case No. 81-125-Civ.-T-K (on file with author's estate).
158. Democrat, Winter Haven.
159. See supra note 114.
160. See supra note 115.
163. Id.
164. Id.
165. Id.
167. Democrat, Miami Beach.
specter of potential lawsuits, the Gordon Amendment\textsuperscript{169} was designed to weaken the Trask Amendment and scare off its proponents. Representative Tom Bush\textsuperscript{170} introduced a companion to the Trask Amendment into the Florida House, and the legislature adopted the so-called "Bush-Trask Amendment" to the House appropriations bills.\textsuperscript{171} Governor Bob Graham allowed the amendment to remain in the state budget bill, which he signed into law on June 30, even though he expressed doubts about its constitutionality.\textsuperscript{172}

In May 1981, the United States District Court in Orlando refused to grant a temporary injunction against the refusal of both the University of Central Florida ("UCF") and the Florida Board of Regents to allow the use of UCF's campus as the site for the Sixth Annual Florida Conference for Lesbians and Gay Men.\textsuperscript{173} Judge George Young found that there had never been a clear agreement or understanding reached regarding the facility's use and that the University had not been fully informed about how large the gathering would be.\textsuperscript{174} The suit died because the conference was held a few days later at an alternate location.\textsuperscript{175}

By July 1981,\textsuperscript{176} Florida Commissioner of Education, Ralph Turlington, filed suit to overturn the Bush-Trask Amendment because he believed it violated gay people's rights to freedom of speech.\textsuperscript{177} The Bush-Trask Amendment also came under fire in a suit by the Florida Task Force,\textsuperscript{178} on the basis that it illegally attached substantive law to an appropriations bill.\textsuperscript{179} Before these cases reached trial, two significant developments occurred.

Reaching the question unanswered in the Eimers case, the Supreme Court of Florida attempted to determine "to what extent the Florida Board of Bar Examiners, in furtherance of its effort to determine the fitness of applicants for admission to the Florida Bar, may inquire into an applicant's..."
sexual conduct." On inquiry by the Board, an applicant had "admitted a continuing sexual preference for men but refused to answer questions about his past sexual conduct and indicated that he had no present intention regarding future homosexual acts. He did state that he would obey all the laws of Florida." In a footnote, the court declined to respond to the applicant's contention that Florida's proscription of unnatural and lascivious acts cannot constitutionally apply to private consensual conduct between adults.

In a per curiam opinion citing the Eimers case and from which two of the seven justices dissented, the court held that "[t]he investigation performed by the Florida Board of Bar Examiners should be limited to inquiries which bear a rational relationship to an applicant's fitness to practice law." It continued: "Private noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law." Notwithstanding the ruling, allegations surfaced in August 1981 that the Florida Board of Bar Examiners continued to question lawyers about homosexuality.

In August 1981, officials at FSU proposed, and then withdrew, an order to require some faculty members and campus groups to sign a pledge to uphold the Bush-Trask Amendment. Instructors of five noncredit courses, taught at the Center for Participant Education ("CPE"), all of which contained material relating to homosexuality, were singled out to sign the oath. Officials withdrew the proposal after protests by the ACLU of Florida and the CPE.

In September 1981, Education Commissioner Turlington's challenge to the Bush-Trask Amendment went to trial. Circuit Judge John Rudd allowed future American Bar Association ("ABA") President Talbot "Sandy" D'Alemberte to join the plaintiffs' side, argued by former ABA

---

181. Id.
182. Id.
183. Id. at 1317.
184. Id.
187. Id.
188. Id.
President Chesterfield Smith. Later that month, Judge Rudd ruled that the legislature acted within the state and United States Constitutions when it passed the amendment. The Florida Task Force’s challenge to the law remained pending but before the same judge.

In October, Education Commissioner Turlington appealed Judge Rudd’s ruling. Lawyers for Turlington said that the constitutional issues were so grave that the state’s highest court should quickly review the case. The District Court of Appeal agreed and certified the case to the Supreme Court of Florida.

Later that month, United States District Court Judge Ben Krentzman, sitting in Tampa, ruled, in a suit brought by a University of South Florida (“USF”) student group formed to advocate sex between unmarried persons, that the Bush-Trask Amendment could not block the annual budget of the university. Ironically Judge Krentzman’s ruling a year earlier had paved the way for introduction of the Bush-Trask Amendment.

The end of 1981 saw Senator Trask once again in action, as he filed legislation which would make fornication a crime once again. The bill aimed to overcome the Supreme Court of Florida’s striking of part of Florida’s sodomy statute as unconstitutional in 1979, by defining “fornication” as sexual intercourse other than between a man and his wife. By early 1982, members of both houses of the legislature had introduced

191. Id.
192. Id. In September 1981, two men were arrested at the Fort Lauderdale Airport after a Sheriff’s deputy objected to two men kissing goodbye as one was about to depart. Two Men Face Criminal Charges After Airport ‘Goodbye Kiss,’ THE WEEKLY NEWS, Sept. 30, 1981, at 3 (on file with author’s estate). A scuffle ensued, and the two men were later found guilty of battery on a police officer, resisting arrest without violence, and disorderly conduct by Circuit Judge John G. Ferris. Id. During the two-day, nonjury trial, the arresting officer testified that he would not have asked a man and a woman to stop kissing and hugging because that’s “proper.” Airport Kissing Trial Ends with Probation for Defendants, THE WEEKLY NEWS, Apr. 7, 1982, at 3 (on file with author’s estate).
194. Id.
195. Id.
197. See Bush-Trask Headed for State Supreme Court, supra note 193, at 3.
199. Id.
bills to repeal Florida’s existing and constitutionally flawed fornication law. Senator Trask had also introduced a watered down version of the earlier Bush-Trask Amendment. The revised bill would have financially penalized schools where student organizations on campus advocated breaking the law as defined by state statutes.

On February 4, 1982, the Supreme Court of Florida unanimously held the Bush-Trask Amendment unconstitutional as an abridgment of the right to free speech. The opinion, written by Chief Justice Joseph A. Boyd, was direct and straightforward. "The right of persons to express themselves freely is not limited to statements of views that are acceptable to the majority of people. . . . A state cannot abridge freedom of speech on campus any more than it may do so off campus."

The supreme court’s ruling came in Commissioner of Education Turlington’s challenge to the amendment. The Bush-Trask Amendment died without ever being enforced, essentially because of the federal ruling in Tampa.

On the same day as the supreme court issued its ruling, however, the University of Florida Lesbian and Gay Society ("UFLAGS") learned that it would lose its office space in the student union, the only welcoming place on campus for gay students at the University of Florida ("UF"). The Bush-Trask Amendment apparently played no part in the decision to oust UFLAGS—rather, the administration claimed UFLAGS did not serve the interests of a sufficiently large group of students.

Back in Tallahassee, Senator Trask changed the direction of his 1982 watered down version of the Bush-Trask Amendment. Rather than withholding funds from state learning institutions which permit groups that

200. H.R. 336, 14th Leg., Reg. Sess. (Fla. 1982) (sponsored by Representative Andy Johnson (Democrat, Jacksonville)); S. 762, 14th Leg., Reg. Sess. (Fla. 1982) (sponsored by Senator Jack Gordon (Democrat, Miami Beach)).
203. Id.
205. Lewis, 416 So. 2d at 461–62.
206. Id. at 458.
207. S. 442, 14th Leg., Reg. Sess. (Fla. 1982).
209. Id.
advocate unlawful or disruptive activities, the further revised version proposed to expel and bar from admission, to any state college or university, for two years, any student who engaged in "disruptive activities." Activities which could result in the banning of a student included violations of criminal law, such as existing laws against homosexual activity. On March 4, 1982, the Senate Education Committee rejected Trask’s bill.

In April 1982, UFLAGS filed suit in federal court, alleging discrimination, violation of free speech and association rights, and violation of equal protection guarantees. One day before the first scheduled hearing in the case, it settled and UFLAGS regained its office space.

The 1982 legislature ended with the demise of attempts in both houses to repeal Florida’s fornication law. The House bill failed in committee; Senator Gordon’s bill was never heard by committee after the House failure. A four-year gap in official attention to lesbian/gay issues followed the 1982 legislative session. This may well have resulted from the resignation in disgrace of State Senator Trask from the legislature, the defeat of Representative Tom Bush in his 1982 campaign for a seat in the Florida Senate, and a slow-starting, but ever-increasing awareness of, and preoccupation of the lesbian/gay community with the emerging threat posed by the illness ultimately labeled Acquired Immune Deficiency Syndrome ("AIDS").

One exception to this gap occurred in December 1982, when the Supreme Court of Florida allowed the readmission of Harris Kimball to The Florida Bar, but only upon his successfully passing The Florida Bar Examination. Kimball had objected to a referee’s recommendation to that effect, and without discussing the cause for Kimball’s disbarment, the court

211. See Bush-Trask Headed for State Supreme Court, supra note 193, at 3.
212. See Trask Introduces 'New & Improved' S.B. 442, supra note 210, at 3.
213. Id.
218. Florida’s Sex Laws, supra note 217, at 10.
221. In re Petition of Kimball, 425 So. 2d 531 (Fla. 1982).
agreed with the referee, relying on the terms of the disbarment and the rules for readmission.222

In June 1985, a federal jury awarded $100,000 to two men who had sued the City of DeLand claiming the city violated their civil rights when it refused to issue them an occupational license for a hair styling salon at their residential address.223 The jury found that the city had "willfully and intentionally deprived plaintiffs of due process of law in denial of an occupational license" and "willfully and intentionally deprived [one of the plaintiffs of his] right of privacy and/or freedom of association."224

Unexpectedly, the next chapter in this history occurred because of the lead of the National Association of Insurance Commissioners ("NAIC"). Recognizing an increasing pattern of insurer discrimination against persons with AIDS and those then perceived as being at highest risk for AIDS—gay men,225 the NAIC on December 11, 1986, while meeting in Orlando,226 adopted guidelines recommended by its Advisory Committee on AIDS.227 Those guidelines included a prohibition of discrimination on the basis of sexual orientation in deciding who must undergo HIV antibody testing as a part of the insurance application process.228 NAIC's adoption of the guidelines, significant in terms of policy direction, carried no real authority in any particular state unless and until that state adopted the guidelines as policy.229

In July 1987, the Florida Insurance Commission formally proposed the adoption of the NAIC nondiscrimination guidelines, including the sexual

---

222. Id. at 534.
223. Two Hair Stylists Get $100,000 in Suit Against DeLand, THE WEEKLY NEWS, June 12, 1985, at 22 (on file with author's estate).
224. Id.
228. Id.
229. In February 1987, the Florida Right to Privacy Coalition was formed by representatives of the Florida ACLU, Florida N.O.W., the National Lawyers Guild, the Florida Young Democrats, and a variety of civil rights/civil liberties and political groups for the specific purpose of repealing the state sodomy statute. Coalition Seeks To Build Privacy Momentum, THE WEEKLY NEWS, Feb. 25, 1987, at 8 (on file with author's estate). Neither a repeal of the legislation nor a court challenge ever materialized.
orientation provision. Before the proposed rules could take effect, however, the Florida Legislature made the rules unnecessary.

Sensing a need to deal with AIDS in a comprehensive manner, rather than allowing the courts to shape Florida's AIDS law on a case-by-case basis, the leadership of the Florida House of Representatives in 1987–1988 appointed a Legislative Task Force on AIDS. Chaired by Representative Lois J. Frankel, the Task Force tackled virtually every issue then intertwined with AIDS in an enlightened manner. Its work product, the Omnibus AIDS Act of 1988, included the sexual orientation nondiscrimination recommendation of the NAIC. Accordingly, the Florida Legislature took the first step toward rights for lesbians and gay men in over a decade. A similar provision of the Omnibus AIDS Act extended the nondiscrimination requirement to health maintenance organizations.

The 1988 session of the legislature also considered the first attempt at hate crimes legislation for Florida. Its coverage included sexual orientation, and the Senate bill passed in that chamber’s Criminal Justice Committee. However, even the lobbyist for the Florida Task Force saw only a slim chance for full passage that year, and the bill did not become law.

In 1989, after a gap of a dozen years, a local ordinance protecting against sexual orientation discrimination was proposed. For the first time since the 1977 repeal of the Dade County ordinance and the failed 1977


231. Id.

232. Democrat, West Palm Beach.


235. Id.

236. Id. (codified at FLA. STAT. § 641.3007(4) (1989)).


239. Id.


efforts in Palm Beach County, Gainesville, and Dade, the City of Tampa began a legislative trend.\textsuperscript{242} Local activists and political leaders sensed that the time might be right to again raise this issue, which had previously caused such agony for so much of Florida.\textsuperscript{243} Shortly thereafter, the same forces proposed an ordinance for Hillsborough County as well. Quickly following suit, activists and political leaders in Palm Beach County felt that the climate was right there too, and introduced a sexual orientation nondiscrimination ordinance that same year.\textsuperscript{244} In January 1989, the Individual Rights and Responsibilities Committee ("IRRC") of The Florida Bar, for the first time, endorsed a ban on sexual orientation discrimination.\textsuperscript{245}

Also in early 1989, the ACLU of Florida formally set as a priority in its litigation program, a challenge to the constitutionality of the state's statutory prohibition against adoptions by homosexuals.\textsuperscript{246} Over the next two years, the ACLU screened potential plaintiffs in an effort to design the best possible test case.\textsuperscript{247}

In February 1989, another group outside Florida took action which would form one of the bases for still further development of these proposals.\textsuperscript{248} The ABA, long considered a bastion of conservatism and the status quo, surfaced as an organization willing to take a noteworthy lead on a variety of progressive issues.\textsuperscript{249} On its third consideration of this issue in seven years,\textsuperscript{250} the ABA House of Delegates passed a sexual orientation nondiscrimination policy by a better than two-to-one vote.\textsuperscript{251} The policy, in large part, reflected the findings of an analytical report which documented the need for such policies and which further refuted all of the reasons

\begin{quote}
\textsuperscript{242} \textit{Id.}
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{County Eased Into Rights Leadership}, BOCA RATON NEWS, Feb. 11, 1990, at 1A (on file with author's estate).
\textsuperscript{247} \textit{ACLU Seeking Gays Looking to Adopt}, supra note 246, at 34.
\textsuperscript{249} \textit{Id.}
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{Id.} The resolution read: "BE IT RESOLVED, that the American Bar Association urges the Federal Government, the states and local governments to enact legislation, subject of such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations. 'Sexual orientation' means heterosexuality, bisexuality and homosexuality." \textit{Id.}
regularly cited by the opponents to sexual orientation nondiscrimination proposals. Among the sponsors was the Dade County Bar Association.

With a more organized approach than had occurred in the prior year, a coalition of individuals from groups including the Anti-Defamation League of the B’nai B’rith, the ACLU, and lesbian/gay rights activists, proposed that Florida join the federal government and multiple other states, which had already enacted in various forms, reporting of special protections against and enhanced penalties for hate crimes evidencing prejudice on specified prohibited bases, including the sexual orientation of the victim.\(^{252}\)

The 1989 legislative session indeed enacted the Florida Hate Crimes Act, but it dealt only with crimes evidencing prejudice based on race, color, ancestry, ethnicity, religion, or national origin of the victim.\(^{253}\) Crimes evidencing prejudice on the basis of the sexual orientation of the victim had fallen to the cutting room floor.\(^{254}\)

Largely on the impetus of the newly-adopted ABA policy, local activists went to the Broward County Human Rights Board (“BCHRB”) and asked it to propose a local ordinance for Broward County.\(^{255}\) The BCHRB held one public hearing and endorsed the proposal by a vote of twelve-to-four, thus providing the first vote by a public body supporting a local sexual orientation nondiscrimination ordinance since the Dade County enactment more than a decade earlier.\(^{256}\) Only after making the proposal did the local activists recognize that the BCHRB lacked the power to act as requested. The Broward County Human Rights Act,\(^{257}\) to which sexual orientation nondiscrimination protections would be added under the proposal, was not a local ordinance, but a state law enacted by the Florida Legislature for the benefit of only Broward County, subject to ratification by the Broward County electorate.\(^{258}\) Amendment of the act would therefore require a change in state law and approval by the voters at a countywide referendum.

---

\(^{252}\) In April 1989, after months of quiet groundwork by area lesbian and gay activists, the Hillsborough County Commission voted four-to-two to refer a proposed sexual orientation nondiscrimination amendment to the County’s Human Rights Ordinance to the County’s legal department for an opinion. \textit{Hillsborough Co. Commission To Consider Pro-Gay Ordinance}, \textit{The Weekly News}, Apr. 26, 1989, at 3 (on file with author’s estate).

\(^{253}\) Ch. 89-133, §1, 1989 Fla. Laws 381, 381 (codified at FLA. STAT. § 775.085 (1989), amended by ch. 99-172, § 1, 1999 Fla. Laws 964, 964).


\(^{255}\) Steve Bousquet, \textit{Gays Seek Stronger Bias Law}, \textit{Miami Herald}, July 19, 1989, at 1BR.

\(^{256}\) Steve Bousquet, \textit{Board Urges Expanded Gay Rights}, \textit{Miami Herald}, Sept. 12, 1989, at 1BR.

\(^{257}\) Ch. 93-386, § 1, 1993 Fla. Laws 204, 205.

\(^{258}\) Bousquet, \textit{supra} note 256, at 1BR. The act was approved by a majority of the voters in the general election of November 6, 1984.
In late-October 1989, by a vote of six-to-one, the Broward County Commission sent the proposed addition of sexual orientation nondiscrimination coverage forward to the Broward County Legislative Delegation with a resolution calling for the necessary change to state law and the requisite referendum.\(^{259}\) By January 1990, the Broward Legislative Delegation had voted twelve-to-four to sponsor the Broward proposal as a local bill,\(^{260}\) and the measure encountered only token opposition in the full legislature.\(^{261}\) The referendum was set for the primary election in September 1990.

In August 1989, Hillsborough County activists successfully took the first step on their road towards a sexual orientation nondiscrimination ordinance.\(^{262}\) By a vote of four-to-three, the Board of County Commissioners agreed to hold a public hearing on the proposal.\(^{263}\)

In September 1989, activists in Dade County began an unsuccessful effort to add coverage for sexual orientation discrimination to the Dade County antidiscrimination ordinance.\(^{264}\) They needed to collect sufficient petition signatures to get the Board of County Commissioners to place the issue on the ballot.\(^{265}\) By late-October of that year, however, volunteers had collected only 500 of the 30,000 signatures necessary to force the Metro Commission either to enact a sexual orientation nondiscrimination ordinance or to put the issue to a public vote.\(^{266}\)

Also in September 1989, the Legislation Committee of The Florida Bar had before it the request of The Florida Bar’s Committee on Individual Rights and Responsibilities to support sexual orientation nondiscrimination legislation. The process required two steps. First, it requires a finding that the legislation is related to the purposes of The Florida Bar and, second, a

\(^{259}\) Steve Bousquet, County Backs Vote On Gay Bias, MIAMI HERALD, Oct. 25, 1989 at 1BR.

\(^{260}\) Id.

\(^{261}\) The Florida House of Representatives initially approved the bill by a vote of 109-to-zero. Steve Bousquet, State House OKs County Referendum on Gay Rights, MIAMI HERALD, May 18, 1990, at 7BR. The county’s three Republicans cast negative votes with the House clerk after the roll call vote. Steve Bousquet, 3 Broward Republicans Voted Against Gay-Rights Referendum, MIAMI HERALD, May 19, 1990, at 2BR. The Florida Senate approved the bill by a vote of 38-to-zero. Senate OKs Gay-Rights Bill, SUN-SENTINEL (Fort Lauderdale), May 29, 1990, at 1A (on file with author’s estate).


\(^{263}\) Id.


\(^{265}\) Id.

\(^{266}\) Debbie Sontag, A Cop’s Crusade, MIAMI HERALD, Dec. 17, 1989, at 1G.
vote on the substance of the proposal.\textsuperscript{267} A motion to find the proposal lay within The Florida Bar’s proper subject matter jurisdiction but died for lack of a second.

In October of 1989, after a six-hour public hearing before a crowd of 500, the Hillsborough County Commission rejected its proposed sexual orientation nondiscrimination ordinance by a vote of five-to-two.\textsuperscript{268} The city of Tampa followed suit within two weeks, with the City Commission rejecting its proposed sexual orientation nondiscrimination ordinance by a vote of four-to-two with one abstention.\textsuperscript{269}

In November 1989, news surfaced that the Polk County Sheriff required gay male and lesbian inmates at the county jail to wear what the sheriff called “pink tags.”\textsuperscript{270} Sheriff’s officials segregated homosexual men and women from the rest of the inmates and made them wear pink bracelets ostensibly for their own protection, arguing that they were subject to beatings from heterosexual inmates.\textsuperscript{271} The practice had apparently gone on for ten years.\textsuperscript{272} By January 1990, as a result of the public outcry, the Sheriff discontinued the practice and allowed inmates who previously fell into the pink-tagged homosexual category to request placement in protective custody if they felt endangered after the change.\textsuperscript{273}

\section*{V. The Decade of the 1990s}

\subsection*{A. Litigation}

In September 1990, the ACLU of Florida filed its first challenge to the discriminatory adoption statute.\textsuperscript{274} The plaintiff, Ed Seebol, was a single, gay man with an unquestionably substantial and respectable reputation in the community and served as executive director of AIDS Help, Inc., in Key

\begin{thebibliography}{9}

\bibitem{267} See R. \textsc{Regulating Fla. Bar Rule} 2-9.3 (1999).
\bibitem{268} Gay Rights Plan Fails on 5-2: Hillsborough Rejects Anti-Bias Proposal, \textsc{St. Petersburg Times}, Oct. 13, 1989, at 1B.
\bibitem{269} Karen Dukess, Tampa Turns Down Gay-Rights Measure, \textsc{St. Petersburg Times}, Oct. 27, 1989, at 1B.
\bibitem{270} Polk County Sheriff Requires Gay, Lesbian Prisoners to Wear Degrading ‘Pink Tags,’ \textsc{The Weekly News}, Nov. 22, 1989, at 3.
\bibitem{271} \textit{Id.}
\bibitem{272} \textit{Id.}
\bibitem{273} Memorandum from Captain Dale C. Tray, Assistant Director, Detention Bureau, Polk County Sheriff’s Office to Concerned Personnel (Jan. 12, 1990) (on file with author’s estate).
\bibitem{274} ACLU/Florida Sues HRS Over Denial of Adoption Bid by ‘Ideal’ Gay Applicant Due to Sexual Orientation, \textsc{The Weekly News}, Oct. 3, 1990, at 10 [hereinafter \textsc{ACLUI/Florida}].
\end{thebibliography}
Seebol had even indicated his willingness to adopt a difficult to place "special needs" child, but the local office of the Florida Department of Health and Rehabilitative Services ("HRS"), which oversees the adoption process, turned him down, specifically because he noted his sexual orientation on his application.

On March 15, 1991, Judge M. Ignatius Lester of the Circuit Court for the 16th Judicial Circuit for Monroe County ruled in the Seebol case, holding Florida's statutory prohibition against adoption by homosexuals unconstitutional as violative of the state's guarantees of equal protection of the laws, of due process of law, and of the state constitutional right to privacy. HRS had not defended the suit. The Attorney General of Florida had not defended the constitutionality of the statutory provision. Henceforth, there was no appeal. Thus, the ruling stood as precedent, but only in Monroe County.

On the heels of the Seebol decision, a gay male couple from Sarasota stepped forward to serve as the plaintiffs in a second challenge to Florida's statutory adoption prohibition. Both had filed adoption petitions which HRS denied because they disclosed their homosexuality. On their behalf, the ACLU of Florida filed Cox v. Health & Rehabilitative Services. This time, HRS actively defended the case. It argued, among other things, that allowing adoptions by homosexuals would deprive a child of an "opposite sex role model," and that having homosexual parents "limits the child's choice of sexual preference" and "does not appear to be in the child's best interest." In March 1993, Judge Scott M. Browning followed the reasoning of the Seebol decision and found that the statutory prohibition against adoption by homosexuals unconstitutionally violated the rights of

---

275. Id.
276. Currently, the Department of Children and Family Services.
279. As early as 1986, the ACLU of Florida had sought plaintiffs willing to challenge Florida's legislative prohibition against adoption by homosexuals. Ready to Adopt? Time to Call ACLU, THE WEEKLY NEWS, Nov. 26, 1986, at 10 (on file with author's estate). The failure to identify an appropriate plaintiff put the effort on hold for several years. Id.
281. Id.
282. 627 So. 2d 902 (Fla. 2d Dist. Ct. App. 1993), reversed and remanded 656 So. 2d 902 (Fla. 1995).
283. See Cox, 627 So. 2d at 1220. See also HRS Lays Out Reasons for Banning Gay Adoptions, ST. PETERSBURG TIMES, Dec. 13, 1992, at 4B.
equal protection, due process, and the constitutional right to privacy. The court pointed out that the law encourages homosexuals to lie. Within a month, HRS announced that it would appeal the circuit court's decision. On December 1, 1993, the Second District Court of Appeal ruled in the appeal of the Cox case. All eleven judges of the Second District, sitting en banc, overturned the circuit court ruling which had found the statutory prohibition against adoption by homosexuals unconstitutional. The court criticized the trial court's failure to take testimony and its reliance instead on assorted academic treatises, but it nevertheless said that whether homosexuals should be allowed to adopt is an issue for the legislature rather than for the courts. The Second District Court of Appeal ruling also suggested a possible setback in the then-pending third ACLU case filed to challenge the adoption prohibition of June Amer. The ACLU of Florida immediately appealed to the Supreme Court of Florida. Among those filing amicus briefs was the Florida Catholic Conference. In late-April 1995, the Supreme Court of Florida sent Cox back to the Sarasota County Circuit Court to hear more evidence to decide whether the statutory prohibition against adoption by homosexuals violates state constitutional rights. In a per curiam opinion, the Supreme Court of Florida approved the decision of the district court of appeal except those portions which did not remand the equal protection issue to the trial court for further proceedings. The decision thus effectively upheld the

---

284. See Cox, 627 So. 2d at 1210. See also 2nd Judge Rejects Gay Adoption Ban, ORLANDO SENTINEL, Mar. 6, 1993, at B3.
285. See Cox, 627 So. 2d at 1210.
288. Id. at 1220.
289. Id. at 1213. See also Ban on Gay Adoptions is Upheld, MIAMI HERALD, Dec. 3, 1993, at 5B (on file with author's estate).
290. Trevor Jensen, Court Ruling May Work Against Lesbian's Bid to Adopt, SUN-SENTINEL (Fort Lauderdale), Dec. 3, 1993, at 4B.
291. Cox v. Florida Dep't of Health & Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995).
293. The appeal to the Supreme Court of Florida was taken only by Cox, Jackman having abandoned his interest in the case. Initial Brief of Petitioners, Cox v. Florida Dep't of Health & Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995) (No. 82967).
294. Cox, 656 So. 2d at 903. See also Gay Adoption to be Reheard, MIAMI HERALD, Apr. 28, 1995, at 5B (on file with author's estate).
295. Cox, 656 So. 2d at 903.
constitutionality of the statute against the challenges on the basis of the privacy and due process guarantees of the Florida Constitution. Justice Gerald Kogan, in an opinion concurring in part and dissenting in part and in which Justice Harry Lee Anstead concurred, disagreed with the majority’s failure to further analyze the due process aspects of the case and would have remanded on that issue as well.

In December 1995, the Cox case was voluntarily dismissed before the mandated retrial could begin. News reports termed the reasons “purely personal,” citing the partners separation after a seven-year relationship and implying that the strain of the legal battle and the media attention to them may have contributed to that development.

In June 1992, the ACLU of Florida had filed the third in its series of challenges to Florida’s statutory prohibition against adoption by homosexuals. This case was brought in Broward County on behalf of June Amer, who, like Ed Seebol before her, had expressed an interest in adopting a “special needs” child. The ACLU had placed its suit on behalf of June Amer on the back burner while the courts dealt with Cox. By late-1995, with that case having concluded, the ACLU moved the Amer matter into the lead in this effort.

During the course of the Amer litigation, two other cases came into prominence, although having little effect on Amer as they dealt with foster parents. In August 1992, the Florida ACLU filed suit on behalf of a lesbian couple, Bonnie Lynn Matthews and Elaine Kohler, from whom HRS took a six-year-old boy who had been in their foster care. Notwithstanding the fact that the plain language of the discriminatory adoption provision, enacted in 1977, refers only to adoption, state social workers “told the couple to forget about being foster parents.” During the same month, lesbian Sharon McCracken in Broward County received a license to be a foster

296. Id. See also LEGAL DIRECTOR’S ACTIVITY REPORT, ACLU OF FLORIDA (May 1995) (on file with author’s estate).

297. Cox, 656 So. 2d at 903–04. See also Supreme Court Looks at Law Preventing Gay Adoptions, FLORIDA BAR NEWS, June 1, 1995, at 16 (on file with author’s estate).

298. Two Men Give Up Fight to Adopt Handicapped Kids, MIAMI HERALD, Dec. 15, 1995, at 5B.

299. Id.

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

301. Id. See also Lesbian Sues HRS for Blocking Adoption, THE WEEKLY NEWS, June 10, 1992, at 12 (on file with author’s estate).

302. Jaime Abdo, Lesbian Leads Battle to Adopt, SUN-SENTINEL (Fort Lauderdale), Dec. 18, 1995, at 3B.

303. Id.


305. Id.
The action came only after she threatened suit. News reports credited her with being the first openly gay person to be granted such a license. HRS officials distinguished the cases, saying that it would treat an unmarried heterosexual couple living together the same as it had the Tampa lesbian couple. However, in a sworn statement in the Tampa case, an HRS official made clear that “in this district, we would not be licensing homosexuals.”

In May 1993, the circuit court in Hillsborough County delivered a split decision in the Matthews v. Weinberg foster care case. Holding that the state cannot decide whether to grant a foster parent’s license based solely on a person’s “sexual status,” the court nevertheless upheld an HRS rule against licensing unmarried couples as foster parents. The ACLU appealed the latter aspect of the ruling.

In October 1994, the Second District Court of Appeal struck down HRS’ policy that prohibited unmarried couples—homosexual or heterosexual—from becoming foster parents. Its decision was based on HRS’ failure to follow rule-making procedures required under Florida law.

While the ruling applies only to the fourteen county jurisdictions within the Second District, there was wide acknowledgment that the case would carry great legal weight throughout the state. In January 1995, the original plaintiffs in the case, the unmarried lesbian couple who sought foster care

306. Wendy Bounds, Lesbian is Stalled in Effort to Become a Foster Mother, MIAMI HERALD, Aug. 1, 1992, at 1BR.
307. Id.
308. Lesbian Wins License to be Foster Parent, ST. PETERSBURG TIMES, Aug. 15, 1992, at 1B.
311. See Matthews v. Weinberg, 645 So. 2d 487, 490 (Fla. 2d Dist. Ct. App. 1994); Mike Mahan, Appeal Heard for Unmarried Foster Parents, ST. PETERSBURG TIMES, July 14, 1994, at 3B.
312. Matthews, 645 So. 2d at 490. See also Sue Carlton, Order Mixed on Foster Parent Rules, ST. PETERSBURG TIMES, May 26, 1993, at 1B.
313. Matthews, 645 So. 2d at 490. See also Mahan, supra note 311, at 3B.
314. Matthews, 645 So. 2d at 490.
315. Id.
316. Court Rules in Favor of Lesbians in Fight Over Foster Rights, TAMPA TRIBUNE, Oct. 1, 1994, at 6. Also in October 1994, an effort to get the Gainesville City Commission to rescind its 1992 recommendation that the Alachua County Commission not enact sexual orientation nondiscrimination procedures met with no success. Chad Terhune, City to Reconsider Anti-Gay Statement, GAINESVILLE SUN, Oct. 26, 1994, at 1B.
approval, appealed to the Supreme Court of Florida in an attempt to gain a ruling on the eligibility of unmarried couples to serve as foster parents.\textsuperscript{317}

Other cases related to battles by parents in same-sex relationships seeking an award of custody or retention of custody of their natural children.\textsuperscript{318} In August 1995, Judge Joseph Q. Tarbuck of the circuit court of Escambia County ruled in a custody modification case then before him.\textsuperscript{319} Because the mother was a lesbian, the court removed an eleven-year-old girl from the custody of the mother who had raised her from birth and steered her successfully through Attention Deficit Disorder.\textsuperscript{320} Custody was awarded instead to the child’s natural father, who had shot his first wife to death, spent eight years in prison for the murder, spouted racist views, and had fallen behind on his child support.\textsuperscript{321} The court reasoned that “the child should be given the opportunity and the option to live in a non-lesbian world or atmosphere to decide if that’s what she wants—that’s the life she wants to pursue when she reaches adulthood.”\textsuperscript{322} Judge Tarbuck continued: “I don’t think that this child ought to be lead into [a lesbian] relationship before she has a full opportunity to know that she can live another lifestyle just by virtue of the fact of her living accommodations.”\textsuperscript{323} An appeal was taken by the mother to the First District Court of Appeal.\textsuperscript{324}

In August 1996, a unanimous three-judge panel of the First District Court of Appeal declined to overturn Judge Tarbuck’s award of custody to

\begin{footnotes}
\item[317] See Matthews v. Weinberg, 624 So. 2d 919 (Fla. 1995).
\item[318] In September 1991, an appeal followed a trial court’s modification of a 1985 award of custody of a minor daughter to the child’s lesbian mother. The modification had allowed the mother to relocate to San Francisco. The child’s father appealed the modification, arguing that San Francisco is “notorious for the number of lesbians and homosexuals living there,” and because the daughter was allegedly living under conditions which would hinder her becoming a normal healthy woman. However, the appellate court’s terse per curiam opinion in no way suggests that the father’s outrageous claims in any way contributed to its having reversed the trial court’s order allowing removal of the child from Florida. Mize v. Mize, 589 So. 2d 959 (Fla. 5th Dist. Ct. App. 1991).
\item[320] John McKinnon, A Lesbian Mom’s Loss of Custody Now a Key Case, Judge Awarded Girl, 11, to Dad—Who’s a Killer, MIAMI HERALD, Feb. 1, 1996, at 6A. Lesbian Mother, Murderer Father, and a Child, MIAMI HERALD, Feb. 9, 1996, at 1A.
\item[321] See Lesbian Mother, Murderer Father, and a Child, MIAMI HERALD, Feb. 9, 1996, at 1A.
\item[322] Transcript of Custody Award Decision Hearing, at 1, lines 12-17, Ward v. Ward, No. 92-2424-CA01-H (on file with author’s estate).
\item[323] Id. at 84, lines 2-7.
\end{footnotes}
the father in the Ward case. "[T]he focus of this case is not on the mother's sexual orientation, but on the best interests of the child," the unsigned opinion read. It found that the trial judge’s decision was supported by "competent and substantial evidence" that the child was being harmed by conduct to which she was being exposed in her mother’s home. The panel cautioned that it was “not suggesting that the sexual orientation of the custodial parent by itself justifies a custody change.” An appeal was filed within a matter of weeks.

In January 1997, the mother in the Ward case died. Her daughter would remain with the child’s father, who had killed his first wife. Counsel for the deceased lesbian mother asked the First District Court of Appeal to withdraw or vacate its opinion and dismiss the appeal.

In 1993, Judge Jere Tolton of the circuit court for Okaloosa County reached a decision similar to that in Ward in a dispute involving an initial child custody award. He cited the mother’s lesbianism in awarding

325. Id. at 255. See also Jackie Halifax, Lesbian Mom Loses Custody Appeal, MIAMI HERALD, Aug. 31, 1996, at 5B.
326. Ward, 742 So. 2d at 252.
327. Id.
328. Id. at 254.
329. Gay Mother Appeals Ruling on Custody, SUN-SENTINEL (Fort Lauderdale), Sept. 18, 1996, at 17A.
330. Lesbian in Custody Case is Dead She Lost Daughter to Killer Father, SUN-SENTINEL (Fort Lauderdale), Jan. 23, 1997, at 24B.
331. Id. However, within a week of the lesbian mother’s death, a formal complaint had been filed against Judge Tarbuck for violation of those provisions of the Canons of Judicial Ethics which prohibit disparagement on the basis of sexual orientation and gender in the performance of their judicial duties. Letter from Thomas C. MacDonald, Jr., General Counsel, Judicial Qualifications Commission, to Allan H. Terl (Mar. 5, 1997) (on file with author’s estate). The complaint noted that an “earlier filing might have negatively impacted the mother . . . if an appellate court had remanded the case back to Judge Tarbuck.” Id. By early March, “after full investigation and consideration of the complaint, the [JQC] concluded that the matter [did] not warrant further proceedings.” Id. It dismissed the complaints and closed its file on the matter. Id.
332. Letter from Charlene M. Carres, Esq., to the First District Court of Appeal (Jan. 28, 1997) (on file with author’s estate).
custody of their four-year-old daughter to the child's natural father. The court wrote,

Mrs. Maradie, with her homosexual lover, spend nights and sleep together in the same bed, kiss, hold hands and speak in terms of endearment in front of the child. The possibility of negative impact on the child, especially as she grows older and reaches her late pre-teen and early teen years, is considerable. The Court does not have to have expert evidence to reach this conclusion, but can take judicial notice that a homosexual environment is not a traditional home environment, and can adversely affect a child.

The mother in that case also appealed to the First District Court of Appeal.

In July 1996, the First District Court of Appeal granted a new hearing in the Maradie case, holding that the Okaloosa County Circuit Court could not assume without evidence that "a homosexual environment [would] adversely affect a child." "We do not mean to suggest that trial courts may not consider the parent's sexual conduct," the ruling said. "In considering the parent's moral fitness, however, the trial court should focus on whether the parent's behavior has a direct impact on the welfare of the child."

In January 1996, Judge Jack R. Heflin of the circuit court for Okaloosa County removed two children from the custody of their mother because she was a lesbian or bisexual and the father could "provide a more traditional family environment for the children." The custody award was made to the father notwithstanding testimony in which the child's maternal grandmother stated that she had witnessed acts of violence by the father against both the lesbian mother and the older of the couple's children, and further testimony that the father had been Baker Acted based on an expressed desire to commit suicide. The First District Court of Appeal affirmed the circuit court's decision.

Other cases during the decade challenged the inability of same-sex couples to marry. In June 1993, a lesbian couple, Shawna Underwood and Denia Davis, challenged Florida's statutory requirement that marriage
license applicants be of the opposite sex.\textsuperscript{342} Filed in the circuit court for Orange County, the suit\textsuperscript{343} was voluntarily dismissed after extensive discussions with lesbian and gay rights legal experts who suggested that the same-sex marriage case, then pending in Hawaii, would be a better first test of this issue.\textsuperscript{344} However, at the end of March 1997, a three-judge panel of the Fifth District Court of Appeal affirmed a decision by Brevard County Circuit Judge Edward M. Jackson recognizing as enforceable a nuptial-type agreement between two women.\textsuperscript{345} Neither party had urged that the agreement was void as against public policy.\textsuperscript{346} The court pointed out that "[e]ven though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this type of agreement."\textsuperscript{347} The sponsor of Florida's version of the Defense of Marriage Act\textsuperscript{348} questioned the appellate court's authority to uphold a "nuptial agreement" between parties whom the law prohibits from marrying.\textsuperscript{349}

One case in the employment area strongly protected the privacy rights relating to the personal life of employees.\textsuperscript{350} In March 1992, an Orlando jury ruled in favor of a deputy, fired from the Orange County Sheriff's Department for being gay.\textsuperscript{351} It found that the deputy was coerced into resigning following an investigation by the sheriff into the deputy's sexual orientation and private life.\textsuperscript{352} With the jury having resolved the issue of whether the deputy resigned or was fired, the next step was for the court to determine whether the firing violated the deputy's rights to privacy and equal protection.\textsuperscript{353} Circuit Court Judge William Gridley ruled that Orange County Sheriff Walt Gallagher had violated the rights of Deputy Thomas

\begin{itemize}
  \item \textsuperscript{342} See Bob Levenson, \textit{Lesbian Couple Sue to Gain Right to Wed}, \textit{Orlando Sentinel}, July 9, 1993, at A1.
  \item \textsuperscript{343} Underwood v. State, No. CI-93-4656 (Fla. 9th Cir. Ct. 1993) (on file with author's estate).
  \item \textsuperscript{344} Letter from Peter Warren Kenney, counsel for the plaintiffs (Feb. 7, 1995) (on file with author's estate).
  \item \textsuperscript{345} Posik v. Layton, 695 So. 2d 759, 759 (Fla. 5th Dist. Ct. App. 1996).
  \item \textsuperscript{346} See id.
  \item \textsuperscript{347} Id. at 761.
  \item \textsuperscript{348} FLA. STAT. § 741.212 (1999).
  \item \textsuperscript{349} Ruling May Sidestep Ban on Gay Marriages, \textit{Miami Herald}, June 12, 1997, at 5B.
  \item \textsuperscript{350} See Woodard v. Gallagher, No. 89-5776, 1992 WL 252279 (Fla. 9th Cir. Ct. June 9, 1992).
  \item \textsuperscript{351} Id. at *1.
  \item \textsuperscript{352} Id.; see also Deputy's Lawsuit Sets Precedent, \textit{The Weekly News}, Mar. 18, 1992, at 3 (on file with author's estate).
  \item \textsuperscript{353} Woodard, No. 89-5776 at *1; see also Bob Levenson, \textit{Jurors Say Deputy Was Forced to Quit}, \textit{Orlando Sentinel}, Mar. 10, 1992, at A1.
\end{itemize}
Woodard when he forced Woodard to resign for being gay.\textsuperscript{354} The judge ruled that "the [state] constitutional right to privacy protects the individual from the prejudice or punitive use" of information about the plaintiff's sexual orientation and private sexual conduct.\textsuperscript{355}

Litigation involving the Florida Hate Crimes Act\textsuperscript{356} also occupied the courts during the nineties. In April 1992, Circuit Court Judge J. Leonard Fleet of Broward County ruled the Florida Hate Crimes Act unconstitutionally broad, and he dismissed misdemeanor battery charges against a man accused of shouting derogatory names at a Jewish lawyer.\textsuperscript{357} The Florida Attorney General voiced full confidence in the law's constitutionality and prepared for an appeal.\textsuperscript{358} In late-November 1992, the Third District Court of Appeal declared Florida's Hate Crimes Act unconstitutionally vague.\textsuperscript{359} Just a few days later, the Florida Hate Crimes Law was declared unconstitutionally vague by Pinellas County Circuit Judge Robert Beach.\textsuperscript{360} In January 1994, the Supreme Court of Florida put to rest the question of the constitutionality of the Florida Hate Crimes Act.\textsuperscript{361} In a five-to-two decision, the court held that the statute applies only to bias motivated crimes and, when so read, is constitutional.\textsuperscript{362}

Finally, significant changes in ethical rules governing the conduct of attorneys and judges emerged in the decade. On July 1, 1993, the Supreme Court of Florida adopted a revised rule of ethics, for the first time prohibiting attorneys from engaging in certain discriminatory acts.\textsuperscript{363} Significantly, lawyers could not

engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly,

\textsuperscript{354} Woodard, No. 89-5776 at *3.
\textsuperscript{355} See id. See also Circuit Court Finds Sheriff Violated Officer's Right To Privacy; Orders Reinstatement and Back Pay, THE WEEKLY NEWS, June 17, 1992, at 10 (on file with author's estate).
\textsuperscript{356} Ch. 91-83, § 1, 1991 Fla. Laws 625, 626 (amending FLA. STAT. § 775.085 (1991)).
\textsuperscript{357} Hate-Crimes Law Voided, THE WEEKLY NEWS, Apr. 29, 1992, at 3 (on file with author's estate).
\textsuperscript{358} Id.
\textsuperscript{360} No Hate-Crimes Law in Pinellas, GAZETTE (Hillsborough County), May 1993, at 13 (on file with author's estate).
\textsuperscript{361} See State v. Stalder, 630 So. 2d 1072 (Fla. 1994).
\textsuperscript{362} Id. at 1077.
\textsuperscript{363} Florida Bar re: Amendments to Rules Regulating The Florida Bar, 624 So. 2d 720, 722 (Fla. 1993).
or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic. 364

The new rules, which "stop short of regulating the employment practices of lawyers" and will be "subject to an evolutionary development of details," took effect January 1, 1994. 365

On September 29, 1994, the Supreme Court of Florida issues revised Canons of Judicial Conduct adding a new canon to extend the substance of the lawyer nondiscrimination rule to the Florida judiciary. 366 The new rule also specifically includes "sexual orientation" as a ground on which prejudice is prohibited. 367 It applies to judges in the performance of their judicial duties. 368 It provides further that judges "shall require lawyers in proceedings before the judge to refrain from manifesting . . . prejudice." 369

B. Initiatives and Legislation

At the beginning of 1990, the Palm Beach County Commission made that jurisdiction the first in Florida to adopt a sexual orientation nondiscrimination ordinance in a dozen years. 370 This modest ordinance, approved by a four-to-one vote of the Board of County Commissioners, applied only to housing and public accommodations. 371 Shortly thereafter, however, by a unanimous vote of the Board of County Commissioners, Palm Beach County became the first jurisdiction in Florida to protect homosexual county employees from discrimination by amending the county's Affirmative Action Plan to provide for redress for lesbian and gay county employees. 372 Later in the year, local activists began openly discussing extending similar protections for employees in the private sector. 373

364. Id. (amending rule 4-8.4(d)) (emphasis added).
367. Id. at 1039; CANONS OF JUDICIAL CONDUCT, Canon 3B(5) (1999).
368. See CANONS OF JUDICIAL CONDUCT, CANON 3B.
369. CANONS OF JUDICIAL CONDUCT, CANON 3B(6).
371. See Larry Aydlette, Clergy's Testimony, Quiet Lobbying Helped Sway County Commissioners, PALM BEACH POST, Jan. 21, 1990, at 16A.
372. See Meg James, Job Policy to Protect Gay Rights Affirmative Action Plan Targets County Hiring, PALM BEACH POST, Feb. 4, 1990, at 1B. See also John F. Kiriacon, West Palm
Also in 1990, activists at Florida International University ("FIU") began the process of proposing the addition of sexual orientation to the university's nondiscrimination policies.\footnote{374} FIU President Modesto A. "Mitch" Maidique supported the change, but felt the decision should be made on a state university system-wide level rather than by an individual campus.\footnote{375} The State University System replied that it had, through the Collective Bargaining Advisory Committee, agreed "to recognize in collective bargaining contracts and elsewhere in policy, those protections against discrimination contained in Federal or state statutes and regulations, or in well-developed judicial case law."\footnote{376} Because sexual orientation lacks such status, the State University System declined to pursue the change.\footnote{377} Activists at FIU, Florida Atlantic University ("FAU"), and other schools within the State University System continued to pursue this expansion of nondiscrimination policies.

During the 1990 session of the Florida Legislature, a proposed amendment to add coverage for crimes evidencing prejudice on the basis of sexual orientation to the Florida Hate Crimes Act passed through necessary committees in both houses, but the bills died in both chambers in the end of session crush.\footnote{378} House Bill 2449 and Senate Bill 3000 originally proposed enhanced penalties for crimes that "manifest prejudice, bigotry, or bias against any definable and identifiable segment of the population," which was meant to include crimes based on the victims' sexual orientation, among other categories.\footnote{379} This version passed its first House committee.\footnote{380} The bill was amended, however, so that "sexual orientation" was added to the then existing list in the Hate Crimes Act instead of using the more general language.\footnote{381}
The 1990 elections significantly impacted lesbian and gay rights in Florida.\(^{382}\) In the September primary, after a particularly nasty campaign that in many respects echoed the 1977 Anita Bryant “Save Our Children” crusade in Dade County,\(^{383}\) the referendum on the Broward “Human Rights Amendment” went down to defeat by a vote of 58.6-to-41.4%. Analysts cited the opposition of Archbishop Edward McCarthy of the Miami Catholic Archdiocese and others who cloaked their opposition in religious terms as a major factor in the defeat.\(^{384}\) During the same election, however, and due at least in part to the work to the lesbian and gay community in greater Tampa, two Hillsborough County Commissioners who had voted against the Hillsborough County sexual orientation nondiscrimination ordinance lost their bids for reelection.\(^{385}\) That seemingly set the stage for a reversal of the commissioners’ prior rejection of the local ordinance.\(^{386}\)

In the aftermath of the loss in the Broward County “Human Rights Amendment” referendum, local activists began the process of moving forward again. They approached the County Human Rights Relations Division (now the Human Rights Division) and obtained agreement that the Division would accept complaints of discrimination on the basis of sexual orientation.\(^{387}\) Even though the Division had no jurisdiction to redress such complaints, the new process would help to document the nature and extent of the problem.\(^{388}\)

Joined by representatives of such other groups as Florida N.O.W., a Broward lesbian/gay democratic club, and the Dade Political Action Committee working on lesbian/gay issues, Broward and Dade activists began a series of meetings with Miami Archbishop McCarthy and his top staff in an effort to find some common ground on which to build a better relationship between the Archdiocese and the lesbian/gay community.\(^{389}\)

In December 1990, Mayor Vicki Coceano of the City of Miramar in Broward County canceled the city’s permission to allow a production of the

\(^{382}\) See id.
\(^{383}\) Carl Hiaasen, Gay-Rights Law Is Defeated by a Margin Greater Than 2-to-1, MIAMI HERALD, June 8, 1977, at 1A.
\(^{384}\) Steve Bousquet, Broward Says No to Gay-Rights Protection, MIAMI HERALD, Sept. 5, 1990, at 1A.
\(^{385}\) Fight for Rights Continues in Hillsborough, GAZETTE (Hillsborough County), Apr. 1991, at 1.
\(^{388}\) Id.
play "Norman, Is That You?" at a municipal theater. She had received a single complaint from a city resident that the play had a homosexual theme. Local activists quickly used the cancellation as a spring board to keep sexual orientation nondiscrimination discussions alive in Broward. Within weeks, the Miramar City Council voted unanimously to apologize for the city's poor handling of the cancellation of the play, and activists began efforts to get the city to enact a sexual orientation nondiscrimination ordinance.

A series of local ordinances in 1991 dealt with discrimination based on sexual orientation. City commissioners in the City of West Palm Beach in Palm Beach County made that the first city in Florida to ban discrimination based on sexual orientation in its municipal employment policies. In August 1991, the cities of Temple Terrace and Plant City in Hillsborough County drafted their own human rights ordinance excluding coverage for discrimination on the basis of sexual orientation. Shortly thereafter, the city councils of both cities petitioned the Board of County Commissioners of Hillsborough County to amend the County's sexual orientation nondiscrimination ordinance to exempt their municipalities from the coverage of the county's Human Rights Ordinance. The County Attorney issued a formal opinion that any such exemption would violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

In late-August 1991, the School Board of Palm Beach County refused to add sexual orientation to its list of categories protected from employment discrimination. Instead, it voted to change the wording of the nondiscrimination clause to prohibit all discrimination currently covered by federal or state laws (with sexual orientation being a protected class at neither level). In late-August, the Chief of Police for the City of Miami Beach in Dade County issued a new discrimination policy for the city's law

390. Keith Eddings, City Cancels Play With Homosexual Themes, MIAMI HERALD, Dec. 5, 1990, at 1BR.
391. Id.
394. See, e.g., Kiriacon, supra note 393, at 3.
395. See id.
396. Memorandum from Emeline C. Acton, Hillsborough County Attorney, to Phyllis Busansky, Chair, Hillsborough County Board of County Commissioners (Sept. 11, 1991) (on file with author's estate).
398. Id.
enforcement employees. The revised policy included a prohibition against discrimination or harassment on the basis of sexual orientation.\(^{399}\)

In September 1991, the City of Key West in Monroe County adopted sexual orientation nondiscrimination protections. Its ordinance extended to employment, credit transactions, bonding and public accommodations.\(^{400}\) The measure received the support of a unanimous City Commission.\(^{401}\) By late-1991, the cities of West Palm Beach, Boynton Beach, and Riviera Beach, all in Palm Beach County, had each adopted a resolution prohibiting the respective municipalities from doing official business with or appropriating funds for country clubs or other organizations with discriminatory membership policies.\(^{402}\)

The 1991 session of the legislature provided a pleasant surprise. The addition of coverage for crimes evidencing prejudice on the basis of sexual orientation to the Florida Hate Crimes Act received an endorsement from Archbishop McCarthy,\(^{403}\) who also recommended support for the proposal by the full Florida Catholic Conference.\(^{404}\) The Senate bill\(^{405}\) was sponsored by Senator Eleanor Weinstock\(^{406}\) and the House bill by Representative James Burke.\(^{407}\) With Archbishop McCarthy’s support added to the lobbying efforts of the Florida Task Force, the Anti-Defamation League, the ACLU of Florida, and others, the amendment passed the Florida Senate by a vote of thirty-three-to-three and passed the House by a vote of seventy-nine-to-twenty-nine.\(^{408}\) Despite a strong push by Christian fundamentalists to get the Governor to veto the bill,\(^{409}\) it passed and was signed into law.\(^{410}\)

By late-1991 and early into 1992, Governor Lawton Chiles had proposed reform of the statewide civil rights laws to combine the then

---

400. KEY WEST, FLA., CODE § 91-30 (1991) (on file with author’s estate).
406. Democrat, West Palm Beach.
407. Democrat, Miami.
410. Ch. 91-83, § 1, 1991 Fla. Laws 625, 626 (codified at FLA. STAT. § 775.085 (1991)).
existing Florida Human Rights Act and the Florida Fair Housing Act into a new Florida Civil Rights Act. Despite pressure from multiple directions, the Governor successfully resisted any attempt to use his 1992 civil rights reforms as a vehicle to add sexual orientation into the list of kinds of discrimination prohibited in Florida. An attempt to add sexual orientation protections to the Governor’s bill failed by a vote of six-to-three in the court system, Probate and Consumer Law Subcommittee of the House Judiciary Committee and then again by voice vote on reconsideration. The sponsor of the Governor’s bill in the Florida House of Representatives reported that Chiles had threatened to veto the measure if it arrived on his desk with sexual orientation protections included.

In February 1992, the City of West Palm Beach again broke new ground, this time allowing employees who are domestic partners the same bereavement leave as married people and blood relatives. The provision defined “domestic partner” in a manner to include lesbian and gay partners.

In late-May 1992, a subcommittee of the Miami Beach Community Relations Board voted to prepare an antidiscrimination ordinance that included sexual orientation, taking the first step towards that city’s sexual orientation nondiscrimination protections. Also in 1992, activists in Alachua County had sought sexual orientation nondiscrimination protections. In June of that year, the Gainesville City Commission, Alachua County’s largest municipality, refused to enact sexual orientation nondiscrimination protections and passed, by a vote of three-to-two, a

---


412. The Florida Civil Rights Act of 1992 was ultimately codified at FLA. STAT. §§ 760.01-.11 (1993).

413. Sponsored by Representative Jim Burke, Democrat, Miami.


415. Representative Willie Logan, Democrat, Miami.


420. Tom Leithauser, *City Withholds Support for Gay Rights Law*, GAINESVILLE SUN, June 2, 1992, at 1A.
reactionary resolution which linked homosexuality to necrophilia, bestiality and pedophilia. It further recommended that the Alachua County Commission not include coverage for sexual orientation discrimination in its human rights ordinance. Shocked lesbian and gay activists staged a sit-in, which resulted in fifteen of them being arrested. Just a week later, the Alachua County Commission, by a vote of four-to-nothing, removed sexual orientation from a proposed amendment to its antidiscrimination ordinance.

In Miami Beach, the full Community Relations Board, by a vote of six-to-four, adopted the recommendation of its subcommittee and recommended to the city commission adoption of an ordinance guaranteeing that “equality of rights shall not be denied or abridged on account of sexual orientation.”

Next came the first public vote on lesbian and gay rights since the 1990 vote in Broward County. “Take Back Broward” had led a movement to repeal Tampa’s sexual orientation nondiscrimination ordinance, and on November 4, 1992, the voters of Tampa did repeal the ordinance by a vote of 58.5-to-41.5%. The vote was held notwithstanding a challenge by the county’s Supervisor of Elections questioning the validity of the signatures on the petitions which forced the referendum. During the same election, Temple Terrace voters adopted by a vote of sixty-three-to-thirty-seven percent a municipal human rights ordinance specifically excluding anyone “who may claim” discrimination because of sexual orientation.

In Miami Beach, with little opposition and just two weeks after the repeal of the Tampa ordinance, the City Commission voted unanimously to preliminarily pass a sexual orientation nondiscrimination ordinance which

424. David Greeberg, Gays Are Deleted from Proposal, GAINESVILLE SUN, June 10, 1992, at 1A.
426. See supra text accompanying notes 382–93.
427. Gay Rights Law is Overturned, MIAMI HERALD, Nov. 5, 1992, at 23A (on file with author’s estate).
429. Todd Simmons, A Farewell to Rights, GAZETTE (Hillsborough County), Dec. 1992, at 5.
extended to employment, housing, and public accommodations.\(^{430}\) The final adoption of the ordinance occurred on December 2, 1992,\(^{431}\) with a similarly unanimous vote.\(^{432}\)

In January 1993, an effort was mounted to pass a sexual orientation nondiscrimination ordinance in the City of Hialeah in Dade County. The proposal was offered by the mayor, who could not vote on proposals before the City Council. The proposal failed when no member of the City Council would bring it up for a vote.\(^{433}\) In the same month, the Broward County Legislative Delegation heard arguments from sexual orientation nondiscrimination supporters who favored rerunning a countrywide referendum to gain such rights and those who favored alternative approaches.\(^{434}\) After split votes on preliminary questions, the delegation unanimously approved the referendum approach, underscoring the solidarity of the delegation in favor of nondiscrimination rights for lesbians and gay men.\(^{435}\) During the 1993 session, however, the Florida Legislature converted the Broward County Human Rights Act from public local law for the benefit of Broward County to a simple county ordinance, allowing the Board of County Commissioners of Broward County to make any further changes without the need for further action by the legislature or approval by the Broward electorate.\(^{436}\)

\(^{430}\) Bonnie Weston, *Gay Rights Passes Beach Test*, MIAMI HERALD, Nov. 19, 1992, at 1A (on file with author’s estate).

\(^{431}\) MIAMI BEACH, FLA., ORDINANCE 92-2829 (1992) (on file with author’s estate).

\(^{432}\) Judy Camillone, *It’s OK to be Gay in Miami Beach!*, THE WEEKLY NEWS, Dec. 9, 1992, at 3.


\(^{435}\) Id.

\(^{436}\) H.R. 1421, 25th Leg., Reg. Sess. (Fla. 1993) (sponsored by Representatives Debbie Wasserman Schultz (Democrat, Davie) and Steven Brian Feren (Democrat, Plantation)). In 1993, the legislature clarified that a mother’s breast feeding of her baby would not fall within conduct prohibited by Florida’s sodomy statute, including the proscription against unnatural and lascivious acts. Ch. 93-4, §§ 1, 6, 1993 Fla. Laws 101, 103 (codified at FLA. STAT. §§ 383.015, 847.001 (1995)). The 1993 session of the legislature saw the first introduction of two significant gay rights measures. Representative Mel McAndrews introduced legislation to add coverage for discrimination on the basis of sexual orientation to the Florida Civil Rights Act (House Bill 737). A companion bill (Senate Bill 1530) was introduced by Senator Ron Silver. Neither bill received a hearing. The other measure in 1993 would have repealed Florida’s statutory prohibition against adoption by homosexuals (House Bill 1461). Sponsored by Representative Suzanne Jacobs, it did get a hearing in the House Committee on Aging and Human Services, but by prior agreement between the sponsor and the Committee Chair, the bill was withdrawn before the committee could discuss or vote on it.
At the end of March 1993, with the public hearing room packed with people and an overflow crowd estimated at 300 gathered in a parking garage across from the courthouse to watch the hearing on television sets, the Board of County Commissioners in Alachua County adopted a sexual orientation nondiscrimination ordinance\(^{437}\) by a vote of three-to-two. The crowd reportedly included a dozen Ku Klux Klan members.\(^{438}\) The ordinance covered housing, employment and public accommodations. The Concerned Citizens of Alachua County, the political arm of the American Family Association, immediately began planning a repeal effort.\(^{439}\) The proposed sexual orientation nondiscrimination amendment for Boynton Beach was the next to come up for a vote. It lost by a three-to-two vote, with the American Family Association figuring prominently in the opposition and the out of uniform grand dragon of the local Ku Klux Klan testifying against the proposal.\(^{440}\)

By 1994, however, Concerned Citizens of Alachua County had collected enough signatures to place two antigay initiatives on the November 1994 ballot. One proposed to amend the County Charter to prohibit the inclusion of “sexual orientation,” “sexual preference,” or any similar classification in any county ordinance; the other proposed to repeal the inclusion of “sexual orientation” in the county’s antidiscrimination ordinance.\(^{441}\)

In June 1994, on the heels of the Supreme Court of Florida’s advisory opinion striking down the proposed statewide antigay constitutional amendment,\(^{442}\) Alachua County activists filed suit challenging the constitutionality of both of the local antigay initiatives.\(^{443}\) In August 1994, Circuit Court Judge James Tomlinson refused to dismiss the challenge to the

---

\(^{437}\) **ALACHUA COUNTY, Fla., ORDINANCE 92-41 (1992)** (on file with author’s estate).


\(^{439}\) *Gay Rights OK’d In Alachua; Right Begins Repeal Effort*, THE WEEKLY NEWS, Apr. 7, 1993, at 12 (on file with author’s estate).


\(^{442}\) *In re Advisory Opinion to the Attorney General*, 632 So. 2d 1081 (Fla. 1994).

\(^{443}\) Lassiter v. County of Alachua, *sub nom.* Morris v. Hill, No. 94-2084-CA (Fla. 8th Cir. Ct. 1994) Alachua County (on file with author’s estate).
two initiatives. On October 12, less than a month before the scheduled election, the circuit court ruled that the repeal initiative could go onto the ballot. And on October 25, the court ruled that the proposed amendment to the county charter could also go onto the ballot.

The Alachua County ordinance was repealed by the voters by a margin of fifty-seven-to-forty-three percent in the Republican landslide general election of November 8, 1994. Thus, in each of the first four times in which the electorate had the opportunity to vote on sexual orientation nondiscrimination ordinances in Florida—Dade County in 1977, Broward County in 1990, Tampa in 1992 and Alachua County in 1994—the result has been the same, and by almost the same margin each time. The second of the Alachua County initiatives, prohibiting the enactment of sexual orientation nondiscrimination ordinances, passed as well, and by a margin of fifty-nine-to-forty-one percent. Only after the passage of the two initiatives in Alachua County and the 1994 elections did the Gainesville City Commission agree, by a vote of four-to-one, to rescind its 1992 resolutions recommending that Alachua County not extend its nondiscrimination protections on the basis of sexual orientation.

Throughout the second half of 1993, the American Family Political Committee of Florida, the state component of the American Family Association, had gathered petition signatures to place on the ballot a proposed amendment to the Florida Constitution. The amendment would

---

446. Id.
447. Repeal of Law on Gay Rights Just a First Step, MIAMI HERALD, Nov. 10, 1994, at 22A.
448. ALACHUA COUNTY, FLA. CHARTER amend. 1, as passed by the voters in November 1994 (on file with author’s estate).
449. Gay Rights Loses, GAINESVILLE SUN, Nov. 9, 1994, at 1A (on file with author’s estate).
450. City Rescinds Anti-Gay Resolution, GAINESVILLE SUN, Dec. 13, 1994, at 1A.
451. The full text of the proposed amendment was as follows:
1) Article I, Section 10 of the Constitution of the State of Florida is hereby amended by:
Inserting "(a)" before the first word thereof and, adding a new subsection "(b)" at the end thereof to read:
(b) The state, political subdivisions of the state, municipalities or any other governmental entity shall not enact or adopt any law regarding discrimination against persons which creates, establishes, or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status or condition other than race, color, religion, sex, national origin, age, handicap,
have prohibited the enactment or adoption by the state and its political subdivisions of any law which provided for nondiscrimination protections on any basis other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status. Furthermore, it would have repealed any such previously enacted laws. Pursuant to the provisions of Article IV, Section 10, of the Florida Constitution and section 16.061(1) of the Florida Statutes, on November 4, 1993, the Attorney General of Florida placed the matter before the Supreme Court of Florida for an advisory opinion concerning the validity of the petition.

One brief in opposition to the petition was filed on behalf of the Florida Public Interest Law Section, the Florida AIDS Legal Defense & Education Fund, the Florida Association of Women Lawyers, Florida Legal Services, Inc., Floridians Respect Everyone's Equality, Floridians United Against Discrimination, Miami Area Legal Services Union, the National Lesbian & Gay Lawyers Association, the Florida Chapter of the National Organization for Women, People for the American Way, the Southern Poverty Law Center, and the United Teachers of Dade's Gay & Lesbian Caucus; a second brief in opposition was filed by the ACLU of Florida. The American Family Political Committee of Florida filed the only brief in support of the petition. Oral argument before the Supreme Court of Florida was made by the Lambda Legal Defense and Education Fund and former ABA President Chesterfield Smith.452 On March 3, 1994, the Supreme Court of Florida ruled on the constitutional amendment proposed by the local branch of the American Family Association to repeal and bar sexual orientation

452. As the American Family Association attempted to place this antigay amendment to the Florida Constitution before the voters, Tampa area activists drafted an alternate amendment designed to expand the “Right of privacy” provision. Known as “The Privacy Project,” the effort’s language did not specifically mention “sexual orientation” or “homosexuality” but instead expressed a right to be let alone. Kevin Klahr, HRTF Plans Amendment to Florida Constitution, GAZETTE (Hillsborough County), Aug. 1993, at 5. The effort was apparently abandoned shortly thereafter.
nondiscrimination laws and local ordinances in Florida. It held that the proposed amendment "touches upon more than one subject and therefore violates the single-subject provision of the constitution." But for the Chief Justice, who recused herself from the case, the decision was unanimous, and the proposed amendment was stricken from the ballot.

In May 1994, the Florida Department of Business and Professional Regulation ruled that within the meaning of their condominium association rules and the attendant circumstances, two same-sex roommates did indeed constitute a "family" and would not be ordered to vacate the condominium unit for violation of a single family use rule. In September 1994, West Palm Beach became the seventh local government in Florida to enact sexual orientation nondiscrimination protections. Adopted by a four-to-one vote, the ordinance extends to housing, employment and public accommodations.

Late in 1994, several of the local sexual orientation nondiscrimination ordinances came under attack. A new effort was begun to petition the Tampa ordinance to referendum, and petitions were also circulated to force the West Palm Beach ordinance onto the ballot.

The Florida component of the American Family Association, which had taken the Tampa and Alachua County ordinances to the voters, renewed its vow to pursue repeal of similar ordinances in Palm Beach County and West Palm Beach. Before the beginning of December, the AFA had again collected enough signatures to force the West Palm Beach ordinance to a referendum. Even before the vote in West Palm Beach, however, the Palm Beach County Commissioners made public a plan to expand that county’s

454. Id. at 1019.
455. Gary Kirkland, State’s High Court Yanks Anti-Gay-Rights Initiative, GAINESVILLE SUN, Mar. 4, 1994, at 1A.
456. Maitland House Management, Inc. v. Martin, No. 93-0242, Division of Florida Land Sales, Condominiums, and Mobile Homes, Department of Business and Professional Regulation (May 27, 1994) (on file with author’s estate).
459. Tampa’s Debate About Gay Rights Enters Round Two, MIAMI HERALD, May 2, 1994, at 5B.
460. Anti-Gay Election Petitions Turned In, MIAMI HERALD, Oct. 14, 1994, at 1B.
461. Id.
462. West Palm Sets Jan. 10 Election on Gay-Rights Law, PALM BEACH POST, Nov. 22, 1994, at 1B.
sexual orientation nondiscrimination ordinance to private employment.463 Beyond the obvious expansion of rights, another effect of such a plan could have mooted the results of the repeal effort then being waged against the West Palm Beach ordinance.464 On January 10, 1995, the West Palm Beach electorate voted fifty-six-to-forty-four percent not to repeal the city’s sexual orientation nondiscrimination ordinance and thus became the first jurisdiction in Florida to withstand, by popular vote, a repeal effort. 465

In late-March 1995, the Broward County Charter Review Commission, by a nine-to-one vote, agreed to place on its public hearing agenda the proposed addition of “sexual orientation” to the Broward County Charter as a basis on which the County Commission is required to protect human rights.466 A week later, the Broward County Commission agreed to hold a public hearing on the proposal to add coverage for “sexual orientation” discrimination to the Broward County Human Rights Act.467 Additionally, Hillsborough County Commissioners voted four-to-three to hold a public hearing on whether to repeal the county’s four-year-old ordinance banning discrimination on the basis of sexual orientation.468 That same week, activists in Broward County withdrew their request to the Broward County Charter Review Commission for the addition of the basis of “sexual orientation” to the human rights guarantee in the Broward County Charter, opting instead to pursue only a change in the county’s human rights ordinance.469

On June 13, 1995, following a lengthy public hearing, the Broward County Board of County Commissioners voted six-to-one to add “sexual orientation” as a category protected by the Broward County Human Rights Ordinance.470 The ordinance, with the 1995 amendments, covers

463. Jay Croft, County Ordinance Would Ban Job Bias Against Gays, PALM BEACH POST, Dec. 30, 1994, at 1B.
464. Id.
466. Larry Keller, Gay Rights Measure on Agenda, County Charter Panel Sets Public Hearings, SUN-SENTINEL (Fort Lauderdale), Mar. 28, 1995, at 1B (on file with author’s estate).
467. Larry Keller, County Leaders Schedule Gay Discrimination Hearing, SUN-SENTINEL (Fort Lauderdale), Apr. 5, 1995, at 3B.
468. Anti-Discrimination Hearing To Be Held, SUN-SENTINEL (Fort Lauderdale), Apr. 7, 1995, at 22A.
469. Bob LaMendola, Activists Switch Strategy, Gay-Rights Groups Ask County for Law, SUN-SENTINEL (Fort Lauderdale), Apr. 27, 1995, at 3B.
employment and housing, and public accommodations. A series of amendments was also added to exempt religious institutions from the sexual orientation nondiscrimination requirement. Opponents vowed to begin collecting signatures immediately to place a measure on the next year’s ballot to rescind the new provision.

On July 18, 1995, by a three-to-four vote, the Palm Beach County Board of County Commissioners rejected an effort to add “sexual orientation” as a protected class under a proposed Palm Beach County Equal Employment Ordinance. The commission then passed the ordinance without the sexual orientation protections by a five-to-two vote.

In late-1995, the Florida Department of Corrections began the formal process of repealing the longstanding listing of “[h]omosexuality” as an offense or deficiency for which an employee could be disciplined. This and other amendments were proposed to delete provisions deemed “obsolete.” The Economic Impact Statement for the proposed amendments noted that the sections had not been used. The rule changes took effect January 30, 1996.

The 1996 session of the Colorado Legislature took note of the then pending possibility that same-sex marriages might be in some manner permitted in Hawaii. In at least twenty states, efforts were underway to deny full faith and credit to same-sex marriages from Hawaii or elsewhere. In Florida, Representative Buddy Johnson introduced House Bill 2369 to do exactly that. The bill was withdrawn from further consideration just

---

471. BROWARD COUNTY, FLA., ORDINANCE 95-26 (1995) (codified at BROWARD COUNTY, FLA., CODE § 16½-3 (1999)).
472. Larry Keller & Tao Woolfe, County Commission OK’s Gay Rights Law, Opponents Plan Drive For Vote to Rescind Rule, SUN-SENTINEL (Fort Lauderdale), June 14, 1995, at 1A.
473. Id.
475. Id.
477. Economic Impact Statement Memorandum from Charles Hazelip to Perri M. King (Nov. 28, 1995) (on file with author’s estate).
478. Id.
481. Id.
482. Republican, Plant City.
one week later, apparently because its sponsor exceeded his bill allotment and possibly because of pressure from the leadership of both houses.

In May 1996, by a six-to-three vote, the United States Supreme Court struck down Colorado's "Amendment 2," which barred state and local units of government within Colorado from providing discrimination protection to lesbians, gay men, and bisexuals. The Court said that the voter-approved amendment to the Colorado Constitution classified homosexuals not to further a proper legislative end but "to make them unequal to everyone else.... A state cannot so deem a class of persons a stranger to its laws." This was the first time the United States Supreme Court had extended the principle of equal protection of the laws to lesbians and gay men, and the decision would have a direct effect on litigation pending in Florida.

By September 1996, in anticipation of a court decision allowing same-sex marriages in Hawaii, Congress passed, and President Clinton signed into law, the Defense of Marriage Act ("DOMA"). providing that the federal government will not recognize homosexual marriages, and allowing states to refuse to recognize such unions licensed in other states.

In December 1996, a Hawaii court ruled on a long pending case that the state had failed to show a compelling state interest in denying lesbian and gay couples the right to marry and ordered the state to begin issuing licenses to same-sex couples. The following day, the same judge put the ruling on hold while the state appealed, acknowledging that Hawaii would have a dilemma if same-sex couples were allowed to marry and the state's supreme court then overturned the lower court's ruling. The Supreme

487. Id. at 635. See also Jan Crawford Greenburg, Gay Rights' Cause Wins Key Victory: Court Throws Out Colorado Amendment, SUN-SENTINEL (Fort Lauderdale), May 21, 1996, at A1.
492. Id. at *21–22. See also Ruling Favors Gay Marriages in Hawaii, supra note 488, at 1A.
493. Hawaii Judge Puts Gay-Marriage Ruling on Hold, supra note 490, at 3A.
Court of Hawaii ordered the state to show cause why the marriage license sought should not be issued and remanded the case to the trial court. 494

The 1997 session of the legislature saw the anticipated introduction into both chambers of a state version of the Defense of Marriage Act. House Bill 147 was filed by Representative Johnnie Byrd495 with twenty-five co-sponsors out of the 120 member House; Senate Bill 272 was filed by Senator John Grant496 with an absolute majority of the Senate, twenty-one out of the forty-member Senate, as co-sponsors.497 The new Speaker of the Florida House, Republican Dan Webster,498 supported the legislation, saying that it would bolster the "legitimacy of a family" and allow "for what the traditional family was designed to do." 499

In early March, the House bill was unanimously approved by the Committee on Government Operations.500 By mid-March, the legislation had been approved by the Senate Judiciary Committee by a vote of eight-to-two.501 In late-March, the Republican controlled House defeated by a vote of eighty-eight-to-twenty-five an amendment sponsored by Representative Lois Frankel502 seeking to apply moral standards to all persons seeking to marry in Florida,503 and a day later, the full House passed the nonrecognition bill by a vote of ninety-nine-to-twenty.504 The Senate bill was reportedly amended to extend Florida's right to refuse to recognize not only same-sex marriages but also domestic partnerships which were lawful where they were formed.505 In late-April, the Senate passed the bill by a vote of thirty-three-

494. Id.
498. Republican, Orlando. Speaker Webster is regularly identified by the media as the leader of the Christian Coalition in the Florida Legislature.
500. Bill Tightens Ban on Same Sex Marriages, MIAMI HERALD, Mar. 6, 1997, at 6B.
501. Same-Sex Marriage Ban Approved by Committee, SUN-SENTINEL (Fort Lauderdale), Mar. 13, 1997, at 7B.
502. Democrat, West Palm Beach.
503. Tyler Bridges, Same-Sex Marriage Ban Passes House Hurdle, MIAMI HERALD, Mar. 26, 1997, at 5B.
504. Tyler Bridges, Same-Sex Marriage Ban Passes House by a 99-20 Vote, MIAMI HERALD, Mar. 27, 1997, at 6B.
The City of Key West passed a formal resolution in early May asking Governor Chiles to veto the legislation. At the end of May, the Governor allowed the bill to become law without his signature.

In mid-June, in "an unexpected vote preceded by an unusual display of prayer, hymn-singing and speaking in tongues by hundreds of Christian activists," the Metro Commission rejected the proposed gay rights ordinance by a vote of seven-to-five on the bill's first reading. First reading is normally "a perfunctory vote that simply moves a [proposed] ordinance along to the next step: a public hearing at a later date in which the issue is fully discussed and a final vote taken." Within less than a month, an effort was made to resurrect the Dade County sexual orientation nondiscrimination proposal. One method would have been for one of the seven commissioners who voted against it during June's first reading to move to reconsider; however, no such motion was made at a July public hearing where it was briefly on the agenda. Another method for returning the issue to consideration is to wait a required six-month period, after which even a commissioner who voted for it earlier could schedule it for first reading. Proponents vowed to use that method.

In June 1997, local activists formally appeared before the Gainesville City Commission to propose the addition of coverage for sexual orientation to the city's existing human rights ordinance. In July 1997, activists went to the Monroe County Commission and proposed the adoption of domestic partner benefits, including those for same-sex couples. One county commissioner observed that passage is inevitable. Also in July 1997, what was believed to be the first "palimony" type suit was filed by one gay man against his former lover, who had adopted the plaintiff some thirteen years ago.

---

506. Mark Silva, Senators Say No to Same-Sex Marriages, After 33-5 Vote Bill Goes to Chiles, MIAMI HERALD, Apr. 30, 1997, at 1A.
508. Tyler Bridges, Same-Sex Marriage Ban Broadened Chiles Decides Not to Block Bill, MIAMI HERALD, May 30, 1997, at 1A.
510. Id.
512. Id.
513. Id.
earlier.\textsuperscript{517} Early reports made no mention of whether the adoption had taken place in Florida in violation of the statutory prohibition against such, and if so, what effect that might have on the case.\textsuperscript{518}

C. The Hillsborough County/Tampa Experience

In early 1991, the Hillsborough County Charter Review Board declined to take up the issue of discrimination against lesbians and gay men.\textsuperscript{519} One of the county commissioners, who had voted against adoption of the ordinance when it came before the Board of County Commissioners in the prior year as an amendment to the County’s Human Rights Ordinance, now sought a referendum instead.\textsuperscript{520} The Charter Review Board sent the issue back to the Board of County Commissioners, feeling that the matter would be better handled by elected officials.\textsuperscript{521}

Later that year, however, the Tampa City Commissioners gave preliminary approval to a sexual orientation nondiscrimination ordinance, with an exemption for religious organizations, by a vote of four-to-three.\textsuperscript{522} After a six-hour joint public hearing attended by more than 2500 people on both the Hillsborough County and Tampa municipal ordinance proposals, and with the changes brought about by the 1990 elections, Hillsborough became the second Florida county to adopt sexual orientation nondiscrimination protections,\textsuperscript{523} reversing by a four-to-three vote the 1989 action of the prior Board of County Commissioners. The ordinance\textsuperscript{524} offered such protection in the areas of public accommodations, real estate transactions, and county contracting and procurement procedures.\textsuperscript{525}

In Tampa, the City Council gave final approval, by a vote of four-to-three to its municipal ordinance.\textsuperscript{526} The Tampa ordinance extended sexual orientation nondiscrimination protections to employment, public

\begin{itemize}
  \item \textsuperscript{517} C. Ron Allen, Adopted Gay Man Sues Former Lover for Home, Couple Legally Linked By Adoption, Splitting up, SUN-SENTINEL (Fort Lauderdale), July 23, 1997, at 6B.
  \item \textsuperscript{518} Id.
  \item \textsuperscript{519} THE GAZETTE (Hillsborough County), Feb. 1991, at 3 (on file with author’s estate).
  \item \textsuperscript{520} Id.
  \item \textsuperscript{521} Id.
  \item \textsuperscript{522} Tampa City Commission Gives Preliminary Approval to Ordinance Banning Anti-Gay Discrimination, THE WEEKLY NEWS, May 15, 1991, at 10 (on file with author’s estate).
  \item \textsuperscript{523} Hillsborough, Tampa Ban Bias, THE WEEKLY NEWS, June 5, 1991, at 3 (on file with author’s estate).
  \item \textsuperscript{524} HILLSBOROUGH COUNTY, FLA., ORDINANCE 88-9 (1991) (on file with author’s estate).
  \item \textsuperscript{525} Hillsborough, Tampa Ban Bias, supra note 523, at 3.
  \item \textsuperscript{526} Id.
\end{itemize}
accommodations, and real estate transactions.\textsuperscript{527} The local component of the American Family Association immediately announced plans to seek a referendum to repeal the Tampa ordinance.\textsuperscript{528} In August 1991, after a sixty-day drive to collect signatures, the head of “Take Back Tampa,” the local element of the American Family Association, submitted petitions to remove coverage for discrimination on the basis of sexual orientation from the Tampa Human Rights Ordinance.\textsuperscript{529} The group claimed to have gathered 15,000 signatures.\textsuperscript{530} Throughout the summer and fall of 1991, the American Family Association (“AFA”) collected signatures to petition the Tampa sexual orientation nondiscrimination ordinance to a referendum.\textsuperscript{531} In late-November, Circuit Court Judge Guy Spicola ruled that the Hillsborough County Elections Supervisor’s disqualification of hundreds of signatures was improper, and the AFA then claimed enough signatures to force the issue to the ballot.\textsuperscript{532} In March 1992, the Hillsborough County Commission, by a vote of three-to-four, denied a request to place on the ballot a proposal to allow voters to adopt or repeal county ordinances.\textsuperscript{533} The proposal had originated with the “Take Back Tampa” campaign.\textsuperscript{534}

In 1992, Circuit Court Judge Roland Gonzalez ordered\textsuperscript{535} that the question of whether or not to repeal the city’s human rights ordinance, including its sexual orientation nondiscrimination protections, must appear on the ballot.\textsuperscript{536} The city vowed to appeal that as well as Judge Spicola’s earlier decision restoring the validity of those “Take Back Tampa” signatures which had been invalidated by the Supervisor of Elections.\textsuperscript{537}

In September 1993, however, the Supreme Court of Florida unanimously invalidated some 462 of the signatures on the petitions that had forced the successful vote on repeal of the Tampa nondiscrimination ordinance.\textsuperscript{538} Thus, notwithstanding the public’s vote to repeal, the

\textsuperscript{527} TAMPA, FLA., ORDINANCE 91-88 (1991).
\textsuperscript{528} AFA to Seek Repeal of Tampa Action via Referendum, THE WEEKLY NEWS, June 5, 1991, at 3 (on file with author’s estate).
\textsuperscript{529} GAZETTE (Hillsborough County), Sept. 1991, at 3 (on file with author’s estate).
\textsuperscript{530} Id.
\textsuperscript{531} Id.
\textsuperscript{533} Hillsborough Vote Deals Setback to Anti-Gay Activists, THE WEEKLY NEWS, Mar. 18, 1992, at 12 (on file with author’s estate).
\textsuperscript{534} Id.
\textsuperscript{535} Rand Hall, Majority Needed for Minority Rights, GAZETTE (Hillsborough County), July 1992, at 3.
\textsuperscript{536} Id.
\textsuperscript{537} Id.
\textsuperscript{538} Rand Hall, Take Back Tampa—WE DID!, GAZETTE (Hillsborough County), Nov. 1993, at 5.
ordinance was reinstated. The legal challenge to Tampa’s sexual orientation nondiscrimination ordinance ended on April 18, 1994, when the United States Supreme Court refused without comment to hear “Take Back Tampa’s” case. “Take Back Tampa” vowed to recirculate the petitions.

In December of 1992, an effort to repeal the Hillsborough County ordinance failed when the Board of County Commissioners deadlocked, three-to-three. And one more vote in January 1993 saw the Hillsborough ordinance upheld by a commission vote of four-to-three.

The Florida component of the American Family Association, which had taken the Tampa ordinance to the voters, renewed its vow to pursue repeal of the reinstated ordinance in Tampa. Before the month of November was out, the AFA had again collected enough signatures to force the reinstated Tampa sexual orientation nondiscrimination ordinance onto the ballot.

In early 1995, the same forces which had formed the “Take Back Tampa” group had reacted to the invalidation of a sufficient number of signatures to stop its petitioning the local nondiscrimination ordinance to referendum by gathering new signatures. Now calling itself “Yes! Repeal Tampa’s Homosexual Ordinance Committee,” it gathered the necessary valid signatures to place repeal of the city’s sexual orientation nondiscrimination ordinance on the March 1995 ballot, along with the city’s mayoral and city council elections. The city approved minor changes from the language of the petitions to the language which appeared on the ballot.

In March 1995, Hillsborough County Court Judge Manuel Menendez removed from the election ballot the second attempt to repeal Tampa’s sexual orientation nondiscrimination ordinance. The judge held that the Tampa City Council lacked the authority to change the wording of the referendum, as it had done, to simplify the ballot language. City attorneys

541. Nancy Valmus, U.S. Supreme Court Refused to Hear Caton, GAZETTE (Hillsborough County), May 1994, at 14.
544. Id.
546. Tom Fielder, Gay-Rights Law Repeal Attempt In Legal Limbo, MIAMI HERALD, Mar. 6, 1995, at 5B (on file with author’s estate).
547. Id.
548. Id.
550. Ballot Changed, MIAMI HERALD, Mar. 4, 1995, at 5B.
appealed, triggering an automatic stay of the circuit court's removal of the issue from the ballot.\textsuperscript{551} However, the appellate court affirmed the circuit court's decision.\textsuperscript{552} Thus, voters were not allowed to decide the referendum on repealing the city's four-year-old sexual orientation nondiscrimination ordinance.\textsuperscript{553}

In mid-May 1995, after a four-hour public hearing on the matter, the Hillsborough County Board of County Commissioners voted four-to-three to repeal the county's four-year-old ordinance banning discrimination on the basis of sexual orientation.\textsuperscript{554} Some 700 people attended the hearing, moved from the county commission chamber to the Hillsborough County Fairgrounds.\textsuperscript{555} Shortly thereafter, "Take Back Tampa" filed suit\textsuperscript{556} for a court order to declare the Tampa sexual orientation nondiscrimination ordinance invalid, claiming that the city "thwarted the will of the people" by enforcing an ordinance that was rejected by a public referendum.\textsuperscript{557}

D. Developments Within the Florida Bar

In late-1990, the then-relatively-new Public Interest Law Section ("PILS") of The Florida Bar, adopted one of its first legislative positions: Endorsing an amendment to the Florida Hate Crimes Act to include crimes evidencing prejudice on the basis of the victim's sexual orientation.\textsuperscript{558} Following through on the work begun by the ABA, the section endorsed legislation at the federal, state, and local levels to prohibit discrimination on the basis of sexual orientation in employment, housing, and public accommodations.\textsuperscript{559} This time the requests did not seek the support of the entire Florida Bar to endorse the legislative positions; rather, they sought only to allow the new section to lobby on these issues. The entire Bar's

\begin{footnotesize}
\begin{enumerate}
\item \textit{Tampa Gay Rights Ordinance in Doubt}, \textit{SUN-SENTNEL} (Fort Lauderdale), Mar. 5, 1995, at 26A.
\item \textit{Tampa Voters Choose Mayor, Not Rights Bill}, \textit{SUN-SENTNEL} (Fort Lauderdale), Mar. 8, 1995, at 22A (on file with author's estate).
\item Id.
\item \textit{County Kills Gay Rights Law}, \textit{MIAMI HERALD}, May 18, 1995, at 5B.
\item \textit{Take Back Tampa Back Again}, \textit{GAZETTE} (Hillsborough County), Aug. 1995, at 5.
\item Id.
\item Minutes of the meeting of the Executive Council of the Public Interest Law Section of the Florida Bar Approved by the Board of Governors in March 1991, at 3 (November 16, 1990) (on file with author's estate).
\item Minutes of the meeting of the Executive Council of the Public Interest Law Section of The Florida Bar approved by the Board of Governors in March 1991, at 2 (Jan. 24, 1991) (on file with author's estate).
\end{enumerate}
\end{footnotesize}
Board of Governors gave the section permission to lobby for these two goals on March 21, 1991.560

The section took yet another legislative position designed to further the rights of lesbians and gay men in Florida. PILS endorsed repeal of Florida's statutory prohibition against adoption by homosexuals.561 Unlike its treatment of the other two sexual orientation positions taken by the section, however, the Board of Governors of The Florida Bar in this case refused to allow PILS to lobby.562 It found the position to be one which had the potential of "deep philosophical or emotional division among a substantial segment of the Bar..." and thus, outside the parameters of cases which defined allowable lobbying within mandatory membership bar associations, as in Florida's.563

PILS ultimately filed a petition with the Supreme Court of Florida seeking to clarify when the Board of Governors could and could not prohibit a section of The Florida Bar from lobbying on a legislative position the section has taken.564 The court, in an unpublished per curium opinion, declined to hear the petition.565 The leadership of PILS then formed a voluntary membership organization, the Florida Academy of Public Interest Lawyers, which endorsed the proposal for repeal of the adoption prohibition as its first legislative position.566

In September 1993, the Public Interest Law Section sought to take a legislative position on another issue affecting the rights of lesbians and gay men.567 This time, PILS endorsed reformation of chapters 798 and 800 of Florida Statutes, which proscribe criminal behavior under the headings "Adultery; Cohabitation" and "Lewdness; Indecent Exposure," respectively, to make noncommercial acts between consenting adults in private beyond

560. Public Interest Law Section of The Florida Bar to Lobby to Eliminate Sexual Orientation Discrimination, a news release by the Public Interest Law Section of The Florida Bar, Apr. 9, 1991 (on file with author's estate).
561. Minutes of the meeting of the Executive Committee of the Public Interest Law Section of The Florida Bar, at 3-4 (Sept. 6, 1991) (on file with author's estate).
562. Id.
563. Minutes of the meeting of the Board of Governors of The Florida Bar, at 8 (Sept. 13, 1992) (on file with author's estate).
564. The Florida Bar re: Authority of a Voluntary Section to Engage in Legislative Action, 599 So. 2d 658 (Fla. 1992).
565. Id.
567. Minutes of the Meeting of Executive Council, Public Interest Law Section of The Florida Bar, at 7 (Sept. 9, 1993) (on file with author's estate).
the scope of the criminal law.\textsuperscript{568} On February 17, 1994, the Board of Governors of The Florida Bar authorized PILS to lobby for those changes.\textsuperscript{569}

The year 1994 marked the start of a new biennium for The Florida Bar. All previous legislative positions were sunsetted, and those sections and committees which sought to renew Bar authorization to lobby on behalf of specific proposals had to begin that process anew.\textsuperscript{570} The Public Interest Law Section sought renewed authority to lobby for sexual orientation nondiscrimination ordinances generally, for the specific addition of coverage for sexual orientation nondiscrimination to the Florida Civil Rights Act, and for decriminalization of victimless crimes, all of which positions had previously been approved for section lobbying by the Board of Governors.\textsuperscript{571}

A new Bar biennium also meant a change of players, however, including those on the Board of Governors’ Legislation Committee. This time, the Legislation Committee rejected all three of the sexual orientation proposals as too controversial and divisive. At the full Board of Governors, the lack of a quorum prevented a vote on whether to uphold or overturn the Legislation Committee.\textsuperscript{572}

In February 1995, notwithstanding the prior finding by the Legislation Committee that the issue is “divisive,” the Board of Governors of The Florida Bar authorized the Public Interest Law Section of the Bar to lobby in support of sexual orientation nondiscrimination laws and ordinances generally, and specifically for the addition of sexual orientation discrimination to the coverage of the Florida Civil Rights Act.\textsuperscript{573} A former PILS chair told the Board that sexual orientation discrimination “is the civil rights issue of the 1990s and we can’t be a public interest law section if we don’t deal with it.”\textsuperscript{574} The section did not pursue Board approval of its proposal to lobby for reform of victimless crimes legislation at that time.

\textit{[At this point, Allan Terl’s manuscript ends.]}
**Brennan v. State: The Constitutionality of Executing Sixteen-Year-Old Offenders in Florida**

---

**TABLE OF CONTENTS**

I. INTRODUCTION .............................................................................. 855

II. HISTORY OF THE DEATH PENALTY FOR JUVENILE OFFENDERS ... 856

   A. United States Supreme Court .................................................. 856
      1. Thompson v. Oklahoma ...................................................... 857
      2. Stanford v. Kentucky .......................................................... 860

   B. Supreme Court of Florida ....................................................... 864
      1. LeCroy v. State .................................................................... 864

III. BRENNAN V. STATE ....................................................................... 869

   A. Facts and Procedural History ................................................... 869

   B. Appellate Brief Arguments ...................................................... 871
      1. Appellant’s Initial Brief ...................................................... 871
      2. Appellee’s Answer Brief .................................................... 872
      3. Appellant’s Reply Brief ...................................................... 873

   C. Analysis of Brennan v. State .................................................... 873
      1. Justice Shaw Announced the Judgment of the Court............ 873
      2. Justice Anstead Specially Concurred .................................. 875
      3. Chief Justice Harding Concurred in Part and Dissented in Part ........................................................................... 877
      4. Justice Wells Concurred in Part and Dissented in Part ......... 879

IV. CONCLUSION .................................................................................. 880

---

I. INTRODUCTION

On March 10, 1995, sixteen-year-old Keith Brennan and eighteen-year-old Joshua Nelson used a baseball bat and a box cutter knife to kill eighteen-year-old Tommy Owens.1 Owens remained conscious during the attack and pleaded for his life, but neither Brennan, nor Nelson showed any mercy toward him.2 Law enforcement officers apprehended Brennan and Nelson a short time after the murder.3 The jury found Keith Brennan guilty as

---

charged for the murder of Owens and recommended the death penalty. The trial judge followed the jury’s recommendation and sentenced Brennan to death. However, on July 8, 1999, the Supreme Court of Florida vacated Brennan’s death sentence and reduced his sentence to life imprisonment without the possibility of parole. The court held that executing Keith Brennan would be cruel or unusual punishment under article I, section 17 of the Florida Constitution because Brennan was only sixteen years old at the time of the murder.

The Supreme Court of Florida made its decision, that executing sixteen-year-old offenders is cruel or unusual punishment, based on the number of juvenile executions that have been carried out in Florida over the last twenty-five years. The court concluded that executing sixteen-year-old offenders is unusual and therefore a violation of article I, section 17 of the Florida Constitution because no sixteen-year-old offenders have been executed in Florida since 1972. The court did not examine jury determinations or legislative enactments in making its decision as the United States Supreme Court did in deciding the constitutionality of executing fifteen and sixteen-year-old offenders in Thompson v. Oklahoma and Stanford v. Kentucky.

The purpose of this comment is to review the history of the juvenile death penalty and to analyze the arguments surrounding Brennan v. State. Part II of this comment will discuss the history of the death penalty for juveniles in the United States Supreme Court and the Supreme Court of Florida. Part III will analyze Brennan, including the appellate brief arguments and the opinions of the justices of the Supreme Court of Florida. Finally, Part IV will conclude this comment.

II. HISTORY OF THE DEATH PENALTY FOR JUVENILE OFFENDERS

A. United States Supreme Court

In 1988, the United States Supreme Court held that executing an offender who is under sixteen years old at the time of their offense constitutes cruel and unusual punishment in violation of the Eighth

4. Id. at S366.
5. Id. at S367.
6. Id. at S368.
7. Id.
8. See Brennan, 24 Fla. L. Weekly at S367.
9. Id.
12. 24 Fla. L. Weekly S365 (July 8, 1999).
Amendment of the United States Constitution.\textsuperscript{13} In 1989, the Supreme Court held that executing sixteen or seventeen-year-old offenders does not constitute cruel and unusual punishment under the Eighth Amendment.\textsuperscript{14} Essentially, the United States Supreme Court has drawn a line at the age of sixteen.\textsuperscript{15} The states may not cross this line, but are free to extend the line to a higher age, making it illegal by statute to execute offenders sixteen and older.

1. Thompson v. Oklahoma

On January 23, 1983, fifteen-year-old William Wayne Thompson participated in the murder of Charles Keene, his former brother-in-law.\textsuperscript{16} Keene's body was found in a river two weeks later, chained to a concrete block.\textsuperscript{17} It was determined that the victim had been shot twice and that his throat, chest, and abdomen had been cut.\textsuperscript{18} Thompson was certified to stand trial as an adult in accordance with Oklahoma law.\textsuperscript{19} A jury found Thompson guilty of first-degree murder and recommended the death penalty.\textsuperscript{20} The trial judge sentenced Thompson to death.\textsuperscript{21} On appeal, the Oklahoma Court of Criminal Appeals affirmed Thompson's conviction and sentence.\textsuperscript{22}

\textsuperscript{13} Thompson, 487 U.S. at 838. See also U.S. CONST. amend. VIII.
\textsuperscript{14} Stanford, 492 U.S. at 380. See U.S. CONST. amend. VIII. Note that the Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment while article 1, section 17 of the Florida Constitution prohibits cruel or unusual punishment. Compare U.S. CONST. amend. VIII, with FLA. CONST. art. I, § 17. Also note that references to a defendant's age in this comment refers to the defendant's age at the time of their offense.
\textsuperscript{15} See Stanford, 492 U.S. at 380; Thompson, 487 U.S. at 838.
\textsuperscript{17} Id. at 861.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 861–62. Under title 10, section 1112(b) of the Oklahoma Statutes, juveniles could be certified to stand trial as adults if the State could prove "prosecutive merit" of the case and, after considering six factors, the court determined that there were no reasonable prospects for rehabilitation of the child within the juvenile system. OKLA. STAT. tit. 10, § 1112(b) (1981). Numerous witnesses testified about Thompson's prior abusive behavior, which included arrests for assault and battery, attempted burglary, assault and battery with a knife, and assault and battery with a deadly weapon. Thompson, 487 U.S. at 861–62. A clinical psychologist testified that the juvenile justice system could not help Thompson. Id.
\textsuperscript{20} Thompson, 487 U.S. at 862.
\textsuperscript{21} Id.
On certiorari, Justice Stevens of the United States Supreme Court held, in a plurality opinion, that imposing the death penalty on sixteen-year-old offenders constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. He held that "evolving standards of decency" demonstrate that society opposes capital punishment for offenders under sixteen, that imposing the death penalty on offenders under sixteen is disproportional, and that imposing the death penalty on offenders under sixteen does not serve the social purposes of capital punishment. Hence, executing offenders under sixteen years of age constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

First, to determine what "evolving standards of decency" were in the United States, Justice Stevens examined legislative enactments and jury determinations. He concluded that state laws limiting the rights of fifteen-

23. Justice O'Connor's concurrence in Thompson was the swing vote, which helped define the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution. See Thompson, 487 U.S. at 848–59. Although she concurred with Justice Stevens' opinion, she was reluctant to adopt it without better evidence. Id. at 848–49. She agreed with Justice Stevens, that statistics showing the rarity of executions imposed on offenders under 16 years old support the inference of a national consensus opposing the death penalty for 15-year-olds, but she said that the statistics are not dispositive. Id. at 853. Justice O'Connor also agreed with Justice Stevens when he said adolescents are generally less blameworthy than adults. Id. However, she said that fact does not necessarily mean all 15-year-olds are incapable of the culpability that would justify imposing capital punishment on them. Id. Finally, Justice O'Connor concluded that offenders under 16 should not be executed under a capital punishment statute that fails to specify a minimum age at which one may become eligible for the death penalty. Thompson, 487 U.S. at 857–58.

Justice Scalia dissented, saying it is impossible for the plurality to hold, based on legislative enactments, that evolving standards of decency demonstrate society's opposition to imposing the death penalty on offenders younger than 16. Id. at 868. This is because 40% of the states and the federal government allow for imposing the death penalty on any juvenile tried as an adult. Id. On the subject of jury determinations as an indicator of "evolving standards of decency," Justice Scalia said that the plurality erroneously examined statistics on capital executions, which are substantially lower than capital sentences. Id. at 869. Justice Scalia concluded by saying, although statistics do indicate that imposing the death penalty on offenders under 16 is rare, the Court is not discussing the rarity of capital punishment for offenders under 16, but whether the Eighth Amendment prohibits it entirely. Id.

24. Thompson, 487 U.S. at 838.
25. Id. at 824–25, 833.
26. Id. at 835.
27. Id. at 837–38.
28. See id. at 838.
29. Thompson, 487 U.S. at 823–33. Courts are guided by "evolving standards of decency that mark the progress of a maturing society" in determining what constitutes cruel and unusual punishment. Id. at 821 (quoting Trop v. Dulles, 356 U.S. 86, 101
year-olds indicate that society regards fifteen-year-olds as less responsible than adults.\(^\text{30}\) Using statistics, Justice Stevens determined that a majority of the states as well as other countries oppose the death penalty for offenders under sixteen years old, indicating that society was becoming less tolerant of imposing capital punishment on juveniles.\(^\text{31}\) Finally, Justice Stevens said that the rarity of executions of offenders under sixteen years old in the United States indicates that juries oppose imposing capital punishment on such offenders.\(^\text{32}\)

Next, Justice Stevens discussed the proportionality of the death penalty and the death penalty's contribution to social purposes when imposed on offenders under sixteen.\(^\text{33}\) He concluded that juveniles are less culpable than adults are because they are less mature and less responsible than adults.\(^\text{34}\)

---

\(^{30}\) Id. at 822–23. If evolving standards of decency indicate that society opposes capital punishment for a certain age group, then executing an offender who belongs to that age group constitutes cruel and unusual punishment. Id. at 821–23 & nn.4–7.

\(^{31}\) Id. at 823–25. At that time, no states allowed 15-year-olds to vote or sit on a jury; in all but one state a 15-year-old could not drive without parental consent; in all but four states a 15-year-old could not marry without parental consent; no state allowed 15-year-olds to purchase pornographic material; all states had enacted legislation designating the maximum age for juvenile court at 16 years old; and no states allowed 15-year-olds to purchase alcohol or cigarettes. Thompson, 487 U.S. at 824.

\(^{32}\) Id. at 826–31. At that time, 14 states did not allow capital punishment at all; 18 other states had expressly established a minimum age in their death penalty statutes at age 16 at the time of the offense; and in the remaining 19 states, the death penalty was allowed, but no minimum age limit had been set. Id. The death penalty had been completely abolished in West Germany, France, Portugal, The Netherlands, and all Scandinavian countries, and was available only for exceptional crimes such as treason in most western countries, including Canada, Italy, Spain, and Switzerland. Id.

\(^{33}\) Id. at 831. It is estimated that only 18–20 people under the age of 16 at the time of their offense have been executed in the 20th Century, the last such execution taking place in 1948. Thompson, 487 U.S. at 832. “The road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.” Id.

\(^{34}\) Id. at 833–38.

\(^{35}\) Id. at 834–35. Justice Stevens wrote that because of less experience, less education, and less intelligence, teenagers are less able to evaluate the consequences of their conduct and are more apt to be motivated by emotion or peer pressure. Id. He cited to Eddings v. Oklahoma, saying that crimes by juveniles deserve less punishment because adolescents have less capacity to control their conduct and to think in long range terms than adults. Thompson, 487 U.S. at 834 (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)). He went on to cite the REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE, 1978 REPORT ON SENTENCING POLICY TOWARD YOUNG OFFENDERS (1978) [hereinafter 1978
Therefore, imposing the death penalty on juveniles is disproportional and hence a violation of the Eighth Amendment. Justice Stevens determined that imposing the death penalty on offenders younger than sixteen years old also does not contribute to the social purposes of the death penalty, specifically, retribution and deterrence.

2. Stanford v. Kentucky

_Stanford v. Kentucky_ involved two consolidated cases. In the first case, seventeen-year-old Kevin Stanford and an accomplice robbed a gas station where twenty-year-old Barbel Poore was working as an attendant. During and after commission of the robbery, Stanford and his accomplice repeatedly raped and sodomized Poore before Stanford shot her in the face and in the back of the head. At trial, a corrections officer testified that Stanford said he killed Poore because she lived next door to him and would recognize him. Stanford was transferred and tried as an adult and was convicted of murder, first-degree sodomy, first-degree robbery and receiving stolen property. He was sentenced to death by the trial judge and his sentence was affirmed by the Supreme Court of Kentucky.
In the second case, sixteen-year-old Heath Wilkins robbed a convenience store owned and operated by Nancy and David Allen. His plan was to rob the store and kill whoever was working there because “a dead person can’t talk.” During the robbery, Wilkins stabbed Nancy Allen, a twenty-six-year-old mother of two, while his accomplice held her. Allen spoke up to assist the two when they had trouble opening the cash register. This led Wilkins to stab her three more times in the chest, two of the wounds puncturing the victim’s heart. When Allen began to beg for her life, Wilkins stabbed her in the throat four times, severing her carotid artery. Wilkins was certified to stand trial as an adult and was sentenced to death. The Supreme Court of Missouri affirmed on review, rejecting Wilkins’ Eighth Amendment argument.

On certiorari, Justice Scalia of the United States Supreme Court held, in a plurality opinion, that imposing capital punishment on sixteen or
seventeen-year-old offenders does not constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. In arriving at that conclusion, Justice Scalia, like Justice Stevens in Thompson, examined legislative enactments and jury determinations to determine what “evolving standards of decency” were in the United States. He concluded that legislative enactments and jury determinations indicate that society does not oppose imposing the death penalty on sixteen or seventeen-year-old offenders. Justice Scalia determined that laws limiting the rights of sixteen and seventeen-year-olds are not proof that it is “categorically unacceptable” to prosecutors and juries to execute minors. Those laws operate in gross and apply to all individuals. However, death penalty statutes provide for individualized consideration of each individual person sentenced to death. An individual’s maturity is appropriately used as a mitigating factor rather than a complete bar to the death penalty.

Justice Scalia stressed the Court’s responsibility to look to the concepts of decency of modern American society as a whole rather than the Court’s own concepts of decency in determining what evolving standards of decency were in America. He determined that the degree of national consensus, which is sufficient to label a particular punishment cruel and unusual, had not been established in this case. Essentially, Justice Scalia held that the

less culpable than adults, they cannot be executed to satisfy the social purpose of retribution. Id. at 403–04.

53. Id. at 380.
54. Id. at 368–74.
55. Stanford, 492 U.S. at 380.
56. Id. at 374.
57. Id.
58. Id. at 375.
59. Id.
60. Stanford, 492 U.S. at 369. Justice Scalia emphasized in footnote one that American standards of decency are dispositive, rejecting the plurality’s examination of sentencing practices in other countries to determine evolving standards of decency in Thompson. Id. at 369 n.1. Justice Scalia wrote that the sentencing practices of other nations cannot be used to establish the Eighth Amendment prerequisite that the punishment in question is accepted among Americans. Id.
61. Id. at 370–72. Fifteen out of 37 states declined to impose the death penalty on 16-year-old offenders and 12 out of 37 declined to impose it on 17-year-old offenders. Id. at 370. Justice Scalia compared and contrasted these numbers to cases where the Supreme Court invalidated the death penalty. Stanford, 492 U.S. at 371–72. In Coker v. Georgia, the Supreme Court struck down capital punishment for the crime of rape holding that Georgia was the only jurisdiction that authorized such a punishment. Id. at 371 (citing Coker v. Georgia,
petitioners did not meet their heavy burden of establishing a national consensus against capital punishment for people sixteen or seventeen years old at the time of their offense. 62

Justice Scalia concluded that the petitioners' argument, that juries' reluctance to impose the death penalty on sixteen and seventeen-year-old offenders is proof of contemporary society's opposition to such punishment, was not supported by evidence because the statistics used by the petitioners carried little significance. 63 He determined that since there are far fewer capital crimes committed by juveniles, that there are also far fewer executions of juveniles. 64 Justice Scalia concluded by saying that the small number of juvenile executions does not mean that society views those executions as categorically unacceptable, but instead, society views imposing the death penalty on individuals under eighteen as something that should be done only in rare instances. 65

Justice Scalia called it "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is

433 U.S. 584, 595–96 (1977)). In Enmund v. Florida, the Supreme Court struck down capital punishment for a crime in which an accomplice took a life, emphasizing that only eight jurisdictions authorized similar punishment. Id. at 371 (citing Enmund v. Florida, 458 U.S. 782, 792 (1982)). The Court in Stanford noted the Court in Ford v. Wainwright struck down capital punishment of the insane saying that "no State in the Union'... permitted such punishment." Id. at 371 (quoting Ford v. Wainwright, 477 U.S. 399, 408 (1986)). However, Justice Scalia likens Stanford to Tison v. Arizona, where the Supreme Court upheld imposition of capital punishment for major participation in a felony with reckless indifference to human life, noting that only 11 jurisdictions out of those allowing capital punishment rejected its use under such circumstances. Id. at 371–72 (citing Tison v. Arizona, 481 U.S. 137, 154 (1987)).


64. Stanford, 492 U.S. 373–74.
65. Id.
profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards.” 66 He held that statutes proscribing minors from drinking, smoking, etc., make determinations in gross about an individual's maturity. 67 Essentially, those statutes are necessary to our society because it would be impossible to examine every person individually to determine whether they are mature enough to drink or drive or smoke cigarettes. 68 However, when imposing the death penalty, states are required to individually consider the maturity of the defendant. 69 Therefore, Justice Scalia held that the existence of statutes limiting the rights of juveniles does not support the argument that all juveniles are too immature to realize that murdering another person is wrong. 70

**B. Supreme Court of Florida**

Individual states are bound by the decisions in *Thompson* and *Stanford* and, therefore, may not execute offenders under sixteen years old. However, they may extend the line drawn by the United States Supreme Court by legislative enactment. In 1988, the Supreme Court of Florida decided that it is constitutional under article I, section 17 of the Florida Constitution to execute seventeen-year-old offenders in Florida. 71 Then, in 1994, the Supreme Court of Florida decided that executing fifteen-year-old offenders is unconstitutional under the Florida Constitution. 72

1. LeCroy v. State

On January 11, 1981, the bodies of John and Gail Hardeman were found in a remote area of Palm Beach County where they had been camping and hunting a week earlier. 73 John died from a single shotgun wound to the head and Gail died from three small caliber gunshot wounds to the chest, neck, and head. 74 When Gail's body was found her trousers had been unzipped and her brassiere had been partially removed. 75 John's wallet, a

66. *Id.* at 374.
67. *Id.* at 374–75.
68. *See id.* at 374.
70. *Id.* at 374.
73. *See LeCroy*, 533 So. 2d at 752.
74. *Id.*
75. *Id.*
.30-06 hunting rifle, and Gail’s .38 revolver were all missing from the scene. Seventeen-year-old Cleo LeCroy ("LeCroy") and his brother Jon ("Jon"), who had been camping in the area with their parents, assisted in the search for the victims. During the search, the brothers claimed to be great trackers, and said that if the police let them search alone that they would find the bodies. Jon found Gail’s body, the first body discovered, in the presence of police officers. The brothers were questioned by the police immediately after discovery of the both bodies. LeCroy waived his Miranda rights and gave two statements to the police, in which he admitted killing the couple. At trial, significant evidence was introduced demonstrating that LeCroy murdered John and Gail. The jury recommended life for John’s murder and death for Gail’s murder. The trial judge agreed with the jury’s recommendations on both murder counts. 

---

76. Id.
77. Id.
78. LeCroy, 533 So. 2d at 752.
79. Id.
80. Id.
81. Id. at 752–53. In his first statement, LeCroy said that he killed John by accident when he fired his gun at a hog and his bullet ricocheted striking John in the head. Id. at 752. Regarding Gail, LeCroy’s first statement changed three times: first, he said that he killed Gail when she burst on the scene and he did not know who she was; next, he said that she fired at him first; and finally, that he killed her to eliminate a witness. LeCroy, 533 So. 2d at 752. He denied touching the bodies or taking anything from them. Id. LeCroy said that he told his brother Jon what had happened, but that Jon had nothing to do with the killings. Id. at 752–53. After giving his first statement, LeCroy asked almost immediately to give another statement. Id. at 753. He waived his Miranda rights again. Id. In his next statement, LeCroy told police that he shot Gail after she came on the scene yelling, and that he unzipped Gail’s trousers to check for a pulse. LeCroy, 533 So. 2d at 753. He also stated that he did take the guns belonging to John and Gail. Id.
82. Id. At trial, LeCroy’s girlfriend testified that LeCroy told her about the killings and taking the money and guns from the victims and that he sold the rifle to an acquaintance, which was later recovered by the police. Id. She also testified that LeCroy told her that he burned a pair of his pants because they had blood on them and that he planned to mutilate the barrel of his .22 to prevent identification. Id. Weapons experts testified that the barrel of LeCroy’s .22 had been mutilated. LeCroy, 533 So. 2d at 753. A jail mate testified that LeCroy admitted the killings. Id. Contrary to LeCroy’s statements, the medical examiner testified that the shots fired at Gail were fired at point blank range, and in two of them, the gun was probably in contact with her body. Id.
83. Id. at 755.
84. Id.
appeal, LeCroy argued that the death penalty imposed on a seventeen-year-old is cruel and unusual punishment.\textsuperscript{85}

Writing for the majority\textsuperscript{86} in \textit{LeCroy}, Justice Shaw held that there is no constitutional bar to imposing the death penalty on seventeen-year-old offenders in Florida.\textsuperscript{87} He began by indicating that the sentencing judge gave great weight to the appellant’s youth as a mitigating factor, yet the judge found that the appellant was mentally and emotionally mature and understood the difference between right and wrong and the nature and consequences of his actions.\textsuperscript{88} Next, Justice Shaw noted that legislative action in Florida over the last thirty-five years had consistently evolved toward treating juveniles who commit serious offenses as adults, and since 1951, the legislature had repeatedly handled juveniles charged with capital crimes “in every respect as adults.”\textsuperscript{89} Then, the court noted that the jury

\begin{itemize}
\item \textsuperscript{85} LeCroy, 533 So. 2d at 756.
\item \textsuperscript{86} Justice Barkett concurred in the majority’s finding of guilt, but dissented as to the sentence because he believed that imposing the death penalty on a 17-year-old offender violates both the Eighth Amendment of the \textit{United States Constitution} and article I, section 17 of the Florida Constitution. \textit{Id.} at 758. He concluded that legal disabilities imposed on minors indicate that youthful offenders have not fully developed the ability to judge or consider the consequences of their behavior. \textit{Id.} He said “[w]hen a government withholds the right of a citizen to enjoy certain benefits and privileges because of immaturity and lack of judgment, then for the same reason it also should withhold the imposition of the ultimate and final penalty, which can be imposed only where there is heightened culpability.” \textit{Id.} at 759. Justice Barkett agreed with Justice O’Connor’s reasoning in her concurrence in \textit{Thompson} when she said that the death penalty should not be imposed on an individual under 16 years old pursuant to the authority of a capital punishment statute that specifies no minimum age. \textit{Id.} at 760 (citing \textit{Thompson v. Oklahoma}, 487 U.S. 815, 857–58 (1988)). Finally, Justice Barkett concluded, saying Florida’s legislature must address the statutory minimum age issue before it continues to allow execution of juveniles. \textit{LeCroy}, 533 So. 2d at 760.
\item \textsuperscript{87} \textit{Id.} at 758.
\item \textsuperscript{88} \textit{Id.} at 756.
\item \textsuperscript{89} \textit{Id.} at 756–57. Florida law recognizes distinctions between juveniles and adults, however “section 39.02(5)(c), Florida Statutes (1979–1987), mandates that a child of any age charged with a capital crime ‘shall be tried and handled in every respect as if he were an adult.’” \textit{Id.} at 756 (quoting \textit{Fla. Stat.} § 39.02(5)(c) (1979–1987)) (emphasis in original). The court in \textit{LeCroy} said that the words “in every respect” can only be read as a declaration of legislative intent that offenders under 18 may be subject to the same penalty as adults, including the death penalty. \textit{LeCroy}, 533 So. 2d at 756–57. Legislative history in Florida has consistently shown strong support for treating juveniles as adults when they are involved in serious crimes. \textit{Id.} Prior to 1950, the Florida Constitution vested jurisdiction over all criminal charges against minors in criminal courts. \textit{Id.} at 756. There were no juvenile courts and all juveniles were tried as adults. \textit{Id.} In 1950, the Florida Constitution was amended, essentially creating the juvenile court system. \textit{Id.} This was codified as chapter 39 of the \textit{Florida Statutes}. \textit{LeCroy}, 533 So. 2d at 756 (citing \textit{Fla. Stat.} § 39 (1951)). Under this
Garofalo

recommended the death penalty for Gail’s murder, but not for John’s murder, concluding that the jury was able to distinguish between the more aggravated murder of Gail.\textsuperscript{90} “This reflects a community judgment that in this particular case, under these circumstances and for this defendant, the death penalty is appropriate.”\textsuperscript{91} Justice Shaw determined that the cases cited by LeCroy indicating the rarity at which the death penalty is imposed on minors in Florida does not prove that there is a per se rule against imposing the death penalty on juveniles.\textsuperscript{92} Instead, Judge Shaw determined that the cases cited demonstrated that minors convicted of first-degree murder tend to “exhibit immaturity or other mitigating characteristics which persuade juries and sentencing judges that the death penalty is inappropriate in their specific cases.”\textsuperscript{93} Essentially, the court concluded: 1) LeCroy’s maturity was considered as a mitigating factor and he was found to be a mature individual; 2) Florida law has evolved toward treating violent juvenile offenders as adults; and 3) the rarity of juvenile executions does not create a

---

\textsuperscript{90} LeCroy, 533 So. 2d at 757.

\textsuperscript{91} Id.

\textsuperscript{92} Id.

\textsuperscript{93} Id. at 757.
per se rule banning juvenile capital punishment. 94 Based on these conclusions the court held that there is no constitutional ban against imposing the death penalty on seventeen-year-old offenders in Florida. 95

2. Allen v. State

On December 10, 1990, fifteen-year-old Jerome Allen and two accomplices stole a car, robbed a gas station, and, during the robbery, shot one of the gas station’s employees, Stephen DuMont. 96 DuMont died from the shotgun wound. However, before dying, he was able to describe his assailants and the car that they drove. 97 Deputies apprehended Allen and searched his house where they found a sawed-off shotgun and ammunition. 98 However, experts could not say whether DuMont had been killed with the gun that was recovered. 99 The jury found Allen guilty of first-degree murder, among other violent crimes. 100 During the penalty phase, one of Allen’s accomplices testified that although Allen did not shoot DuMont, he was the one who urged the other accomplice to do so to prevent being identified. 101 The jury recommended the death penalty on a seven-to-five vote. 102 During the sentencing hearing, a forensic psychologist testified that Allen had a traumatic, chaotic childhood, that his father violently attacked him on occasion, and that Allen suffered from behavioral and learning disorders. 103 The psychologist also noted that Allen suffered head trauma that may have resulted in organic brain injury or neurological problems, and that he had a low Intelligence Quotient. 104 Allen’s mother testified that Allen sometimes went into a daze and often suffered from fainting spells. 105 The trial court sentenced Allen to death. 106

94. See id. at 756–57.
95. LeCroy, 533 So. 2d at 756–57.
96. See Allen v. State, 636 So. 2d 494, 495 (Fla. 1994).
97. Id.
98. Id.
99. Id.
100. Id.
101. Allen, 636 So. 2d at 496.
102. Id.
103. Id.
104. Id.
105. Id.
106. Allen, 636 So. 2d at 496.
The court held, per curiam,\textsuperscript{107} that because the death penalty is hardly ever imposed on fifteen-year-old offenders, it is either cruel or unusual punishment if imposed on offenders who are under the age of sixteen at the time of the crime.\textsuperscript{108} Therefore, the court concluded that the death penalty is prohibited for fifteen-year-olds by article I, section 17 of the Florida Constitution.\textsuperscript{109} "We cannot countenance a rule that would result in some young juveniles being executed while the vast majority of others are not, even where the crimes are similar."\textsuperscript{110}

### III. BRENNAN V. STATE

#### A. Facts and Procedural History

Sixteen-year-old Keith Brennan and eighteen-year-old Joshua Nelson wanted to leave the city of Cape Coral, so they devised a plan to steal Tommy Owens' car.\textsuperscript{111} On March 10, 1995 they lured Owens to a remote spot, and began to beat Owens with a baseball bat.\textsuperscript{112} Owens pleaded with Nelson and Brennan for his life and told them to take his car, but after a discussion Nelson and Brennan decided to kill Owens to avoid being caught by the police.\textsuperscript{113} After tying Owens up, Brennan cut Owens' throat with a box cutter knife.\textsuperscript{114} Owens remained conscious during the stabbing and begged Nelson to hit him again with the bat so that he would be knocked...
unconscious before the stabbing continued. Nelson complied with Owens’ request; he and Brennan continued to strike Owens with the bat. After the beating and stabbing, Nelson and Brennan dragged Owens’ body under nearby bushes. They then picked up Tina Porth and Misty Porth in Owens’ car, and drove to New Jersey after stopping in Daytona Beach. Law enforcement officers later apprehended Nelson and Brennan in New Jersey.

Brennan was charged with first-degree premeditated murder, first-degree felony murder, and robbery with a deadly weapon. The Porth sisters testified that, during the trip, Nelson and Brennan informed them that they had killed Owens. Brennan gave a taped confession in which he admitted his involvement in the murder but denied that there was any prior plan to kill Owens. The confession was played to the jury during trial and Brennan was found guilty on all three counts.

At the time of the crime, Brennan was a sophomore in high school. He had no significant history of prior criminal activity and his juvenile records showed only prior crimes against property. During the penalty phase, Brennan presented evidence that his mother committed suicide when he was two years old, that she suffered from severe depression, and that he had been institutionalized. He also presented evidence that he was sexually molested by his older brother when he was eight and was allegedly “picked on” by others. In 1993, he received inpatient care for alcohol and drug addiction.

The jury recommended the death penalty by a vote of eight-to-four after hearing all the evidence. Among the aggravators, the trial judge found that “the capital felony was especially heinous, atrocious, or cruel” and “the
capital felony was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification." The trial judge also considered six statutory mitigators and twenty-five nonstatutory mitigators. Age as a statutory mitigator was given great weight, while the statutory mitigator of lack of significant criminal history was given moderate weight. Although the trial judge gave significant weight to Brennan's young age and his lack of significant prior criminal history, the court concluded that he "wielded a baseball bat and [a] box cutter to murder another young man." The trial court followed the jury's recommendation and sentenced Brennan to death for the first-degree premeditated murder charge.

B. Appellate Brief Arguments

1. Appellant's Initial Brief

Brennan's primary argument with respect to the constitutionality of the juvenile death penalty was that imposing the death penalty on sixteen-year-old Brennan constitutes cruel and/or unusual punishment in violation of article I, section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments of the United States Constitution. Brennan adopted the rationale set forth in Allen, which said that executing a sixteen-year-old is a violation of article I, section 17 of Florida's Constitution because executing such a person is "unusual" due to the rarity of executions of sixteen-year-olds in Florida. Brennan indicated that in the last twenty-five years only three other sixteen-year-olds were sentenced to death in Florida, and none of them were executed. He concluded that imposing the ultimate penalty on only

130. Id.
131. Id. at S373 n.2.
133. Id.
134. Id.
136. Id.
137. Id. at 25. See Allen, 636 So. 2d at 494.
139. Appellant's Initial Brief at 27-28. In each case, the offender was re-sentenced to life in prison. See Farina v. State, 680 So. 2d 392 (Fla. 1996); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Morgan v. State, 537 So. 2d 973 (Fla. 1989); Morgan v. State, 453 So. 2d 394
one sixteen-year-old in twenty-five years is “cruel, unusual, and disproportional” and is prohibited by the Florida Constitution and the United States Constitution.140

2. Appellee’s Answer Brief

In its answer brief, the State argued that Brennan failed to meet his heavy burden of demonstrating that imposing the death penalty on sixteen-year-old offenders is cruel and/or unusual under article I, section 17 of the Florida Constitution or under the Eighth and Fourteenth Amendments of the United States Constitution.141 The State began its argument by stressing that in Stanford, the United States Supreme Court has already rejected Brennan’s argument—that it is cruel and unusual to execute a sixteen-year-old.142 The State especially stressed the fact that Brennan was only eight days short of being seventeen when he killed Owens.143 Next, the State addressed Brennan’s use of Allen in its argument, which said that it is unconstitutional to execute a sixteen-year-old in Florida because no sixteen-year-old offenders who have been sentenced to death in the last twenty-five years have been executed.144 In response, the State argued that no one under twenty has been executed in Florida in the last twenty-five years either.145 “Surely this does not mean that the death penalty cannot be imposed on anyone nineteen or younger.”146 The State then argued that Brennan’s argument finds no support in legislative enactments because legislative enactments in Florida have “consistently evolved toward treating juveniles charged with serious offenses as if they were adult criminal defendants.”147 Then, the State said that Brennan’s argument, that the death penalty has not been carried out on a sixteen-year-old offender in the last twenty-five years, is not as important as how many times it has been imposed, which has been

---

140. Appellant’s Initial Brief at 28.
142. Id. at 5 (citing Stanford v. Kentucky, 492 U.S. 361 (1989)).
143. Id.
144. Id. at 6.
145. Id.
146. Appellee’s Answer Brief at 6.
147. Id. at 7 (quoting LeCroy v. State, 533 So. 2d 750, 757 (Fla. 1988)). See supra note 89.
seven times in the last twenty-five years.\textsuperscript{148} The State stressed that none of the other sixteen-year-olds had their sentence reduced based solely on their age.\textsuperscript{149}

3. Appellant's Reply Brief

Brennan began his reply brief by indicating that the issue of imposing the death penalty on a sixteen-year-old offender has not been addressed or resolved in Florida (although it was decided in the United States Supreme Court); the court in \textit{Farina} avoided that issue.\textsuperscript{150} Brennan then argued that \textit{Allen} supports the inference that rarity of executions of a particular age group demonstrates that it is cruel or unusual punishment to execute members of that age group and that such execution is prohibited by the Florida Constitution.\textsuperscript{151} He said that although the State cited \textit{Stanford} for the proposition that the federal constitution does not prohibit execution of a sixteen-year-old, that case has never been cited by a Florida appellate court.\textsuperscript{152}

C. Analysis of Brennan v. State

1. Justice Shaw Announced the Judgment of the Court

The majority of the court held that imposing the death penalty on Brennan, for a crime committed when he was sixteen years of age, would constitute cruel or unusual punishment in violation of article I, section 17 of the Florida Constitution.\textsuperscript{153} In arriving at that conclusion the Supreme Court of Florida was guided by the holding in \textit{Allen}, which said that imposing the death penalty on a fifteen-year-old would be cruel or unusual punishment under the Florida Constitution because it is almost never imposed on fifteen-year-olds in Florida.\textsuperscript{154} Essentially, the court in \textit{Brennan} determined that

\textsuperscript{148} Appellee’s Answer Brief at 8. Henry Brown (one time), James Morgan (four times), James Farina (one time so far), and Brennan. \textit{Id}.
\textsuperscript{149} \textit{Id.} at 8–9.
\textsuperscript{151} \textit{Id.} (citing Allen v. State, 636 So. 2d 494 (Fla. 1994)).
\textsuperscript{152} \textit{Id.} at 1–2.
\textsuperscript{153} Brennan v. State, 24 Fla. L. Weekly S365, S368 (July 8, 1999).
\textsuperscript{154} \textit{See id.} at S367 (citing Allen v. State, 636 So. 2d 494, 497 (Fla. 1994)). \textit{Allen} held that over a half century had passed since a 15-year-old was executed in Florida, and that whatever the reasons for the rarity of such executions that the court could not "countenance a
sixteen-year-olds are executed so rarely (a sixteen-year-old has not been executed in Florida since 1940) that the court is compelled to adopt the same conclusion arrived at in Allen.\textsuperscript{155} The court rejected the State's argument that executing a juvenile was no different than executing a woman since both are so uncommon, saying that the law itself recognizes that children are not as responsible for their acts as are adults.\textsuperscript{156}

The majority then attacked the State's argument, that it is constitutional to execute a sixteen-year-old offender in Florida because the United States Supreme Court has already decided that it is constitutional to execute such an offender in \textit{Stanford}.\textsuperscript{157} The court said that, to the contrary, the \textit{Stanford} opinion supports the determination that imposing the death penalty on sixteen-year-old offenders in Florida is unconstitutional.\textsuperscript{158} The court arrived at that conclusion saying that the plurality in \textit{Stanford} concluded that the constitutionality of capital punishment statutes depends on the individualized consideration given to the defendant's circumstances, and that Florida statutes are devoid of any such individualized consideration.\textsuperscript{159} The majority in \textit{Brennan} argued that, in \textit{Stanford}, the plurality determined that juvenile transfer statutes ensure consideration of a defendant's individual maturity and moral responsibility.\textsuperscript{160} Based on that cite from \textit{Stanford}, the Supreme Court of Florida held in \textit{Brennan} that it is unconstitutional to execute a juvenile under Florida law because section 985.225(1)(a) of the \textit{Florida Statutes} neither sets a minimum age for the death penalty nor sets forth criteria to ensure individualized consideration of the defendant's maturity and moral responsibility.\textsuperscript{161}

\textsuperscript{155} \textit{Brennan}, 24 Fla. L. Weekly at S367. The court in \textit{Brennan} said that the last reported case where the death penalty was imposed and carried out on a 16-year-old offender was in \textit{Clay v. State}, 196 So. 2d 462 (Fla. 1940), which was over 55 years ago. \textit{Id.} The court also noted that in the last 25 years, only three other 16-year-old defendants were sentenced to death and none of those sentences were carried out. \textit{Id.} \textit{See also}, \textit{supra} note 139.

\textsuperscript{156} \textit{Brennan}, 24 Fla. L. Weekly at S367 (citing Allen v. State, 636 So. 2d 494, 497 (Fla. 1994)).

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.} (citing Stanford v. Kentucky, 492 U.S. 361, 375 (1989)). The Kentucky and Missouri statutes considered in \textit{Stanford} specifically provided for individualized consideration before transferring juveniles to be tried as adults. \textit{Stanford}, 492 U.S. at 375 n.6.

\textsuperscript{161} \textit{See Brennan}, 24 Fla. L. Weekly at S367--68. Section 985.225(1)(a) of the \textit{Florida Statutes} provides that a child of any age may be indicted for a capital crime and shall
The Legislature's failure to impose a minimum age, the legislative mandate that a child of any age indicted for a capital crime shall be subject to the death penalty, and the failure to set up a system through our juvenile transfer statutes that "ensure[s] individualized consideration of the maturity and moral responsibility" render our statutory scheme suspect under the federal constitution and the reasoning of Stanford as it applies to sixteen-year-old offenders.162

Finally, the court noted that a proportionality analysis requires the court to compare the totality of the circumstances of the case at hand with other capital cases (similar defendants, facts, and sentences).163 The court concluded that the inherent problem of upholding the death penalty in Brennan is highlighted by the fact that the death penalty has not been upheld for any other defendant who was sixteen at the time of the crime, i.e., there are no similar cases to compare it to.164 Therefore, the court declined to conduct a proportionality analysis.165

Essentially, since the death penalty is almost never imposed on defendants who are Brennan's age, and when imposed in the last twenty-five years the sentence has been subsequently vacated, the court decided that it could not impose the death penalty on Brennan consistently with Florida's case law and constitution.166 The death sentence was therefore vacated and reduced to life imprisonment without a possibility of parole.167

2. Justice Anstead Specially Concurred

Justice Anstead concurred in the majority's opinion and noted the soundness of the court's reasoning based on its holding in Allen.168 However, Justice Anstead wrote a separate opinion because he believes in an alternative basis for holding that it is unconstitutional to

---

163. See id. (citing Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991)).
164. Id.
165. Id.
166. Id. (citing Allen v. State, 636 So. 2d 494, 497 (Fla. 1994)).
168. Id. (Anstead, J., concurring).
execute a juvenile sixteen years of age in the state of Florida. He based his argument on "society's traditional values" and examined the rights society has historically prescribed to children. He concluded that "based upon the enormous value we place on our children, and our historically consistent treatment of children differently from adults for virtually all legal purposes, but especially for purposes of assessing responsibility and meting out punishment for criminal acts, that the constitutional line should be drawn at age seventeen." Justice Anstead determined that our laws have consistently shown that a person only becomes sufficiently mature to accept the responsibilities and privileges of adulthood at age eighteen. That line, he said is consistent with our traditional attitude towards children and represents our "determination not to give up on our children."

Justice Anstead continued, stressing that we must stand by the line we have already drawn, which is at seventeen, even when it becomes difficult to do so as in a case where a horrible crime has been committed by a juvenile. He said that "in standing firm we demonstrate the strength of our commitment to our children" and then quoted Justice Barkett in LeCroy, when he said, "[w]hen a government withholds the right of a citizen to enjoy certain benefits and privileges because of immaturity and lack of judgment, then for the same reason it also should withhold the imposition of the ultimate and final penalty, which can be imposed only where there is heightened culpability." Justice Anstead concluded saying that to allow

169. Id.
170. See id.
171. Id. ""Florida law protects seventeen-year-olds and those who are younger, treating them as minors and children."
    It is no coincidence, for example, that we use the age of eighteen as the cutoff for child dependency and for the legal requirement of parents to take care of their children, as well as a dividing line for a countless number of other legal distinctions based upon a firmly established public policy of placing limitations upon and extending special protections to the young and immature.
    Id.
173. Id.
174. Id.
175. Id. (quoting LeCroy v. State, 533 So. 2d 750, 759 (Fla. 1988) (Barkett, J., concurring in part, dissenting in part)).
capital punishment of juveniles below eighteen years old would be hypocrisy and would destroy society’s values.\(^{176}\)

3. Chief Justice Harding Concurred in Part and Dissented in Part

Chief Justice Harding concurred with Brennan’s conviction but dissented as to his sentence.\(^{177}\) He said that although he concurred in the *Allen* decision and its reasoning, he now believes it to be flawed.\(^{178}\) Chief Justice Harding now believes that this issue should be resolved based on Florida’s legislative history on the subject as suggested in *Stanford*.\(^{179}\) He concluded that an analysis of the unusual element should include more than just asking how often the death penalty is imposed.\(^{180}\)

Chief Justice Harding pointed out several problems with the reasoning in *Allen*, which was adopted by the majority in this case.\(^{181}\) First he noted that the *Allen* standard does not allow for a change in public opinion on the issue because once the standard is put in place it can never be changed if citizens change their minds.\(^{182}\) Essentially, once a punishment is held to be “unusual,” it will not be imposed anymore and will remain “unusual” forever.\(^{183}\) The second flaw results if the state decides to alter its method of execution.\(^{184}\) Under *Allen*, the first time a new method of punishment is used it will be considered unusual and thus subject to constitutional scrutiny since it has never been used before.\(^{185}\)

Chief Justice Harding then cited to the concurring opinions in *Allen*, written by Justice Grimes and Justice Overton, which provided that the issue of executing sixteen-year-olds is controlled by *Thompson*.\(^{186}\) Chief Justice Harding agreed with Justice Grimes’ and Justice Overton’s opinion and said that because there is no federal constitutional bar against executing a sixteen-year-old offender, the better way to resolve this issue in Florida is to determine whether the legislature has spoken on the subject.\(^{187}\) Chief Justice

\(^{176}\) See *Brennan*, 24 Fla. L. Weekly at S369.
\(^{177}\) Id. (Harding, C.J., concurring in part, dissenting in part).
\(^{178}\) See id.
\(^{179}\) Id.
\(^{180}\) Id.
\(^{182}\) Id.
\(^{183}\) See id.
\(^{184}\) Id. at S369–70.
\(^{185}\) Id.
\(^{186}\) *Brennan*, 24 Fla. L. Weekly at S370.
\(^{187}\) Id.
Harding then examined the legislative history of the juvenile death penalty in Florida by focusing on the information set forth in LeCroy.\textsuperscript{188} He concluded that Florida's legislative history reveals a distinct cutoff line between offenders that are sixteen and older and those younger than sixteen.\textsuperscript{189}

Chief Justice Harding then compared the rationale in LeCroy to the rationale in Allen concluding that the two opinions are in conflict.\textsuperscript{190} In Allen the court concluded that juveniles are treated differently than adults.\textsuperscript{191} Under Florida law, a juvenile is defined as any unmarried person who has not yet reached the age of eighteen.\textsuperscript{192} Chief Justice Harding determined that under the logic of Allen, all juveniles, including seventeen-year-olds, fall into the purview of the Allen test.\textsuperscript{193} The majority in Brennan and in Allen said that no fifteen or sixteen-year-old offenders have been executed in over twenty-five years and therefore, it is unconstitutional to execute such offenders.\textsuperscript{194} However, no seventeen-year-olds have been executed in over twenty-five years either.\textsuperscript{195} Thus it seems that the holding in Allen would prevent a seventeen-year-old offender from being executed, despite LeCroy's holding to the contrary.\textsuperscript{196}

Chief Justice Harding determined that since the courts in LeCroy and Stanford based their decisions on legislative enactments, that the reasoning in those cases is more persuasive than Allen.\textsuperscript{197} He determined that according to current figures, the contemporary consensus is very similar to that of 1989 when Stanford was decided.\textsuperscript{198} Since 1989, two more states have actually altered their laws to allow for capital punishment of sixteen-year-olds bringing that number to a total of twenty-four states out of forty

\begin{thebibliography}{99}
\bibitem{188} Id. \textit{See also supra note 89.}
\bibitem{189} Brennan, 24 Fla. L. Weekly at S370.
\bibitem{190} Id.
\bibitem{191} Id.
\bibitem{192} \textit{Id. See also Fla. STAT. § 985.03(7) (1999).}
\bibitem{193} Brennan, 24 Fla. L. Weekly at S370.
\bibitem{194} Id.
\bibitem{195} Id.
\bibitem{196} Id.
\bibitem{197} Id. at S371. LeCroy and Stanford examined legislative enactments to determine what society viewed as acceptable punishment, while Allen examined the number of executions of 16-year-olds. Stanford v. Kentucky, 492 U.S. 361, 370–77 (1989); LeCroy v. State, 533 So. 2d 750, 756–57 (Fla. 1988); Allen v. State, 636 So. 2d 494, 497 (Fla. 1994). Chief Justice Harding is essentially saying that legislative enactments in Florida over the last 50 years are a better indicia of what society considers to be acceptable punishment rather than tallying the number of 16-year-olds executed over the last 25 years. Brennan, 24 Fla. L. Weekly at S371.
\bibitem{198} Brennan, 24 Fla. L. Weekly at S371.
\end{thebibliography}
that allow capital punishment.\textsuperscript{199} Those figures reaffirm the holdings in \textit{Stanford} and also \textit{LeCroy}, that there is no consensus against executing sixteen-year-old offenders.\textsuperscript{200}

Chief Justice Harding finally argued that in attempting to distinguish \textit{Stanford} from this case, the majority relied on only one single aspect of Justice Scalia's reasoning (that juvenile transfer statutes ensure individualized consideration).\textsuperscript{201} While it is undisputed that transfer statutes ensure individualized consideration of defendants, Chief Justice Harding believes that the United States Supreme Court was concerned with the general concept of individualized consideration of maturity and moral responsibility, using juvenile transfer statutes only as an example of individualized consideration, not as a constitutional requirement.\textsuperscript{202} Chief Justice Harding concluded that in Florida, the legislature has designated age as a statutory mitigating circumstance, which, in his view, satisfies Justice Scalia's concerns regarding individualized testing.\textsuperscript{203}

4. Justice Wells Concurred in Part and Dissented in Part

Justice Wells concurred in the affirmance of guilt, but joined Chief Justice Harding's dissent as to Brennan's sentence.\textsuperscript{204} Specifically, Justice Wells argued that the majority's reliance on \textit{Allen} as precedent in \textit{Brennan} is clearly wrong and an abuse of the doctrine of \textit{stare decisis}.\textsuperscript{205} He argued that \textit{Allen} is precedent for cases involving people under sixteen while \textit{LeCroy} is precedent for \textit{Brennan}.\textsuperscript{206} Justice Wells agreed with the majority's concern for society's values for children, but said that the court has a responsibility

\begin{itemize}
\item \textsuperscript{199} \textit{Id.} at S374 n.23. Chief Justice Harding said that since 1989, three more states have allowed for capital punishment but set a minimum age at 18, two states have moved from having a minimum age of seventeen to having no minimum age, and Washington has decided that no juveniles may be put to death. \textit{Id.} Forty states allow capital punishment. \textit{Id.} Out of those, 19, including Florida, have no express minimum age limit. \textit{Id.} The highest courts in Alabama, Arizona, South Carolina, and Virginia have upheld cases where 16-year-old defendants were sentenced to death. \textit{Brennan}, 24 Fla. L. Weekly at S374 n.23. Vermont no longer permits capital punishment for the crime of murder. \textit{See id.}
\item \textsuperscript{200} \textit{Id.} at S371.
\item \textsuperscript{201} \textit{Id.} (citing \textit{Stanford} v. Kentucky, 492 U.S. 361, 374–77 (1989)).
\item \textsuperscript{202} \textit{Id.} Individualized consideration in capital sentencing is a constitutional requirement. \textit{Stanford}, 492 U.S. at 375.
\item \textsuperscript{203} \textit{Brennan}, 24 Fla. L. Weekly at S371.
\item \textsuperscript{204} \textit{Id.} at S372 (Wells, J., concurring in part, dissenting in part).
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{Id.}
\end{itemize}
to exercise the doctrine of separation of powers. He argued, since the United States Supreme Court has already determined that the death penalty is constitutional, whether or not to have the death penalty is a legislative decision, which must be made by the individual state legislatures, not by members of the court. Justice Wells determined that since the people are imposing the punishment, it should be the people, through their elected representatives, who decide the punishment. He concluded that in this case, the majority, by one vote, has not sufficiently shown due respect to "the 'authority' of the legislature and assumes too much authority."210

IV. CONCLUSION

By vacating Keith Brennan's death sentence and holding it to be cruel or unusual punishment under the Florida Constitution to execute sixteen-year-old offenders using the rarity of executions standard, the Supreme Court of Florida has accomplished the following. First, it has banned the execution of sixteen-year-old offenders forever in Florida, unless the court decides to review this issue again on certiorari and uses a standard other than the rarity of executions standard. Second, the rarity of executions standard, if applied consistently, makes it impossible for Florida to ever initiate a new method of execution. This is because, if Florida attempts to use lethal injection, for example, as its method of execution instead of the electric chair, such method of punishment, which has not yet been used in Florida, will be rare and unusual. Based on that standard, courts could, in theory, find that a new, more humane method of execution is unconstitutional solely because it has never been used before.

It is unclear why the Supreme Court of Florida did not examine jury determinations and legislative enactments in this case to resolve this issue. It is also unclear why the court would use the rarity of executions standard when it has had a hand in producing the statistics upon which it relies.214

207. Id. at S371.
209. Id.
210. Id. at S372.
211. See supra text accompanying notes 185–86.
212. See supra text accompanying notes 187–88.
213. Id.
214. See Farina v. State, 680 So. 2d 392 (Fla. 1996); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Morgan v. State, 537 So. 2d 973 (Fla. 1989); Morgan v. State, 453 So. 2d 394 (Fla. 1984); Morgan v. State, 392 So. 2d 1315 (Fla. 1981). The Supreme Court of Florida
Juries in Florida have recommended the death penalty six times over the last twenty-five years for sixteen-year-old offenders, including Brennan, but the Supreme Court of Florida has vacated the sentence each time on technicalities having nothing to do with the defendant's age thereby preventing the executions from being carried out.\(^{215}\) Finally, it is unclear why, under the standard adopted by the court, it is not unconstitutional to execute all offenders under the age of twenty.\(^{216}\)

It is apparent that there is more than one standard that may be applied to determine whether punishment is cruel or unusual. However, to maintain the doctrine of *stare decisis* it is the court’s duty to develop the most sensible and most fair standard and apply it consistently.\(^{217}\)

Andrew F. Garofalo

\(^{215}\) *Id.*

\(^{216}\) *See supra* text accompanying notes 148 & 198.

\(^{217}\) *See supra* text accompanying note 208.

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 883
II. THE SINGLE SUBJECT MATTER RULE ............................. 887
III. STATEMENT OF THE CASE ............................................. 889
IV. ANALYSIS ........................................................................... 891
   A. Judicial Construction of the Single Subject Matter Rule .... 891
   B. The Sections of Chapter 95-182 of the Laws of Florida ...... 892
   C. The Applicability of Bunnell v. State and State v. Johnson ... 896
   D. Burch v. State and the Wide Latitude Afforded the Legislature by the Courts in the Enactment of Laws ............... 898
   E. The Legislative History of Chapter 95-182 of the Laws of Florida .............................................................................. 901
V. CONCLUSION ................................................................. 904
VI. ADDENDUM ........................................................................... 904

I. INTRODUCTION

On June 7, 1995, Governor Lawton Chiles signed Committee Substitute for Senate Bill 168 into law, creating chapter 95-182 of the Laws of Florida. Sections two through seven of chapter 95-182 are identified as the “Officer Evelyn Gort and All Fallen Officers Career Criminal Act of 1995” (“Gort Act”). The Gort Act’s namesake, Metro-Dade police officer Evelyn Gort, was shot and killed by an armed robber in Coconut Grove, Florida in 1993. Her assailant, twenty-two year old Wilbur Leroy Mitchell, was a career criminal with several prior felony convictions. State senators, prompted by Gort’s death and responding to the elevated number of crimes committed in

2. Ch. 95-182, § 1, 1995 Fla. Laws 1665, 1665.
3. Florida Legislature, Career Criminal Bill Merits Support, SUN-SENTINEL (Fort Lauderdale), Feb. 19, 1995, at 6G.
4. Id.
Florida by career criminals, introduced the Gort Act as Senate Bill 168. The bill was initiated during the 1995 Regular Legislative Session as part of a comprehensive four-bill crime package.

The Gort Act contains six sections. Section one of chapter 95-182 identifies sections two through seven as the "Officer Evelyn Gort and All Fallen Officers Career Criminal Act of 1995." Section two is the heart of the Gort Act. Section two amends section 775.084 of the Florida Statutes, which provides enhanced penalties for habitual felony offenders and habitual violent felony offenders. It creates a violent career criminal classification and establishes enhanced sentencing guidelines for qualifying offenders.

The act mandates minimum prison terms for violent career criminals and requires them to serve at least eighty-five percent of their court-imposed sentences. It expressly prohibits discretionary early release for violent career criminals and limits the amount of gain time awards they are eligible to receive.

Section two also establishes the qualifications for sentencing as a "violent career criminal." First, a defendant must have three prior felony convictions in Florida as an adult. Qualified offenses enumerated in section two include any forcible felony and felonies involving violence or threats of violence such as aggravated stalking and aggravated child abuse. Convictions that have been set aside by any postconviction proceeding or pardon are not considered. Second, a defendant’s present felony offense must be one of the felonies enumerated in section two. Third, a defendant


7. Michael Griffin, Senate Gets Tough on Crime, Package Meant to Force Longer Prison Sentences, SUN-SENTINEL (Fort Lauderdale), Mar. 9, 1995, at 1A.


9. Id. § 2, 1995 Fla. Laws at 1665–70 (codified at FLA. STAT. § 775.084 (1995)).

10. Id.

11. Id. § 2, 1995 Fla. Laws at 1670 (codified at FLA. STAT. § 775.084(4)(j)2. (1995)).

12. Id.

13. Ch. 95-182, § 2, 1995 Fla. Laws 1665, 1667 (codified at FLA. STAT. § 775.084(1)(c) (1995)).

14. Id.

15. Id.

16. Id.

17. Id.
must have been incarcerated in a state or federal prison. 18 Fourth, the defendant must have committed the present felony offense “within 5 years after the conviction of the last prior enumerated felony or within 5 years after the defendant’s release... from a prison sentence... imposed as a result of a prior conviction for an enumerated felony, whichever is later.” 19 Finally, the defendant must have committed the current felony offense after October 1, 1995, the effective date of chapter 95-182. 20

Section three of the Gort Act amends section 775.08401 of the Florida Statutes by requiring state attorneys to adopt uniform criteria for deciding when to pursue the habitual felony offender, habitual violent felony offender, and violent career criminal sanctions. 21 Section four amends section 775.0841, which states legislative findings and intent regarding career criminals. 22 Section five amends section 775.0842 of the Florida Statutes, which identifies “[p]ersons subject to career criminal prosecution efforts.” 23 Section six amends section 775.0843 of the Florida Statutes, which requires criminal justice agencies to “employ enhanced law enforcement management efforts and resources for the investigation, apprehension, and prosecution of career criminals.” 24 Section seven creates section 790.235 of the Florida Statutes, making it illegal for violent career criminals to own or possess firearms. 25 Section seven imposes a minimum sentence of fifteen years imprisonment for individuals convicted of violating the section. 26

Following certification to the House of Representatives, committee members in the House amended Senate Bill 168 by adding three sections addressing domestic violence. 27 The amendments became sections eight through ten of chapter 95-182. Section eight amends section 741.31 of the Florida Statutes, allowing an award of damages for “[a]ny person who suffers an injury and/or loss as a result of a violation of an injunction for protection against domestic violence.” 28 Section nine creates section 768.35,
granting victims of continuing domestic violence a cause of action against the perpetrator for compensatory and punitive damages.29 Section ten amends section 784.046 of the Florida Statutes, which establishes the procedures governing the issuance and enforcement of injunctions for protection against repeat violence.30 It enlarges the duties of the clerk of the court, updates the guidelines for transmission of related information among law enforcement agencies, restricts the authority to serve or execute injunctions for protection against domestic violence to specified law enforcement officers, and enables courts to utilize criminal contempt proceedings to enforce injunctions for protection against repeat violence.31 The House amendments are the source of the current constitutional challenge raised against chapter 95-182.32

The Second and Third District Courts of Appeal of Florida are split over the constitutionality of chapter 95-182.33 The question raised before the courts was whether chapter 95-182 violates Article III, section six of the Florida Constitution, commonly known as the single subject matter rule.34 In Thompson v. State,35 the Second District Court of Appeal held that chapter 95-182 violates the single subject matter rule, reasoning that the career criminal and domestic violence provisions of the act constitute two subjects.36 The court relied on the Supreme Court of Florida’s decisions in Bunnell v. State,37 State v. Johnson,38 and Burch v. State39 in reaching its

29. Id. § 9, 1995 Fla. Laws at 1674 (codified at FLA. STAT. § 768.35 (1995)).
30. Id. § 10, 1995 Fla. Laws at 1674–75 (codified at FLA. STAT. § 784.046 (1995)).
33. Id.; Spann v. State, 719 So. 2d 1031 (Fla. 3d Dist. Ct. App. 1998).
34. Thompson, 708 So. 2d at 316; Spann, 718 So. 2d at 1031.
35. 708 So. 2d 315 (Fla. 2d Dist. Ct. App. 1998).
36. Id. at 317. Recently, a nearly identical issue was presented before the First District Court of Appeal in Trapp v. State. 736 So. 2d. 736 (Fla. 1st Dist. Ct. App. 1999). Trapp involved a single subject challenge to chapter 95-184 of the Laws of Florida. Id. at 737. Similar to chapter 95-182, sections two through 35 of chapter 95-184 address career criminal sentencing. Id. at 737–38. Sections 36 through 38 of chapter 95-184 are identical to sections eight through 10 of chapter 95-182. Compare ch. 95-184, §§ 36–38, 1995 Fla. Laws 1676, 1722–24 (codified at FLA. STAT. §§ 741.31, 768.35, 784.046 (1995)), with ch. 95-182, §§ 8–10, 1995 Fla. Laws 1665, 1673–75 (codified at FLA. STAT. §§ 741.31, 768.35, 784.046 (1995)). As in Thompson, the First District Court of Appeal determined that the act “combine[d] criminal penalties with civil remedies.” Trapp, 736 So. 2d at 737. However, the court declined to follow Thompson. See id. at 738–39. Instead, it upheld chapter 95-184 under the controlling authority of Burch v. State, 558 So. 2d 1 (Fla. 1990), reasoning that “[a]ll portions of the legislation...deal[t] with remedies for acts which constitute crimes.” Id. at 738. However, the court speculated that the creation of the act may have involved logrolling and certified the question to the Supreme Court of Florida. Id. at 739.
37. 453 So. 2d 808 (Fla. 1984).
decision. The Third District disagreed and in Spann v. State upheld chapter 95-182, rejecting a single subject matter challenge. Both courts acknowledged the conflict. The Supreme Court of Florida granted review.

This comment examines the Second District Court of Appeal's decision in Thompson. Part II of this comment illustrates the issue presented in Thompson, providing background on Article III, section six of the Florida Constitution. Part III presents the facts of the case, its procedural history, and the court's holding. Part IV scrutinizes the court's decision.

This comment disagrees with the court's holding for four reasons. First, the Gort Act relates to the domestic violence provisions in chapter 95-182 by listing aggravated stalking as a qualified offense for sentencing as a violent career criminal and habitual violent felony offender. Second, the Thompson court erroneously characterized the Gort Act as a criminal subject and the domestic violence provisions as an unrelated civil subject. Third, the chapter laws invalidated in Bunnell and Johnson are distinguishable from chapter 95-182. The court also incorrectly distinguished Burch and ignored precedent supporting a conclusion of constitutionality. Fourth, the legislative history of the act does not indicate the presence of "logrolling," the legislative practice sought to be eliminated by the single subject matter rule.

II. THE SINGLE SUBJECT MATTER RULE

Article III, section six of the Florida Constitution states, "[e]very law shall embrace but one subject and matter properly connected therewith, and

---

38. 616 So. 2d 1 (Fla. 1993).
39. 558 So. 2d 1 (Fla. 1990).
41. 719 So. 2d 1031 (Fla. 3d Dist. Ct. App. 1998).
42. Id. at 1031, per curiam (relying on Higgs v. State, 695 So. 2d 872 (Fla. 3d Dist. Ct. App. 1997)).
43. See id.; Thompson, 708 So. 2d at 317.
44. See State v. Thompson, 717 So. 2d 538 (Fla. 1998). The Florida Constitution requires the supreme court to hear appeals from decisions of courts of appeal "declaring invalid a state statute or a provision of the state constitution." FLA. CONST. art. V, § 3(b)(1). It grants the supreme court discretionary authority to hear decisions of courts of appeal "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law," or decisions "that [are] certified by [a district court of appeal] to be in direct conflict with a decision of another district court of appeal." FLA. CONST. art. V, § 3(b)(3), (4).
45. 708 So. 2d 315 (Fla. 1998).

https://nsuworks.nova.edu/nlr/vol24/iss3/1
the subject shall be briefly expressed in the title.” Many state constitutions have similar provisions limiting statutes to a single subject and requiring the title of a legislative enactment to disclose its subject. The single subject rule is designed to prevent “the evils of all-inclusive, incongruous, and disconnected legislation.” In State v. Canova, the Supreme Court of Florida identified three specific objectives of the single subject matter rule. First, the rule prevents “log rolling legislation.” Logrolling is a practice whereby the legislature combines in one bill several unrelated matters that individually could not garner legislative support. The legislature then procures the bill’s passage by combining the “minorities in favor of each of the measures into a majority that will adopt them all.” Second, the rule prevents fraud and surprise through the careless and unintentional adoption of provisions in a bill not broached by its title. Third, the single subject matter rule affords the public notice of an act’s contents and an opportunity to be heard thereon.

Article III, section six only applies to chapter laws. Chapter laws are acts of the legislature not yet officially published as part of the Florida Statutes. Chapter laws are added to the existing body of state law under the state’s continuous statutory revision program. Acts of the legislature, signed into law are initially printed as session laws, which are bound and published as the Laws of Florida. Following each odd-year legislative

---

46. FLA. CONST. art III, § 6. The single subject rule contained in article III, section 16 of the 1885 Florida Constitution is nearly identical to that of the current 1968 Florida Constitution. Compare FLA. CONST. of 1885, art III, § 16, with FLA. CONST. art. III, § 6. The former provision read, “Each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title.” FLA. CONST. of 1885, art. III, § 16.

47. See, e.g., ALA. CONST. art IV, § 45; MO. CONST. art III, § 23; OHIO CONST. art II, § 15(D); OR. CONST. art IV, § 20.


49. 94 So. 2d 181 (Fla. 1957).

50. Id. at 184.

51. Id.


54. See State v. Canova, 94 So. 2d 181, 184 (Fla. 1957).

55. See id.

56. See State v. Johnson, 616 So. 2d 1, 2 (Fla. 1993).


58. Id. at 1430.

59. Id.
session, session laws are biennially adopted as part of the Florida Statutes. Once enacted as part of the statute law of the state, "a chapter law is no longer subject to challenge on the grounds that it violates the single subject requirement of article III, section 6, of the Florida Constitution." Therefore, an individual has standing to raise a single subject matter challenge to a chapter law if the violation occurred after the law's effective date and before the date of its reenactment as part of the Florida Statutes.

III. STATEMENT OF THE CASE

The state charged Carol Leigh Thompson with "robbery with a firearm, a first-degree felony punishable by life, aggravated battery of a victim over the age of sixty-five, a first-degree felony, and felon in possession of a firearm, a second-degree felony." All charges are qualified offenses for sentencing under the Gort Act. The state notified Thompson that it would prosecute her as a "habitual felony/habitual violent felony offender/violent career criminal." Thompson moved to "preclude her sentencing as a violent career criminal and to declare unconstitutional chapter 95-182, Laws of Florida." The trial court denied Thompson's motion. Thompson "entered pleas of no contest to each offense, reserving her right to appeal that denial." The trial court concluded that Thompson was a violent career criminal and sentenced her pursuant to the Gort Act.

On appeal, the Second District Court of Appeal reversed Thompson's sentence and declared chapter 95-182 repugnant to Article III, section six of Florida's Constitution. In its opinion, the court identified two distinct...
subjects in chapter 95-182—one criminal and one civil.\textsuperscript{71} According to the court, the first subject, embodied in sections two through seven, "create[s] and define[s] the violent career criminal sentencing category and provide[s] sentencing procedures and penalties."\textsuperscript{72} The second subject, contained in sections eight through ten, addresses "civil aspects of domestic violence."\textsuperscript{73} To support its reasoning, the court presented a simplified history of Senate Bill 168, noting that the Gort Act began as a single bill in the Senate while sections eight through ten of chapter 95-182 originated as three separate bills in the House of Representatives.\textsuperscript{74} These three House bills died in committee.\textsuperscript{75} Language from these three bills was engrailed onto two separate House bills, one being Committee Substitute for Senate Bill 168.\textsuperscript{76} According to the court, "[i]t is in circumstances such as these that problems with the single subject rule are most likely to occur."\textsuperscript{77}

The court analogizes the combination of provisions contained in chapter 95-182 to chapter laws struck down by the Supreme Court of Florida in Johnson and Bunnell.\textsuperscript{78} In both cases, the court invalidated chapter laws for violating Article III, section six of the Florida Constitution.\textsuperscript{79} The Thompson opinion implies that the chapter laws invalidated in Johnson and Bunnell were struck down because they impermissibly combined criminal and civil provisions.\textsuperscript{80} Concluding that chapter 95-182 impermissibly combines civil and criminal subjects, the court invalidated it based on the Johnson and Bunnell holdings.\textsuperscript{81} The court resolved that the provisions of chapter 95-182 had "no 'natural or logical connection.'"\textsuperscript{82} According to the court:

> Nothing in sections 2 through 7 addresses any facet of domestic violence and, more particularly, any civil aspect of that subject.

\begin{itemize}
  \item \textsuperscript{71} Thompson, 708 So. 2d at 317.
  \item \textsuperscript{72} Id. at 316.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} Id. at 317.
  \item \textsuperscript{77} Thompson, 708 So. 2d at 317.
  \item \textsuperscript{78} Id.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} See id.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} Thompson, 708 So. 2d at 317.
\end{itemize}
Nothing in sections 8 through 10 addresses the subject of career criminals or the sentences to be imposed upon them. It is fair to say that these two subjects "are designed to accomplish separate and dissociated objects of legislative effort."\(^{83}\)

IV. ANALYSIS

A. Judicial Construction of the Single Subject Matter Rule

The single subject matter rule is the source of numerous constitutional challenges to chapter laws. The difficulty facing the courts when presented with single subject challenges is determining what exactly constitutes a single subject. This task is complicated by the reality that bills passed by the legislature contain numerous provisions, the result of complex transactions and tradeoffs that result in compromised legislation.\(^{84}\) In response, the courts have developed a framework within which single subject challenges to chapter laws are examined.

As noted, Article III, section six of the Florida Constitution requires that "[e]very law . . . embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."\(^{85}\) Courts afford the legislature great deference when enacting laws,\(^{86}\) and will resolve every reasonable doubt in favor of constitutionality.\(^{87}\) The courts will not declare an act unconstitutional unless it is invalid beyond a reasonable doubt.\(^{88}\) Nevertheless, the courts continually reiterate that the provisions of an act must have a "natural or logical connection" in order to pass constitutional muster.\(^{89}\) In Canova, the Supreme Court of Florida stated that the provisions of an act must be "fairly and naturally germane" to its subject.\(^{90}\) An act's provisions must be "necessary incidents to or tend to make effective or promote the objects and purposes of legislation included in the subject."\(^{91}\) Courts state that the provisions of an act must not

\(^{83}\) Id. (quoting State v. Thompson, 163 So. 270, 283 (Fla. 1935)).
\(^{85}\) FLA. CONST. art III, § 6.
\(^{86}\) See, e.g., Burch v. State, 558 So. 2d 1, 3 (Fla. 1990).
\(^{87}\) See, e.g., State v. Kinner, 398 So. 2d 1360 (Fla. 1981).
\(^{88}\) Id.
\(^{89}\) See, e.g., Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991).
\(^{90}\) State v. Canova, 94 So. 2d 181, 184 (Fla. 1957).
\(^{91}\) Id.
"accomplish separate and disassociated objects of legislative effort." This test is based on "common sense." Acts of the legislature are said to have subjects and objects. In *Spencer v. Hunt*, the Supreme Court of Florida distinguished the two concepts as follows:

The "subject" of an act is the matter to which it relates; the "object" is its general purpose. Although the two terms are held to be equivalent by some authorities, the better view is that the word "subject" is a broader term than the word "object," as one subject may contain many objects.

In *Board of Public Instruction v. Doran*, the Supreme Court of Florida established that "[t]he term 'subject of an act' . . . means the matter which forms the groundwork of the act and it may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection." This is a crucial distinction as Article I, section six requires laws to be singular in subject, not object. The single subject rule does not prohibit a statute from containing many provisions, nor does it require the embodiment of every thought of the legislature in a different statute. An examination of chapter 95-182 within this context reveals that all of its provisions naturally and logically relate to the single subject of repeated criminality.

B. *The Sections of Chapter 95-182 of the Laws of Florida*

The Second District Court of Appeal's holding is partially based on its deduction that nothing in the Gort Act, which is comprised of sections two through seven of chapter 95-182, "addresses any facet of domestic violence." However, the court's deduction is inaccurate. In actuality, the

93. Smith v. Department of Ins., 507 So. 2d 1080, 1087 (Fla. 1987).
94. 82 C.J.S. Statutes § 217 (1955).
95. 147 So. 282 (Fla. 1933).
96. Id. at 284 (citing *Ex parte* Heman, 77 S.W. 225 (Tex. Crim. App. 1903)).
97. 224 So. 2d 693 (Fla. 1969).
98. Id. at 699.
100. Petitioner's Initial Brief on the Merits at 3, State v. Thompson, 750 So. 2d 643 (Fla. 1999) (No. 92-831).
Gort Act does address a facet of domestic violence—aggravated stalking. The act addresses aggravated stalking on two occasions. First, section two of chapter 95-182 lists "[a]ggravated stalking, as described in s. 784.048(3) and (4)" of the Florida Statutes as a qualified offense for sentencing as a violent career criminal. Second, section two amends section 775.084 of the Florida Statutes by adding aggravated stalking as a qualified offense for sentencing as a habitual violent felony offender.

Section 784.048(4) of the Florida Statutes defines the crime of aggravated stalking as follows:

Any person who, after an injunction for protection against repeat violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking.

The definition of aggravated stalking includes conduct occurring after violation of an injunction for protection against domestic violence. The title of section eight of chapter 95-182, which created section 741.31 of the Florida Statutes, is a "violation of an injunction for protection against domestic violence." It enables domestic violence victims to secure damages for injuries resulting from breach of an injunction. The definition of aggravated stalking in section 784.048(4) of the Florida Statutes also includes conduct occurring after a violation of an injunction for

102. Brief of Appellee at 1, Thompson v. State, 708 So. 2d 315 (Fla. 2d Dist. Ct. App. 1998) (No. 96-02517). The argument that aggravated stalking connects the various sections of chapter 95-182 was the foundation for the state's case in the Second District Court of Appeal of Florida. Id. The state presented this same argument before the Third District Court of Appeal in Higgs v. State, which upheld the constitutionality of chapter 95-182. Id. at 2; Higgs v. State, 695 So. 2d 872, 873 (Fla. 3d Dist. Ct. App. 1997). In its Initial Brief on the Merits in the Supreme Court of Florida, the State incorporated this argument as part of its analysis of the sections of chapter 95-182. Petitioner's Initial Brief on the Merits at 16, State v. Thompson, 750 So. 2d 643 (Fla. 1999) (No. 92-831).

103. Ch. 95-182, § 2, 1995 Fla. Laws 1665, 1667 (codified at FLA. STAT. § 775.084 (1995)).

104. Id.


106. Id.

107. Ch. 95-182, § 8, 1995 Fla. Laws 1665, 1673 (codified at FLA. STAT. § 741.31 (1995)).

108. Id.
protection against repeat violence.\textsuperscript{109} Section ten of chapter 95-182 governs the issuance and enforcement of injunctions for protection against repeat violence.\textsuperscript{110} Thus, sections eight and ten of chapter 95-182 relate to the crime of aggravated stalking. Collectively, sections eight through ten of chapter 95-182 relate to the crime of aggravated stalking because the definition of domestic violence, which is contained in section 741.28(1) of the \textit{Florida Statutes}, specifically lists aggravated stalking as a qualifying offense.\textsuperscript{111}

When chapter 95-182 amended section 775.084 of the \textit{Florida Statutes}, it listed aggravated stalking as a qualified offense for sentencing as a violent career criminal and added aggravated stalking as a qualifying offense for sentencing as a habitual violent felony offender.\textsuperscript{112} Thus, the legislature's inclusion of aggravated stalking as a qualifying offense for both violent career criminals and habitual violent felony offenders connects the Gort Act to sections eight through ten of chapter 95-182.\textsuperscript{113}

The \textit{Thompson} court identified two distinct subjects in chapter 95-182—one criminal and one civil.\textsuperscript{114} According to the court, sections one through seven "create and define the violent career criminal sentencing category and provide sentencing procedures and penalties."\textsuperscript{115} The court held that sections eight through ten of chapter 95-182 address "civil aspects of domestic violence."\textsuperscript{116} Based on its characterization of these provisions as "civil" and "criminal," the court concluded that they have no natural or logical connection.\textsuperscript{117} However, the court's description of sections eight through ten is inaccurate. They are criminal statutes.

Sections eight through ten of chapter 95-182 address various aspects of domestic violence.\textsuperscript{118} Section 741.28(1) of the \textit{Florida Statutes} defines domestic violence as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical

\textsuperscript{109} \textit{FLA. STAT.} § 784.048 (1999).
\textsuperscript{110} Ch. 95-182, § 10, 1995 Fla. Laws 1665, 1674 (codified at \textit{FLA. STAT.} § 784.046 (1995)).
\textsuperscript{111} \textit{FLA. STAT.} § 741.28(1) (1999).
\textsuperscript{112} Ch. 95-182, § 2, 1995 Fla. Laws 1665, 1666–67 (codified at \textit{FLA. STAT.} § 785.084 (1995)).
\textsuperscript{113} Brief for Appellee at 1, Thompson v. State, 708 So. 2d 315 (Fla. 1998) (No. 96-02517).
\textsuperscript{115} \textit{Id.} at 316.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 317.
\textsuperscript{118} Ch. 95-182, §§ 8–10, 1995 Fla. Laws 1665, 1673–74 (codified at \textit{FLA. STAT.} §§ 741.31, 768.35, 784.046 (1995)).
injury or death of one family or household member by another who is or was residing in the same dwelling unit.” The Florida Statutes identify each offense enumerated in section 741.28 as either a felony or misdemeanor. Felonies and misdemeanors are crimes. Likewise, domestic violence, which may encompass any one or a combination of these offenses, is also a crime. In addition, the legislature expressly stated “that domestic violence [should] be treated as a criminal act rather than a private matter.” Despite the court’s characterization, sections eight through ten clearly have a criminal orientation.

Sections eight through ten of chapter 95-182 provide restitution for victims of repeat criminal behavior. Restitution is a remedy designed to compensate a victim for damage or loss caused by a defendant’s criminal offense. Restitution is statutory and may come from the state in the form of governmental assistance to innocent victims of crime, or directly from the responsible perpetrator.

In Spivey v. State, the Supreme Court of Florida held that the purposes of restitution are “to compensate the victim, [and] . . . serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.” The court stated that “restitution is a criminal sanction.” Damages awarded to individuals injured as a result of a breach of an injunction against repeat violence, and compensatory and punitive damages awarded for injuries resulting from continuing domestic violence, clearly may be characterized as restitution since they require “the convicted defendant [to] ‘pay’ for [his] crime by making financial compensation to the victim . . . .”

All the sections of chapter 95-182 relate to the single subject of repeat criminal behavior. It is clear that the Gort Act is an attempt to abate recidivism since habitual felony offenders and violent career criminals are by definition repeat criminals. Conceivably, the threat of longer incarceration will dissuade many from a return to crime. The domestic violence provisions of chapter 95-182 also are an attempt by the legislature

119. FLA. STAT. § 741.28 (1999).
120. Id. §§ 784.01, .011, .02, .021, .03, .045, .048.
121. Id. § 741.2901(2).
122. Petitioner’s Initial Brief on the Merits at 13, State v. Thompson, 750 So. 2d 643 (Fla. 1999) (No. 92-831).
123. 15 FLA. JUR. 2d Criminal Law § 2754 (1993).
124. Id. § 2740.
125. 531 So. 2d 965 (Fla. 1988).
126. Id. at 967.
127. Id. (emphasis added).
to dissuade repeated criminality. A repeater is a person who "commit[s] crime and [is] sentenced, and then commit[s] another and [is] sentenced again." 129 Under Florida law, any family or household member who is the victim of domestic violence has standing to file a petition for an injunction for protection against domestic violence against the perpetrator. 130 Domestic violence is a crime. 131 When the perpetrator breaches that injunction, he commits a misdemeanor of the first degree. 132 Misdemeanors are crimes. 133 Thus, one who breaches a protective injunction is a repeater since he committed the crime warranting the injunction, and then committed a second crime by breaching the injunction. Section eight of chapter 95-182 is an attempt to abate such breaches, and in turn control repeat criminality through the deterrent effect of restitution. 134 Likewise, section nine attempts to prevent repeated incidents of domestic violence by providing damages to victims "who [have] suffered repeated physical or psychological injuries over an extended period of time ...." 135 Section ten endeavors to control repeated criminality by enabling the courts to utilize criminal contempt proceedings to force compliance with injunctions for protection against repeat violence. 136

C. The Applicability of Bunnell v. State and State v. Johnson

Once one identifies an act’s subject, the court must find a natural and logical relationship between the act’s components. The Thompson court relied on Bunnell and Johnson to invalidate chapter 95-182. 137 However, the chapter laws voided by the Supreme Court of Florida in Bunnell and Johnson are distinguishable from chapter 95-182.

Bunnell presented a challenge to chapter 82-150. 138 Section one of chapter 82-150 created the crime of obstruction of justice by knowingly giving false identification to a law enforcement officer. 139 Sections two and three of the act changed and reduced the membership of the Florida Council

130. FLA. STAT. § 741.30(1)(a) (1999).
131. Id. § 741.2901(2).
132. Id. § 741.31(4)(a).
133. Id. § 775.08(4).
134. Ch. 95-182, § 8, 1995 Fla. Laws 1665, 1674 (codified at FLA. STAT. § 741.31 (1995)).
135. Id. § 9, 1995 Fla. Laws at 1674 (codified at FLA. STAT. § 768.35 (1995)) (emphasis added).
136. Id. § 10, 1995 Fla. Laws at 1674 (codified at FLA. STAT. § 784.046 (1995)).
139. Id.
on Criminal Justice. The *Bunnell* court invalidated chapter 82-150 reasoning that "the subject of section 1 has no cogent relationship with the subject of sections 2 and 3 and that the object of section 1 is separate and disassociated from the object of sections 2 and 3."

Chapter 95-182 differs significantly from chapter 82-150. Chapter 95-182 has a single subject—repeated criminality. Sections two through seven are designed to control criminal behavior through the embellishment of criminal penalties. Sections eight through ten attempt to abate recidivism through the retributive and restitutinal qualities of civil damage remedies. In contrast, the provisions of chapter 82-150 were attenuated. Section one of chapter 82-150 was a prototypical criminal provision designed to subordinate criminal behavior and expedite criminal investigations. However, sections two and three of chapter 82-150 could be described best as managerial or governmental. These sections are quite clearly designed to accomplish completely different objects of legislative effort. Adjusting the membership of a bureaucratic agency could impact criminal behavior in only a superficial way.

Likewise, the chapter law invalidated by the Supreme Court of Florida in *Johnson* is distinguishable from chapter 95-182. *Johnson* involved a challenge to chapter 89-280. The first three sections of the act amended sections 775.084, 775.0842, and 775.0843 of the *Florida Statutes* pertaining to "habitual felony offenders," "career criminal prosecutions," and "policies for career criminal cases." However, "[s]ections four through eleven of the act pertain[ed] to the Chapter 493 provisions governing private investigation and patrol services, specifically, repossession of motor vehicles and motorboats." The court held that the provisions of chapter 89-280 had no cogent relationship, rejecting the state’s argument that the two provisions

140. *Id.*

141. *Id.* The rationale of *Bunnell* is somewhat flawed. The court identified two distinct subjects in chapter 82-150, then concluded that that the two subjects have no cogent relationship. *Id.* However, since Florida’s constitution mandates every law to be singular in subject, a law with two subjects would be *per se* unconstitutional. Thus, once the court reasoned that the act had two subjects, it was superfluous to determine their relationship.

142. *Bunnell*, 453 So. 2d at 809.


144. *See* id. §§ 8–10, 1995 Fla. Laws at 1673–74 (codified at FLA. STAT. §§ 741.31, 768.35, 784.046 (1995)).

145. *See* Johnson v. State, 616 So. 2d 1, 2 (Fla. 1993).

146. *Id.*

147. *Id.* at 4.

148. *Id.*
relate to the broad subject of crime control.\textsuperscript{149} According to the court, the act "addresses two very separate and distinct subjects."\textsuperscript{150}

Unlike the provisions in chapter 89-280, the provisions in chapter 95-182 have a natural and logical relationship. The inclusion of aggravated stalking as a qualified offense for sentencing as a violent career criminal and habitual felony offender links the Gort Act to sections two through ten of chapter 95-182.\textsuperscript{151} The definition of aggravated stalking includes conduct occurring after violations of injunctions for protection against domestic violence and repeat violence.\textsuperscript{152} Section eight of chapter 95-182 allows domestic violence victims to secure damages for injuries resulting from a violation of a domestic violence injunction.\textsuperscript{153} Section ten amends the procedures governing the issuance and enforcement of injunctions for protection against repeat violence.\textsuperscript{154} Collectively, the domestic violence provisions of chapter 95-182 relate to the Gort Act because all are efforts to control repeat criminal behavior.\textsuperscript{155} All sections of chapter 95-182 are necessary incidents to and promote the aim of controlling repeat criminal behavior.\textsuperscript{156} In sharp contrast, the provisions of chapter 89-280 have no relationship other than a scant association with crime control.\textsuperscript{157} As the Johnson court noted, "[n]o reasonable explanation exists as to why the legislature chose to join these two subjects within the same legislative act."\textsuperscript{158}

D. \textit{Burch v. State and the Wide Latitude Afforded the Legislature by the Courts in the Enactment of Laws}

In \textit{Burch v. State},\textsuperscript{159} the Supreme Court of Florida upheld chapter 87-243 of the \textit{Laws of Florida} against a single subject attack.\textsuperscript{160} Chapter 87-243 was a comprehensive piece of crime control legislation. In all, the act contained seventy-six sections, amending, creating, and repealing over

\begin{itemize}
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Johnson}, 616 So. 2d at 4.
\item \textsuperscript{151} Brief of Appellee at 1, Thompson v. State, 708 So. 2d 315 (Fla. 2d Dist. Ct. App. 1998) (No. 96-02517).
\item \textsuperscript{152} \textit{FLA. STAT.} § 784.048(4) (1999).
\item \textsuperscript{153} Ch. 95-182, § 8, 1995 Fla. Laws 1665, 1673 (codified at \textit{FLA. STAT.} § 784.046 (1995)).
\item \textsuperscript{154} \textit{Id.} § 10, 1995 Fla. Laws at 1674 (codified at \textit{FLA. STAT.} § 784.046 (1995)).
\item \textsuperscript{155} \textit{See} 1995 Fla. Laws ch. 95-182.
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} 1989 Fla. Laws ch. 89-280.
\item \textsuperscript{158} \textit{Johnson v. State}, 616 So. 2d 1, 4 (Fla. 1993).
\item \textsuperscript{159} 558 So. 2d 1 (Fla. 1990).
\item \textsuperscript{160} \textit{Id.} at 3.
\end{itemize}
seventy Florida statutes. The act addressed an array of topics including standards and schedules of controlled substances, abatement of nuisances, aircraft registration practices, improvement districts and enterprise zones, safe neighborhoods, drug testing, and drug abuse education in primary and secondary schools. The court held that each area "bear[s] a logical relationship to the single subject of controlling crime . . . ."

The Thompson court distinguished the chapter law upheld in Burch. The court noted that chapter 87-243 had an extensive preamble in which the legislature detailed the purpose of the act and explained the relationship between its parts. According to the preamble, the legislature drafted chapter 87-243 as an "urgent and creative remedial action" to combat a crime rate crisis. The legislature stated that it enacted a comprehensive law in order to avoid fragmented, duplicative legislation. The courts apply the single subject matter rule less stringently to comprehensive legislation provided an act combats a stated crisis and the legislature explains the relationship between its parts. Comparing Burch, the Thompson court seems to fault chapter 95-182 for not having an explanatory opening statement. However, chapter 95-182 is not comprehensive legislation like that in Burch. Comprehensive means "including much, comprising many things, having a wide scope, [and] inclusive." Chapter 95-182 does not address an expansive subject like crime control. It is relatively narrow legislation designed to abate recidivist criminal behavior through increased criminal penalties and civil remedies. No explanatory preamble is necessary to explain the natural and logical relationship between multifarious provisions.

"Prior comprehensive enactments by the legislature demonstrate that widely divergent rights and requirements can be included without challenge

162. Id.
163. Burch, 558 So. 2d at 3.
165. See id.
166. 1987 Fla. Laws ch. 87-243.
167. Id.
168. Cf. State v. Leavins, 599 So. 2d 1326, 1334 (Fla. 1992). In State v. Leavins, the court invalidated chapter 89-187 of the Laws of Florida on the ground that it violated the single subject rule. Id. at 1335. The court identified 22 subjects in the act ranging from gas lease regulation, hunting stamp fees, oyster licenses, and license plate taxes. Id. at 1333–34. The court rejected the state's argument that the provisions of the act related to the general topic of environmental resources. Id. at 1334. "[S]uch a finding would not, and should not, satisfy the test" under the single subject rule. Id. at 1335.
169. See Thompson, 708 So. 2d at 317.
170. 8 WORDS AND PHRASES 444 (1951).
in statutes covering a single subject." On numerous occasions the courts have rejected single subject challenges to chapter laws containing diverse provisions. In Smith v. Department of Insurance, the Supreme Court of Florida upheld the 1986 Tort Reform and Insurance Act against a single subject challenge. The court identified five discrete parts to the act. The legislation included copious long term insurance and tort reforms, and temporary insurance reforms. It also created an insurance law and tort reform task force, and "modified[d] [the] financial responsibility requirements applicable to physicians." The court rejected the appellee's contention that the act impermissibly combined civil litigation and tort reform. The court held that civil litigation and tort reform have a natural and logical relationship to the legislature's express objective of making low cost liability insurance available.

In State v. Lee, the Supreme Court of Florida held that a comprehensive chapter law did not violate the single subject rule because it reformed tort laws, automobile insurance laws, and assessed additional fines for various traffic offenses. The court stated that the single subject rule "is not designed to deter or impede legislation by requiring laws to be unnecessarily restrictive in their scope and operation." In Chenoweth v. Kemp, the Supreme Court of Florida upheld chapter 76-260 against a single subject challenge. Chapter 76-260 "covers a broad range of statutory provisions dealing with medical malpractice and insurance . . . ." The court summarily upheld the law, stating that tort litigation and insurance reform have a natural and logical connection.

172. 507 So. 2d 1080 (Fla. 1987).
173. Id. at 1083.
174. Id. at 1085–87.
175. Id. at 1085.
176. Id. at 1086.
177. Smith, 507 So. 2d at 1087.
178. Id.
179. 356 So. 2d 276 (Fla. 1978).
180. Id. at 282.
181. Id.
182. 396 So. 2d 1122 (Fla. 1981).
183. Id. at 1124.
184. Id.
185. Id. Chief Justice Sundberg criticized the Chenoweth majority. Id. at 1126–27. Sundberg characterized chapter 76-260 as a "haphazardly formulated and disjointed" piece of legislation "ranging over almost the entire insurance field." Chenoweth, 396 So. 2d at 1124. According to Sundberg, if chapter 76-260 "passes constitutional muster, one is hard put to envision a chapter which would not." Id. at 1127. Nevertheless, the courts consistently cite Chenoweth with approval. See Burch v. State, 558 So. 2d 1, 2 (Fla. 1990); Smith v. Smith,
The provisions contained in chapter 95-182 are nowhere near as extensive as those in *Burch, Smith, Lee,* and *Chenoweth.* The court in each case reiterated and reaffirmed the proposition established by *Board of Public Instruction v. Doran* that an act "may be as broad as the Legislature chooses provided the matters included in the law have a natural and logical connection." Each decision is highly illustrative of the great deference afforded the legislature by the judiciary.

E. *The Legislative History of Chapter 95-182 of the Laws of Florida*

When faced with a single subject matter challenge to a legislative act, Florida courts often will examine its legislative history. In this context, legislative history means the "history of the evolution" of the statute. As a general rule, courts may properly look to legislative history where statutes are challenged "because the object to be accomplished is prohibited or a prohibited route is selected to reach a permissive destination."

The Gort Act was introduced in the Senate on March 7, 1995 as Senate Bill 168. The Senate certified the bill to the House on March 8, 1995, where it entered containing only the Gort Act provisions. As stated previously, House members amended the bill by adding three sections addressing domestic violence. These amendments became sections eight through ten of chapter 95-182. The language in sections eight through ten originated in three separate House bills: House Bill 1251, House Bill 1789, and House Bill 2513. But all three bills died in committee. The *Thompson* court opined that the legislative history of Senate Bill 168

Department of Ins., 507 So. 2d 1080, 1085 (Fla. 1987); State v. Leavins, 599 So. 2d 1326, 1334 (Fla. 1st Dist. Ct. App. 1992).

186. 224 So. 2d 693 (Fla. 1969).


189. *73 AM. Jur. 2d Statutes § 150 (1974).*

190. *Id.*


indicates the presence of logrolling.195 Thompson asserted that the legislature “took advantage of the popular public furor [surrounding Gort’s death] to slip ... pet bills into” Senate Bill 168.196 However, the legislative history presented by the Thompson court to support its conclusion is oversimplified. The complete legislative history of chapter 95-182 discounts the inference of the presence of logrolling.

The Final Bill Analysis of House Bill 1251 indicates that it contained six sections.197 The bill amended sections 741.29 and 741.2902 of the Florida Statutes by inserting legislative intent regarding services for victims of domestic violence and requiring courts to consider making perpetrators attend batterers intervention programs.198 Section three of House Bill 1251 amended section 741.30 of the Florida Statutes, enlarging the duties of the clerk of the court with respect to protective injunctions, and authorizing certain law enforcement officers to serve those injunctions.199 Section four of House Bill 1251 amended section 741.30 of the Florida Statutes by enlarging the offense of violation of an injunction for protection against domestic violence to include contacting the victim by telephone, and going to the victim’s home, school, or place of employment.200 Section five of the bill amended section 784.046 of the Florida Statutes.201 Similar to section three, section five enlarged the duties of the clerk of the court and law enforcement officers with respect to protective injunctions. Section six of House Bill 1251 provided the effective date.202

Of House Bill 1251’s six sections, the House only borrowed language from section five.203 Section five became section ten of chapter 95-182.204 Thus, the legislature did not engrat the substance of House Bill 1251 onto Senate Bill 186 as the Thompson court suggests.205 Instead, the legislature incorporated only a fraction of the House Bill 1251’s language.

197. ANALYSIS PCS/HB 1251, supra note 194.
198. Id.
199. Id.
200. Id.
201. Id.
202. ANALYSIS PCS/HB 1251, supra note 194.
203. Compare ANALYSIS PCS/HB 1251, with ch. 95-182, § 10, 1995 Fla. Laws 1665, 1774 (codified at FLA. STAT. § 784.046 (1995)).
204. Compare ANALYSIS PCS/HB 1251, with ch. 95-182, § 10, 1995 Fla. Laws 1665, 1774 (codified at FLA. STAT. § 784.046 (1995)).
The House also incorporated domestic violence language from House Bill 1789.\textsuperscript{206} The Final Bill Analysis of House Bill 1789 illustrates its connection to Senate Bill 186. It notes that "the current definition of domestic violence does not include stalking and aggravated stalking."\textsuperscript{207} House Bill 1789 "broadened the definition of domestic violence" by adding, \textit{inter alia}, aggravated stalking to the definition of domestic violence.\textsuperscript{208} The bill added aggravated stalking because the offense is "prevalent in domestic violence cases."\textsuperscript{209} The Final Bill Analysis also reveals that House Bill 1789 "enhanced the already existing domestic violence law" by adding "aggravated stalking to the list of crimes which qualify an offender for sentencing as an habitual [violent felony] offender."\textsuperscript{210} Thus, it appears that the legislature recognized a relationship between aggravated stalking, habitual offenders, and domestic violence prior to amending the Gort Act. This suggests that the legislature did not "logroll" domestic violence provisions from House Bill 1789 onto the Gort Act. Instead, it simply added provisions it always considered germane to the habitual offender statute.

The House also borrowed language from House Bill 2513.\textsuperscript{211} The substance of House Bill 2513 became section nine of chapter 95-182.\textsuperscript{212} House Bill 2513 provided, \textit{inter alia}, civil remedies for victims of violators of injunctions for protection against domestic violence.\textsuperscript{213} Domestic violence is a crime that enables victims to obtain protective injunctions against the perpetrator.\textsuperscript{214} Since violation of an injunction for protection against domestic violence is a misdemeanor of the first degree,\textsuperscript{215} those who breach protective injunctions are repeat offenders. House Bill 2513 clearly was an attempt by the legislature to contain such recidivism through the deterrent effect of civil remedies. The Gort Act, with its enhanced penalties for habitual felony offenders and violent career criminals, is also an attempt to contain repeat criminal behavior. Since both bills dealt with repeat criminality, it was natural and logical for the legislature to combine House Bill 2513 and Senate Bill 168 into one act.

\begin{itemize}
\item \textsuperscript{206} ANALYSIS PCS/HB 197, \textit{supra} note 194. House Bill 1789 incorporated recommendations found by the Governor's Task Force on Domestic Violence. \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} ANALYSIS PCS/HB 197, \textit{supra} note 194.
\item \textsuperscript{211} See ANALYSIS HB 2513, \textit{supra} note 194.
\item \textsuperscript{212} Compare ANALYSIS HB 2513, \textit{with} ch. 95-182, § 9, 1995 Fla. Laws 1665, 1674 (codified at FLA. STAT. § 768.35 (1995)).
\item \textsuperscript{213} See ANALYSIS HB 2513, \textit{supra} note 194.
\item \textsuperscript{214} See \textit{id.}
\item \textsuperscript{215} FLA. STAT. § 741.31 (1999).
\end{itemize}
Chapter 95-182 of the Laws of Florida does not violate Article III, section six of the Florida Constitution. An examination of its provisions reveals that each addresses the single subject controlling repeat criminal behavior. The cases relied on by the Thompson court to invalidate chapter 95-182 are distinguishable. Chapter 95-182 is not comprehensive legislation. No explanatory preamble is needed to explain the correlation between its parts. On the contrary, it is relatively narrow legislation akin to numerous chapter laws previously upheld by the Florida courts. The legislative history of chapter 95-182 discounts any suggestion of logrolling and reveals a natural and logical relationship between its parts.

Statutory interpretation is complicated by the fact that “words in statutes have multiple meaning.”216 Traditionally, it has been the role of the judiciary to ascertain the meaning of indeterminate statutory language and develop tests to ascertain the lawful boundaries of those statutes. Court decisions interpreting the single subject rule illustrate the difficulty of statutory construction and the challenge of defining a single subject. America’s body of law continues to move further away from the common law, becoming increasingly statutory.217 Acts of the legislature tend to be conglomerations of provisions born of multifarious sources. They are the product of debate and compromise. As the law becomes increasingly more statutory, single subject rule challenges to legislative acts may comprise a larger segment of future court dockets.

VI. ADDENDUM

On December 22, 1999, the Supreme Court of Florida published its decision in State v. Thompson.218 In a per curiam opinion, the majority held that chapter 95-182 of the Laws of Florida violated the single subject matter rule.219 In its opinion, the court assimilated most of the reasoning of the Second District Court of Appeal.220 The majority adopted the Second District’s observation that nothing in the Gort Act “addresses any facet of domestic violence” and that “nothing in sections eight through ten [of chapter 95-182] addresses the subject of career criminals or the sentences to

218. 750 So. 2d 643 (Fla. 1999).
219. Id. at 649.
220. See id. at 648.
be imposed upon them." It analogized chapter 95-182 to chapter laws invalidated in Johnson and Bunnell. The court concluded that the legislative history of chapter 95-182 indicated the presence of logrolling.

In his dissenting opinion, Justice Wells adopted the reasoning of the First District Court of Appeal in Trapp v. State, which upheld chapter 95-184 against a single subject attack. Justice Wells concluded that all portions of the chapter 95-182 dealt with remedies for criminal acts, and therefore the subject of the act is crime prevention. The dissent reiterates the strong presumption favoring the constitutionality of a statute, and the wide latitude afforded the legislature by the courts. Justice Wells also noted that "three district courts out of the four which have ruled on this issue have found the statute sustainable against the one-subject challenge." According to Justice Wells, "the decisions in favor of constitutionality by these three district courts, at the very least, demonstrate that the statute is not unconstitutional.

In its opinion, the majority took cognizance of a jurisdictional split regarding the window period within which an individual had standing to raise a single subject rule challenge to chapter 95-182. The Second District Court of Appeal concluded that the window period for bringing a single subject matter challenge to chapter 95-182 was between October 1, 1995, the law’s effective date, and May 24, 1997. The court concluded the latter date was the date of its reenactment as part of the Florida Statutes. However, while Thompson was pending before the Supreme Court of Florida, the Fourth District Court of Appeal decided Salters v. State. In Salters, the Fourth District concluded that the window period expired on October 1, 1996. The Supreme Court of Florida, however, declined to reach a decision on this matter because Thompson’s offense, which occurred on November 16, 1995, fell within either period. Thus,

221. Id. (quoting Thompson v. State, 708 So. 2d 315, 317 (Fla. 2d Dist. Ct. App. 1998)).
222. Id.
223. Thompson, 750 So. 2d at 646.
224. Id. at 649.
225. Id.
226. Id. at 650.
227. Id.
228. Thompson, 750 So. 2d at 650.
229. Id. at 646.
231. See id. (citing 1997 Fla. Laws ch. 97-97).
232. 731 So. 2d 826 (Fla. 4th Dist. Ct. App. 1999).
233. Id. (citing Scott v. State, 721 So. 2d 1245, 1246 (Fla. 4th Dist. Ct. App. 1998)).
234. Thompson, 708 So. 2d at 316.
235. Thompson, 750 So. 2d at 646.
the window period in which an individual has standing to raise a single subject matter challenge to a chapter law is presently unresolved.

Ivan J. Kopas*

* The author wishes to thank Susan D. Dunlevy, Assistant Attorney General, Tampa, Florida, and Richard J. Sanders, Assistant Public Defender, Bartow, Florida for their assistance.
There’s Nothing Psychological About It: Defining a New Role for the Other Mother in a State that Treats Her as Legally Invisible

TABLE OF CONTENTS

I. INTRODUCTION .............................................................................. 907
II. THE LEGALLY RECOGNIZED PARENT ............................................ 909
   A. Psychological Parent ............................................................... 910
   B. In Loco Parentis ..................................................................... 911
   C. Equitable Parent .................................................................... 912
III. FLORIDA LAW CONCERNING THE LESBIAN MOTHER .................. 913
   A. Florida Statutes ...................................................................... 913
   B. Florida Case Law .................................................................. 914
      1. Von Eiff v. Azicri ................................................................. 915
      2. After Von Eiff ..................................................................... 918
IV. Kazmierazak v. Query .................................................................... 919
   A. Background ........................................................................... 919
   B. Kazmierazak’s Argument ....................................................... 920
   C. Query’s Argument .................................................................. 922
   D. The Decision ......................................................................... 924
V. THE MISIDENTIFICATION OF LESBIAN OTHER MOTHERS .............. 926
VI. THE NEED FOR CHANGE ................................................................ 929
VII. CONCLUSION .................................................................................. 932

I. INTRODUCTION

Stranger. Third party. Nonparent. All three of these titles are meaningless to a child who loves her mother. The child has a different name for this stranger. She calls her “mommy.” She calls the stranger by that name because that is who she has been told this person is by her relatives, her biological mother, and even by the stranger herself.

She also calls the stranger mommy because the stranger has been there for her throughout her short, yet fulfilling life. She has cooked, played games, tucked her into bed, told her bedtime stories, and taught her all that she knows about the world in which she lives. The child does not know that her mother is denied the legal right to care for her, but she feels the effect when her mother is taken away from her. She may not understand why her mother cannot see her anymore, but she knows that for the rest of her life,
whether or not she ever sees her mother again, she will never think of her as a stranger.

The lesbian nonbiological mother, sometimes called the "other mother" or "psychological parent," is often treated in court as a stranger to her children.¹ So long as she and the biological mother remain a couple, the well being of the children remains intact and the relationship between mother and child is protected.² However, in the event of death or separation, the lesbian mother can lose all contact with her child.³

Although the interest and participation of lesbian partners in donor insemination have continued to rise since its introduction, the legal system has been resistant to align itself with the medical field when it comes to recognizing the family created by this procedure.⁴ Florida has treated this type of family as anything but how they have attempted to define themselves, likening the situation instead to a grandparent verses parent visitation rights case.⁵ This state has removed the other mother from the family unit and treated her as an outsider, as if she was never considered to be a parent from the start.

The true irony of this situation is that the state, in implementing this standard, uses the same reasoning to support it as is used to allow for the creation of the family—the fundamental right to privacy.⁶ The right to privacy in child bearing allows for artificial insemination of a woman in a lesbian relationship. The state cannot demand that she not have a child because she is gay. But then, after fostering this relationship, the state once again uses the right to privacy, this time in child rearing, to forbid the other mother from maintaining a relationship with her child. In other words, the same right—the fundamental right to privacy—is used both as the creation and destruction of a family.⁷

This article will examine the recent decisions in Florida based upon this fundamental right that have destroyed a lesbian nonbiological mother's chances of maintaining a relationship with her child after separating from the

3. Id. at 514.
5. See Kazmierazak, 736 So. 2d at 107.
7. This right to privacy is found in both the United States Constitution and the Florida Constitution. However, as this note will discuss, the Florida Constitution speaks expressly to the right to privacy. Compare U.S. CONST. amend. XIV, § 1, with FLA. CONST. art. I, § 23.
biological mother. It will propose a test that, in spite of the recent decisions stripping a lesbian mother of her rights, will carve out a path for her to continue to be a mother to her children. This new path will avoid a restructuring of well-settled principles of family law in Florida. Part II of this article will discuss the nontraditional types of parenthood recognized by law. Part III consists of a discussion of the Florida Statutes and case law affecting the nonbiological lesbian mother. Part IV will examine a recent Florida case concerning custody rights between the mothers of a child. Part V will discuss why there is no legal label that can truly identify the role of a nonbiological lesbian mother to her daughter. In Part VI of this article, Wisconsin’s answer for the lesbian mother will be examined to see how that state handled a problem that its statutes had not addressed. It will demonstrate how the test created in Wisconsin can be altered slightly to fit the needs of Florida. Part VII will conclude this article.

II. THE LEGALLY RECOGNIZED PARENT

As a starting point, it is important to understand the definition and rights of a parent verses those of a nonparent. A parent is “[t]he lawful father or mother of a person.” The definition suggests that:

[T]he word comprehends much more than mere fact of who was responsible for the child’s conception and birth and is commonly understood to describe or refer to a person or persons who share mutual love and affection with a child and who supply child support and maintenance, instruction, discipline and guidance.

“Parent” includes the natural or biological mother and father of a child and parenthood created through adoption. “Biological parent” is “a parent who has conceived or sired a child rather than adopted a child and whose genes are therefore transmitted to the child.” An adoptive parent does not have biological ties to the child but has gone through the legal process of becoming a parent. Florida statutory law has also defined “parent” as such.

The definition of nonparent is not found in the dictionary per se. However, the prefix “non” means not and implies the negative of that which

9. Id.
10. See id.
12. See id. at 27.
it precedes. This would therefore make the term nonparent meaning the reverse of one who brings up or cares for another. Nonparents who care for and raise children know that this classification is anything but accurate.

Both a parent and a nonparent can essentially perform the same functions for a child. Many times, the nonparent has a closer relationship with the child than does the parent. However, the parent has legal ties to the child whereas the nonparent does not. Because of this distinction, numerous theories of parentage have emerged in an attempt to maintain the relationship between a nonparent and the child that the nonparent has raised.

A nonparent must first acquire standing to fight for custody or visitation of his or her child. In order to acquire standing to fight for parental rights, nonparents must first show that they have created a relationship with their child whereby they have assumed the role of the child’s parent. If this can be proven, the law affords alternatives to these parents who do not share biological or adoptive ties with their children. Nonparents may attempt to meet the standing requirement by proving that they are either a psychological parent, that they stand *in loco parentis* with their child, or that they are an equitable parent.

A. Psychological Parent

A psychological parent, also called a de facto parent, is “‘one who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs.’” The psychological parent theory was first used in legal proceedings in 1963. At that time, the theory was described as “‘mutual interaction between adult and child, which might be described in such terms as love, affection, basic trust, and confidence.’”

16. See id.
17. *Id.*
18. *Id.*
20. *Id.* at 1010.
21. *Id.* at 1010 n.57 (quoting *Alternatives to “Parental Right” in Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 151 (1963)).
The psychological bond may, if the two are separated, lead to socialization problems for the child. This is because the bond is formed through daily interaction between the parent and the child. The psychological parent theory often occurs when children are placed in foster care. This theory of parenthood does not protect parental autonomy. It can be a problem because the parents who are recognized by law do not have to intend to have this relationship develop between their child and another in order for a third party to assume the role of psychological parent.

B. *In Loco Parentis*

Similar to the psychological parent theory is the *in loco parentis* doctrine, wherein “a person who intentionally provides support or takes custody without adopting may incur the rights and responsibilities of parenthood.” This relationship is often created by marriage and terminated by divorce. However, some courts have extended the relationship, rights, and obligations past the termination of marriage.

The theory is that the person stands in the shoes of an already existing parent. This most likely occurs in situations where there is a stepparent that cares for the children of the spouse. That person, although not the biological or adoptive parent, acts like the child’s parent. Furthermore, the stepparent in assuming this roll, takes the place of an already existing parent. The nonparent gains standing through the marriage, which has created the *in loco parentis* relationship.

The *in loco parentis* relationship can occur without the consent of the biological parent. The relationship is also nonexclusive, meaning, “the doctrine does not arbitrarily limit the gender or number of people who may stand *in loco parentis* to a child.”

---

22. *Id.* at 1010–11.

23. *Id.*


26. *Id.*


28. *Id.*

29. *Id.*


32. *Id.*
C. *Equitable Parent*

An equitable parent, although not the biological or adoptive parent of the child, "desires such recognition, is willing to accept the obligations of supporting the child and in return wants the 'reciprocal rights' of custody and visitation." This doctrine has its roots in the doctrine of equitable estoppel and equitable adoption. The comparison creates a type of parenthood by action:

Equitable estoppel is the doctrine that a person may be precluded by his actions, conduct, or silence when he is obligated to speak, from asserting a right that he otherwise would have possessed. Fundamental fairness prevents a party from benefiting from prior inconsistent conduct upon which others have relied to their detriment.

In terms of family law, equitable parenthood is the result of a nonparent who because of prior conduct and actions, is estopped from claiming nonparenthood. Therefore, because others have relied on the nonparent's actions as a parent, the nonparent is precluded from claiming that he or she is not a parent. This title is often given to people who hold themselves out to be parents and then deny biological ties. However, in the context of lesbian parents, it is the nonparent who most often tries to label herself as an equitable parent.

Unlike the psychological parent and the *in loco parentis* relationship, equitable parenthood cannot be created without the consent of the legally recognized parent. The circumstances giving rise to the equitable parent relationship must be created by the legally recognized parent. If they are not, the equitable estoppel doctrine cannot be used.

34. *Id.* at 202.
35. *Id.* (footnotes omitted). Equitable adoption refers to an oral contract to adopt a child which is fully performed, resulting in a legal adoption usually for the purposes of inheritance. *Id.*
36. See *id.*
38. See, e.g., Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991). Michele G.'s attempt to classify herself as an equitable parent was unsuccessful as it had never been applied as a title for the challenger of parental rights. *Id.*
40. *Id.*
41. *Id.*
Because lesbian couples are incapable of creating a child with biological ties to only the two of them, when the couple wants to start a family, a decision must be made concerning donor insemination. Couples often choose one parent to be the birth mother and then choose a donor with similar characteristics to the other mother. When lesbian couples separate, after years of planning and raising a family, it is not uncommon for the estranged pair to disagree about custody and visitation arrangements. The legal system's willingness to recognize the rights of the nonparent, or other mother, has not been as generously applied to lesbian parents as to heterosexual "other mothers." The nonbiological mother has traditionally had to prove that she has rights to her child by classifying herself as one of the titles above, mainly a psychological parent.

III. FLORIDA LAW CONCERNING THE LESBIAN MOTHER

In Florida, a lesbian mother, who through donor insemination of her partner, planned for and raised a child, is banned from creating a legal relationship with her family. Although such a lesbian mother is anything but a stranger to her child, the law treats her as one.

A. Florida Statutes

Because the lesbian other mother has not given birth to her child, they share no biological ties. Statutory law in Florida does not permit her to adopt her child because of her sexual orientation. Section 63.042(3) of the Florida Statutes allows adoption by married and single persons whether they are adults or minors. This same statute forbids a lesbian woman in a long-
term committed relationship from adopting the child she planned for and raised solely because she is a homosexual. 50

Statutory law in Florida also forbids homosexuals from marrying. 51 Section 741.212(1) of the Florida Statutes states that “[m]arriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida . . . are not recognized for any purpose in this state.” 52 In prohibiting homosexuals to marry, it has been noted that Florida “denie[s] homosexuals the rights granted to married partners that flow naturally from the marital relationship.” 53 Notwithstanding the validity of these statutes, Florida’s acceptance of the creation of the lesbian parented family through artificial insemination gives rise to a biased protection of one mother over another.

B. Florida Case Law

In 1925, Supreme Court of Florida ruled that a child could not be taken away from its natural mother without a showing that the mother was unfit. 54 Since that ruling, courts in Florida have been hesitant to recognize the role of a psychological parent in terms of custody disputes. 55 Additionally, there was often disagreement concerning the standard that would apply to these proceedings. 56 In some cases, the courts accepted the showing of psychological parenthood as meeting the standing requirement. 57 In other cases, courts held that a showing of demonstrable harm or unfitness was required before the state could intervene in a person’s private life concerning child rearing. 58

Along with the noncohesive standing requirement, came the scattered approach to deciding the proper test for a transfer of custody. In some

50. Id.
52. Id.
54. Parker v. Gates, 103 So. 126 (Fla. 1925). Although Parker had allowed her son to be in the custody of Gates for the greater part of his life, she had not relinquished her right to custody of her child. Id. at 126.
55. See infra notes 57–59.
56. Id.
57. See, e.g., Simmons v. Pinkey, 587 So. 2d 522 (Fla. 4th Dist. Ct. App. 1991). The court reasoned that it was in the best interests of a teenage girl to remain with her foster mother after her father was released from jail. Id. at 524. The decision was made after a showing that the father had not been honest in his relationship with his daughter. Id.
opinions, the courts used the best interests of the child standard.° In others, the best interests of the child would only be considered after it was proven that the child’s welfare was at stake.° One district held that the law did not recognize the role of psychological parents.

Throughout these decisions, the belief that the natural parent had a right that was superior to all others challenging that parent for custody remained. However, there was the opportunity for a nonparent to gain custody in certain circumstances. Despite this, lesbians, who considered themselves to be psychological parents of their partners’ biological children, had been unsuccessful in their fight for custody. But, prior to the Supreme Court of Florida decision in Von Eiff v. Azicri, the lesbian other mother still had a remote chance of persuading a court that she deserved to be considered in the custody decisions of her child. Although Von Eiff was a visitation rights battle between the parents and grandparents of a child, the reasoning behind the case and the resulting decision laid the groundwork for denying a lesbian other mother rights to her child.

1. Von Eiff v. Azicri

In Von Eiff, maternal grandparents sued their grandchildren’s father and his wife for visitation rights. Von Eiff and the Azicri’s daughter, Luisa, were married and had a child the following year. Luisa died, and after Von Eiff remarried, his new wife adopted the child. The grandparents sued for visitation rights under section 752.01(a) of the Florida Statutes, which

59. Simmons, 587 So. 2d at 524; Wills v. Wills, 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981); Heffernan v. Goldman, 256 So. 2d 522 (Fla. 4th Dist. Ct. App. 1971).
60. Paul, 530 So. 2d at 364.
61. Taylor v. Kennedy, 649 So. 2d 270 (Fla. 5th Dist. Ct. App. 1995); Swain v. Swain, 567 So. 2d 1058 (Fla. 5th Dist. Ct. App. 1990) (finding that “[t]here is no such thing [as a psychological parent] recognized in law,” and that the duty to support children is only laid upon natural and adoptive parents).
62. See, e.g., Simmons, 587 So. 2d at 524.
63. See Music v. Rachford, 654 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1995) (holding that a woman who planned to raise a child with her lesbian partner as the biological mother was not considered a de facto parent).
64. 720 So. 2d 510 (Fla. 1998).
65. Id. at 510.
67. Von Eiff, 720 So. 2d at 510.
68. Id. at 511.
69. Id.
grants such visitation to grandparents in certain circumstances. The Third District Court of Appeal granted visitation to the grandparents, however, the following question was certified to the Supreme Court of Florida:

IS SECTION 752.01(1)(a), FLORIDA STATUTES (1993), FACIALLY UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY INFRINGES ON PRIVACY RIGHTS PROTECTED BY ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION?

The Supreme Court of Florida answered affirmatively, and “focus[ed] exclusively on whether it is proper for the government, in the absence of demonstrated harm to the child, to force such interaction against the express wishes of at least one parent.” The court reasoned that government intervention in the life of a parent, absent a showing of demonstrable harm to the child, violated that parent’s fundamental right to privacy.

The court began by reviewing the right to privacy in child rearing that is offered by the United States Constitution. One of the liberties afforded by the Due Process Clause of the Fourteenth Amendment is the right to personal privacy. The court stated that it is “‘clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.’” Furthermore, there is a specific liberty afforded to parents concerning the “‘care, custody, and management’” of their children.

After discussing the right to privacy granted by the United States Constitution, the court explained the extra protection that Florida provides. The right to privacy in Florida is not only protected by the United States

70. FLA. STAT. § 752.01(1)(a) (1999). Section 752.01(1)(a) of the Florida Statutes states that a court shall award reasonable visitation rights to grandparents when it is in the child’s best interests if one or both of the child’s parents are deceased. Id.
71. Von Eiff, 720 So. 2d at 512.
72. Id. at 510-11.
73. Id. at 511.
74. Id. at 514.
75. Id. at 513.
76. U.S. CONST. amend. XIV.
79. Id. (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).
80. Id. at 514.
Article 1, section 23 of the Florida Constitution states that "[e]very person has the right to be let alone and free from government intrusion into his private life." The court concluded that Florida’s explicit right to privacy affords more protection than the implied federal right to privacy in that it “is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart.”

The court reasoned that because the right to privacy had been classified as a fundamental right in Florida, the highest standard of scrutiny must be applied when determining whether the government may infringe upon these rights. The state has the burden of justifying the intrusion of privacy by showing that there is a compelling state interest. The state must prove that the challenged regulation serves the compelling state interest and that the interest is served by using the least restrictive means.

The court stressed that the compelling state interest required to be proven by the government before interference with a natural parent’s decision-making was the existence of a “significant harm to the child threatened by or resulting from those decisions.” The court held that the best interests of the child analysis can only be explored after the state established significant harm. Therefore, the court concluded that section 752.01(1)(a) was unconstitutional because it granted visitation to grandparents only upon a showing of the best interests of the child instead of first requiring proof that the child had suffered demonstrable harm.

Furthermore, the court provided examples of compelling state interests. These interests included protecting children from the threat of abuse, neglect and death, preventing sexual exploitation of children in the home, and ensuring reasonable medical treatment for children. Therefore, there are many different circumstances that can cause demonstrable harm to a child—it does not automatically result from the death of one parent.

---

81. U.S. CONST. amend. XIV.
82. Von Eiff, 720 So. 2d at 513; FLA. CONST. art. I, § 23.
83. Von Eiff, 720 So. 2d at 514.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id. at 515.
91. Id. (referring to Padgett v. Department of Health & Rehabilitative Servs., 577 So. 2d 565, 570 (Fla. 1991)).
92. Id. (following Schmitt v. State, 590 So. 2d 404, 415–16 (Fla. 1991)).
93. Von Eiff, 720 So. 2d at 515 (relying on M.N. v. Southern Baptist Hosp., 648 So. 2d 769, 770 (Fla. 1st Dist. Ct. App. 1994)).
94. Id.
In quashing the decision of the lower court, the Supreme Court of Florida agreed with and followed the dissenting opinion of Judge Green. Judge Green, arguing for the interests of the natural parent, noted that "it appears to be an unassailable proposition that otherwise fit parents . . . who have neither abused, neglected, or abandoned their child, have a reasonable expectation that the state will not interfere with their decision to exclude or limit the grandparents' visitation with their child." Therefore, because the grandparents had not proven that their grandchildren suffered demonstrable harm under the care and supervision of Von Eiff and his new wife, they failed to meet the standing requirement to argue their case.

Finally, the court in Von Eiff noted that despite the constitutional hurdle, using a best interests analysis instead of mandating proof of demonstrable harm to the child "permits the State to substitute its own views regarding how a child should be raised for those of the parent." The court reasoned that doing this would be "stripping [the parents] of their right to control in parenting decisions." 

2. After Von Eiff

Von Eiff strengthened the rights of the natural parent. By requiring a showing of demonstrable harm to the child before entertaining a change of custody from a natural parent to a nonparent, the court solidified the biological mother's right to care for and make decisions for her child without government intervention. Interpreting the right to privacy in Florida to include the right to privacy in child rearing grants natural parents the autonomy deeply rooted in our belief system as free individuals. However, requiring a showing of demonstrable harm adds an additional hurdle for a lesbian mother to overcome in her battle to maintain a relationship with her child.

In Florida, the statutory ban on the creation of the nontraditional family has forced the nonbiological mother in a lesbian partnership to use the psychological parent status in order to gain standing at a custody hearing. Proving the existence of her relationship was, until Von Eiff, her only avenue. Although it had not been persuasive when applied to the lesbian

95. Id.
96. Von Eiff, 699 So. 2d 772, 781 (Green, J., dissenting).
97. Von Eiff, 720 So. 2d at 516.
98. Id.
99. Id.
100. See id.
101. Von Eiff, 699 So. 2d at 780–85 (Green, J., dissenting). Judge Green noted that only four other state constitutions contain an explicit right to privacy. Id. These include Alaska, California, Hawaii, and Montana. Id.
psychological parent relationship, a small body of precedent was available to work with. Due to the Von Eiff decision, those opportunities for relief are no longer available to her.

Although the interpretation of the right to privacy in Von Eiff leaves grandparents and stepparents with the same hurdles as the lesbian parent, it does not have the same crushing effect on heterosexual psychological parents. If the natural parent consents, a heterosexual can adopt the child of his or her spouse, which then places the new parent on equal footing with the biological parent.

Furthermore, the other parent in heterosexual unions is introduced as a third party. Children in that situation either know or they are told about their original parent. Often times, children maintain the relationships with their natural parents while creating and fostering new relationships with their psychological parents. Therefore, the effect of Von Eiff is different on a lesbian who has been treated and considered an equal parent by her partner and her child.

IV. Kazmierazak v. Query

A. Background

Penny Kazmierazak and Pamela Query were involved in a long term, lesbian relationship. During the course of the relationship, the couple decided to have a child through donor insemination. They chose Query as the parent to carry the child. Query delivered the couple’s daughter on December 24, 1993. On their baby’s medical records, Kazmierazak was

103. See, e.g., Wills v. Wills, 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981).

104. The decision took away a lesbian, nonbiological parent’s ability to claim status as a psychological parent because the existence of that relationship will not be acknowledged as a compelling state interest. Von Eiff, 720 So. 2d at 516. The Von Eiff interpretation of the right to privacy changed the standing requirement in that it solidified the standard that demonstrable harm to the child must be proven as the interest justifying state intervention. Id.

105. See id.

106. Id. The court noted that in adopting the child, Von Eiff’s new wife had created the same relationship between herself and the child as would have been had the child been her biological daughter. Id.


108. Id.

109. Id.

110. Id.
listed as a “parent” and “responsible party.”" She was also listed on the baby’s family tree as “mom.” Despite the family’s belief that Kazmierazak was a mother of their baby, she had no biological ties with the child. Because Florida law bars homosexuals from marrying or adopting, the couple could not legally make Kazmierazak a parent of their child.

On April 7, 1998, soon after the couple ended their relationship, Kazmierazak filed a Petition for Custody of their child. Query responded by filing a motion to dismiss, arguing that because Kazmierazak was not a legal parent of their child, she did not have standing to obtain custody or visitation rights. The trial court agreed that Kazmierazak lacked standing and granted the motion to dismiss. Kazmierazak then appealed to the Fourth District Court of Appeal. This appeal was filed prior to the Supreme Court of Florida’s decision in *Von Eiff*.

**B. Kazmierazak’s Argument**

Kazmierazak argued that determining a grant of custody turns on the best interests of the child. She claimed that denying her the opportunity to fight for her child based on a statutorily imposed lack of standing “disallows any and all proof of the appellant’s relationship to her little girl, treating a loving parent as a total stranger and threatening a five-year-old child with the permanent loss of her primary caretaker.”

Kazmierazak’s first contention was that Florida law allowed a psychological parent to show that the best interests of the child are served through continuing contact between the child and the psychological parent. She relied on *Wills v. Wills*, wherein a stepmother, given standing as a psychological parent, was able to gain visitation rights over her nonbiological, nonadoptive daughter based on the psychological and

112. Id. at 78.
113. Initial Brief of Appellant at 2, Kazmierazak (No. 98-2854).
115. Record at 1–3, Kazmierazak (No. 98-2854).
116. Id. at 10–12.
117. Id. at 24–25.
118. Id. at 26–28.
119. Id. The notice of appeal was filed on August 11, 1998. *Von Eiff* was not decided until November 12, 1998. *Von Eiff* v. Azicri, 720 So. 2d 510, 510 (Fla. 1999).
120. Initial Brief of Appellant at 32, Kazmierazak (No. 98-2854).
121. Id. at 6.
122. Id. at 7.
123. 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981).
emotional ties that had developed during the relationship. In that case, Kazmierazak noted, visitation was authorized based on the best interests of the child:

It seems to us that if an adequate record can be made demonstrating that it is in the child's best interest that such visitation be authorized the trial judge's discretion in the matter is sufficiently broad to allow him to authorize visitation with a non-parent. Certainly this type of visitation, contrary to the wishes of the custodial parent, should be awarded with great circumspection. But if the welfare of the child is promoted by such visitation and there is no other substantial interest adversely affected the trial judge should be allowed that latitude.

Kazmierazak continued by arguing that denying her a hearing to determine whether she possessed a relationship with her daughter worthy of granting custody was a violation of her privacy rights as a parent.

Second, Kazmierazak argued that there was a large body of case precedent that granted standing to persons similarly situated who had shown themselves to be in a parental relationship with a child. She added that this precedent supported her claim to be given the opportunity to establish the same type of relationship.

Kazmierazak's third argument focused on the court's protection of children of lesbian parents. She argued that across the country cases involving lesbian parents had been decided based on the best interests of the child. Kazmierazak reasoned that, similar to these cases, the Wills

124. Id.; Initial Brief of Appellant at 8, Kazmierazak (No. 98-2854).
125. Initial Brief of Appellant at 8, Kazmierazak (No. 98-2854) (quoting Wills v. Wills, 399 So. 2d 1130, 1131 (Fla. 4th Dist. Ct. App. 1981)).
126. Id. at 11.
128. Initial Brief of Appellant at 13, Kazmierazak (No. 98-2854).
129. Id. at 18-26.
130. Id. J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. 1996), Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995), and A.C. v. C.B., 829 P.2d 660 (N.M. App. 1992), are three cases wherein the petitioners were lesbian nonbiological mothers who were granted the opportunity to fight for custody and visitation rights of their children.
decision required the court to hear her case and determine what would best promote her child's welfare. 131

The fourth argument focused on the family that she and her partner had worked to create and maintain. 132 Kazmierazak argued that the couple intended to make a family with her being the parent of their child. 133 The medical records and family planning records showed that the couple intended to create a family—not that Query had a daughter for whom Kazmierazak would be a caretaker. 134 She argued that these arrangements were sufficient to establish standing as a psychological parent. 135

Kazmierazak's final argument was one made on behalf of her daughter. 136 She supported her argument with research showing that children able to maintain relationships with both parents were more content. 137 She also stated that Florida law supported the proposition that children and noncustodial parents should partake in "frequent and continuing contact." 138

When she petitioned for custody and again in her brief, Kazmierazak mentioned that Query may not have been a fit person to care for their daughter alone. 139 However, she offered no proof to validate this contention. Kazmierazak concluded that she deserved an opportunity to establish the bond between her and her daughter. 140 Moreover, she claimed that precedent turned on the best interests of the child and not on the family into which she was born. 141

C. Query's Argument

Query considered Kazmierazak a stranger to the relationship between Query and her biological daughter. 142 Query first argued that in a custody suit between a parent and a third party, the natural parent's rights must be

131. Initial Brief of Appellant at 25, Kazmierazak (No. 98-2854).
132. Id. at 26–30.
133. Id. at 27–28.
134. Id. at 27.
135. Id. at 26–30.
137. Id. at 30. Kazmierazak explained that whether children are raised in straight or gay households, they have the same needs for stability and security. Id. at 31. Denying children of gay parents relegates them to second-class status. Id.
138. Id. at 30.
139. Record at 2, Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999) (No. 98-2854); Initial Brief of Appellant at 3, Kazmierazak (No. 98-2854).
140. Initial Brief of Appellant at 32, Kazmierazak (No. 98-2854).
141. Id.
142. Initial Brief of Appellee at 4, 7, Kazmierazak (No. 98-2854).
She claimed that although the best interests standard is applied when the dispute arises between two natural parents, this tougher standard applied to her case as she was a natural parent in a custody battle with a third party. Secondly, Query argued that she should not have to defend her rights to her child against a stranger without a showing of unfitness or abandonment. She stated that because a third party does not have legal or financial obligations toward the child of another, a third party does not have any rights to the child either. Furthermore, she argued that natural parents should not have to fear that their children could be taken away from them by one who is not related by blood or marriage.

Query's third argument focused on the visitation rights of a nonparent. She claimed that visitation rights of a nonparent were established by statute. She therefore contended that because Kazmierazak was not recognized by statute as having any type of relationship with her daughter, Kazmierazak was barred from claiming custody rights.

Finally, Query argued that no cause of action arose in that a stranger sought custody of a child without a compelling state interest defined by statute. Because Kazmierazak was unable to involve state action through a dependency proceeding, an adoption petition, or a dissolution of marriage, Query argued that Kazmierazak was unable to state a cause of action for taking her child.

143. Id. at 4.
144. Id.
145. Id. at 4–6.
146. Id.
147. Initial Brief of Appellee at 4–6, Kazmierazak (No. 98-2854).
148. Id. at 6–7.
149. Id. "Visitation rights are, with regard to a nonparent, statutory, and the court has no inherent authority to award visitation." Meeks v. Garner, 598 So. 2d 261, 262 (Fla. 1st Dist. Ct. App. 1992). See also Music v. Rachford, 654 So. 2d 1234, 1235 (Fla. 1st Dist. Ct. App. 1995). In Music, the court refused to grant standing to a lesbian nonbiological mother who had not argued her case under any statutory scheme. Id.
150. Initial Brief of Appellee at 4–6, Kazmierazak (No. 98-2854).
151. Id. at 7–8. The government has the power to intervene in a family only when there is a showing that the welfare of the child is at stake. Beagle v. Beagle, 678 So. 2d 1271, 1275–76 (Fla. 1996).
152. Initial Brief of Appellee at 7–8, Kazmierazak (No. 98-2854). The nonparent seeking to take a child out of a detrimental environment has three statutory options. Id. The nonparent can file a petition for dependency. FLA. STAT. § 39.404(1) (1999). A grandparent may file for visitation during a divorce. Id. § 61.13(2)(b)2.c. The nonparent may petition for adoption proving that the biological parent has abandoned the child. Id. § 63.072(1).
Query concluded that Kazmierazak had not even shown that it was in the best interests of their child to give her custody or visitation. As far as claiming rights to their child, Query argued that Kazmierazak was not on equal footing with her, but rather was at the level of a stepparent, grandparent, or sibling. Because custody or visitation is not granted to persons identified by those categories absent a compelling state interest, Query reasoned that custody or visitation should not have been granted to Kazmierazak absent that same showing.

D. The Decision

Three months after the notice of appeal was received, the Supreme Court of Florida decided Von Eiff. This decision, which defined Florida’s constitutional right to privacy in terms of child rearing, shattered any chance Kazmierazak had of claiming rights to her child as a psychological parent. Because she identified herself as a psychological parent, the issue before the Fourth District Court of Appeal was whether a psychological parent has the same rights in terms of child rearing as a biological parent. By definition, a psychological parent can never be on equal footing with a biological parent. The court recognized this fact and noted that Von Eiff changed the legally recognized status of psychological parents.

First, the court noted that common law did not recognize a psychological parent. The court also noted that Kazmierazak had not petitioned for custody under a statutory scheme. Second, the court stated, that concerning a custody battle between a nonadoptive, nonbiological parent and a natural, biological parent, the law recognizes the biological parent’s constitutionally protected right to privacy. Applying Von Eiff, the court equated Kazmierazak’s rights to those of a grandparent or a stepparent, instead of equating her rights to those of a natural parent. It is this distinction and categorization that required the court to decide the case based

153. Initial Brief of Appellee at 7-8, Kazmierazak, (No. 98-2845).
154. Id.
155. Id.
158. Nitti, supra note 19, at 1003.
159. Kazmierazak, 736 So. 2d at 110.
160. Id. at 107.
161. Id.
162. Id.
163. See id. at 110. The court stated that “in light of Von Eiff, [it could not] construe these cases as holding a psychological parent is entitled to parental status equivalent to the biological parent.” Kazmierazak, 736 So. 2d at 110.
on whether Query’s decisions would cause demonstrable harm to their child. Because Query had a right to privacy in making parental decisions, Kazmierazak first would have to prove that living with the biological mother would cause her daughter demonstrable harm. Only after Kazmierazak proved this would she have met the standing requirement permitting her to request custody and prove that placing their daughter in her custody would be in the child’s best interests. Specifically, it would have to be Kazmierazak’s burden in proving that Query was an unfit mother that granted her standing. Due to the Von Eff decision, proof of her role as a psychological parent would no longer suffice.

However, as the court noted, Kazmierazak did not argue that leaving their daughter in the custody of Query would cause her to suffer demonstrable harm. She only argued that it was in the child’s best interests to keep a connection with her psychological mother. Because the child’s best interests falls short of the compelling interest required before the state can invade the privacy of a biological parent, the court was compelled to rule in favor of Query.

The court examined the cases Kazmierazak relied upon to support her position. The court pointed out that each case was decided before Von Eff, and, therefore, did not address the issue of standing. The court also noted that the cases Kazmierazak relied upon were decided without meeting the threshold requirement of demonstrable harm to the child. Because Von Eff changed the standard, Kazmierazak was left without authority to contradict Query’s right to privacy. Therefore, she had not met the more arduous standing requirement to argue for her rights as a mother.

164. See id. at 109.
165. See id.
166. See id.
167. Id. at 110.
168. Kazmierazak, 736 So. 2d at 107. The court felt that this argument was not pushed to the forefront of the case to make an argument of demonstrable harm. See id. at 109. Harm to the child was mentioned by Kazmierazak in a footnote of her brief. Id. However, it was not incorporated as a main argument for relief. Id.
169. Id. at 107.
170. Kazmierazak, 736 So. 2d at 110.
171. Id. at 108–09.
172. Id.
173. Id.
V. THE MISIDENTIFICATION OF LESBIAN OTHER MOTHERS

The error in this case is not in the decision, but rather in the labeling of Kazmierazak as a third party, as a stranger, and even as psychological parent. Grandparents, stepparents, foster parents, and anybody who assumes the role of a parent can be classified as a psychological parent. They are all third parties to the nuclear family that at some point in time existed. In situations like these, the biological or adoptive parents should be given that extra layer of protection from the state constitution to guard their families from outside individuals.

Contrary to this, in a lesbian relationship that utilizes donor insemination, there is no third party. The other mother is not thought of as a third party until the couple separates. The intention of the two women from the first moment of family planning is to have two parents. The fact that they are two women is only a legal problem when the nonbiological mother wants to continue the relationship with her child.175

The cases Kazmierazak relied upon were distinguishable from her case. However, the difference was not that the cases were decided before the right to privacy in parental decisionmaking was clarified. The distinguishing factor was that Kazmierazak’s situation was one where no other remedy was available.176

In Wills v. Wills,177 the court awarded visitation rights to the psychological mother of a twelve-year-old girl.178 The father and mother adopted the child when she was only three years old just prior to the mother’s death.179 When the girl was four years old, her father remarried, and the new couple raised the child together for seven years until the time they were divorced.180 The court held that the psychological bond that had developed between the psychological mother and the daughter was strong

175. Because of the right to privacy afforded by both the United States Constitution and the Florida Constitution, the state cannot interfere with the right of a woman to procreate. U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I., § 23; Carey v. Population Servs. Int’l, 431 U.S. 678, 684–85 (1977); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942). The state then uses the same constitutional right to privacy to deny the other mother in that lesbian relationship from maintaining the relationship that the state allowed her to create. See Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999).

176. Because she is statutorily precluded from creating the legal relationship, the lesbian other mother is treated as a third party.

178. Id. at 1131.
179. Id.
180. Id.
enough to grant visitation even though there was no legally recognized relationship.\textsuperscript{181}

In Simmons v. Pinkey,\textsuperscript{182} the child was a fourteen-year-old girl who had been living with her foster mother for thirteen years.\textsuperscript{183} When she was less than two years old, her father killed her biological mother and was sent to prison.\textsuperscript{184} The court denied the father custody of his daughter, and instead ruled that she should remain in the custody of her foster mother.\textsuperscript{185}

In Heffernan v. Goldstein,\textsuperscript{186} the court granted custody of the two children to the stepmother against the natural mother after the death of the children’s father.\textsuperscript{187} The children had been living with their father since their mother and father divorced eleven years earlier.\textsuperscript{188} The court did this despite the fact that the father and stepmother had only been married six months when the father died.\textsuperscript{189} The court weighed heavily the children’s request to remain with their stepmother.\textsuperscript{190}

Kazmierazak’s argument cannot be supported by the authority she cited. First, the nonbiological parents in the cited cases were not barred from creating a legal relationship with their children. Because they were heterosexual, they were able to marry the biological parent or adopt the children.\textsuperscript{191} Although adoption and marriage are both options that require the consent of the natural parents, these actions were legal options for the people involved in the cited cases.\textsuperscript{192}

Second, in Wills and Heffernan, the nonparent had created the in loco parentis relationship with the child through marriage.\textsuperscript{193} Statutory law permitting couples of the opposite sex to marry formed this relationship. In addition, it and provided a legal opportunity for these parents to be afforded rights to their stepchildren.\textsuperscript{194}

\begin{footnotes}
\item 181. \textit{Id.}
\item 182. 587 So. 2d 522 (Fla. 4th Dist. Ct. App. 1991).
\item 183. \textit{Id.} at 523.
\item 184. \textit{Id.}
\item 185. \textit{Id.} at 524–25.
\item 186. 256 So. 2d 522 (Fla. 4th Dist. Ct. App. 1971).
\item 187. \textit{Id.} at 523.
\item 188. \textit{Id.}
\item 189. \textit{Id.}
\item 190. \textit{Id.}
\item 191. FLA. STAT. §§ 63.042(3), 741.212 (1999).
\item 192. See FLA. STAT. §§ 63.042(3), 741.212.
\item 193. Wills v. Wills, 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981); Heffernan v. Goldman, 256 So. 2d 522 (Fla. 4th Dist. Ct. App. 1971).
\item 194. See FLA. STAT. § 741.212 (1999).
\end{footnotes}
Third, and most importantly, the psychological parents in these cases had taken the place, or filled in, for the natural parent. At no time did any of them claim to be the real parent. Each knew that they were a replacement for the already existing and absent parent. These de facto parents represented the true definition of a psychological parent. They had fulfilled the child's psychological and physical needs for a parent.

Distinguishing these cases from the present situation, it is clear that Kazmierazak is not a psychological parent. She did not take the place of an already existing parent. Her daughter knew only two parents from birth. Kazmierazak planned for the child, coached her partner through lamaze, watched the birth of her daughter, and cared for her for seven years. It was not as if she began dating a woman who already had a daughter or made the choice to care for a child that was not hers. Kazmierazak was denied her daughter because the couple was biologically unable to create a child together. The previous choice to have Query as the birth mother now keeps her from continuing the parent-child relationship. Furthermore, Kazmierazak and Query's daughter did not have psychological or physical needs for a parent, because she had two parents present in the home.

Currently in Florida, a legal title does not exist that defines Kazmierazak's relationship to her daughter. Although she is her mother, she cannot be recognized as such because she and her daughter do not share biological ties. Although the only title she can give herself is that of psychological parent, this grossly underclassifies the relationship and is no longer recognized as a threshold determination of standing.

This narrow fact pattern, where two women plan for and raise a family together, must be examined differently than the biological versus psychological parent battles. It must also be examined differently than from a situation where both of the parents have biological or adoptive ties to the child. Essentially, in lesbian planned parenting situations such as that which existed between Kazmierazak and Query, there should be a threshold standing requirement. This requirement should fall between the compelling interest of a person's right to privacy and the best interests of the child analysis.

The biological parent's right to privacy must, in a custody battle with a psychological parent, continue to be a pretext to determining with whom a child belongs. Concerning two biological or adoptive parents, the best interests of the child standard is a favorable way to determine custody disputes. However, between a lesbian couple, the biological mother's right to privacy should not be a barricade to the other mother's chance to continue...

195. Simmons v. Pinkey, 587 So. 2d 522 (Fla. 4th Dist. Ct. App. 1991); Wills, 399 So. 2d at 1131; Heffernan, 256 So. 2d at 523.
196. See Nitti, supra note 19, at 1003.
197. See id.
in parenting her child. The other mother in a lesbian custody battle should be required to prove her relationship to her child before progressing to the best interests of the child analysis. However, legal decisions based on a mother’s sexual preference preempt her from proving that relationship.\textsuperscript{198}

Because the Florida Legislature bars a lesbian mother from becoming a legal part of her family, the courts should provide her alternatives.

VI. THE NEED FOR CHANGE

At least one jurisdiction has permitted parents to show that continuing a relationship would be in the child’s best interests after a threshold showing of a parent-like relationship.\textsuperscript{199} Holtzman v. Knott,\textsuperscript{200} is a case which stands on all fours with the Kazmierazak and Query’s situation.\textsuperscript{201} In that case, the lesbian couple chose to have a child by donor insemination, raised their son together, and separated when he was five years old.\textsuperscript{202} The trial court reluctantly decided against granting Holtzman custody or visitation rights.\textsuperscript{203} The court reasoned:

\begin{quote}
\[ T \text{his [is] a case where a family member ought to have the right to visit and keep an eye on the welfare of a minor child with whom she has developed a parent-like relationship. Unfortunately because the law does not recognize the alternative type of relationship which existed in this case, this court can not offer the relief Holtzman seeks.}\]
\end{quote}

The Supreme Court of Wisconsin analyzed the case beyond the statutory hurdles.\textsuperscript{205} It developed a test enabling a nonparent to prove first that a parent-like relationship with the child exists and then that a “significant triggering event justifies state intervention in the child’s relationship with a biological or adoptive parent.”\textsuperscript{206} The court held that the four elements required to prove a parent-like relationship were:

\begin{itemize}
\item \textsuperscript{198} See Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999); Music v. Rachford, 654 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1995).
\item \textsuperscript{199} Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995).
\item \textsuperscript{200} Id. at 419.
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id. at 421–22.
\item \textsuperscript{203} Id. at 422–23.
\item \textsuperscript{204} Holtzman, 533 N.W.2d at 422–23.
\item \textsuperscript{205} Id. at 424–25.
\item \textsuperscript{206} Id. at 421.
\end{itemize}
(1) that the biological or adoptive parent consented to, and fostered, the [nonparent’s] formation and establishment of a parent-like relationship with the child;

(2) that the [nonparent] and the child lived together in the same household;

(3) that the [nonparent] assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and

(4) that the [nonparent] has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

The court further held that the two elements required to prove a significant triggering event which would justify the state interfering in the relationship between the child and the natural parent were that the biological or adoptive parent “has interfered substantially with the [nonparent’s] parent-like relationship with the child and that the [nonparent] sought court ordered visitations within a reasonable time” after the parent’s interference. The court reasoned that after this showing, the nonparent may then proceed in persuading the court as to the best interests of the child.

The test created in Holtzman has since been adopted by New Jersey. In March 1999, the Superior Court of New Jersey, in V.C. v. M.J.B., used the test to determine that the lesbian nonbiological mother was entitled to visitation rights. Because Florida law treats all nonbiological and nonadoptive parents as “third parties” who have to show demonstrable harm to the child in order to cut through the protective right to privacy layer surrounding the natural parent, this test, in its original form, is inapplicable in Florida. However, with some alteration, but without chipping away at the biological mother’s right to privacy, this test can be formatted to address those in the same position as Kazmierazak and Query.

The altered test would have to require proof of a committed relationship between two homosexuals who planned a family through donor insemination. There would need to be proof that prior to the baby’s birth, the couple prepared together for his or her arrival. Most importantly, the

207. Id.
208. Id.
209. Holtzman, 533 N.W.2d at 421.
211. Id. at 13.
212. Id.
A nonbiological parent would have to prove that she is the only other person the child considers a parent beside the biological mother. The revised test for Florida could require that, in order for a lesbian nonbiological mother to be awarded visitation of the biological child of her former partner, she must first prove: (1) that she and the biological mother planned and prepared for the birth of the child together; (2) that the biological mother took specific steps to recognize her as the other parent of their child, consenting to and fostering her formation and establishment of a parental relationship with the child; (3) that she lived with and was a member of the household with the biological mother and the child, assuming the characterization of a family; (4) that she assumed the parental obligations by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation; (5) that she maintained her parental role from the prebirth stage, building a bonded, dependant relationship with her child, and attempted to continue in that role after the couple separated; and (6) that the child has always known the biological and nonbiological mother to be her only two parents.

Applying this test as a threshold standing requirement would not conflict with the existing statutory law forbidding adoption and marriage by homosexuals. Neither would it open the door to all persons, not biologically related, seeking custody or visitation rights. The bond between a biological parent and a child should be afforded special protection. The right to privacy in child rearing is a protection for the natural parent that should not be violated absent an interest of the highest

---

**214.** The act of planning for the child separates the lesbian other mother from all other situations where a person takes the place of another, already existing parent.

**215.** This is similar to the first element of the Holtzman test. See Holtzman, 533 N.W.2d at 421.

**216.** See the second element of the Holtzman test. Id. at 421. This is another way of distinguishing the lesbian other mother from those that are not part of the nuclear family who try to gain rights to the child, for example, a grandparent. See id.

**217.** See id. See the third element of the Holtzman test. Id. at 421.

**218.** See Holtzman, 533 N.W.2d at 421. This is more stringent than the fourth element of the Holtzman test. Id.

**219.** This final element is added to reinforce the importance of the plan by the two women to create a family from the beginning with two parents, both of them women. Id.

**220.** This test would not challenge sections 63.042(3) and 741.212 of the Florida Statutes. Instead, the test challenges the court system to look beyond legislation to find the best result instead of being irrevocably bound by it.

**221.** The fear that this test would create a slippery slope, leading to a deterioration of the right to privacy, is without merit. This test is specially designed for the limited cases of lesbian nonbiological mothers who have been left without any legal options because of the Von Eiff decision.
degree. This standing requirement should continue to apply to psychological parents. However, similar to a married couple who plans an adoption or a married couple who partakes in donor insemination, the decision by a lesbian couple to raise the child is a two-part team effort from the first time the topic is discussed. The nonbiological parent in this situation creates a stronger relationship than the title "psychological parent" affords. This established relationship should not only be granted the opportunity to continue after a showing of unfitness of, or abandonment by, the natural parent.

VII. CONCLUSION

It is easy to conclude that lesbian mothers who fight for custody of their children are a minority, and, therefore, will never make a deep enough impact in family custody battle for which they would deserve a special standing requirement. However, as the nontraditional family continues to grow, the law will be forced to grow with it. The result of this special requirement affects the child of this broken partnership more than it does the mothers. Children in nontraditional families are as entitled to remain in contact with their parents after a separation as are children whose mother and father get divorced. The law functions to protect children from being pawns in their parents' games of hate. The lack of legal recognition of the lesbian nonbiological parent in Florida means that the battle is over before she enters the courtroom.

Although this battle may be between the two parents, or even between the nonbiological parent and the law, the effect is most strongly felt by the child. Unfortunately, the only thing the child understands is that her mother has been taken away.

Stacy A. Warman