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

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

INTRODUCTION: THE FLORIDA EXAMPLE

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

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

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

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

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

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

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

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

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

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

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

6. FLA. STAT. § 63.042(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

This assumption that being gay or lesbian is immoral has a long history in the State of Florida. It is appropriate that this seminar take place in Florida, and not only because of the fact that Anita Bryant launched her initial campaign against anti-discrimination laws meant to protect lesbians and gay men. Florida has long been at the center of legal controversies concerning the rights of lesbians and gays, as recounted in earlier articles published in this law review by the late Allan Terl, an attorney who spent most of his legal career advocating for the rights of LGBT persons and the civil liberties of everyone¹⁵ and one of the co-authors of this introduction.¹⁶

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

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

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

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

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

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

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

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

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

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

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

20. *Id.*

21. *Id.* at 796-797.

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

23. *Id.* at 801-803.

24. *Id.* at 802.

25. *Id.*

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

27. *Id.* at 8.

28. *Id.*

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

30. *Id.* at 1316.

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

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

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

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

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

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

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

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

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

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

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

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

ously repealed anti-discrimination ordinances through local ballot initiatives.⁴⁰

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

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

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

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

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

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

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

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

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

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