

The Dade County Human Rights Ordinance of 1977: Testimony Revisited in Commemoration of Its Twenty-Fifth Anniversary

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INTRODUCTION AND BACKGROUND

The 1969 Stonewall uprising in New York City marked the beginning of the gay rights movement. The 1960s civil rights movement enlisted a new generation of lawyers in the fight for racial equality. The victories in that struggle, culminating in the Civil Rights Act of 1964, inspired young lawyers to champion the rights of other groups in our society that had been subjected to legal discrimination, namely, women, prisoners, and persons suffering from mental illness and mental retardation. It was not until Stonewall, however, that a movement to secure the rights of gays and lesbians was born.

This emerging gay rights movement focused its attention on local anti-discrimination ordinances, already on the books in many cities and counties, that prohibited discrimination in housing, employment, and public accommodations. The goal was to amend these ordinances to include gays and lesbians among the classes protected against discrimination. I worked on such a campaign in New York City in 1973, but the effort failed. I thereafter moved to Florida to accept a faculty position with the University of Miami School of Law. In late 1976, I was elected by the American Civil Liberties Union of Florida to be its General Counsel.

The Gay Coalition in Miami had entered the political arena in the general election in November of that year, seeking endorsements from local politicians on gay rights issues in exchange for the Coalition's electoral support. The time seemed ripe to push for gay rights' legislation. The ACLU board meeting, during which I was elected General Counsel, occurred in Orlando and following the meeting I traveled back to Miami with other board members from the Miami area. We discussed what the ACLU could do on the gay rights frontier, and board member Robert Basker and I decided to launch an effort to amend

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the Dade County Human Rights Ordinance in order to prohibit discrimination based on sexual orientation.¹

Dade County Commissioner Ruth Shack agreed to sponsor the legislation, and I was given the task of figuring out how to draft it. The problem I faced, however, was a state penal law prohibiting “unnatural and lascivious” sexual conduct.² While this criminal provision was not limited to same-sex conduct, it certainly had been primarily invoked against homosexuals.

Could a local ordinance ban discrimination against a group whose members, by definition, violate state law when they engage in sexual conduct? This was the dilemma that I faced in deciding how to define the class of persons that the proposed amendment to the Human Rights Ordinance would cover. I decided to use the phrase “sexual or affectional preference.” My thinking was that whatever the penal law phrase “unnatural and lascivious” conduct might include, it could not include having a preference. The penal law could punish conduct, but not preferences. Preferences were protected by the First Amendment, which distinguishes between beliefs and actions; preferences, by their nature, are absolutely protected, whereas acts in furtherance of them can be regulated and perhaps even prohibited by the state.³ State law, therefore, could not punish having preferences without violating the First Amendment. Indeed, punishing someone because of his or her sexual or affectional preference would also seem to violate the Eighth Amendment’s ban on cruel and unusual punishment, which had been read to prohibit the criminalization of a status, as opposed to conduct.⁴

The Florida statute, therefore, could not be read to include merely having a sexual preference, at least not without violating the Constitution. Prohibiting discrimination based on sexual or affectional preference thus would not violate state law. While some people in the protected category might violate the state penal law provision, it could not be said with certainty that all gay and lesbian persons would commit violation. Some people with sexual preferences, either for their own or the opposite sex, might choose to be celibate, of course, such as catholic priests and nuns, for example. Incorporating this concept into the proposal would create no inconsistency between a penal law provision

1. See Dade County, Fla., Human Rights Ordinance 77-4 (Jan. 18, 1977).

2. 1971 Fla. Laws ch. 71-136, § 778, *amended by* 1993 Fla. Laws ch. 93-4, § 2 (Mar. 9, 1993) (current version at FLA. STAT. ANN. § 800.02 (West 2001)) (categorizing such acts as constituting a misdemeanor offense of the second degree).

3. See *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

4. See *Robinson v. California*, 370 U.S. 660 (1962) (criminalizing drug addiction held to violate Eighth Amendment).

prohibiting certain conduct and a county ordinance banning discrimination against a class of people, some of whom engage in such conduct.

When we submitted the proposed legislation, Stuart Simon, the Dade County Attorney at the time, told me that he was uncertain as to whether he could authorize the placing of the proposed ordinance on the agenda at the next county commission meeting because of its seeming inconsistency with state law. I was able to convince him that state law did not, and indeed could not, constitutionally punish or otherwise criminalize the having of sexual or affectional preferences, and he then agreed to place the measure on the commission's agenda. The Commission considered the proposed amendment on January 18, 1977, when a public hearing was held. Tensions ran high in the county commission chambers, and cheers and boos greeted each speaker from a noisy crowd waving placards.

I testified in favor of the ordinance, presenting the argument that it did not conflict with state law, and that the ordinance should be adopted in order to protect gays and lesbians from the discrimination to which they had been historically subjected. I also argued that if left unremedied, such discrimination would keep many gay individuals imprisoned in the closet, leading subterranean and secret lives that would inevitably diminish their mental health and emotional well-being, as well as that of the community more generally. This latter argument can be seen as an early example of what I have since called therapeutic jurisprudence, a form of interdisciplinary legal scholarship that examines the law's therapeutic and antitherapeutic consequences, and seeks to reshape the law and how it is applied in order to minimize its antitherapeutic effects and maximize its potential for psychological well-being.⁵

Following testimony for and against the proposed ordinance, the county commission voted to adopt the ordinance by a vote of five to three.⁶ Pandemonium broke loose in the commission chambers and

5. See generally DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1997); *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996); *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000). For a more recent application of a parallel therapeutic jurisprudence argument to attack the Armed Services' "Don't Ask, Don't Tell" policy, see Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, in *LAW IN A THERAPEUTIC KEY*, *supra*, at 343.

6. *Hearing on Ord. 77-4 Before the Dade County Comm'n* (Miami, Fla. 1977) (on file with *Law & Sexuality*).

spilled out into the community. The gay and lesbian community and those who valued civil rights were jubilant. The conservative and church groups who had opposed the ordinance, however, were appalled. They mounted an extensive campaign in opposition to the ordinance, first challenging its legality in court, and then gathering sufficient signatures to force a county referendum on the repeal of the ordinance. The legal challenge sought to invalidate the ordinance as inconsistent with the state penal law provision banning unnatural and lascivious sexual conduct. I joined County Attorney Simon in court to advance the arguments that I had earlier used to convince him that the ordinance would be valid. Dade County Circuit Judge Sam Silver rejected the challenge, upholding the validity of the ordinance,⁷ but the referendum effort ultimately succeeded in repealing the ordinance some five months after it was enacted.

The 1977 ordinance was a defining moment for Dade County and one of the most important civil rights struggles of our time. The ordinance and the ensuing referendum focused national and even international attention on Miami as it struggled with the extension of civil rights to a previously unprotected minority group, the gay and lesbian community. A national debate on this issue followed, which in the past twenty-five years has succeeded in creating a more tolerant and egalitarian society in our country. The Dade County Human Rights Ordinance of 1977 galvanized this debate and became the rallying cry for this and other human rights struggles, effectively awakening the consciousness of America for extending the principle of equal rights under the law to all of our people.

On January 18, 2002, Miami-Dade County officially celebrated the twenty-fifth anniversary of the Human Rights Ordinance with an award ceremony sponsored by Mayor Alex Pinellas and the county's Community Relations Board and a public forum discussing the ordinance and its historic importance. In preparing for that celebration, I rediscovered the testimony that I had given twenty-five years earlier in support of the ordinance, and I am grateful to the editors of *Law & Sexuality* for their decision to publish it.

7. Rubin v. Metro. Dade County Bd. of Comm'rs, No. 77-9668 (Fla. Dade County Ct. 1977) (unpublished decision), *appeal dismissed sub nom.* Rubin v. Bd. of Metro. Dade County Comm'rs, 348 So. 2d 970 (Fla. Dist. Ct. App. June 17, 1977) (unpublished table decision).

January 18, 1977

TESTIMONY OF PROFESSOR BRUCE J. WINICK,
UNIVERSITY OF MIAMI SCHOOL OF LAW,
BEFORE THE DADE COUNTY COMMISSION,
CONCERNING CIVIL RIGHTS WITHOUT DISCRIMINATION
AS TO SEXUAL OR AFFECTIONAL PREFERENCE

I am Bruce J. Winick, Professor of Law at the University of Miami, testifying today in support of the amendment to extend Dade County's anti-discrimination ordinance to include discrimination based on sexual or affectional preference. I testify both as a law professor especially concerned with protecting the constitutional rights of minority group members, and as a mental health professional—both as a teacher and scholar in the area of law and psychiatry and as the former Director of Court Mental Health Services for New York City and the General Counsel of the New York City Department of Mental Health and Mental Retardation Services—experiences which have given me a special knowledge of human behavior and a sensitivity to the human issues implicit in the ordinance you are considering today.

I would first like to clarify certain points relating to the legality of the proposed amendment. The Florida criminal statutes contain no special provision relating to homosexual acts; to the extent that they cover sexual acts at all, they apply equally to heterosexual as well as homosexual acts. The Florida statute generally invoked against homosexual acts, pertaining to "unnatural and lascivious acts," applies to the commission of such acts by both heterosexuals and homosexuals.⁸ This proscription clearly applies to such acts committed in public places; it is less clear whether it applies to acts done in private between consenting adults. Indeed if construed to cover acts between consenting adults performed in the privacy of the home, there would be substantial doubt as to its constitutionality.

In any event, there is no actual inconsistency between a penal law provision proscribing certain conduct and a county ordinance preventing discrimination against a class of people, some of whom

8. 1971 Fla. Laws ch. 71-136, § 778, *amended by* 1993 Fla. Laws ch. 93-4, § 2 (Mar. 9, 1993) (current version at FLA. STAT. ANN. § 800.02 (West 2001)) [Eds. Note].

may engage in that conduct. As the penal law provision applies equally to heterosexual and homosexual acts that can be characterized as “unnatural and lascivious,” it would be inappropriate for employers or landlords to inquire of their prospective employees or tenants who may be homosexual as to their private sexual habits, just as such an inquiry as to the private sexual habits of prospective heterosexual employees or tenants would be inappropriate.

The proposed amendment will ban housing and job discrimination on the basis of sexual preference. It will not legalize any conduct currently banned by the penal law. Nor will it require an employer to hire or a landlord to rent to an individual who is unacceptable for reasons other than sexual orientation, any more than legislation prohibiting discrimination against women or against racial and ethnic minorities has that effect. The ordinance would provide only that otherwise qualified applicants may not be denied housing, employment, or public accommodation on the basis of their sexual preference.

Much of the resistance to hiring or renting or selling property to homosexuals, and much of the resistance to legislation prohibiting discrimination against homosexuals, has stemmed from the belief that all homosexuals are alike and behave in a stereotyped fashion, and from the apprehension that if anti-discrimination legislation were enacted, employers would be forced to hire and landlords forced to rent to any homosexual applicant, whether or not such applicant would otherwise be a suitable employee or tenant.

These apprehensions are not well founded. It is clear from the work of Kinsey and the National Institute of Mental Health Task Force on Homosexuality, and from the growing number of openly homosexual men and women, that gay men and women span the entire range of personality types, employment positions, and other characteristics, just as heterosexuals do. The final report of the National Institute of Mental Health Task Force stated:

Homosexuality is not a unitary phenomenon, but rather represents a variety of phenomena which take in a wide spectrum of overt behaviors and psychological experiences. Homosexual individuals can be found in all walks of life, at all socioeconomic levels, among all cultural groups within American society, and in rural as

well as urban areas. Contrary to the frequently held notion that all homosexuals are alike, they are in fact very heterogeneous.⁹

During the last several years, an increasing number of religious denominations, social organizations, and professional associations have taken public stands in efforts to dispel irrational fear of and prejudice against homosexual people and to support this minority in its quest for civil and legal rights. Psychiatric opinion, which for many years had classified homosexuality as a personality *disorder*, has changed dramatically. In 1973, the American Psychiatric Association (APA) adopted the position that, by itself, homosexuality does not meet the criteria for being a psychiatric disorder.¹⁰ The APA simultaneously adopted the following resolution with respect to discrimination against homosexuals:

Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation, and licensing, and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other persons. Further, the American Psychiatric Association supports and urges the enactment of civil rights legislation at the local, state, and federal levels that would offer homosexual citizens the same protections now guaranteed to others on the basis of race, creed, color, etc. Further, the American Psychiatric Association supports and urges the repeal of all discriminatory

9. NAT'L INST. OF MENTAL HEALTH (DHEW Pub. No. (HSM) 72-9116, NAT'L INST. OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY: FINAL REPORT AND BACKGROUND PAPERS 2 (John M. Livingood ed., 1972) [Eds. Note].

10. See AM. PSYCHIATRIC ASS'N, Fact Sheet, *Homosexual and Bisexual Issues* (Feb. 2000) (detailing the history of the APA's positions on homosexuality); see also Alfred M. Freedman, *Recalling APA's Historic Step*, PSYCHIATRIC NEWS (Sept. 1, 2000), available at <http://www.psych.org/pnews/00-09-01/recalling.html> [Eds. Note].

legislation singling out homosexual acts by consenting adults in private.¹¹

Similar resolutions urging an end to discrimination against homosexuals have been adopted by the American Bar Association, the American Medical Association, the American Federation of Teachers (AFL-CIO), the American Personnel and Guidance Association, the American Psychological Association, the National Federation of Priests' Councils, the American Jewish Committee, the National Conference on Jewish Men and Women, the National Educational Association (NEA), and the National Organization for Women (NOW).

From my experience—in the mental health area, I am cognizant of the public cost of discrimination against an entire group of people. Members of a minority lacking the most basic civil rights live with a fundamental sense of insecurity and a damaged sense of self-esteem that may well contribute to mental illness, even if they never directly experience overt discrimination, most male and female homosexuals retain jobs and housing only by “passing” as heterosexuals. Society, in effect, asks them to live a lie, which can be flung in their faces at any time, for example, as a result of a pre-employment or promotion investigation. Many homosexuals limit their life goals, fearing that promotion or certain types of employment for which they are well-qualified will lead to exposure. Thus, their potential contributions to the social and economic fabric of the County are reduced. Others move ahead, taking extraordinary “security” precautions and living with a sense of anxiety about possible discovery that is debilitating to their personal, if not professional, lives.

The consequences of ignorance, prejudice, and discrimination are also felt by the heterosexual majority. There is a sense of threat from the existence of this little known and thus necessarily misunderstood minority group which, forced to live in a subterranean fashion, becomes the subject of fear-ridden fantasies on the parts of heterosexuals.

The simple fact is that, as many mental health professionals have observed, the overwhelming majority of homosexual men and women live responsible, productive lives, and are unnecessarily

11. AMERICAN PSYCHIATRIC ASSOCIATION, Position Statement, *1973 APA Position Statement on Homosexuality and Civil Rights* (Nov. 1973), available at http://www.psych.org/public_info/homose~1.cfm [Eds. Note].

harassed by the lack of basic civil rights. Of the small percentage of homosexuals receiving psychotherapy, most seek treatment to learn to adjust to their diminished status in society and to cope with the effects of such discrimination, rather than because of any pathology specific to their sexual orientation. The thrust of this ordinance is to make equal the status of homosexuals by assuring them of the most basic rights in our society, not to give them any special privileges or exempt them from accepted standards of public behavior and dress. If enacted into law, this legislation can have only beneficial effects for Dade County and its citizens—by decreasing fear, misunderstanding and polarization among the population as a whole; by ensuring that homosexuals have access to decent jobs, housing, and public accommodations on the same basis as other citizens; and by enabling homosexual men and women to develop their own human potential and contribute to society. I strongly urge that this Commission approve the proposed legislation which extends the principle of equal protection under the law to all our citizens, regardless of sexual preference.