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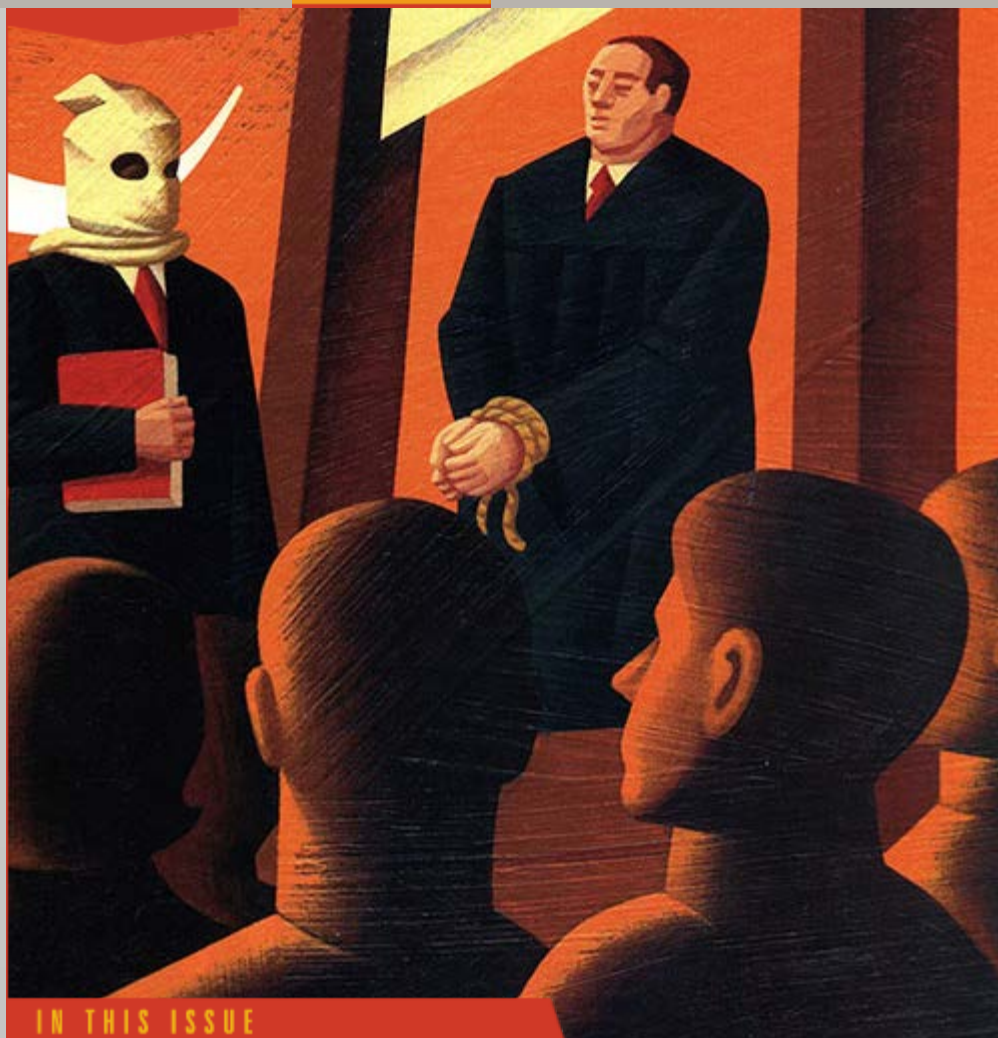
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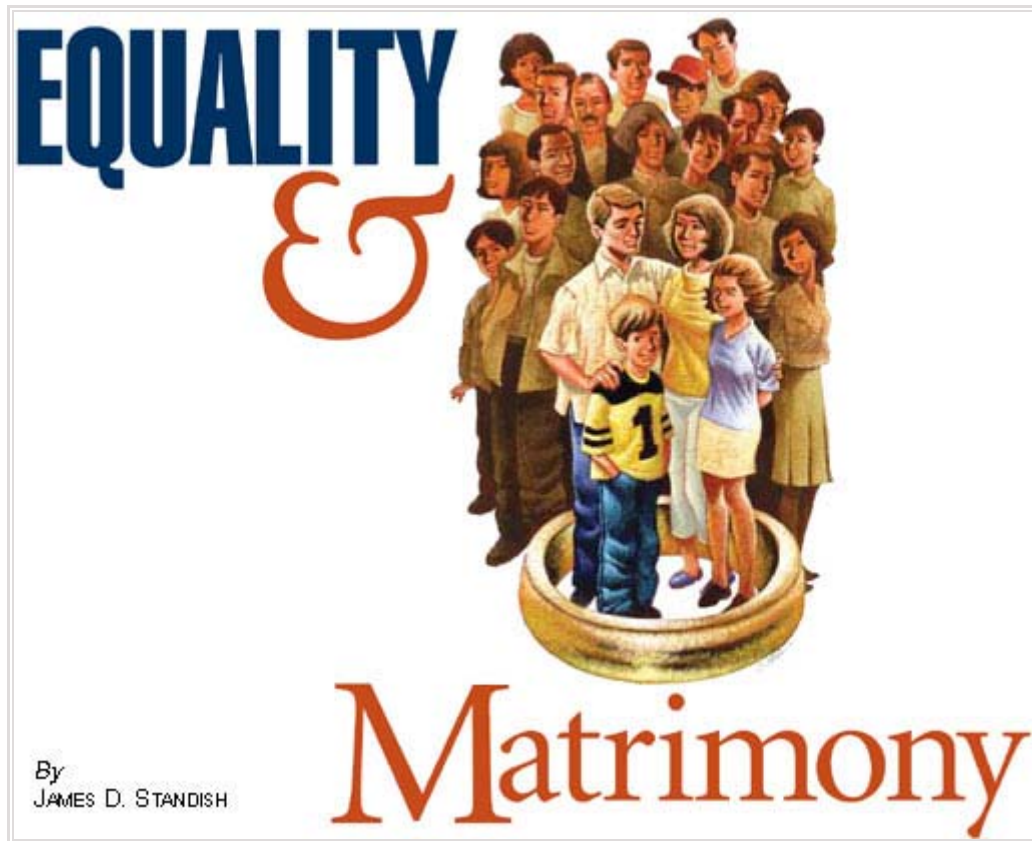
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SEPTEMBER / OCTOBER 2007

Equality & Matrimony

BY: JAMES D. STANDISH



One enters the fray of the same-sex marriage debate with trepidation. The principal parties in the debate are so polarized, and the stakes seemingly so high, that anyone game enough to express an opinion either way had best be prepared to bear the brunt of brutal attacks not merely on his position but on his character as well.

It is therefore worth beginning this piece by clearly stating at the outset what the article is, and is not, about. This article is not about rights for homosexuals. Indeed, many of those who oppose redefining marriage to include same-sex relationships are in favor of protections against discrimination on the basis of sexual orientation in the secular workplace and are in favor of the robust enforcement of laws against those who perpetrate hate crimes against the gay community. It is not about whether legislatures can redefine marriage; clearly they can. Further, it is not about stigmatizing or alienating gay Americans. By now most people in America realize that they have friends from high school, college, work, or their neighborhood who are gay, and many of us have family members who are gay.

What this article is about is whether same-sex relationships must be recategorized as "marriage" or not. Or more particularly, whether our concept of equal protection under the law requires such a recategorization.

[The Equal Protection Claim](#)

The legal challenges to the definition of marriage as a relationship between a man and a woman are based on the guarantee of equal protection under the law found in the equal protection clause of the federal Constitution and its state corollaries. Equal protection does not mean that everyone is treated the same. Indeed, the legal and legislative systems are set up to ensure that some citizens are treated differently than others. The equal protection principle may best be summed up like this: all citizens must be treated differently in the same manner—as long as the government has a reason to treat them differently.

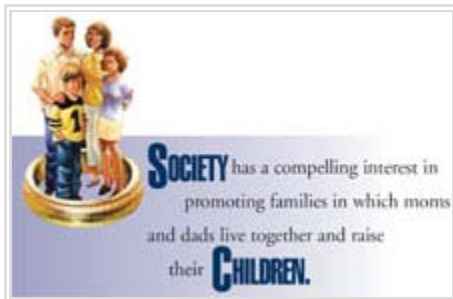
How good does the government's reason need to be? That depends. Over the years the courts have established a hierarchy of

protections depending on the substance of the equal protection challenge. In particular, in cases that involve laws that discriminate on the basis of race or national origin; law that interfere with First Amendment rights and other fundamental rights such as the right to travel and to privacy; and, in some cases laws that classify based on citizenship status, the courts apply the familiar "strict scrutiny" analysis. That is, they require the government to have "compelling" reasons to treat people differently and to show that the law is necessary to accomplish that compelling interest. The courts apply that it have a rational basis that is tied to a legitimate state interest for making a distinction between citizens.

Some argue that strict scrutiny analysis should be applied to clarifications based on sexual orientation because of the history of discrimination and marginalization of the gay community. To date, this standard has not been applied. The Massachusetts Supreme Court decision in *Goodridge v. Department of Public Health*, finding that the state's equal protection clause mandates the redefinition of marriage to include same-sex couples, used the rational basis analysis to come to its remarkable decision. Whichever standard is used, however, the case for distinguishing between heterosexual marriage and same-sex relationships is compelling. There are two principal reasons for making this distinction: the disparate impact on children and the disparate impact on the practitioners. Before we get to that question, however, it is worth asking whether the state has a legitimate interest in marriage at all.

State Interest

There is a variety of reasons the state has an interest in marriage. The first, and most obvious, is that marriages produce children. Even after four decades of "sexual revolution," approximately 68 percent of American children are born to married couples. This is down from approximately 95 percent in the 1950s, but still solidly constitutes the norm for our society.



That society has a compelling interest in the birth and nurture of children is obvious on its face. Who will care for us when we're old, who will continue our civilization, who will protect our nation, who will maintain our infrastructure, who will service the national debt? It will be little babies of today. There are few, if any, more pressing interests of society than providing an optimal environment in which our next generation is born and matures. That it turns out that marriage is not only the principal arrangement through which Americans, and virtually every other society throughout recorded history, bring forth and care for our young, but also the best means of doing so (as will be discussed in the next section of this article) only reinforces society's interest in the institution.

In addition to producing and nurturing children, marriage provides a vital stabilizing force for adults (particularly young men), and provides a remarkably strong economic unit. In short, the state has every reason to take an interest in an institution that is vital for the survival of society.

Impact on Children

Some activists have stated that same-sex families are no different than heterosexual families. This claim is problematic on its face. Clearly they are different. The question, therefore, should not be whether they are different, but whether they are different in a manner that should matter when the government is deciding how to treat them.

The most obvious difference between heterosexual couples and same-sex couples is the lack of gender diversity in the latter. The second difference is that heterosexual relationships are capable of producing children. This does not, of course, mean that people involved in same-sex relationships do not have children at home—some do. But the laws of nature still require that every child have a biological mom and dad. Further, as we will discuss, those laws also dictate that a mother and a father are necessary to provide an ideal environment for children to mature.

There is solid evidence that the best environment for children is a unified family in which the mother and father stay together. For example, an Australian study compared the academic performance of children from three types of households: children living with their married parents, children living with an unmarried heterosexual couple, and children living with a homosexual couple. The study found that children from married households outperformed children from unmarried heterosexual households, and that children from both forms of heterosexual households outperformed the children living in homosexual households.

Similarly, a recent study found that teenagers living with their two biological parents have significantly improved mental health and academic achievement, and significantly lower rates of serious behavioral problems at school, compared to teenagers living in single parent households or "blended families." This study was sponsored by the Urban Institute, which has published material in favor of same-sex marriage, but frankly concludes that "the most favorable outcomes we observe are for teenagers living with their biological parents who are married to each other."

The American Psychological Association's Review of General Psychology recently published an article that concludes that there is overwhelming evidence that the love of mothers and the love of fathers differ in significant ways, and that the receipt of both kinds of love is very beneficial to children. Finally, there is evidence that children experience the lowest rates of abuse when they live with their mom and dad.

All of these studies, and many like them, point to the rather unremarkable conclusion that kids do best when they live with their mom and dad. Advocates of same-sex marriage often point out that there are many American families that are deeply dysfunctional or even abusive. This, of course, is nothing new to those who have for decades been decrying the breakdown of the family. Even during this time of almost unimaginable instability in families, however, the mom-and-dad family still outperforms all others. It is time for society to do all that it can to preserve, protect, and advance it rather than taking further steps down the tragic path to family disintegration that we have been on during the past four decades, and that has left so many American children living without their mom or without their dad.

It is worth noting that just because there is overwhelming evidence that, as a rule, children do best when raised with their mom and dad, this does not mean that there is universal agreement on the matter. In fact, some professional associations have adopted positions stating that there is no distinction between parenting arrangements and the environment for children. These positions resemble statements of faith informed by political ideology, rather than informed positions based on the reality children face.

Society has a most compelling interest in the birth and nurture of children. Children do best when they live with their mom and dad. Therefore, society has a compelling interest in promoting families in which moms and dads live together and raise their children. This is accomplished by recognizing and promoting the uniquely beneficial nature of male/female marriage.

Health Impact

The state also has a compelling interest in promoting the health of its citizens. As a rule, homosexuality exerts a serious detrimental impact on the health of its practitioners. According to the International Journal of Epidemiology, participants in the gay lifestyle lose an estimated 20 years in life span. Homosexuality is associated with a dramatically increased incidence of suicide (a study published in the Archives of General Psychiatry, found that men who had same-sex partners were 6.5 times more likely to commit suicide than those who did not). Homosexuals also suffer from significant increase in liver dysfunction as a result of hepatitis; high rates of rectal and bowel diseases that cause a wide range of serious health problems; and dramatically increased incidence of a wide variety of sexually transmitted diseases (homosexuals contract syphilis at up to 10 times the rate of heterosexuals; incidence of gonorrhea is estimated to be 3.7 times higher among homosexual males than heterosexual males; and homosexuals experience dramatically increased incidence of HIV/AIDS).

In addition to lower life spans and significantly higher rates of disease, the homosexual lifestyle is associated with significantly higher rates of substance abuse and physical abuse. For example, according to a study published in the Journal of Consulting and Clinical Psychologists, lesbians were more than 2.5 times as likely to engage in heavy drinking as heterosexual women. There is also dramatically increased incidence of physical abuse; male homosexual couples have up to twice the rate of domestic violence of that in the heterosexual population.

In stark contrast, married heterosexual couples experience significant physical and psychological health benefits. The Department of Sociology at Ohio State University provides a comprehensive summary of the relation of heterosexual marriage to mental and physical health. Heterosexual married couples experience significantly better physical and mental health than those involved in cohabitation and those who are single. In addition, married heterosexual couples live longer.

Some have argued that redefining marriage will mitigate the disparate health impacts, and that, further, many of the disparate health impacts are the results of discrimination. This argument is speculative at best. Evidence appears to suggest the contrary—that is, that the negative health impact of the homosexual lifestyle has only increased with the gains made by the gay rights movement over the past four decades, not decreased.

The disparate impact on the health of those engaged in heterosexual and homosexual relationships provides ample rationale for society to distinguish between which lifestyle it will promote through marriage laws.

Conclusion

Equality before the law permits the state to treat citizens differently if it has a legitimate state interest to do so. There is no state interest more compelling than promoting the best conditions to nurture children. Further, the state has a compelling interest in promoting physical and psychological health. In both cases heterosexual marriage provides a uniquely beneficial relational arrangement. The state, therefore, acts well within its constitutional prerogative when it promotes heterosexual marriage over alternative family structures.



James D. Standish is executive director of the North American Religious Liberty Association: www.religiousliberty.info

- 1 U.S. Department of Health and Human Services, Center for Disease Control and Prevention, National Center for Health Statistics, www.cdc.gov/nchs/fastats/unmarry.htm.
- 2 Sarantakos, Sotirios. "Children in Three Contexts: Family, Education and Social Development," *Children of Australia*, Vol. 21, no. 3 (1996): 23-31. (Finding that children of married heterosexual couples do significantly better in a broad range of academic areas than children of unmarried heterosexual couples, and that the children of married and unmarried heterosexual couples significantly outperform children raised by homosexual couples).
- 3 Sandi Nelson, Rebecca L. Clark and Gregory Acts, "Beyond the Two-Parent Family: How Teenagers Fare in Cohabiting Couples and Blended Families," www.urbaninstitute.org (finding that teenagers living with their two biological parents have significantly improved mental health and academic achievement and significantly lower rates of serious behavioral problems at school compared to teenagers living in single parent households or blended families. This study was sponsored by the Urban Institute, which has published material in favor of gay marriage, but frankly concludes that "the most favorable outcomes we observe are for teenagers living with their biological parents who are married to each other").
- 4 Ronald P. Rohmer and Robert A. Veneziano, "The Importance of Father Love: History and Contemporary Evidence," *Review of General Psychology*, Vol. 5 no. 4 (2001): 382-405, <http://academic.uofs.edu/student/sitoskis2/fatherlove.html>.
- 5 It is sometimes suggested that those promoting the preservation of the definition of marriage would better use their time working to reduce divorce rates. This assumes two things. First, that there is no connection between the promotion of alternative family structures and the decline in marriage, and second, that those working on the one issue are not already working on the other. While it is difficult to prove a correlation, it appears hardly coincidental that we are experiencing high levels of family breakdown in a society in which many of those promoting same-sex marriage have been promoting with equal ardor the concept that there is nothing uniquely beneficial about heterosexual marriage and that sexual freedom is an integral component of personal happiness. Further, it is worth noting that many of the individuals and organizations most firmly dedicated to preserving the definition of marriage are just as dedicated to strengthening divorce laws, providing premarital counseling, and taking other steps to strengthen the faltering marriage institution. The two positions are complementary.
- 6 Robert S. Hogg et al., "Modeling the Impact of HIV Disease on Mortality in Gay and Bisexual Men," *International Journal of Epidemiology*, Vol. 26 (1997).
- 7 R. Herrell et al., "A Co-Twin Study in Adult Men," *Archives of General Psychiatry*, Vol. 56 (1999): 867-874.
- 8 Mortality and Morbidity Weekly Report (Centers for Disease Control and Prevention), Sept. 4, 1998, p. 708; "Viral Hepatitis B—Frequently Asked Questions," National Center for Infectious Diseases (Centers for Disease Control and Prevention) Sept. 29, 2000; "Hepatitis C: Epidemiology: Transmission Modes," *Mortality and Morbidity Weekly Report (Centers for Disease Control and Prevention)*, 1998.
- 9 C. M. Hutchinson et al., "Characteristics of Patients With Syphilis Attending Baltimore STD Clinics," *Archives of Internal Medicine*, Vol. 151 (1991): 511-516.
- 10 Vincelette et al., "Predictors of Chlamydial Infection and Gonorrhea among Patients Seen by Private Practitioners," *Canadian Medical Association Journal*, Vol. 144 (1995): 713-721.
- 11 *Ibid.*
- 12 For example, according to AVERT, an international HIV/AIDS charity, in Australia "a history of male homosexual contact was reported in more than 85 per cent of newly acquired HIV infection diagnosed in 1997 to 2001," www.avert.org.ausstatg.htm.
- 13 Peter Freiberg, "Study: Alcohol Use More Prevalent for Lesbians," *The Washington Blade*, Jan. 12, 2001, p. 21, citing to the JCCP.
- 14 D. Island and P. Letellier, *Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence* (New York: Haworth Press, 1991), p. 14.
- 15 www.sociology.ohio-state.edu/bm/mainpage.html.

SEPTEMBER / OCTOBER 2007

Sex, Law & Politics

BY: JOHN MCKAY

The debate about same-sex "marriage" is a quintessential example of competing values. In some ways it is almost a textbook example of the competition among politics, ethics, morality, and religion.

The gay rights movement did not start in 1982, but for our purposes we reached a significant Canadian milestone in that year. Parliament passed the Charter of Rights and Freedoms in 1982. The justice minister of the day (Jean Chrétien) was asked repeatedly by Svend Robinson and others to include sexual orientation in the charter as a prohibited ground for discrimination.

Once the Charter of Rights and Freedoms came into existence, Canada acquired a new set of political actors. The courts of Canada received into their hands a wonderful tool to shape Canadian society in profound ways. And these judges are not value-free. They too come from ethical, moral, and faith bases. They are also very political. The question that arises, though, is where do justices of the Supreme Court of Canada get their values? In part, the justices get their values from the body of law developed in Canada or elsewhere over generations, and beyond that from the British common law tradition developed over centuries by a country from which Canada draws many of its traditions and institutions. We quite explicitly ask them to start from that point, and we make them, as a branch of good governance, responsible for assuring a balance between continuity with the established laws and innovation when there are new circumstances. They are also informed by their personal set of circumstances. Judges are not value-free or impartial.



The opening that judges use to access the shaping of society is section 15 (1) of the charter, which prohibits discrimination:

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law *without discrimination* and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." (Italics supplied.)

Once you've found discrimination, you're in the door, and the onus shifts to the government to justify the discrimination under the terms of section 1: "reasonable limits . . . in a free and democratic society."

In the words of Janet Somerville, former general secretary of the Canadian Council of Churches and associate editor of the *Catholic New Times newspaper*, in her letter to Bill Graham, MP: "If we take the opposite-gender dimension out of marriage, what do we have left? Well, in the new definition proposed for the Supreme Court's consideration, we will still have the element of free personal choice—the choice of two persons to live in 'union' with each other. And in popular opinion (though not in law, since law cannot command love), you will still have love. What love means, alas, is no longer very clear in modern Western societies. Does love have the profound, sacrificial, self-transcending, creation-affirming meaning that it has in Jewish and Christian religious traditions—for example, in the thirteenth chapter of Paul's letter to the Corinthians? Or does 'love' now refer to the sizzle that comes (and goes) with mutual sexual attraction? If the latter is what is meant, then there is not much left of the traditional institution of marriage. If the meaning of marriage has been whittled down to mutual free choice and mutual sexual attraction, then why should it exclude gays and lesbians who love each other?"

"Indeed marriage is built on love: love between a man and a woman, love of the children of that couple, and loving loyalty to grandparents, in-laws, cousins, uncles/aunts, and all the connections into past and future that come with an institution which is about welcoming and nurturing a new generation of human beings into family life. Traditional marriage is an institution that carries a great deal of the weight of human life in society: not just personal faithfulness and mutual pleasure, but the expectation that new human life will be welcomed, named, and nurtured to responsible adulthood. Heterosexual marriage has a biological foundation in a natural resource that is crucial for any society's future: that natural resource is human fertility. Heterosexual marriage integrates the great 'green' biological gift of fertility with interpersonal love and with long-term social responsibility. Because of its deeply natural connection with responsibility for young life, marriage requires commitment, time, hard work, loyalty, truth, etc. And marriage requires long-term support and respect from the society into which it is bringing new children.

"When you take opposite gender out of the definition of marriage, you have taken away a great deal of the social and public importance

of marriage. If it's only about free mutual choice and faithfulness, and not at all about the willingness to become parents together, how is it different from all the interdependent relationships that are possible in life—a mother and daughter who live together, for example, or two old celibate friends, or an eccentric scientist and his or her housekeeper? When marriage was a heterosexual institution, society was collectively prepared to defer to it as the one institution that is foundational to society and its continuation. The new definition ('two persons') is no longer foundational, and so the reasons for excluding all those other kinds of mutually dependent relationships would appear no longer valid. Why not call them marriages as well? And then, what is left of the meaning of the word?"

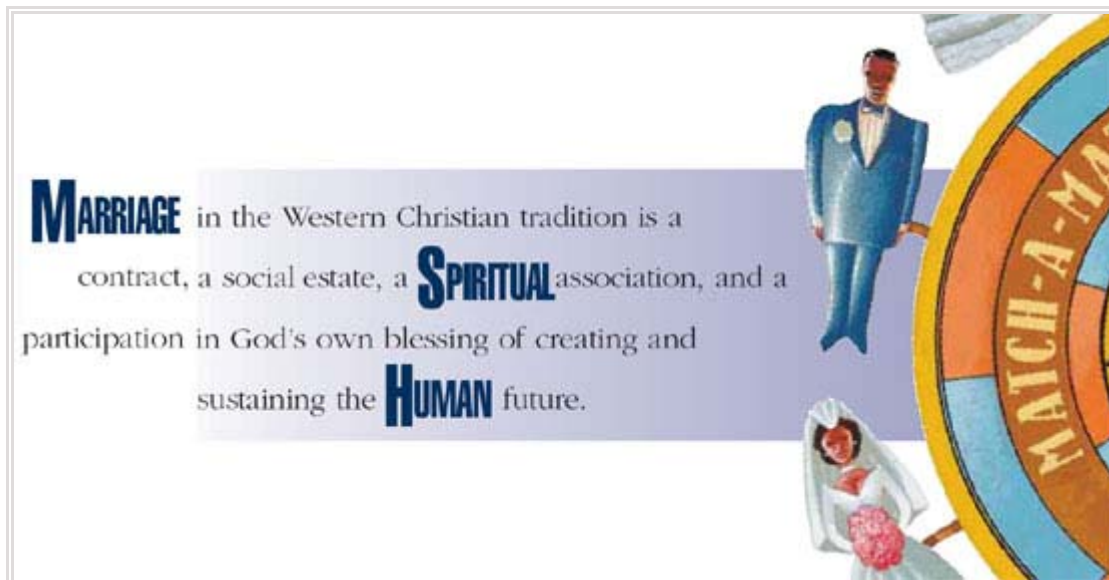
Everyone has a religion, in the broad sense in which religion means "that which is of ultimate importance to a person." The judges have a religion, and likewise, the politicians; indeed, even the academics do.

In that sense, those who argue in favor of same-sex "marriage" speak from a "religious" base. The charter is the scripture, judges are the priests, law school their theological institutes, and law texts their sacred writings.

By electing nondiscrimination as their core principle, they have elevated the "right to choose" above all else. Rabid individualism trumps the communal virtues required to make a society work.

"The different ways of 'life' (individualisms) that we see around us are in fact often ways of death."

What are those ways of death? Think particularly of the ideologies of individualism and materialism. The brand of individualism we encounter today promotes material gain as the normative primary objective. It proclaims: "Never mind the needs of others; never mind the legitimate needs and rights of the wider society. My needs, my wants, my demands, come first. Forget about everybody else's!" This type of ideology, when lived out in the context of a marriage, is a surefire marriage killer.



Ironically, one of the ways this rabid individualism triumphs is by marginalizing "other religions" and defining the public space as "secular." How many times have we heard that "religious" people must keep their faith private and out of the public sphere? It is a particularly devastating argument for people who are attached to a particular faith group. "Religious people" are to do whatever it is they do on Friday/ Saturday /Sunday, but for heaven's sake, keep it quiet and out of the public domain. Immediately people of faith are marginalized and excluded from shaping society's direction. They become apologetic when speaking from a sacred text. Once you have marginalized the opposition, you will win the argument by default. Your ideas may be quite goofy, or they may even promote, as my friend Gerry Vandezande says, "the ways of death," but they will prevail.

To the extent that you privatize the gospel (faith), you secularize public debate. Privatization, then, leads to secularization. "If allowed to go unchecked, secularism reduces life to individual choice, material gain, and 'non-religious' thought. It ignores the integrity of human community and the reality of faith at work in our society. It is a shallow, reductionistic view of life that violates the . . . message of the gospel and the organic unity of humanity created in the image of God. It undermines any but its own view of spirituality of life." In the same-sex "marriage" debate, brave is the citizen who says, "But the Bible says . . ."

Professor John Witte, in his Parliament Hill lecture "Religion, Secularism and Human Rights," made a very critical point in suggesting that "without religion, the regime of human rights becomes infinitely expandable. The classic faiths of the Book adopt and advocate human rights to protect religious duties. A religious individual or association has rights to exist and act not in the abstract, but in order to

discharge discrete religious duties. Religious rights provide the best example of the organic linkage between rights and duties. Without them, rights become abstract, with no obvious limit on their exercise or expansion." His point is that religion creates a context for rights. It provides a needed balance in the rights dialogue. It outlines the duties and responsibilities that balance each other. He argues that religion acted as the midwife of the rights movement but has since been marginalized, in part, because a rights culture has not been part of the theological discourse and teaching. I am convinced that he is right.

The same-sex "marriage" debate is framed almost entirely in rights language. Other analyses, equally valid if not more so, are deemed to be speculative. To mount a social utility argument on the efficacy of heterosexual marriage to a society is ipso facto deemed to be irrelevant. Legislators and jurists are not interested in the sociology of marriage, let alone the theology. The web of interconnectedness that is the institution of daily life is immaterial to a jurist focused solely on rights. "Yet religion (faith) is at the heart of a person or an institution's existence." Cut out the heart, and you no longer have a person or an institution. I would suggest that cutting the gender completely out of marriage cuts out its heart. To argue that the elimination of gender from the institution is risk-free or value-neutral is disingenuous to the extreme.

This intellectual sophistry, which conflates equality and sameness, may give comfort to some small "l" liberals, but it is really a failure in inclusive pluralism. If we in Canada are to have a real understanding of pluralism, one size will not fit all. People are different—relationships are different. Poking and jamming people and relationships into one category does not make them the same or equal. Trying to fit same-gender relationships into the box of marriage may look like equality, but it is the pabulum mush of misguided pluralism. Equality is not sameness—sameness is not equality.

He who frames the debate wins. Frame it in rights chatter, marginalize some voices (religious, historical, moral, etc.), dismiss others as speculative, and you will win every time. Rights win—and we all lose.

We seem not to be able to learn from past experience. In the early 1970s we set the legislative ball rolling to create "no fault" divorce. The arguments were that this was long overdue, that women, in particular, were trapped in unhappy relationships, and that very few people would be affected. Subsequently Canada has seen the number of successful marriages plummet, divorces skyrocket, poverty feminized, children single-parented, and men marginalized (85 percent of men lose custody disputes). We have created a divorce culture.

I daresay that there is not a person reading this who has not been directly or indirectly affected by our divorce culture—the genesis of which started with some minor legislative tinkering. While it was sold as affecting only a small group of unhappy people, it has in fact impacted every marriage in the nation. We took out of the marriage mystique the concept of lifelong covenant and replaced it with the simplicity of contract. What was supposed to affect the few has in fact affected just about everyone. What was a minor move from covenant to contract has profoundly changed the way we think about the institution itself. Prior to gay rights we were well on our way to trivializing the institution of marriage. With the developments that have occurred in the past few months, we have accelerated this very regrettable trend. No less a deconstructionist than Svend Robinson commented, when asked about his getting "married" now that it is "legal": "Why do I need the state imprimatur to validate my relationship?"

Where do you get your values? There is the analogy of a web. The strands of marriage are, among other things, theological, sociological, generational, legal, and cultural. It is a fragile yet remarkably strong structure. You cannot detach strand after strand, however, and expect it to survive.

Collectively we have dismissed the religious as insignificant, and have limited them to being "those religious people." The Court of Appeal in Ontario rendered the procreative potential of heterosexual unions as irrelevant to the public understanding of marriage. By bombing the intergenerational bridge (front and back), the courts have indeed succeeded in reducing marriage to the level of any other nonprocreative institution. Marriage as an institution is now nonprocreative. Does that mean there is now no point in getting married to be procreative (as in "We are going to have kids, so we decided to get married")? Parents will now ask their children, "Why bother?" How do I answer my daughters, Sarah, Rachael, and Caitlin, when they say they want to get married? What's the point? No less an authority than the Court of Appeal of Ontario has said there is no necessary connection between marrying and choosing to have children.

Every culture develops its unique ways of celebrating the exchanging of commitments between males and females. One of the reasons is to reinforce the notion that the covenant between the two is much larger than the couple themselves and extends to the community at large.

The community says to the couple, in effect, that they will protect the couple's vulnerable flank because the "Mr. and Mrs." are critical to the health and well-being of the community. They then proceed to develop a set of protective laws and institutions to encourage the marriage to flourish but also to protect the parties in the event of a breakdown. Does the same analysis, the same external commitment, apply when marriage is merely a free-choice contract between any two persons? When gays divorce there will be sadness, but unless the couple has gone on to adopt children, it will not have generational or societal impact. In the case of heterosexual divorce, especially when there are children, we know that all hell breaks loose. The larger society is diminished with each divorce, because the marriage

reaches backward into previous generations and forward into future generations, hobbles the current generation, and ripples out into the wider community through various support mechanisms and government backfilling. None of that will occur with a gay divorce, because it is, in its essence, a "love institution," unique to the parties themselves, and themselves only.

Marriage in the Western Christian tradition is a contract, a social estate, a spiritual association, and a participation in God's own blessing of creating and sustaining the human future.

As a secular state Canada has embraced the law of contract and diminished all other aspects. We are now reaping the whirlwind. Marriage and the family are in trouble today.

We get our beliefs and values from a wide variety of sources—some religious, some anthropological, some legal. A debate about marriage that restricts itself to a rights-based argument is a surrender that will ultimately be a great disservice to our society.



John McKay is the member of Parliament for Scarborough East, Ontario, Canada. He is the vice chair of the Committee on Justice and Human Rights.

1 Janet Somerville, in her letter to Bill Graham, MP, Aug. 18, 2003.

2 Vandezande, in Justice, Not Just Us, 1999.

3 Vandezande, in "Public Justice Through Confessional Pluralism: Toward Reconciliation in a Divided World," Social Work and Christianity Journal, p. 7.

4 Vandezande, in Justice, Not Just Us, 1999, p. 72.

5 See sections 121 and 122 of Court of Appeal ruling regarding Halpern et al. v. Attorney General of Canada et al., June 10, 2003.

SEPTEMBER / OCTOBER 2007

Canada's Justice Minister Wants To Change The Constitutional Meaning Of Marriage

BY: JOE WOODARD



On June 10, 2003, Chief Justice Roy McMurtry, of the Court of Appeal of Ontario, issued a judgment ordering the government of Canada to recognize that the word "marriage" in Canada's Constitution must include both heterosexual and homosexual couples. In response, Canada's justice minister, Martin Cauchon, decided to introduce an amendment to Canadian law to provide that marriage in Canada will include the phrase: "the voluntary union for life of two persons to the exclusion of all others."

The amendment would include a clause to protect religious organizations from being forced to provide a ceremony of marriage for homosexual couples contrary to the religious teachings of the organization.

Prior to introducing the amendment in Parliament, the minister of justice has asked the Supreme Court of Canada to provide an advisory opinion on the constitutionality of his proposed amendment. The Court has been invited to give only yes or no answers to these questions: Does the proposed act fall within the exclusive legislative authority of the Parliament of Canada? Is the proposed act consistent with the Charter of Rights and Freedoms? And do the charter's religious freedom guarantees protect religious officials from being compelled, contrary to their religious beliefs, to perform a marriage between two individuals of the same sex?

To date, three Canadian provincial governments have intervened in the Canadian Marriage Reference, including Alberta, British Columbia, and Quebec. It is not clear at this time what arguments will be advanced by each province. However, two additional parties have sought status in the appeal. They are members of Parliament and members of the same Liberal caucus as Justice Minister Cauchon. Senator Anne Cools and Roger Gallaway, MP, have sought party status in the reference for the purpose of introducing evidence to be considered by the Supreme Court and for the purpose of presenting legal arguments.

According to documents filed with the Supreme Court, the two members of Parliament intend to ask the Supreme Court to refrain from answering the questions posed in the Marriage Reference. They will suggest that the questions in the Marriage Reference are still at the political stage and have not yet matured. They will also argue that if the Supreme Court decides to answer the questions posed, the Court should conclude that Parliament may not change the meaning of marriage by simple legislative action. They will submit that the only way in which the meaning of marriage may be modified is by constitutional amendment.

Calgary lawyer Gerald Chipeur, who drafted Cool's and Gallaway's application, was blunt about what the intervention means. "Don't politicize the Supreme Court of Canada. Don't merge the political and judicial functions," Chipeur said. "There's a longstanding principle in the Canadian Constitution that the courts should not be used for political purposes. And here the minister of justice is asking the Supreme Court to write his legislation for him."

In addition to a number of technical arguments, the members of Parliament will point out the following:

1. Civil unions established under provincial legislation provide same-sex couples with complete equality of benefit and treatment under the law, and there is no reason under the Charter of Rights and Freedoms to modify federal law to achieve the objective of equality.
2. The meaning of marriage under the common law and under the Canadian Constitution has since Canadian Confederation in 1867 always included only the union of one man and one woman, to the exclusion of all others.
3. No other common law jurisdiction in the world has amended the meaning of marriage to include same-sex unions.
4. The Canadian Bill of Rights identifies the family as fundamental to democracy.
5. The international treaties to which Canada is a signatory require Canada to promote the family and protect children, and there is no better way to achieve both of these objectives than to promote heterosexual marriage.
6. Marriage is a unique societal institution that exists for the benefit of the family and children, and should be maintained as a heterosexual relationship so as to ensure that, to the extent possible, children are raised by their own parents.

Joe Woodard writes from Calgary, Alberta, Canada, where he is the religion editor for the Calgary Herald.

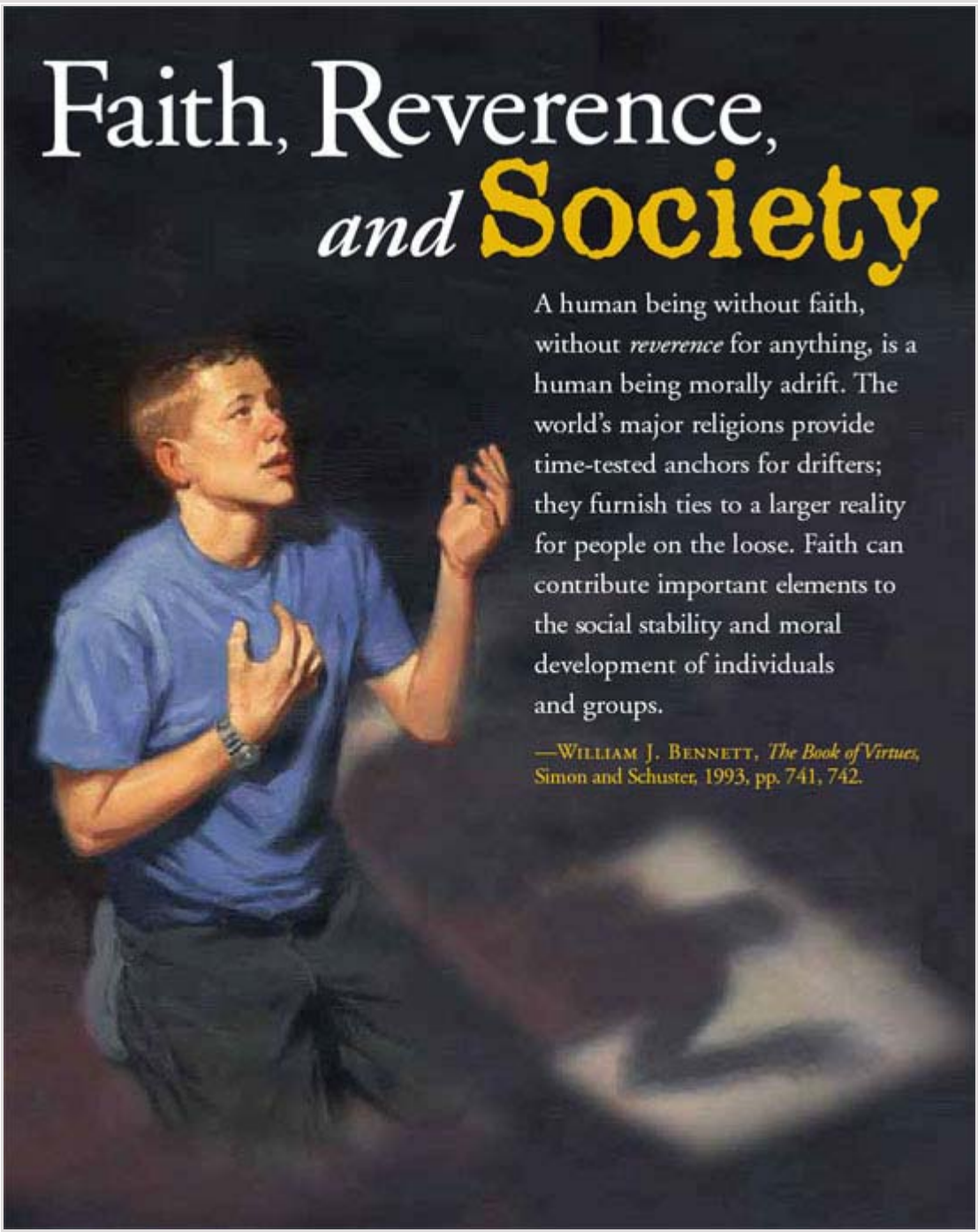
1 Joe Woodard, "The Court Urged to Refuse Same-Sex Bill Review," *Calgary Herald*, Sept. 12, 2003.

2 *ibid.*.

SEPTEMBER / OCTOBER 2007

Faith, Reverence And Society

Faith, Reverence, *and* Society



A human being without faith, without *reverence* for anything, is a human being morally adrift. The world's major religions provide time-tested anchors for drifters; they furnish ties to a larger reality for people on the loose. Faith can contribute important elements to the social stability and moral development of individuals and groups.

—WILLIAM J. BENNETT, *The Book of Virtues*, Simon and Schuster, 1993, pp. 741, 742.

SEPTEMBER / OCTOBER 2007

Teaching True Values

BY: BARRY BUSSEY



Perhaps it is not surprising that the classroom has become the battlefield of hot debate over public values. Schools, whether private or public, have often been the site of contention over values. They are the vehicles through which a society passes on its values and customs.

As La Forest stated in *Ross v. New Brunswick School District No. 15*: "A school is a communication center for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the board of inquiry stated, a school has a duty to maintain a positive school environment for all persons served by it.

Celebration

Bruce MacDougall, a law professor and gay rights activist at the University of British Columbia, has argued that a minority group's struggle for equality requires three identifiers to be free from discrimination: (1) acceptance (compassion), (2) access to benefits others have (condonation), and (3) inclusion as a valuable group by the society (celebration). The gay community in Canada, he argues, has obtained compassion and condonation. The struggle now is for celebration. The celebration issues for the gay community include marriage and content of school curricula, he maintains.

The foremost obstacle to society's celebration of the gay community is the religious community. While there are some denominations that have embraced the gay cause, they are, for now at least, the minority. Religious communities that refuse to endorse the gay "rights" will soon undergo a relentless campaign to conform. As the levers of power are exercised by those sympathetic to the cause, they will be applied with increasing intensity on the nonconformists.

Canada has seen a dramatic turnaround in the legal system supporting gay demands. In the early 1980s the country adopted the Charter of Rights and Freedoms, which included the right of equality for a number of listed grounds, such as religion, race, and age. While "sexual orientation" was suggested at the time, it was rejected by Parliament. However, the words "in particular" were included in the description—opening the door for a future court to add "analogous grounds." In 1995 the Supreme Court of Canada (SCC) held that "sexual orientation" was indeed an analogous ground, and the Charter is now read with that in mind. The end result is that the homosexual community has obtained numerous benefits, from pension rights to adoption rights to full spousal rights. For the most part there has been little friction. That cannot be said, though, with respect to the homosexual community and the religious community.

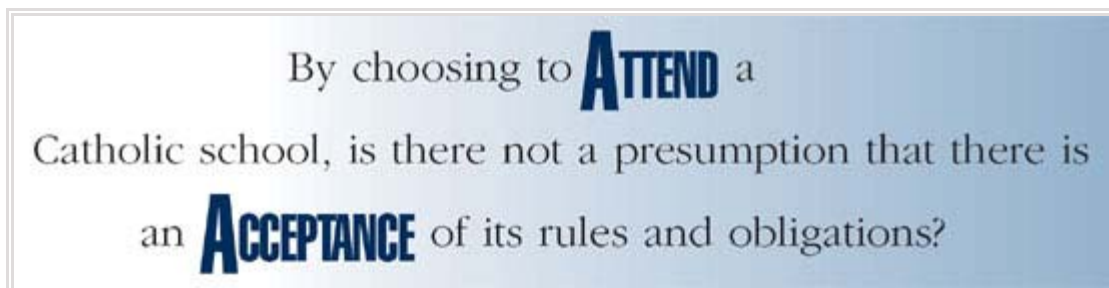
Church Schools

Trinity Western University Case: In the case of *Trinity Western University v. British Columbia College of Teachers* the British Columbia College of Teachers (BCCT) took offense to Trinity Western University's (TWU) Community Standards, rules of conduct that the students were required to sign upon entering. TWU being a Christian institution, its code set out the student's responsibility to maintain

"an atmosphere that is consistent with [the] profession of faith." One part required the student to "refrain from practices which are biblically condemned," including "premarital sex, adultery, and homosexual behavior." BCCT denied its own committee's recommendation to approve TWU's education program because "the proposed program follows discriminatory practices that are contrary to the public interest." Particularly offensive was the prohibition of homosexual behavior. The BCCT was afraid that teachers graduating from TWU would be biased against homosexual students in the public schools.

By an 8-1 decision the SCC found in favor of TWU, noting that one's freedom of religious belief was broader than religious practice. While the religious belief prohibited homosexual behavior, there was no evidence such a belief discriminated against homosexual students.

The majority was concerned about the hardship of TWU and its students by the BCCT's decision placing "a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system." This despite the fact of no evidence of any harm caused by TWU graduates—for the SCC this was unacceptable.

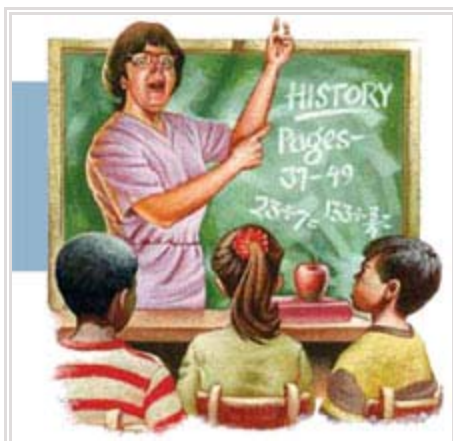


Marc Hall Case

The TWU decision was later applied by a lower court in Ontario in a case involving a homosexual student attending a Roman Catholic school. Marc Hall asked the principal for permission to take his homosexual boyfriend (who was not a student) to the graduation prom. The principal refused based on the teachings of the Roman Catholic Church. The court granted an injunction against the school and ordered that Hall was entitled to take his boyfriend to the prom. Justice MacKinnon had evidence from the local bishop that homosexuality was condemned by the Roman Catholic Church; however, there was also evidence that there were some in the church who questioned that doctrine. The justice was not convinced that the bishop's evidence was "the majority position."

One cannot but ask, "Since when was the Roman Catholic Church's doctrine based on any position of the 'majority' "?

Nevertheless, he held, "But I find that Mr. Hall is entitled in this court to question the correctness of the statement in the defendant's materials that Catholic teachings and Board policy in fact proscribe 'homosexual behavior' and a 'homosexual lifestyle' so as to justify prohibiting Mr. Hall from attending his prom with Mr. Dumond. If individuals in Canada were permitted to simply assert that their religious beliefs require them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians in Canada because everyone who wished to discriminate against them could make that assertion."



Justice MacKinnon on the one hand said that it is not the role of the court to direct what the beliefs of the Catholic Church ought to be. However, in effect he did just that. Failing to recognize the bishop's authority was a failure of the court to defer to the Catholic Church's own authority with respect to its faith. The Catholic Church is not a democracy. It has a history, a culture, and a doctrine that are not based—nor are they claimed to be based—on liberal pluralistic ideology. However, the court imposed such ideals on this religious community.

The church's teaching was in effect distasteful to the judge's sensitivity concerning society's change in sexual mores. It is time for the church to change. The court noted, "The idea of equality speaks to the conscience of all humanity—the dignity and worth that is due each human being. Marc Hall is a Roman Catholic Canadian trying to be himself."

The *Marc Hall* decision is very problematic for religious groups operating their own school system. It was a Catholic school; Mr. Hall did not have to attend classes there; he was

free to go elsewhere; he chose not to do so. By choosing to attend a Catholic school, is there not a presumption that there is an acceptance of its rules and obligations? It was very obvious that the court was intent on eliminating the right of the school to determine for itself what was in keeping with Catholic faith. What is more, the court felt it had the authority to assist a member to unilaterally determine what was and was not Catholic doctrine.

Justice MacKinnon stated that the Catholic school was a "government actor" in that it received government funding, and thus was subject to the Charter. However, he made a further comment that has a chilling effect upon private schools: "*Even schooling that is not funded by the government must still respect the right of the province to insist on certain minimal requirements in the education of all students*" (Emphasis added.)

In commenting on the *Hall* case, Professor MacDougall states: "In the context of an accredited school or college, however, the state is lending or transferring its authority—and duties—to such institutions. The constitutional obligations of the state ought to be transferred with that authority and duty. Otherwise, as R. MacKinnon suggested, the state could handily avoid many of its Charter obligations by transferring its duties to religious organizations which could claim religious immunity from compliance with Charter guarantees of equality."

Thus, the logic continues, even though a private school does not receive government funding for its operation, it nevertheless receives governmental authority to educate students. MacDougall argues that such authority ought to be given only to those who will abide by "Charter guarantees of equality." In other words, those religious institutions that do not accept gay "rights" and "celebrate" the gay community within the school curriculum ought not to be accredited.

Given such developments, it is imperative that religious communities not remain silent. The implications of gay rights public policy needs to be explored further to ensure that the historical rights of religious communities are not lost in the clamor for equality—especially is this so with respect to religious schools.



Barry Bussey is a lawyer who writes from Toronto, Canada.

1 Bruce MacDougall, "Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology," *Saskatchewan Law Review* 61 (1998): 41.

2 *Ross v. New Brunswick School District No. 15* [1996] 1 SCR 825, par. 42.

3 MacDougall, "The Celebration of Same-Sex Marriage," *Ottawa Law Review* 32 (2001): 253.

4 *Egan v. Canada* [1995] 2 SCR 513.

5 *Trinity Western University v. British Columbia College of Teachers* [2001] 1 SCR 772.

6 *Ibid.*, par. 32.

7 *Hall (Litigation guardian of) v. Powers* [2002] 59 OR (3d) 423.

8 *Ibid.*, p. 434.

9 For further discussion on this and other matters of state interference with religious groups, see Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2 (a) and Beyond," *University of Toronto Faculty of Law Review* 54, no. 1 (1996): 1-64.

10 *Hall*, par. 59.

11 Daniel Johnson provocatively points out, "Those who see their own religious tradition only as a dangerous anachronism are unlikely to care about those of others." "The threat of Secular Fundamentalism," *Daily Telegraph*, Ap. 16, 2003.

12 *Hall*, par. 43.

13 MacDougall, "The Separation of Church and State: Destabilizing Traditional Religion-Based Legal Norms on Sexuality," *University of British Columbia Law Review* 36 (2003): 1-27.

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Why Silence Is Not An Option

BY: BARRY BUSSEY

Religious communities that view sexual relations outside of the traditional marriage of one man and one woman as immoral and a "sin" ought to prepare for the greatest assault on religious freedom in recent memory. The assault will come from two fronts. One front will be external. As those in power begin taking a sympathetic stance toward the "new sexual realities," they will use their influence and governmental power to coerce conformity. The other front will be internal. Those within the religious communities who fear being marginalized by membership in a nonconforming group will exert pressure to change religious teachings to bring them into line with society's new views.

In discussions with a particular pastoral candidate local church elders informed him that should he come to their church, he was not to mention a word about same-sex relationships. No sermons, no Bible studies, no church discipline, could be administered over the issue. Silence on the matter was not only expected; it was demanded of the pastor. In good conscience the pastor decided that that church was not for him. He went elsewhere to minister.

One could perhaps understand if the church that made such a demand were of a liberal mainline denomination. However, such was not the case. It was a local church in my own denomination—Seventh-day Adventist.

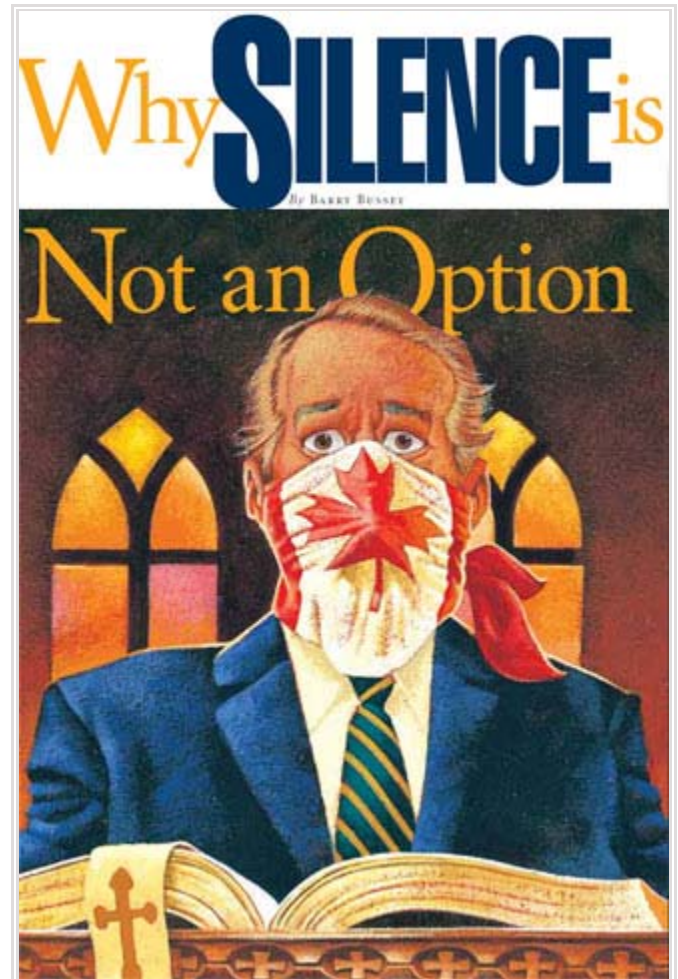
For religious communities that look to the Bible as the source of their faith, there is an immense struggle to be compassionate toward our neighbors who are struggling with immoral sexual inclinations and at the same time be consistent with the strong biblical prohibition of extramarital sex. Such communities find themselves in the midst of a fierce firestorm—condemned on the one hand as giving in to the world or on the other as being judgmental and uncaring. It is almost a no-win situation.

Many today argue that religion has no place in the public discussion of morality and law in a liberal democratic society. Professor Robert Wintemute argues: "Although religious individuals may find it hard to put their religious beliefs aside when they enter the public sphere, a liberal democracy cannot function in any other way. This also means that religious individuals who accept employment in the public sector cannot insist on being exempted from serving LGBT individuals or same-sex couples, whether this involves selling them stamps, teaching them, or a few years from now, marrying them."

Religious leaders are calling on their denominations to refrain from voicing an opinion. One religious group, they argue, has no right to insist that a culture and society reflect its religious views, because if it does, the right must continue to others, and those others may disagree.

Such reasoning fails to recognize a number of important points. First, the liberal democratic tradition of the West, including of course the United States and Canada, has always based its views of morality on religious tradition, i.e., the Judeo-Christian ethic. The philosophers of political theory, on whose shoulders we stand, often warned of the follies of freedom without virtue.

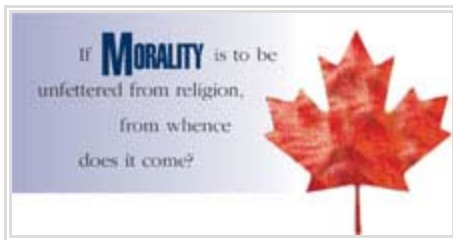
Consider, for example, these words of Edmund Burke: Men qualify for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love of justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men



of intemperate minds cannot be free. Their passions forge their fetters.

Jonathan Chaplin, of the Institute for Christian Studies, argues, "Nothing in the obligations of virtuous citizenship in a liberal democracy requires that there should be any restraints at all on the employment of religiously-based arguments in law and public policy advocacy."

Second, religious communities in our democracy have consistently helped shape political debate over public issues. Examples of this abound. The prohibition and temperance movements of the nineteenth century, the civil rights era of the 1940s, 1950s, and 1960s had at their center Christian churches who sought reform on public and at times controversial issues. To suddenly turn off the tap and tell the religious community that their views are no longer necessary for our "liberal democracy" flies in the face of our history. Further, one cannot deny the fact that the freedom we enjoy today is due in no small part to the efforts of the religious community to maintain freedom.



Third, such an opinion rejects the notion that the human endeavor, at least in part, is to seek knowable truth. Objective truth has never been thought to occur only by means of secular reasoning. Certainly Sir Isaac Newton did not think so. Michael McConnell observes: "There are not secular truths and religious truths, but only truths. . . . Unless truth is internally inconsistent, the person who thinks that secular arguments point in one direction and religious arguments in another should examine the conflict and find out where the error lies."

Particularly problematic in the current discussion over same-sex rights is the attempt by the gay rights advocates to shut down debate using the levers of power. A number of disturbing developments have occurred in Canada in this regard.

Hugh Owens placed an advertisement in the *StarPhoenix* of June 30, 1997, on the occasion of the city of Saskatoon's Gay Pride Week. It listed in a column four Bible references (Romans 1:21-32, Leviticus 18:22, Leviticus 20:13, and 1 Corinthians 6:1-10), followed by a mathematical equal sign, followed by the universal prohibition sign (circle with slash) over a graphic of two stick men holding hands. Three homosexual activists complained to the Saskatchewan Human Rights Commission, which agreed that it was discriminatory and exposed homosexuals to hatred. The decision was appealed.

On December 11, 2002, Justice Barclay of the Saskatchewan Court of Queen's Bench held: "[21] In my view the Board was correct in concluding that the advertisement can objectively be seen as exposing homosexuals to hatred or ridicule. When the use of the circle and slash is combined with the passages of the Bible, it exposes homosexuals to detestation, vilification and disgrace. In other words, the Biblical passage [sic] which suggest that if a man lies with a man they must be put to death exposes homosexuals to hatred."

In the late spring of this year Parliament passed an amendment to the "hate crimes" sections of the *Criminal Code of Canada* (section 318 and section 319) to include "sexual orientation" as a prohibited ground. The crimes include "advocating or promoting genocide" and "public incitement of hatred," which is defined as communicating statements in a public place that incite hatred against any identifiable group.

There was some considerable opposition to the amendment from the religious community. The decision in the Hugh Owens case, though a civil matter, did raise a concern as to whether a court in a criminal case under hate crimes would find that the Bible exposes homosexuals to hatred. In all probability it would. What will that mean to those members of the clergy who would preach against homosexuality, making reference to the Bible? Time will tell.

In all likelihood the hate crimes prosecution for matters involving sexual orientation will be rare. Religious groups and members of the clergy will not be interested in exposing themselves to possible criminal charges. The result may well be what the activists wanted in the first place—a limit on the discussion of sexual behavior as an issue of morality within and outside of the religious community.

Bruce MacDougall, a law professor and homosexual activist at the University of British Columbia, notes that "traditional conservative religion" is "the major voice that would deny any celebration of homosexuality" by the state. The characterization of the cases for equality rights "as being about religious freedom. . . [is] a justification for translating religious standards and views into political and legal decisions about equality issues such as sexual orientation."

Iain Benson, of the Centre for Cultural Renewal, argues that judges should be mindful of the competing faith claims in these cases. "They must also be careful to avoid the temptation (now frequently offered by litigants) to re-fashion what are, in essence, disputes of differing conscience or faith beliefs as disputes based on a supposed and imagined superiority of principles of equality, instead of a conflict that is actually rooted in differing faith conceptions."

MacDougall counters that Benson turns equality rights issues "into religious/morality debates," which would not happen under other headings of discrimination, such as women's rights or mixed marriages.

Benson argues that since "all human beings operate on some basis of faith," even those who claim to be "secular," faith being metaphysical assertions that we cannot prove, it is crucial that those whose faith is influenced by religion should not be arbitrarily dismissed from the public debate on law and morality. As D. M. Brown puts it, "The 'neutrality of the secular' is simply a myth and should be recognized for what it is—a substitute moral construct supported by the power of the state."

"Equality for gays and lesbians is only a 'moral' issue," says MacDougall, "because the established religions make it so. . . . If the court accepts that characterization then the issue is fought on the terms and territory and with the language established by religion and of course religion will win."

MacDougall notes that other grounds of discrimination do not have this "moral" problem as sexual orientation does. It is imperative to remove this "religious characterization" of homosexuality.

If morality is to be unfettered from religion, from whence does it come?

From "the law itself," says MacDougall. "The Charter should be the starting point for determining what is legally relevant as 'moral.'" Since the Supreme Court of Canada has decided that sexual orientation cannot be a ground for government discrimination, how then can it be said that such a ground is "morally controversial"?

Thus the mantra that whatever is legal must therefore be "moral." Follow that logic, and we end up with the conclusion that whatever is illegal—such as the discrimination by the religious community against homosexuals in their hiring and firing practices or their failure to properly provide a "nondiscriminatory" curricula in their schools—is not only illegal but "immoral."

Suddenly the religious community will find themselves in a very precarious position indeed. Certainly that is why we must not be silent.

Barry Bussey is a lawyer who writes from Toronto, Canada. He is the public affairs and religious liberty director for the Seventh-day Adventist Church in Canada.

1 Robert Wintemute, "RELIGION vs. Sexual Orientation: A Clash of Human Rights?" *Journal of Law & Equality* (2002): 125, par. 33.

2 Jonathan Chaplin, "Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy," *University of British Columbia Law Review* 33 (2002): 617-646, par. 36.

3 As quoted by Richard F. Duncan, "Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a 'Homophobe'?" *Notre Dame Journal of Law, Ethics, and Public Policy* 10 (1996): 592.

4 *Owens v. Saskatchewan (Human Rights Commission)* [2002] SKQB 506.

5 Bruce MacDougall has argued that a minority group's struggle for equality requires three identities to be free from discrimination: (1) compassion; (2) access to benefits others have (condonation); and (3) inclusion as a valuable group by the society (celebration). He notes that the current state of affairs for the homosexual community is that they have achieved compassion and condonation; now they are after celebration—which has to do with such symbolic matters as pride day proclamations, content in school curricula, and marriage. See B. MacDougall, "The Celebration of Same-Sex Marriage," *Ottawa Law Review* 32 (2001): 253.

6 Bruce MacDougall, "A Respectful Distance: Appellate Courts Consider Religious Motivation of Public Figures in Homosexual Equality Discourse—The Cases of Chamberlain and Trinity Western University," *University of British Columbia Law Review* 35 (2002): 511, par. 4.

7 *Ibid.*, par. 17.

8 Iain T. Benson, "Notes Towards a (Re)Definition of the 'Secular,'" *University of British Columbia Law Review* 33 (2003): 543.

9 MacDougall, "A Respectful Distance," par. 19.

10 Benson, p. 529.

11 D. M. Brown, "Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights," *University of British Columbia Law Review* 33 (2000): 610.

12 Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (Toronto: University of Toronto Press (2000), p. 124.

13 See a historical account of this by John M. Finnis, "Law, Morality, and 'Sexual Orientation,'" *Notre Dame Journal of Law, Ethics, and Public Policy* 9, no. 1 (1995): 1-39.

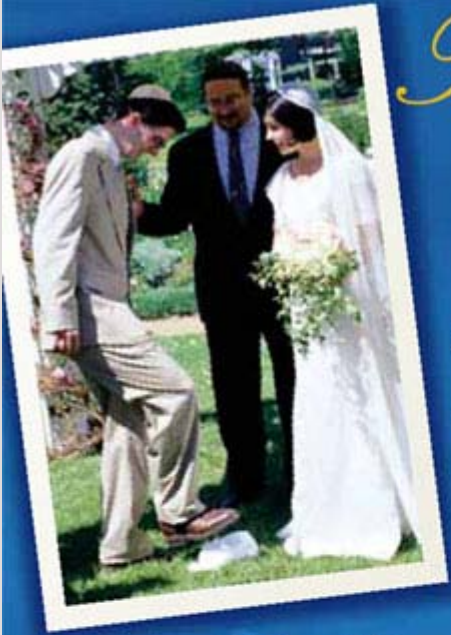
14 MacDougall, "A Respectful Distance," par. 37.

15 *Ibid.*, par. 39. For further discussion, see Lucinda Peach, *Legislating Morality: Pluralism and Religious Identity in Lawmaking* (New

York: Oxford University Press, 2002).

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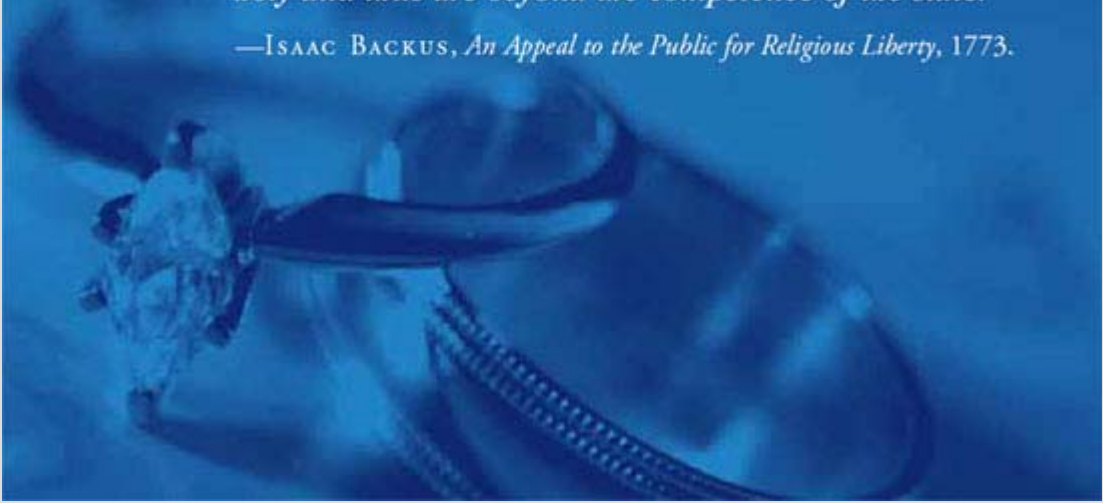
Beyond The State



Beyond the State

Religious matters are to be separated from the jurisdiction of the state not because they are beneath the interests of the state, but, quite to the contrary, because they are too high and holy and thus are beyond the competence of the state.

—ISAAC BACKUS, *An Appeal to the Public for Religious Liberty*, 1773.





Response to Same-Sex Unions

A REAFFIRMATION OF CHRISTIAN MARRIAGE*

Over the past several decades the Seventh-day Adventist Church has felt it necessary to clearly state in various ways its position in regard to marriage, the family, and human sexuality. These subjects are at the heart of many pressing issues facing society. That which for centuries has been considered to be basic Christian morality in the marriage setting is now increasingly called into question, not only in secular society but also within Christian churches themselves.

The institutions of family and marriage are under attack and facing growing centrifugal forces that are tearing them apart. An increasing number of nations are now debating the topic of same-sex unions, thus making it a world issue. The public discussion has engendered strong emotions. In light of these developments the Seventh-day Adventist Church is clearly restating its position.

We reaffirm, without hesitation, our long-standing position. As expressed in the church's Fundamental Beliefs statement, "Marriage was divinely established in Eden and affirmed by Jesus to be a lifelong union between a man and a woman in loving companionship."¹ Though "sin has perverted God's ideals for marriage and family," "the family tie is the closest, the most tender and sacred of any human relationship," and thus "families need to experience renewal and reformation in their relationships" (*An Affirmation of Family*, 1990).² God instituted "marriage, a covenant-based union of two genders physically, emotionally, and spiritually, spoken of in Scripture as 'one flesh.'" "The monogamous union in marriage of a man and a woman is . . . the only morally appropriate locus of genital or related intimate sexual expression." "Any lowering of this high view is to that extent a lowering of the heavenly ideal" (*An Affirmation of Marriage*, 1996).³

Homosexuality is a manifestation of the disorder and brokenness in human inclinations and relations caused by sin coming into the world. While everyone is subject to fallen human nature, "we also believe that by God's grace and through the encouragement of the community of faith, an individual may live in harmony with the principles of God's Word" (*Seventh-day Adventist Position Statement on Homosexuality*, 1999).⁴

We hold that all people, no matter what their sexual orientation, are children of God. We do not condone singling out any group for scorn and derision, let alone abuse. However, it is very clear that God's Word does not countenance a homosexual lifestyle; neither has the Christian church throughout her 2,000-year history. Seventh-day Adventists believe that the biblical teaching is still valid today, because it is anchored in the very nature of humanity and God's plan at Creation for marriage.

* A church-approved statement of January 21, 2004.

¹ "Marriage and the Family," *Seventh-day Adventists Believe—A Biblical Exposition of 27 Fundamental Doctrines*.

² Public statement, *An Affirmation of Family*, released July 5, 1990, at the General Conference session, Indianapolis, Indiana.

³ Statement voted by the General Conference Administrative Committee on April 23, 1996.

⁴ Statement voted by the Annual Council of the General Conference Executive Committee on October 3, 1999.

SEPTEMBER / OCTOBER 2007

Behind Closed Doors

Behind **CLOSED** Doors

There are people who might argue that a discussion of the same-sex marriage issue does not belong in Liberty magazine—a journal devoted to the freedom of religious expression and the constitutionally mandated principle of a separation of church and state. Of course they would have to be willing to restrict that very religious expression and resort to the sort of "religion-free zone" argument that antireligionists have sometimes revealed in overzealous separationist talk. No society was ever free of moral values, and every society's moral values tend to gather from its shared cosmology (see religious values).

As I look back over the years of Liberty coverage I am struck by the enthusiasm this magazine brought to the temperance cause—that is, the social activism that resulted in the Eighteenth Amendment to the Constitution in 1920. For many years this magazine listed 10 declarations of principle on the inside cover. The first declaration was a belief in the separation of church and state. Number 10 (taken verbatim from our first issue of 1927) stated, "We also believe in temperance, and regard the liquor traffic as a curse to society."

Well, consistent with that principled stand, I say, "We also believe in marriage, and regard all challenges to it as curses to society." And those who see no threat to religion in recent moves to legalize same-sex marriage don't understand the movement's long-ago articulated intention to dismantle religious values. And those who think gay marriage just another option for a secular society have thought little about how we got the society we have.

For much of the world, Abu Ghraib will be a lingering symbol of Western bestiality for quite some time. We can only hope that time will somehow reveal that it was truly not "us" at work in those midnight scenes of torture and humiliation. A comment made several times by the media soon after the acts at the prison became public startled me as much as the visuals. It was something to the effect that the sexual mistreatment of the Iraqi men was particularly humiliating to them because of Islamic prohibitions against homosexuality! But what about Christian prohibitions? What about Western norms that still linger in spite of unprecedented efforts to change them? What about the near universal taboo status that societies assign to the practice—notwithstanding the Greek and Roman debaucheries in their declining imperial moments?



We give away too much by allowing the homosexual agenda to be framed as a civil rights argument (a vastly flawed syllogistic argument that is demeaning to the great battle for civil rights waged by racial minorities; see the article by Jonathan Sorum, page 8). We give away too much by debating whether or not same-sex marriage actually harms heterosexual marriage; as though its nuisance value is the real issue. We are actually talking about a radical restating of society—not in the form of a secular utilitarian model, but a calculated rejection of civil and religious norms. And while the expressions of this shift are many, the present marriage debate tends to crystallize the decline.

Listening to early Senate debate on the constitutional amendment to protect marriage, I was struck by the weakness of the argument in its favor—weak because of the way the issue has been framed, most of the senators seemed unwilling to speak to the real issue.

Our society has indeed traveled light years beyond medieval constructs that ascribed mental illness to demon possession, and poverty to moral depravity; that allowed the state to persecute the questioner of church dogma, however unbiblical it might have been—and we have created a civil construct that recognizes the dignity and rights of others, even as they live and act differently from us and out of a norm. Much is good in this social journey. Racism and intolerance are removed from state and church protection, for example. However, our continuing social journey proceeds apace, oblivious to or denying some larger realities.

The elephant in the room that no one wants to truly acknowledge for fear of appearing retrograde is a moral construct for our shared activity. The ambiguities are manifold, but nowhere more stark than in the issue of human sexuality and marriage. Some Christian churches have, in contradiction to the plainest of biblical directions, incorporated condemned lifestyles into the very structure of their

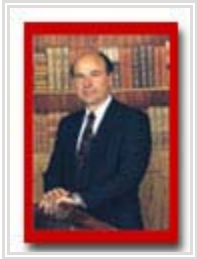
organizations. And in our secular social discourse we simultaneously battle the worldwide scourge of AIDS while empowering the very lifestyle behaviors that feed it—surely if there were more real concern for people, we might act differently as a society, rather than using the bad parenting approach of indulging harmful demands.

The temperance movement this magazine so unambiguously supported is, I hold, a good model for how we might respond to this present crisis, which includes the debate over same-sex marriage.

First, it is a model of an appropriate way for people of faith to project their views in the public sphere. The movement advanced in broad coalitions of churches and secular organizations. They put aside differences for a shared view of the need to protect society from the self-evident breakdown of family and public behavior. Something analogous to the depredations of alcohol within Native American populations was developing in American society at large, and a morally fueled concern bred the temperance movement.

The separation of church and state was under no threat by the movement, in spite of a lingering charge that it was led by "wowsers" (puritanical individuals). It was social concern by people of faith, working through democratic means that won out—not any doctrinal imposition on society or an improper support of churches by the state. For people of faith it was a true "faith-based initiative," fueled by their love for their fellow human beings. The illustration with this editorial captures that spirit beautifully: Christian women praying outside the closed doors of the saloon. It was theirs and society's concern what happened behind those closed doors.

Unfortunately, the temperance movement and the amendment to the Constitution that followed also illustrate the limits of a movement unless it finds a continuing commitment from society. This present marriage amendment bid is foundering early because of lackluster commitment—even as a majority of the nation clearly supports the intention of the proposal. There is a rather supreme irony that much of the recent progress toward legitimizing same-sex marriage has come about as laws have been flouted and licenses issued—and now we wish to resort to a supralaw to stop it! The need is less for laws than informed debate and social action.

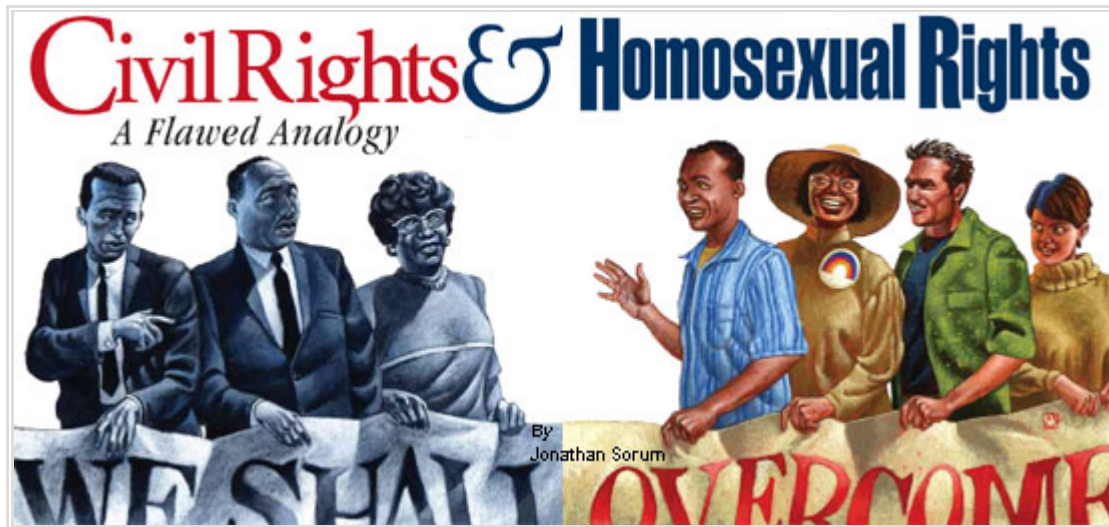


A handwritten signature in black ink, appearing to read "L. Hill", enclosed in a white rectangular border.

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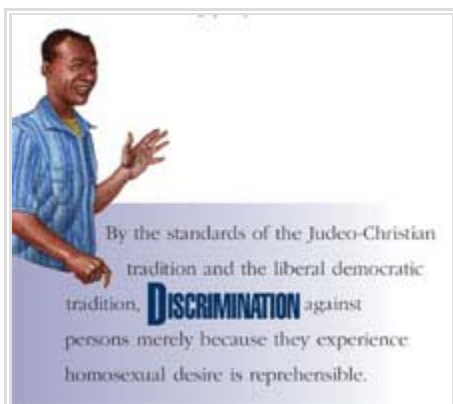
Civil Rights & Homosexual Rights - A Flawed Analogy

BY: JONATHAN SORUM



Advocates of the homosexual rights movement repeatedly draw an analogy between their own struggle and the civil rights movement of the 1950s and 1960s, in which African-Americans worked to gain the rights enjoyed by other Americans but denied to them on account of their skin color. Just as African-Americans struggled to gain equal rights and equal acceptance in society, they say, so also people who claim a homosexual orientation are struggling for equal rights and equal acceptance. Just as African-Americans are discriminated against on account of their race, so also people are discriminated against on account of their homosexual orientation. But can this analogy between race and sexual orientation be sustained?

The original civil rights movement, led by Martin Luther King, Jr., and his associates, was a vigorous attack on the concept of race as a moral category. Racists allege that outward physical appearance is an indicator of the moral worth of a person. Those with dark skin and African facial features are morally inferior, they claim, and therefore should be in a subordinate position in society. Superficially, King's campaign for full civil rights for African-Americans may seem to have been a call for tolerance. But "tolerance" could be interpreted as tolerance of African-Americans even though morally inferior, or even as tolerance of the idea that race is related to moral worth.



King, on the contrary, called for intolerance of the whole question of the relation of moral worth to physical appearance. Not only did he insist that physical appearance has nothing to do with morality; he insisted that to make physical appearance a moral category is itself immoral. As he famously stated in his "I Have a Dream" speech, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." Perhaps the deepest test of the success of King's movement is the extent to which it is today disreputable even to bring up the question of the relation of skin color and moral character.

King's struggle was to disentangle the alien element of race from our moral discourse. His plea was that a common moral standard should be applicable to all, regardless of race. The concept of race was introduced in the first place in order to justify the immorality of slavery and oppression, and its continued presence in our moral discourse hideously distorts our ordinary standards for what is right and just. King appealed here most

basically and deeply to the Christian tradition. A large number of Americans, White and Black, north and south, regularly went to church, where they heard that God created all people as a single human race and that Jesus came for all people and that "God shows no partiality, but in every nation anyone who fears him and does what is right is acceptable to him" (Acts 10:34, 35, NRSV).* This teaching

of the essential equality of all people before God is such a pervasive implication of the Christian gospel that it cannot ever be entirely suppressed, even when the gospel is preached within the most racist contexts. (This concept is also a major theme of Judaism, helping to spur the significant participation of Jews in the civil rights movement.)

Moreover, the classic liberal political tradition, of which the United States is a product, affirmed the same thing. Almost every schoolchild memorized the words from the Declaration of Independence: "All men are created equal [and] are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." The notorious "separate but equal" justification of segregation, which admitted that a "separate and *unequal*" policy was immoral, was an attempt to dodge the combined force of the Judeo-Christian and liberal traditions.

But the two traditions vigorously reject both separateness and inequality. King's strategy was to force Americans to confront the contradiction between their own deeply held convictions and the continuing existence of racial discrimination. Faced with the nonviolent suffering of those who refused to be put in their place, Americans could no longer take refuge in lies about "separate but equal" or assurances that change would come about gradually sometime in the future. They had to face the full implications of their beliefs and act on them and make real changes in society, in politics, and in their own behavior and attitudes. The result would be not more tolerance, but less. Not only racism itself, but even the question of whether racism might be true, would become intolerable. Race as a moral category would be rendered out of bounds and excluded from our moral discourse more in line with our deepest convictions. Moral judgments would be color-blind.

How does this compare to the homosexual rights movement? In the civil rights movement, the identifying characteristic of the group in question is race—outward physical appearance.

In the homosexual rights movement, the identifying characteristic of the group is homosexual orientation, the tendency to experience sexual desire for persons of the same sex rather than for persons of the opposite sex. By analogy, the goal of the homosexual rights movement is the recognition that sexual orientation is a nonmoral category.

Therefore, persons who experience sexual desire primarily for persons of the same sex should not be treated as if they were in some way morally inferior to other persons just because of their desire. Just as race must be excluded from moral discourse, so must sexual orientation.

In part the analogy seems to hold. By the standards of the Judeo-Christian tradition and the liberal democratic tradition, discrimination against persons merely because they experience homosexual desire is reprehensible. The mere experiencing of desires that differ from those of the majority is no reason for making a moral judgment on a person; and certainly no reason for denying that person's inherent dignity as a human being and participation in society and in the church. The analogy, however, quickly breaks down. Skin color and sexual desire are not, in fact, simply analogous human characteristics, since sexual desires, like many other sorts of desire and unlike skin color or bone structure, are necessarily the subject of moral evaluation in any ethical system.

Moreover, the homosexual rights movement means something more by sexual orientation than merely the private experience of a sexual desire; sexual orientation, in their definition, includes *acting* on that desire. As a moderate statement of the pro-homosexual movement in the Evangelical Lutheran Church in America states, "today we know homosexual activity is engaged in and experienced as natural by those whose homosexual orientation goes to the core of who they are" (*The Church and Human Sexuality: A Lutheran Perspective—First Draft of a Social Statement* [Division for Church in Society, Department of Studies, ELCA, 1993]).

"Natural," here, certainly means "morally good." (The word "natural" casts a penumbra of wholesomeness and goodness on anything to which it is applied, without necessarily meaning very much, as modern advertisers know. Simply labeling something "natural," as here, is a way of begging the moral question rather than answering it. Because of this potential for abuse, it may be a good idea for ethicists to avoid using the word altogether, despite its venerable history and potential usefulness when carefully defined.) The presumption is that both the desire and acting on the desires are in principle good. This means that the goodness of homosexual activity *as such* may not be questioned. Indeed, suppressing homosexual desire *because it is homosexual* is precisely what the homosexual rights movement rejects. The minority they envision is one in which homosexual desire is expressed in *action*. The homosexual rights movement equates a minority that faces discrimination and moral condemnation because of its members' physical appearance with a minority that faces discrimination and moral condemnation because its members act in a certain way. Just as no moral judgment should be made based on race, so also, they say, no moral judgment should be based on sexual orientation in its expanded definition that includes both experienced desire and acting on that desire. In other words, sexual orientation—always including the implicit justification of acting on that orientation—is outside the realm of morality. The only immorality involved is bringing it within the realm of morality.

But this move overthrows morality as such. As soon as an action that springs from a desire, and not the mere experiencing of a desire, is exempted from moral consideration, then there is no morality. Morality, by all accounts, appeals to some authority to decide which desires should be expressed and which desires should be suppressed and to what extent. To declare a desire "natural" and good and

rule out ahead of time any moral evaluation of the expression of that desire in action short-circuits morality. Desires are not the source of morality, but that which morality evaluates and regulates. Morality is what intervenes between the desire and the action. The sureness and skill with which persons now restrain, now express one desire or another in accord with their moral training is "the content of their character."

Christian morality appeals, finally, to the Scriptures as the external source of moral norms. This appeal does not mean that the Scriptures must be interpreted as a law code whose every precept is directly applicable to us today. The Lutheran tradition, for example, insists that the scriptural law can be discerned only from the perspective of the gospel, the good news of what God has done for us in Jesus Christ. From that perspective, the tradition insists, the Scriptures provide a coherent view of the basic shape of a human life consistent with God's redeeming work, which also reflects God's work as Creator and sustainer of the world. For example, the tradition clearly teaches that, according to the Scriptures, marriage is rooted in God's creative intention (Matthew 19:4-8) and finds its final fulfillment in God's redemptive work (Ephesians 5:31, 32). From such a Christological perspective, it is possible to evaluate all the biblical texts related to marriage, including some we may find problematic, and construct an authoritative biblical answer to the question about how we should conduct ourselves with respect to this area of life. Our needs, desires, prejudices, and preferences do not have any authority in this process. Of course, we can't fully escape such things, and inevitably they color our interpretation. But the constant work of biblical interpretation, under the power of the Holy Spirit and aided by the communion of saints in space and time, aims precisely at eliminating such factors from the church's teaching so that the church may discern the will of God. The church's moral debate is *internal* to the tradition. If we are to revise our moral teaching, we must do so on the basis of the Scriptures themselves, within the context of our tradition of interpretation.

The homosexual rights movement, however, insists that the discovery of a "homosexual orientation" in and of itself demands a revision of the church's moral teaching. Some people, they say, experience sexual desire for persons of the same sex as "natural," and its expression in actions is therefore in principle good. But here the moral judgment is made before ever consulting the Scriptures or the church's teaching of the Scriptures. The desire is declared good ahead of time, and whatever the Scriptures say will have to agree with this judgment or else be rejected. Advocates of homosexual rights in the church may believe they want to change only one plank in the church's moral position. But in reality they reject the authority of the Scriptures and the church's teaching altogether.

Indeed, they reject morality as such, for if desires are their own moral justification, then all values are overthrown. Of course, most advocates of homosexual rights in the church do not consciously intend to overthrow morality as such. In church circles the pro-homosexual argument usually maintains that homosexual relationships should be morally evaluated by the same standards as heterosexual relationships. Such relationships ought to be loving, faithful, mutual, compassionate, and so on. What is not legitimate, according to this position, is to pose the question of whether homosexual activity is right or wrong simply because it is between two persons of the same sex. But why does the homosexuality of homosexual desire have such a privileged position? If the expression of homosexual desire as such cannot be morally evaluated, then by what right, for example, do we morally evaluate the desire to have impersonal and promiscuous sex, whether homosexual or heterosexual? If desires are their own justification, then such values as love, respect, and commitment must also give way to any desires to the contrary. Any restriction on desires they might imply is an attack on a person's identity, "the core of who they are." This, in fact, is the position of the homosexual rights movement outside the church, and it is the basis of the whole sexual revolution. So the basic position of the homosexual rights movement within Christian circles requires that the values its members may want to retain, such as love, respect, and commitment, are deprived of all validity. Morality as such is overthrown. While King's struggle was for the purification of moral discourse, purging it of an alien element that distorted it, the homosexual rights movement is an attack on moral discourse itself, making any evaluation of behavior or character logically impossible.

Someone might reply: Granted, sexual orientation is not very much like outward physical appearance. But what about right- or left-handedness? Surely this is a compulsion. Formerly some parents and teachers considered left-handedness a moral issue and punished children for using their left hand to write or to eat. Now we consider it wrong to treat left-handedness as a moral issue. This would seem to be an analogy to sexual orientation. If we have excluded handedness from moral discourse, making it positively immoral to evaluate the dominance of either hand in moral terms, then we also can exclude sexual orientation from moral discourse. And presumably we can do both without thereby attacking all morality whatsoever, because we have made a distinction between desires that ought to come under moral scrutiny and those that ought not to come under such scrutiny.

But this argument fails to grasp the essential point. We can decide whether a desire ought to come under moral evaluation or not *only on the basis of a moral tradition*. We have seen that King appealed to a powerful confluence of the Christian and liberal traditions to insist that race as a moral category was intolerable. A similar appeal to the same traditions, though perhaps less explicit, underlies our present belief that the impulse to favor one hand or the other similarly ought not to be made a moral issue. There is nothing in the normative Judeo-Christian and liberal democratic traditions condemning the use of the left hand where most use their right, and the



issue is irrelevant to life in community and to its institutions, such as marriage, family, government, and the economy. According to these traditions, making left-handedness a moral issue is an arbitrary distortion of the moral order.

Similarly, homosexual desire must come under the scrutiny of the moral tradition in order to determine whether its expression in actions ought to be a moral issue. In other words, is the mere fact that persons having sex with each other are of the same sex morally relevant or not? Only moral tradition can answer this question.

The End of Dialogue

The whole point of the homosexual rights movement, however, is to rule the moral question out of bounds ahead of time. Homosexual desire is a part of one's identity, and any moral examination of that desire that does not automatically affirm it as morally good is a personal attack on one's identity. The result is the end of the dialogue, especially moral dialogue. Confrontation and violence (verbal and otherwise) become the order of the day.

The violence at the heart of the homosexual rights movement is manifestation of a much larger phenomenon—the descent of Western society into nihilistic individualism and moral relativism. Today, for large numbers of people, moral positions are understood mostly as mere personal preferences. The only sin left is to say that there is a sin, explicitly or implicitly criticizing a person's lifestyle choices from a moral point of view. The homosexuality issue has become so painful because it exposes the extent to which even people in the church have accepted this common viewpoint. We have already crossed many boundaries. We have accepted divorce, cohabitation outside marriage, and premarital sex. Many of us, however, hesitate to accept homosexuality. Those who identify themselves as homosexual are understandably furious. The prevailing logic is irresistible: if it doesn't harm anyone else and it makes persons feel happy and fulfilled, how can we condemn it? Reluctance to accept homosexuality can be only a prejudice, a form of bigotry. Since there is no common moral framework, moral arguments make no sense. So moral arguments against homosexuality, when they are made, can be interpreted only as personal attacks. The breakdown of dialogue on the issue of homosexuality is a symptom of the larger moral fragmentation of our society.

The parallel with the civil rights movement may again be instructive. Prominent African-American leaders turned away from King's vision, especially after his death in 1968, and retrieved race as a moral category. A concept originally invented to justify oppression now became the basis for a positive identity and a matter of pride. Significantly, it was at this time, too, that these leaders increasingly turned away from Christianity to various forms of Marxism, an idiosyncratic form of Islam. (Normative Islam, like Christianity and Judaism, is resolutely antiracist.) From a Christian and liberal democratic point of view, their reappropriation of the concept of race for the purpose of instilling a unique identity reintroduced a distortion into moral discourse, destroying the fundamental equality and solidarity of humankind. Black racism was no improvement on White racism, and it was also a betrayal of Martin Luther King's dream. King tried to correct an injustice in society condemned by that society's own moral authorities, thereby reinforcing and strengthening those moral authorities. Some of his successors abandoned and attacked those very moral authorities by asserting race as its own moral authority.

Similarly, the homosexual rights movement has exalted sexual identity to a positive identity, the shaping force for persons' lives. But it has an advantage that the Black power groups did not enjoy. However hard they struggled to articulate their new racial identity, in the end the Black power movements found it hard to conceal the violence at their center. It was hard to mistake them for groups that might be beneficial or even innocuous to the goals of most people, including African-Americans. The homosexual rights movement, by contrast, has a much easier time. Its goal is the setting free of desire. This goal fits in well with the individualistic "pursuit of happiness" and ethos of tolerance so prevalent in Western society, which seeks as much as possible to let each person find and express his or her individual identity, without interference or fear of oppression. This goal seems, in the short run, to be no threat to the larger society. On the contrary, it promises harmony as the policy of "live and let live" prevails, allowing a rainbow of lifestyles and identities to express themselves.

But the sweet reasonableness is deceptive. At the core of the movement is not reasonableness, but a demand that there be no reasonableness. It is the sheer demand that their identity—that is, their desire and its expression in action—must be fully accepted and approved without question. When it meets resistance to this core demand, the movement shows the violence at its core. Since it has no reasoned arguments—its very essence is the rejection of reasoned argument—the only way it can maintain its position is by launching personal attacks on anyone who tries to bring up the moral question. Those who say that the morality of the expression of homosexual desire must be determined on the basis of an external moral authority are, they claim, merely acting out of fear and hate. They are "homophobic," trapped in their own narrow prejudices against those who are different from them. In this way they bully their opponents into silence and make political headway. At the core of this movement is sheer willfulness and violence, which is death to any community, not only in the church, but also in the larger society.



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