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HOMOSEXUAL MARRIAGE AND THE MYTH OF
TOLERANCE: IS CARDINAL O'CONNOR A
"HOMOPHOBE"?

RICHARD F. DUNCAN*

I. INTRODUCTION

In a 1993 law review article, Professor Larry Yackle peered into a crystal ball and told our collective fortune.¹ He declared that "American society is now absorbed in yet another great civil rights movement, this one on behalf of gay, lesbian, and ambisexual citizens, which will lead ineluctably to the elimination of legal burdens on the basis of sexual orientation."² Thus, Yackle confidently predicted the reordering of society along lines advocated by homosexual activists, a world in which the gay legislative agenda has been fully implemented. In this America-to-be, same-sex marriages — the ultimate priority of the homosexual political agenda³ — will be fully recognized and supported by government.

Yackle's utopia may strike some readers as a tolerant place, a land guided by the principle "live and let live." But that would be a serious misreading of both Yackle and the world of his hopes and visions. In his land of milk and honey, of peace, love and gay

* Sherman S. Welpton, Jr., Professor of Law, University of Nebraska College of Law (rduncan@unlinfo.unl.edu). I wish to thank Lynn Wardle, Steve McFarland, Kelly Duncan, Charlie Rice, and my cyberspace colleagues on the ReligionLaw discussion group. This Essay is dedicated to my children, Casey, Joshua, Rebecca Joy, and Hannah Grace—never trade your birthright for a bowl of red pottage.

1. Larry W. Yackle, *Parading Ourselves: Freedom Of Speech At The Feast Of St. Patrick*, 73 B.U. L. REV. 791 (1993).

2. *Id.* at 791.

3. Andrew Sullivan calls access to marriage "the critical measure necessary for full gay equality." Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24, 37. See also ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 185 (1995) [hereinafter SULLIVAN, VIRTUALLY NORMAL] (stating that homosexual marriage is "the only reform that truly matters").

liberation, the "old order" will be crushed and driven from the field.⁴ "[P]rivate homophobia," exclaims Yackle, "deprived of legal sanction, will ultimately be discredited and forced to the margin."⁵

What is this "private homophobia" that is to be stigmatized when the new paradigm shoulders its way to a dominant legal position? What kinds of people and institutions will be marginalized and delegitimized when the "legal sanctions" of traditional sexual morality have been toppled? We shall see.

I do not write this Essay as an expert on family law (I missed that class in law school). Although I teach and write about constitutional law, neither will I here attempt to analyze the constitutional arguments regarding same-sex marriage.⁶ Rather, I write in a much more personal voice — as a husband and father who cares deeply about the institutions of marriage and the family; as a Christian who believes that human beings were *created* male and female for a reason of fundamental importance and that this created order is "typically and paradigmatically expressed in the marriage of a man and a woman who form a union of persons in which two become one flesh — a union which, in the biblical tradition, is the foundation of all human community";⁷ and as a lawyer who has chosen to devote much of his professional energy to the cause of religious freedom.

The purpose of this Essay is to explain why I believe the heterosexual norm should be defended in what well may be the decisive moment of the sexual revolution — the battle over the meaning of marriage in human community. In particular, I will focus on an aspect of this controversy that often goes unnoticed — the impact of a paradigm shift on the "old order," on those who continue to affirm the conventional understanding of sexual morality and marriage.

4. Yackle, *supra* note 1, at 793.

5. *Id.* at 792.

6. For an excellent analysis of these issues, see Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1.

7. *The Homosexual Movement: A Response by the Ramsey Colloquium*, FIRST THINGS, Mar. 1994, at 15, 17 [hereinafter *Ramsey Colloquium*]. The Ramsey Colloquium "is a group of Jewish and Christian theologians, ethicists, philosophers, and scholars that meets periodically to consider questions of morality, religion, and public life." *Id.* at 15.

II. SAME-SEX MARRIAGE: A BRIEF SURVEY OF THE LEGAL BACKGROUND

Same-sex marriage⁸ has been unanimously and consistently rejected by the laws of every state in this country.⁹ Even when a state's marriage statute does not expressly confine marriage to one man and one woman, the courts have consistently held that same-sex marriages are not permitted.¹⁰ Indeed, at present "same sex marriage is allowed in no country or state in the world."¹¹ A recent collaboration of scholars and legal professionals from around the world working together on an "international marriage recognition project" concluded it was unlikely that a foreign same-sex marriage "would be fully recognized at the present time as a *marriage* in any jurisdiction in the world."¹²

In short, under the law as it stands today, homosexual marriage is an oxymoron. It simply does not exist, because the legal definition of marriage "is that it is a union of a man and a woman. Therefore the union of man and man or of woman and woman cannot be a marriage."¹³ This is true even when state marriage laws do not use gender-specific terms such as "husband" and "wife" — any argument for interpreting these laws to permit same-sex marriage is dispatched by the definitional approach.¹⁴

Despite this strong worldwide consensus supporting the heterosexual norm in marriage, influential elites in affluent western

8. The phrases "same-sex marriage" and "homosexual marriage," as used in this Essay, refer to a legal marriage between persons of the same gender.

9. See Barbara J. Cox, *Same-Sex Marriage And Choice-of-Law: If We Marry In Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1034; HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 77 (2d ed. 1988).

10. See CLARK, *supra* note 9, at 77; Richard D. Mohr, *The Case For Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 220 (1995).

11. Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L. Q. 497, 500 (1995). Although Sweden, Denmark, and Norway have legalized "domestic partnerships" for same-sex couples, lawmakers in these nations carefully distinguish domestic partnerships from marriage. *Id.*

12. *Id.* at 509 (emphasis in original). The few nations which currently recognize domestic partnerships might recognize a foreign same-sex marriage as a domestic partnership. *Id.* Of course, since no country presently allows homosexual marriage, this question has never actually arisen. *Id.*

13. CLARK, *supra* note 9, at 77. See *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) (stating that the "recognized definition" of marriage is a relationship "which may be entered into only by two persons who are members of the opposite sex").

14. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1427-28 (1993).

nations recently have provoked a “clamor for same-sex marriage.”¹⁵ This agitation has produced limited results, and many European nations now provide at least some legal benefits to homosexual relationships.¹⁶ In the United States, a small but not insignificant number of jurisdictions provide limited benefits to same-sex domestic partnerships.¹⁷

Moreover, a lawsuit recently brought by same-sex couples in Hawaii now threatens to impose a paradigm shift by judicial fiat. In *Baehr v. Lewin*,¹⁸ the Supreme Court of Hawaii held that the Hawaii marriage statute, which does not permit same-sex marriage, discriminates on the basis of gender and therefore triggers strict scrutiny under article I, section 5 of the state constitution.¹⁹ The court remanded the case to the trial court to allow the state an opportunity to meet its burden of justifying the marriage law “by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.”²⁰

Richard Mohr, anticipating victory in Hawaii for proponents of homosexual marriage, celebrated by asserting “if one is married in Hawaii, one is married everywhere — thanks both to common law tradition and to the U.S. Constitution’s full faith and

15. Wardle, *supra* note 11, at 514.

16. See *supra* note 11; Wardle, *supra* note 6, at 7-8. For example, Finland reportedly provides some governmental social benefits to same-sex partners and Belgium allows homosexual prisoners to have conjugal visits from same-sex partners. *Id.* at 8.

17. *Id.* at 8-9.

18. 852 P.2d 44 (Haw. 1993).

19. HAW. CONST. art. I, § 5 provides:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Unlike the 14th Amendment of the U.S. Constitution, the Hawaii state constitution expressly prohibits discrimination on the basis of sex. *Baehr*, 852 P.2d at 63, n.26. Thus, classifications based on sex are suspect categories subject to strict scrutiny. *Id.* at 67.

20. *Id.* at 68. The Hawaii legislature responded to *Baehr* by amending the state’s marriage laws to make absolutely clear that to be valid a marriage contract must be between a man and a woman. See HAW. REV. STAT. § 572-1 (Supp. 1995). The legislative findings accompanying this act declare that heterosexuality is intrinsic to marriage because Hawaii’s marriage laws are (and were originally) “intended to foster and protect the propagation of the human race.” Act of June 22, 1994, No. 217, § 1, 1994 Haw. Sess. Laws 217, *reprinted in* 20 FAM. L. REP. 2013, 2015 (1994).

credit clause."²¹ Can this be true? Is it possible for an activist court in one state — a state representing only a tiny fraction of the population of the United States and less than one-quarter of the population of New York City²² — to impose its peculiar views of gender and marriage on the entire nation?

Not exactly. Certainly, if Hawaii — or any state — were to legalize same-sex marriage, gay and lesbian couples by the thousands would flock there to marry. Indeed, one scholar has predicted a tourism boom worth billions of dollars for the first state to legalize homosexual marriage.²³ But when these "married" same-sex couples return home, they are likely to find difficult litigation awaiting them.

Courts in different states are likely to come up with different answers to what are very complex issues of choice-of-law and constitutional law.²⁴ Undoubtedly, courts in some states will decide that "recognizing same-sex marriage is the better choice."²⁵ Other courts will conclude that to recognize out-of-state homosexual marriages would violate strong public policy interests of the forum state.²⁶ For example, the Utah legislature amended its marriage recognition laws in 1995 — with Hawaii in mind — to make clear that same-sex marriages solemnized outside the state

21. Mohr, *supra* note 10, at 236. Mohr, a philosophy professor, cited no legal authority for this confident and unqualified legal opinion on complex issues involving choice-of-law and constitutional law. The issues are much more difficult than Mohr seems to comprehend. See *infra* notes 23-28 and accompanying text.

22. According to official statistics, as of 1994 the population of Hawaii was 1,179,000, and that of the United States was 260,341,000. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, table 27 (115th ed.). The population of New York City, as of 1992, was 7,312,000. *Id.* at table 46.

23. See Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives To Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995). Professor Brown estimates that the "first mover" advantage in tourism revenue generated by same-sex marriages "could exceed \$4 billion." *Id.* at 747. She seems genuinely perplexed that no state has yet "seized the prize" by moving quickly to legalize same-sex marriages. *Id.* at 835-36. Perhaps the state legislatures have wisely looked beyond tourist dollars to realize that Brown is tempting them with Esau's bargain, the sale of their heritage for a bowl of red pottage. See *Genesis* 25:29-34 (King James).

24. See generally, Cox, *supra* note 9; Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499 (1995) [hereinafter Keane, *Aloha, Marriage?*]; Habib A. Balian, Note, *Til Death Do Us Part: Granting Full Faith and Credit To Marital Status*, 68 S. CAL. L. REV. 397 (1995).

25. Cox, *supra* note 9, at 1118.

26. *Id.*

are not valid in Utah.²⁷ It is possible (but I believe unlikely) that the Supreme Court will require all states to give full faith and credit to same-sex marriages performed in Hawaii.²⁸ These issues will not be analyzed here. But Professor Mohr to the contrary notwithstanding, they are not easy questions.

III. A BRIEF DEFENSE OF THE TRADITIONAL PARADIGM

A full and complete defense of the heterosexual norm in marriage is beyond the scope of this Essay. Instead, I will here share some personal insights on the value and importance of the traditional paradigm as the standard for state-sanctioned marriage.

I write as an academic lawyer and as a Christian. My views are informed and animated by what I consider to be the best public policy arguments, as well as by my belief in the created order as revealed in the Old and New Testaments. To the extent that my "secular" views and "religious" views can be distinguished, they each affirm the heterosexual ideal for marriage. Indeed, religious reasoning and secular reasoning should always reach identical conclusions, because as Michael McConnell once observed: "There are not secular truths and religious truths, but only truths [U]nless 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."²⁹

To begin at the beginning, it is crucial to recognize that when homosexual activists seek legal validity for same-sex marriages they are demanding much more than tolerance. If we view

27. The Utah marriage recognition law, as amended in 1995, provides: A marriage solemnized in any other country, state, or territory, if valid where solemnized, is valid here, unless it is a marriage:

- (1) that would be prohibited and declared void in this state, under Subsection 30-1-2(1), (3), or (5); or
- (2) between parties who are related to each other within and including three degrees of consanguinity.

UTAH CODE ANN. § 30-1-4 (Supp. 1995). § 30-1-2(5) of the Utah Code provides that marriages "between persons of the same sex" are prohibited and declared void. Thus, same-sex marriages performed outside of Utah are invalid within that state.

28. I agree with the student commentator who predicted that "[r]ather than compel interstate recognition of marriage under the Full Faith and Credit Clause," the Supreme Court and lower federal courts "will most likely consign the question to the 'dismal swamp' of conflicts law." Keane, *Aloha, Marriage?*, *supra* note 24, at 531.

29. Professor McConnell made this statement in cyberspace as part of a recent discussion among the members of the ReligionLaw list.

the posture of the state toward certain kinds of behavior and personal relationships as a continuum, there are at least three possible legal categories.³⁰ The least favorable category involves prohibited relationships and conduct, and includes activities and associations forbidden or proscribed by government. The second category is composed of permitted relationships and conduct, and includes behavior and associations tolerated or allowed by government. The third category is reserved for preferred relationships and conduct, and includes relationships and activities that are "singled out for special approval, encouragement, and preference, including those officially endorsed as fundamental to our society, culture, and democratic way of life."³¹

The boundary between the first two categories — between what is prohibited and what is permitted — is the line of "tolerance"; the boundary between the second and third categories — between what is permitted and what is encouraged — is the line of "preference."³² Obviously, the demand for same-sex marriage laws is a call not for tolerance but for approval, encouragement and preferred status. Indeed, since marriage is "one of the oldest and most widely-respected types of preferred, specially protected relations," the claim of homosexuals for access to marriage is one "for the highest type of specially preferred, exceptionally secured status the law confers."³³ In other words, "there is a legally recognized and profound difference between the state not punishing private homosexual behavior between consenting adults and the state endorsing or recognizing a public right to engage in such behavior."³⁴

A tolerant society might decide that homosexual behavior, although permitted between consenting adults, should nevertheless be discouraged or at least deprived of public encouragement. Indeed, according to John Finnis, the "standard European position" on the issue of homosexuality is decriminalization coupled with laws and policies designed to make clear

30. This analysis is based upon the work of Professor Lynn Wardle as developed in an unpublished position paper he has circulated. See Lynn D. Wardle, *Same-Sex Marriage and Domestic Partnership: A Critical Analysis* 4-6 (Mar. 31, 1995) (draft of position paper, copy on file with author).

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 5. See also Wardle, *supra* note 6, at 40 ("proponents of same-sex marriage fail to recognize the difference between public noninterference with *private* homosexual behavior and *public* approval or endorsement of homosexual behavior") (emphasis in original).

34. Wardle, *supra* note 6, at 40.

that the state has by no means renounced its legitimate concern with public morality and the education of children and young people towards truly worthwhile and against alluring but bad forms of conduct and life. Nor have such states renounced the judgment that a life involving homosexual conduct is bad even for anyone unfortunate enough to have innate or quasi-innate homosexual inclinations.³⁵

Finnis has argued persuasively that homosexual conduct — including “overtly manifested active willingness to engage in homosexual conduct”³⁶ — is “intrinsically shameful, immoral, and indeed depraved or depraving.”³⁷ Obviously, if Finnis is correct, the intrinsic immorality of homosexuality is a sufficient justification for denying the validity of same-sex marriage. However, even if we are unconvinced that homosexual conduct is intrinsically wrong, we might nevertheless conclude that it lacks sufficient goodness to qualify for access to a governmentally-endorsed and specially-preferred status such as marriage.³⁸

We live in an age that glorifies “public reason,”³⁹ but seems hopelessly to have lost common sense. Why should organized society treat certain relationships as fundamentally important and shower those relationships with all sorts of benefits and privileges? Is it because those relationships are committed and loving? Perhaps, but most committed and loving relationships —

35. John M. Finnis, *Law, Morality, and “Sexual Orientation”*, 69 NOTRE DAME L. REV. 1049, 1052 (1994).

36. *Id.* at 1049.

37. *Id.* at 1055. Finnis argues that this was the position of all three of the “greatest Greek philosophers, Socrates, Plato and Aristotle.” *Id.* He concludes that a “political community which judges that the stability and protective and educative generosity of family life is of fundamental importance” has a compelling interest in denying that homosexual conduct “is a valid, humanly acceptable choice and form of life.” *Id.* at 1070. For a critique of Finnis’ views, see Michael J. Perry, *The Morality of Homosexual Conduct: A Response To John Finnis*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 41 (1995).

38. See Dennis Prager, *Homosexuality, the Bible and Us — a Jewish Perspective*, THE PUBLIC INTEREST, Summer 1993, at 60, 73 (“Whether or not homosexuals choose homosexuality is entirely unrelated to the question of whether society ought to regard it as an equally valid way of life.”). Gary Young, in his thoughtful and important analysis of the issue of the status of homosexuals in the military, argues that “[w]hile liberal society often refuses to regulate private behavior on the grounds of tolerance, the government nevertheless retains the proper role of regulating the public realm through public encouragement or discouragement of such conduct.” Gary L. Young, Jr., *The Price of Public Endorsement: A Reply To Mr. Marcossan*, 64 UMKC L. REV. 99, 107 (1995).

39. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1993). For a critique of Rawls’ “secular fundamentalism,” see Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814 (1994) (reviewing *POLITICAL LIBERALISM*).

those between brothers and sisters, platonic roommates, and grandmothers and grandsons to name a few — do not receive the special privileges granted to a husband and his wife. What is it about a committed relationship between one man and one woman that uniquely calls out for public encouragement? What is the ideal that the institution of marriage points toward and is designed to embrace and nurture?

If babies grew under cabbage leaves and were raised in state institutions, there would be no compelling reason to treat marriage as a preferred institution or to subsidize the living arrangements of committed sexual partners. The institution of marriage is designed to promote and encourage procreation. It is a public recognition that the heterosexual norm — a committed-for-life relationship between one man and one woman — “gives full expression to the commitment to time and history evident in having and caring for children.”⁴⁰ In other words, conventional marriage is of critical importance to society because, as Chief Justice Warren observed in *Loving v. Virginia*,⁴¹ it is “fundamental to our very existence and survival.”⁴²

Nature has designed the human body to allow heterosexual couples to unite biologically in a way it has denied homosexuals — “reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow them to *experience* their *real common good*.”⁴³ Joseph Cardinal Ratzinger, in a letter addressed to

40. *Ramsey Colloquium*, *supra* note 7, at 17. Richard Posner has observed that “marriage, even though considered sacramental only by Catholics, is believed by most people in our society to be not merely a license to reproduce but also a desirable, even a noble, condition in which to live.” RICHARD A. POSNER, *SEX AND REASON* 312 (1992). Posner opposes homosexual marriage because that “would place government in the dishonest position of propagating a false picture of the reality of homosexuals’ lives.” *Id.* In a 1994 amendment to the Hawaii marriage laws, the Hawaii legislature expressly found that heterosexuality is intrinsic to marriage because the institution of marriage is “intended to foster and protect the propagation of the human race.” Act of June 22, 1994, No. 217, § 1, 1994 Haw. Sess. Laws 217, *reprinted in* 20 *FAM. L. REP.* 2013, 2015 (1994).

41. 388 U.S. 1 (1967).

42. *Id.* at 12. Although *Loving*, which invalidated laws preventing marriage on the basis of racial classifications, is often cited by analogy in support of homosexual marriage, it seems obvious that the Court accepted the heterosexual norm and was concerned only about laws “which restrict the rights of citizens on account of race.” *Id.* See Wardle, *supra* note 6, at 75-82. For a list of law review publications developing the *Loving* analogy, see *id.* at 75, n.342.

43. Finnis, *supra* note 35, at 1066 (emphasis in original). Andrew Sullivan, a prominent proponent of homosexual marriage, concedes that “[t]he timeless, necessary, procreative unity of a man and a woman is inherently denied homosexuals.” SULLIVAN, *VIRTUALLY NORMAL*, *supra* note 3, at 196.

the bishops of the Catholic Church, stated that God created human beings male and female and "in the complementarity of the sexes" husbands and wives are called "to reflect the inner unity of the Creator" by cooperating with Him "in the transmission of life by a mutual donation of the self to the other."⁴⁴

Moreover, the complementary natures of husband and wife go far beyond their reproductive capacities. A man and a woman united in marriage "constitute a unit that is more complete, more comprehensive, more whole, more balanced, more complementary, and more liberating than any relationship of two persons of the same sex can ever be."⁴⁵ Legalizing homosexual marriage would deny this reality and endorse the "tragic illusion" that a same-sex relationship is no different than the union of a man and a woman.⁴⁶

Proponents of homosexual marriage, noting that states allow infertile heterosexuals to marry, argue that this latitude "belies any claim that the narrow purpose of marriage is to promote and protect propagation."⁴⁷ Andrew Sullivan, a former editor of the *New Republic* and perhaps the most articulate advocate of same-

44. Joseph Cardinal Ratzinger, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, in *HOMOSEXUALITY: DEBATING THE ISSUES* 205 (Robert M. Baird & M. Katherine Baird eds. 1995). Cardinal Ratzinger's letter was dated November 13, 1986. It was approved — *in forma communi* — by Pope John Paul II and therefore represents "an act of the teaching Church." John R. Quinn, *Toward an Understanding of the Letter "On the Pastoral Care of Homosexual Persons"*, in *HOMOSEXUALITY: DEBATING THE ISSUES*, *supra*, at 211.

45. Wardle, *supra* note 30, at 14. Professor Wardle notes that profound differences of gender are undeniable because "[t]here is too much evidence, compiled by too many disciplines, and compiled too recently, that establishes the innumerable ways in which men and women differ." *Id.* at 13-14. For example, he cites the work of Carol Gilligan as evidence of the fundamental ways in which moral reasoning and moral development occur differently in women than in men. *Id.* at 14. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Andrew Sullivan concedes that "no two lesbians and no two homosexual men can be parents in the way that a heterosexual man and a heterosexual woman with a biological son or daughter can be." SULLIVAN, *VIRTUALLY NORMAL*, *supra* note 3, at 196. Sullivan also acknowledges the transformative function of heterosexual fatherhood and motherhood, both on husband and wife and on their marriage. *Id.*

46. Wardle, *supra* note 30, at 14. See also POSNER, *supra* note 40, at 312. Andrew Sullivan concedes that the "heterosexuality of marriage is intrinsic" if marriage is designed to promote and encourage procreation. SULLIVAN, *VIRTUALLY NORMAL*, *supra* note 3, at 179. Sullivan's support for homosexual marriage is based upon his belief that marriage should be understood merely as state recognition of "an emotional commitment by two people to each other for life." *Id.* at 180.

47. Mohr, *supra* note 10, at 223. See also SULLIVAN, *VIRTUALLY NORMAL*, *supra* note 3, at 179.

sex marriage, recently chided presidential candidate Patrick Buchanan for opposing homosexual marriage despite the fact that Buchanan and his wife "do not have kids."⁴⁸ Sullivan explained the relevance of this proffered evidence as follows:

From the public absence of his children, as from the public statement of my [Sullivan's] homosexuality, I can infer certain things about Buchanan's "lifestyle." Either Buchanan is using contraception, in which case he is a hypocrite; or he or his wife is infertile, and he is, one assumes, engaging in non-procreative sex. Either way, I can see no good reason why his sexual life is any more sinful than mine.⁴⁹

I won't here attempt to decide whether Sullivan's or Buchanan's sexual life is "sinful"; however, I do believe there is a distinction between infertile heterosexual couples and same-sex couples for purposes of the law governing marriage. First, the state could not exclude infertile heterosexual couples from marriage without imposing onerous invasions of privacy. The state would need to ask grossly intrusive questions — Has your doctor ever tested you for infertility? Have you ever had a hysterectomy or tubal ligation? Do you plan to use contraceptives? — or require medical examinations to identify sterile couples and those who intend to artificially avoid procreation.⁵⁰ Same-sex couples, on the other hand, are inherently incapable of procreation and can be identified without intrusive questions, examinations or other invasions of privacy.

Second, there is an even more important distinction between infertile couples and same-sex couples relevant to the state's interest in encouraging procreation. Homosexual acts are "radically and peculiarly non-marital"⁵¹ in the sense that "their reproductive organs cannot make them a biological (and therefore personal) unit."⁵² Sterile heterosexual couples, however, are able to unite biologically in marital intercourse, although their infertility prevents them from accomplishing everything they "may hope and imagine."⁵³ The state's decision to allow infertile couples to marry is not inconsistent with the claim that the primary purpose of marriage is to promote and protect procreation. Same-sex marriage, however, has no procreative signifi-

48. Andrew Sullivan, *What You Do*, NEW REPUBLIC, Mar. 18, 1996, at 6.

49. *Id.*

50. Moreover, the state would need to periodically recertify couples as fertile and open to procreation, and invalidate the marriages of those who fail.

51. Finnis, *supra* note 35, at 1062.

52. *Id.* at 1066.

53. *Id.* Marital intercourse, the biological union of husband and wife, has "procreative significance" even if the couple happens to be infertile. *Id.* at 1067.

cance and its recognition would signal a complete rejection of that purpose.

Drawing a line that distinguishes between tolerance of private sexual lives on the one hand, and withholding public recognition and encouragement of same-sex marriages on the other, does not doom homosexuals to solitary and loveless lives.⁵⁴ Homosexuals remain free to live their lives as they choose. Some may choose, for religious or moral reasons, to lead a chaste life rather than act upon homosexual inclinations.⁵⁵ Others may enter into committed same-sex relationships, perhaps even with benefit of clergy, and consider themselves married.⁵⁶ In this latter case, although same-sex couples are denied the legal and public status of married persons,⁵⁷ they are free to live with and love whomever they wish. Finally, as Professor Stanton Jones has reminded us, there is also the hope for healing and change:

The more prevalent myth is that there is no hope for healing. Anyone who says there is no hope is either ignorant or a liar. Every secular study of change has shown some success rate, and persons who testify to substantial healing by God are legion. There is hope for substantial change *for some* in this life.⁵⁸

54. See Sullivan, *supra* note 48, at 6. Sullivan's point here is that the teachings of the Roman Catholic Church doom homosexuals to a loveless life. Of course, the Church does teach that homosexuals, like everyone else, must "seek to follow the Lord" by avoiding "a way of life which constantly threatens to destroy them." Ratzinger, *supra* note 44, at 208. However, persons who choose to live chaste and celibate lives in obedience to God are not thereby condemned to lovelessness and loneliness. Many unmarried persons are blessed with a multitude of rich and loving friendships. In any event, the line discussed in the text above does not impose the Roman Catholic or any other religious position on anyone. It permits private homosexual conduct and relationships, and withholds only public sponsorship of same-sex marriage.

55. See note 54 *supra*. See also Stanton L. Jones, *The Loving Opposition*, CHRISTIANITY TODAY, July 19, 1993, at 18, 23.

56. See Eskridge, *supra* note 14, at 1498-1500.

57. Most of the entitlements connected with the status of marriage — welfare benefits, tax benefits, inheritance, adoption, and the like — are, in any event, "designed with heterosexual marriage in mind, more specifically heterosexual marriages resulting in children." POSNER, *supra* note 40, at 313. Posner asks whether these benefits are appropriate for homosexual couples. For example, do we really believe homosexual couples should "have the same rights of adoption and custody as heterosexual couples?" *Id.* He also expresses concern about the prospect of a homosexual marrying "a succession of dying AIDS patients in order to entitle them to spouse's medical benefits." *Id.* His solution is to face these questions one at a time rather than "in a lump" by opening marriage to homosexuals. *Id.*

58. Jones, *supra* note 55, at 25 (emphasis added). Thomas Schmidt, a scholar who teaches at Westmont College, has written a helpful analysis of

Jones, the chair of the psychology department at Wheaton College and an expert on human sexuality, readily acknowledges that “few people choose to have homosexual inclinations,”⁵⁹ and that the cause of sexual orientation is a complex web of nature, nurture, and personal circumstances.⁶⁰ His point is simply that some persons struggling with homosexual feelings may be helped and even healed if given appropriate counseling and support.

The law serves an educative function. It is like a teacher in a “vital national seminar”⁶¹ teaching citizens fundamental lessons about the meaning of the good life. This leads to one additional concern I have with proposals to radically alter the legal definition of marriage. As Richard Posner recently observed, “[t]o permit persons of the same sex to marry is to declare, or more precisely to be understood by many people to be declaring, that homosexual marriage is a desirable, even a noble, condition in which to live.”⁶² This teaching about the meaning of the most fundamental building block of human community — which is at odds with what most people in this society believe⁶³ — is certain to have many unintended (perhaps intended by some) consequences.

For example, if marriage laws are amended to encompass homosexual couples, will public education be affected? Almost certainly it will. Curriculum used to teach children about human sexuality and family life will need to be revised to reflect the new paradigm. Books like *Heather Has Two Mommies*⁶⁴ and *Daddy's*

therapy and healing programs for homosexuals. Schmidt reports that both secular and Christian programs have produced significant positive results. THOMAS E. SCHMIDT, *STRAIGHT & NARROW? COMPASSION & CLARITY IN THE HOMOSEXUALITY DEBATE* 153-58 (1995). For example, one study of fifty-four men and thirteen women “who expressed a desire to convert or revert to a heterosexual orientation,” produced positive results in more than half of the participants. *Id.* at 153-54. Schmidt quotes a former homosexual — now healed and ten years out of the lifestyle — who explained why homosexual activists often fly into a rage when someone suggests that healing is possible: “[H]omosexual activists want to convince not only the public but *themselves* that change never occurs, because *if I exist, each of them must be haunted by the possibility that they, too, might find the power to change.*” *Id.* at 155 (emphasis in original).

59. Jones, *supra* note 55, at 23.

60. *Id.*

61. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (referring to Supreme Court Justices as “teachers in a vital national seminar”).

62. POSNER, *supra* note 40, at 312.

63. *See id.*

64. LESLEA NEWMAN, *HEATHER HAS TWO MOMMIES* (1989). In this picture book for young children, Heather is a little girl with two lesbian parents, Mama

*Roommate*⁶⁵ — designed to teach young children that homosexuality “is just one more kind of love”⁶⁶ — will become required texts in public elementary schools.⁶⁷ Similar changes will be made in the curriculum of secondary schools.⁶⁸ Perhaps it is appropriate to teach children about the equal goodness of homosexual and heterosexual relationships. But I doubt most parents will think so. The public schools are already one of the primary battlegrounds in the culture war,⁶⁹ and this development will throw gasoline on the fire.

A second unintended consequence — the stigmatization of traditional religion and morality — is also likely to accompany legislation that celebrates the goodness of same sex relationships.

Jane and Mama Kate. Young readers learn that when Mama Jane and Mama Kate decided to have children they visited a “special doctor” who “put some sperm into Jane’s vagina.” Heather is the result of this clinical fertilization. Eventually, Heather is sent to day care where she learns that many of the other children have fathers. When Heather feels sad because she has no father, her teacher Molly assures her that “You have two mommies. That’s pretty special.” *Id.*

65. MICHAEL WILLHOITE, *DADDY’S ROOMMATE* (1990). In this picture book for children, the main character is a boy whose “Mommy and Daddy got a divorce last year.” But soon there is “somebody new at Daddy’s house.” Daddy and his “roommate” Frank “live together, work together, eat together, [and] sleep together.” At the end of the day, the young reader learns that “[b]eing gay is just one more kind of love, and love is the best kind of happiness.” *Id.*

66. *Id.*

67. These books were recommended for use in first grade as part of a multicultural curriculum designed for public schools in New York City. See Midge Decter, *Homosexuality and the Schools*, COMMENTARY, March 1993, at 19-20.

68. A recent controversy at Framingham High School in Massachusetts provides a glimpse of what the future may hold. The parents of two 10th graders removed them from a class designed to promote “tolerance of sexual preference.” The class involved a “role reversal” exercise in which students were given a “role reversal questionnaire” that asked the following questions:

Is it possible you are heterosexual because you fear the same sex? If you have never slept with someone of the same sex, how do you know you wouldn’t prefer that? Is it possible you merely need a good gay experience?

THE WANDERER, Mar. 21, 1996, at 1. See also Mark Mueller, *Parents Rip Class on Gay Tolerance*, BOSTON HERALD, Mar. 1, 1996, at 1. For a case upholding the right of a public school to require students to attend an AIDS education program in which a performance artist named Suzi Landolphi performed a number of monologues and skits in which she graphically and crudely discussed male and female genitals, excretory functions, anal sex, oral sex, masturbation, and homosexuality, see *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S. Cl. 1044 (1996).

69. See STEPHEN BATES, *BATTLEGROUND: ONE MOTHER’S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

This issue will be developed at length in the following section of this Essay. Finally, unintended consequences — because they are, well, unintended — are inherently difficult to predict. But one thing is certain — if the concept of marriage is transformed by adoption of the new paradigm, the unexpected consequences will be legion. As Dennis Prager has said: “Accepting homosexuality as the social, moral, or religious equivalent of heterosexuality would constitute the first modern assault on the extremely hard-won, millennia-old battle for a family-based, sexually monogamous society.”⁷⁰

IV. THE HANDMAID’S TALES: NARRATIVES OF SHIFTING PARADIGMS AND RELIGIOUS STIGMA

In her novel, *The Handmaid’s Tale*,⁷¹ Margaret Atwood probed the darkest recesses of feminist paranoia and reimagined a future America — renamed the “Republic of Gilead” — as a repressive theocracy.⁷² Although it is a shallow and silly book filled with one-dimensional characters and politically correct banalities, *The Handmaid’s Tale* has its admirers. For example, Joyce Johnson reviewed the book for the *Washington Post* and compared it to George Orwell’s *1984*.⁷³ Whatever the merits of the book, Atwood’s land of Gilead is a nightmarish place in which the “sin” of reading is forbidden, abortionists are executed under *ex post facto* laws for having performed *legal abortions* under the former political order, and fertile women are held in bondage as “handmaids,” women whose wombs are conscripted by the state and assigned to ruling class men whose wives are barren.

The Handmaid’s Tales that I will recount in the following pages borrow only their title from Atwood’s book. These tales are about what life almost certainly will be like if Professor Yackle’s utopia — a place in which homosexual love is celebrated

70. Prager, *supra* note 38, at 72.

71. MARGARET ATWOOD, *THE HANDMAID’S TALE* (1986).

72. *Id.* The dust jacket of the book provides the following synopsis: Set in the near future, it describes life in what was once the United States, now called the Republic of Gilead, a monotheocracy that has reacted to social unrest and a sharply declining birthrate by reverting to, and going beyond, the repressive intolerance of the original Puritans. The regime takes the Book of Genesis absolutely at its word, with bizarre consequences for the women and men of its population.

Imagine a theocracy so far to the right that Pat Buchanan is an ultra-liberal. Now picture his evil-fundamentalist-zealot-twin brother — Magog Buchanan — as dictator of this horrific America. Hold this thought for 300 or so pages, and you have the drift of Atwood’s story.

73. Joyce Johnson, *Margaret Atwood’s Brave New World*, WASH. POST BOOK WORLD, Feb. 2, 1986, at 1.

and “private homophobia” is discredited and banished to the margins of society — comes about as he predicts it will.⁷⁴ But my narratives are not fiction. They are true stories about the world we live in, and about the impact of gay liberation on people of faith and religious institutions. They are about the myth of tolerance, and the reality of religious persecution. They are windows to one possible future, a future eagerly anticipated by much of today’s educated elite. Look. Listen. Decide for yourself.

A. *Is Cardinal O’Connor A “Homophobe”?*

If we accept his major premise, Professor Yackle’s logic is compelling. If gay liberationists prevail and convince government to legislate the equal goodness of homosexuality, bisexuality, and heterosexuality, traditional religion will indeed be delegitimized. If homosexual relationships are good and legitimate, religions that proclaim traditional sexual morality are “homophobic” institutions, equivalent to the Ku Klux Klan and similar racist organizations. If homosexual unions are good, the Bible — as it is understood by traditional Jews, Catholics, and Protestants — is hate literature.⁷⁵

For example, I will never forget the night I showed up at the University of Nebraska film theater to participate in a panel discussion on government-subsidized art and censorship.⁷⁶ I knew a number of controversial films would be screened as part of the program, but I had no idea I was about to sit through twenty-three minutes of non-stop religious bigotry and hate. Even more amazing, the object of this hatred and rage was a man I admire and a Church I respect.

The film, Robert Hilferty’s *Stop The Church*, is an award-winning documentary⁷⁷ about what can only be described as a hate crime — the illegal disruption of Mass at St. Patrick’s Cathedral in December 1989 by Act-Up, a group of AIDS and homosexual

74. See *supra* notes 1-5 and accompanying text.

75. The late Paul Monette, an openly gay intellectual whose work won a National Book Award and three Lambda Literary Awards, often raged against traditional believers, religious institutions, and even the Bible. For example, Monette won the 1992 National Book Award for a book in which he described the “enemies” of homosexuals as “the Nazi Popes and all their brocaded minions, the rat-brain politicians, the wacko fundamentalists and their Book of Lies.” PAUL MONETTE, *BECOMING A MAN: HALF A LIFE STORY 2* (1992).

76. I have told this story before. See Richard F. Duncan, *Who Wants To Stop The Church: Homosexual Rights Legislation, Public Policy, And Religious Freedom*, 69 NOTRE DAME L. REV. 393, 440-42 (1994).

77. *Stop The Church* was shown at the Berlin International Film Festival and won an award for “best documentary” at the Ann Arbor Film Festival. Robert Hilferty, *Why Is PBS Afraid of AIDS?*, NEWSDAY, Sept. 4, 1991, at 46.

activists.⁷⁸ I sat there shaking my head in disbelief as one outrage after another flickered across the screen.

When asked to describe the Catholic Church, one woman responds: "The Catholic Church is hypocrisy and hate." Another says it is "a very homophobic body." A man hisses: "The Catholic Church is arrogant, sterile, retrograde, blind." Still another man was even more venomous: "The Catholic Church is a tiny, anachronistic, feudalism leftover which practices ritual sacrifice on the bodies of gay men, lesbians, women, and people of color." A middle-aged woman points to a disrespectful picture of Cardinal O'Connor and refers to him as "that fat cannibal." A man calls the Cardinal a "cretin." The camera scans a poster which reads: "CARDINAL O'CONNOR WON'T TEACH SAFE SEX. STOP THE CHURCH." Another poster identifies the Cardinal as a "PUBLIC HEALTH MENACE." Another targets the Church: "FIGHT ITS MURDEROUS AIDS POLICY. TAKE DIRECT ACTION. TAKE CONTROL OF YOUR BODY. STOP THE CHURCH."

In another scene, the camera moves inside St. Patrick's Cathedral and the filmmaker employs a song called *The Vatican Rag* to ridicule believers at worship:

First you get down on your knees
Fiddle with your rosaries
Bow your head with great respect
And genuflect, genuflect, genuflect.

As scenes change rapidly we see homosexual activists at a rally preparing for their demonstration. A man shouts: "The Church is our enemy." A young woman urges the crowd to "shut down the Church" and declares that freedom of religion is "bullshit." And so they seem to think it is. The film concludes with coverage of the illegal disruption of Mass at St. Patrick's — shrill whistles blowing, demonstrators screaming insults, and others using their bodies to block aisles and the Communion rail in a mock "die-in."

What are we to make of this film and its depiction of rage and hatred directed at a man of God and his Church? What is it about traditional religion that needs to be "stopped" and silenced?

78. Robert Hilferty, the film's producer and director, is a member of Act-Up, the AIDS Coalition to Unleash Power. See Kim Masters, *Here Is "The Church," Scenes From the Documentary PBS Yanked*, WASH. POST, Aug. 14, 1991, at C1.

I think the answer is clear. "Private homophobia"⁷⁹ — the teaching of the Church about homosexuality and safe-sex — was the primary object of the hate. Cardinal O'Connor is only the messenger. Hilferty believes that homosexual conduct is good, and that information about condoms and "safer sex" are vital to the health and well-being of the homosexual community. The Church's conflicting vision of the good must be stigmatized and marginalized if gay liberation is to prevail.

B. *God and Finnis At Harvard Law*

On April 19, 1994, Professor John Finnis spoke at Harvard Law School.⁸⁰ Finnis, one of the world's leading authorities on natural law and now a member of the Notre Dame law faculty, had been invited to speak at Harvard by the Catholic Law Students Association.⁸¹ It must have been a thrill for the CLSA to host a speaker of Professor Finnis' distinction.

However, not everyone was happy to see Finnis at Harvard. His speech was rudely interrupted by a small group of gay rights advocates. One "proud individual" hit a switch that lowered a movie screen located behind the podium; across the screen "were enormous, green letters spelling 'HOMOPHOBE.'"⁸²

Scott Wiener, a Harvard law student and one of the leaders of the protest, explained that Finnis is a "hate-monger" because of his public stand in opposition to certain aspects of the gay political agenda.⁸³ Wiener denounced Finnis' "blatant homophobia" and said that inviting him to lecture at Harvard was like inviting "the Grand Wizard of the KKK" to speak there.⁸⁴

Like Professor Yackle, Wiener believes that people such as Finnis — people who reject the idea that homosexual conduct is legitimate and good — must be discredited and marginalized. Wiener explained his reasoning in an essay published in the *Harvard Law Record*:

Being pro-gay and in any way legitimating homophobia are completely incompatible, just as one cannot reasonably be pro-Jewish while tolerating Holocaust

79. See *supra* note 5 and accompanying text.

80. See Scott Wiener, *Homophobia Cannot Be Tolerated*, HARVARD LAW RECORD, Apr. 29, 1994, at 11.

81. *Id.*

82. *Id.*

83. *Id.* According to Wiener, Finnis was responsible for "hate crimes committed against gays and lesbians in Colorado" because he had testified "strongly in favor" of Colorado's Amendment Two. *Id.*

84. *Id.*

revisionism or pro-African-American while failing to condemn phrenology.

All three of these positions are hypocritical, yet an overwhelming number of "pro-gay" straight people fail to see this inconsistency. They passively allow homophobia to have a legitimate forum in which to spread its hateful, violent message that homosexuals are moral perverts whom society must suppress. But homophobia's message is not simply an alternative point of view; it is every bit as repugnant and dangerous as the view that all blacks are dumb and lazy or that the Holocaust is the creation of a Jewish conspiracy. Indeed, like anti-Semitism and racism, homophobia has a body count.⁸⁵

Thus, if gay liberation is to become a reality, right-thinking persons "have a duty to take affirmative steps to stamp out homophobia."⁸⁶ Scholars like Professor Finnis will have to find other work.

C. *The Least Tolerant City In America*

San Francisco likes to take pride in its reputation as a tolerant city, a city with a live and let live attitude. And indeed, when it comes to libidinal license, San Francisco is undoubtedly the city that will tolerate — and even celebrate — anything and everything.

But if you're going to San Francisco Dorothy, you better leave your Bible back home in Kansas. Because when it comes to respect for religious freedom, the City By The Bay is perhaps the least tolerant community in America. Just ask the Salvation Army. Or the Boy Scouts.

In January 1996, the San Francisco Board of Supervisors held up \$65,000 in federal grants earmarked for emergency shelter services operated by the Salvation Army in the Tenderloin district. The funds were blocked — and 600 homeless persons were held hostage — because the Supervisors wanted to express their concern over a letter published in a local newspaper that purported to describe the Salvation Army's religious beliefs about homosexuality.⁸⁷ The letter, signed by a Salvation Army captain, said homosexuality "is contrary to the teachings of the Bible and presents a serious threat to the integrity, quality and

85. *Id.*

86. *Id.*

87. See Catherine Bowman, *S.F. Freezes Funds For Salvation Army*, S.F. CHRON., Jan. 3, 1996, at A13; Steven A. Chin, *Shelter OK'd After No-Gay-Bias Pledge*, S.F. EXAMINER, Jan. 17, 1996, at A3.

solidarity of society as a whole.”⁸⁸ Supervisor Tom Ammiano denounced these religious beliefs as “homophobic” and stridently announced: “If they cannot change, I don’t think they should get public money.”⁸⁹

Well, with \$3 million a year at stake, and with the lives of hundreds of homeless persons hanging in the balance, the Salvation Army repented and agreed to schedule lesbian-gay sensitivity training for all senior staff and officers and to appoint homosexuals to two positions on its advisory council. The gracious Board of Supervisors then voted 8-1 to award the grant to the chastened charity.⁹⁰

The Salvation Army was punished for heresy, for the mere expression of its religious beliefs. There was no evidence that the Salvation Army discriminated against homosexuals or anyone else. As the *San Francisco Chronicle* editorialized, the “Salvation Army’s 113-year record of tolerance, services to the poor, the elderly and substance abusers in San Francisco speaks for itself.”⁹¹ But inquisitions target beliefs, and in San Francisco the Bible and its “homophobic” teachings are unacceptable.

Perhaps even more remarkable than the Salvation Army saga is the story of the Bank of America, the Boy Scouts, and the San Francisco Board of Supervisors. A few days before Christmas in 1992, the Supervisors passed what was described as “a most modest proposal” by Supervisor Roberta Achtenberg.⁹² By a vote of 7 to 3, the Supervisors passed a resolution urging the city to boycott the Bank of America — by withdrawing \$6 million from city accounts — to protest the bank’s decision to make charitable gifts to the Boy Scouts.⁹³ The Boy Scouts, you see, is a discreditable, homophobic organization which “refuses to allow openly gay Scouts and Scoutmasters.”⁹⁴ Achtenberg declared victory after the resolution passed by crowing that this measure sends “a message to the youth of this city that this board will stand up for what is right.”⁹⁵ The resolution was subsequently vetoed on

88. Bowman, *supra* note 87, at A13.

89. *Id.*

90. See Chin, *supra* note 87, at A3; *Fund The Salvation Army*, S.F. CHRON., Jan. 5, 1996, at A22.

91. S.F. CHRON., Jan. 5, 1996, at A22. Moreover, the Salvation Army serves many AIDS patients and “substance abusers with HIV” in its San Francisco shelters. *Id.*

92. David Tuller, *S.F. Board Protests B of A’s Scout Policy*, S.F. CHRON., Dec. 22, 1992, at A15.

93. *Id.*

94. *Id.*

95. *Id.*

Christmas Eve by Mayor Frank Jordan, who was promptly denounced as a traitor by the gay press in the city.⁹⁶

That anyone could think of the Salvation Army and the Boy Scouts as evil organizations is shocking and appalling. But in San Francisco it is good politics, because the new paradigm of sexual relativism has already achieved dominance there. And in this brave, new world, private homophobia, such as that of the Salvation Army and the Boy Scouts, has been delegitimized and forced to the margin.

D. *The Myth of Tolerance*

Proponents of the gay political agenda often assert that it is their intention merely to affirm the virtue of tolerance. However, as Cardinal O'Connor, Professor Finnis, the Salvation Army, and the Boy Scouts discovered, there is an iron fist behind the pink triangle.

The gay political agenda is not a tolerant agenda. It is an attempt to codify the values of the sexual revolution and to impose a particular view of the good on all of society.⁹⁷ Persons or institutions who stand in the way of this effort to transform human community — those guilty of what Professor Yackle calls “private homophobia” — will be (must be) delegitimized, marginalized, and even demonized as the new paradigm advances to a position of dominance.

“Tolerance,” says Stanley Fish, “is exercised in an inverse proportion to there being anything at stake.”⁹⁸ Advocates of the gay political agenda recognize that much is at stake in their attempt to transform our laws and basic institutions. It is time we all learned that lesson.

96. David Tuller, *Gay Paper In S.F. Urges Recall of Mayor Jordan*, S.F. CHRON., Dec. 30, 1992, at A16.

97. See Duncan, *supra* note 76, at 397-415.

98. Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1466 (1990). Fish explains this insight as follows:

[T]olerance is not a virtue with its own context-independent shape, but is rather a way of relating or attending whose shape depends on the commitments one already feels. The Rortyan injunctions “be ye tolerant” or “learn to live with plurality” or “notice suffering when it occurs” or “expand our sense of ‘us’” are like the biblical injunction “be ye perfect” or the parental injunction “be good”; one wants to respond, yes, but in relation to what? One cannot *just* be tolerant; one is tolerant (or not) in the measure a given situation, complete with various pressures and with the histories of its participants, allows.

Id. at 1467 (emphasis in original).

