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# The Fallacy of Neutrality from Beginning to End: The Battle Between Religious Liberties and Rights Based on Homosexual Conduct

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Articles

# *425 THE FALLACY OF NEUTRALITY FROM BEGINNING TO END: THE BATTLE BETWEEN RELIGIOUS LIBERTIES AND RIGHTS BASED ON HOMOSEXUAL CONDUCT

**Rena** M. **Lindevaldsen** [FNd1]

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> In every action we take, we are doing one of two things: we are either helping to create a hell on earth or helping to bring down a foretaste of heaven. We are either contributing to the broken condition of the world or participating with God in transforming the world to reflect his righteousness. We are either advancing the rule of Satan or establishing the reign of God. [FN1]

## I. Introduction

In C.S. Lewis' The Screwtape Letters, readers get a glimpse into the spiritual battle for souls as they read fictional letters between a senior demon, Screwtape, and his demon apprentice, Wormwood. [FN2] In the letters, Screwtape provides advice to Wormwood on how to turn his "patient," an ordinary man from England, toward "Our Father Below" (Satan) and away from "the Enemy" (God). [FN3] In one of the letters, Wormwood is frustrated that his patient has engaged in only little sins, preferring that his patient engage in "spectacular wickedness." [FN4] Screwtape advises him that small sins are just as good as big sins in leading the patient away from the Enemy. [FN5] In fact, he explains that

> the only thing that matters is the extent to which you separate the man from the Enemy. It does not matter how small the sins are provided that their cumulative effect is to edge the man away from the Light and out into the Nothing. . . . Indeed the safest ***426** road to Hell is the gradual one-the gentle slope, soft underfoot, without sudden turnings, without milestones, without signposts. [FN6]

While many see the truth in that statement with respect to the path forged by their actions, they do not often, if ever, consider that the same is true with respect to how they think. The Bible plainly states, however, that everyone must either "bring every thought into captivity to the obedience of Christ" [FN7] or continue as "enemies in your mind." [FN8] Un-Biblical thinking, like un-Biblical actions, leads one on a path away from God.

Part II of this Article will briefly introduce a Biblical approach to thinking about contemporary issues and discuss how Christians can unwittingly abandon distinctively Biblical thinking under the guise of neutrality. Part III will present a number of cases that highlight the fallacy of neutrality in the battle between religious liberties and rights based on homosexual conduct. Part IV will contend that the battle for rights based on homosexual conduct is a zero-sum game and that, therefore, society should choose to protect religious liberties and free speech rights. Part V will briefly conclude.

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## II. Thinking Biblically

"The plea for Christians to surrender to neutrality in their thinking is not an uncommon one." [FN9] It frequently begins with a request for the Christian to explain, without relying on the Bible, why he holds a particular position. If he accepts the bait and attempts to justify his position by relying on non-Biblical, secular arguments, he has abandoned his greatest weapon-the truth of Scripture. The Christian who abandons Scripture under the guise of neutrality ignores the fact that everyone has a worldview and makes life decisions through the lens of that worldview. For the Christian, his worldview should be based on what God tells him in the Scripture is right and wrong. In 2 Timothy 3:16, Paul reminds us that "[a]ll Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness."

In contrast, the worldview of those who refuse to live according to Scripture is based on an ever-changing, man-made standard of what is right and wrong. The request that Christians abandon their worldview, therefore, ***427** is a call for Christians "to surrender [their] distinctive religious beliefs[,] to temporarily 'put them on the shelf,' to take a neutral attitude in [their] thinking. Satan would love this to happen" because it "would make professing Christians impotent in their witness, aimless in their walk, and disarmed in their battle with the principalities and powers of this world." [FN10] When Christians attempt to argue or make decisions from a position of neutrality, they leave the fortress without their strongest weapon and enter the enemy's camp.

Not only is it a poor strategic decision to abandon the governing assumptions of the Christian worldview and make decisions from a supposed neutral starting point, but it also is un-Biblical. The Bible is quite clear that it is futile even to attempt to be neutral in discussions and decision-making.

> "No man is able to serve two lords." (Matt. 6:24). It should come as no surprise that, in a world where all things have been created by Christ (Col. 1:16) and are carried along by the word of His power (Heb. 1:3) and where all knowledge is therefore deposited in Him who is the Truth (Col. 2:3; John 14:6) and who must be Lord over all thinking (2 Cor. 10:5), neutrality is nothing short of immorality. [FN11]

When a Christian attempts to be neutral, he abandons truth, which makes his position both distinctive and right, and exchanges it for a non-Biblical, secular mindset. "To turn away from intellectual dependence upon the light of God, the truth about and from God, is to turn away from knowledge to the darkness of ignorance." [FN12] The Bible explains that "The fear of the Lord" is the beginning of knowledge and wisdom. [FN13] Thus, a person who does not fear the Lord lacks Biblical wisdom and knowledge. The choice for the Christian is whether he will have "the mind of Christ," [FN14] and therefore be on the path to attain Biblical knowledge and wisdom, or the "vain mind of the Gentiles," [FN15] and therefore be a fool. [FN16] Stated differently, he will either ***428** "bring every thought into captivity to the obedience of Christ" [FN17] or continue as an enemy of Christ in his thinking. [FN18]

The Bible is clear that adopting an un-Biblical, secular mindset that is based on mankind's subjective definition of what is right, just, and moral leads to approval of conduct the Bible declares immoral. The Bible warns of the consequences for those who "call evil good and good evil." [FN19]

> The wrath of God is being revealed from heaven against all the godlessness and wickedness of men who suppress the truth by their wickedness, since what may be known about God is plain to them, because God has made it plain to them. For since the creation of the world God's invisible qualities-his eternal power and divine nature-have been clearly seen, being understood from what has been made, so that men are without excuse. For although they knew God, they neither glorified him as God nor gave

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> thanks to him, but their thinking became futile and their foolish hearts were darkened. Although they claimed to be wise, they became fools and exchanged the glory of the immortal God for images made to look like mortal man and birds and animals and reptiles. Therefore God gave them over in the sinful desires of their hearts to sexual impurity for the degrading of their bodies with one another. They exchanged the truth of God for a lie, and worshiped and served created things rather than the Creator-who is forever praised. Amen. Because of this, God gave them over to shameful lusts. Even their women exchanged natural relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion. Furthermore, since they did not think it worthwhile to retain the knowledge of God, he gave them over to a depraved mind, to do what ought not to be done. They have become filled with every kind of wickedness, evil, greed and depravity. They are full of envy, murder, strife, deceit and malice. They are gossips, slanderers, God-haters, insolent, arrogant and boastful; they invent ways of doing evil; they disobey their parents; they are senseless, faithless, heartless, ruthless. Although they know God's righteous decree that those ***429** who do such things deserve death, they not only continue to do these very things but also approve of those who practice them. [FN20]

On issues related to homosexuality, the Bible accurately portrays current efforts to gain rights based on homosexual conduct: there are those who seek to call evil good and good evil. They actively seek to legalize (declare good) conduct the Bible calls evil and to call evil that which the Bible declares good (living according to the truth of Scripture). Christians must realize that neutrality is impossible in the battle between religious liberties and rights based on homosexual conduct.

## III. The Fallacy of Neutrality

### A. Education Necessarily Involves Morals Training

The prime target in the battle to gain rights based on homosexual conduct is the next generation. One prominent homosexual leader aptly explained, “Whoever captures the kids owns the future.” [FN21] If children can be trained to reject the Judeo-Christian values of their parents or grandparents and to accept sinful conduct as good, the nation's future will be changed. As a result, the classrooms of America represent the front line in this battle to acquire rights based on homosexual conduct. Here are a few examples of the efforts to suppress the truth of Scripture:

> · In October 2008, eight first-graders took a field trip to San Francisco City Hall for the “wedding” of their teacher and her lesbian partner; administrators called the field trip “a teachable moment.” [FN22]
>
> · A school nurse in California explained in an interview that as part of the school's efforts during Gay Pride Month, the school had created the Rainbow Cafe where each day students could discuss a different topic related to sexuality and LGBT (Lesbian, Gay, Bisexual, and Transgender) issues. To encourage attendance by “kids who wouldn't be exposed to this kind of programming,” teachers were encouraged to give extra credit to students who participated. [FN23]
>
> · The Maine Human Rights Commission ruled that a school district unlawfully discriminated against a transgendered fifth-grade student by ***430** denying the boy access to the girls' restrooms in the school. Initially, the school permitted the boy to use the girls' restrooms, but it subsequently required him to use a single-stall faculty bathroom after boys began to harass him for using the girls' restrooms. [FN24] Unhappy with that compromise, the parents filed a discrimination complaint against the school and won. The

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school now must allow the boy to use the girls' restrooms and take all steps to keep the child safe. In March 2010, the Commission held a public hearing on its proposal to require all schools in Maine to permit transgendered students to use the restroom of their choice, regardless of whether they are boys or girls.

· One organization that has dedicated itself to LGBT issues in public schools is GLSEN (Gay, Lesbian, Straight Education Network). Kevin Jennings, founder of GLSEN, was appointed by President Obama to lead the "safe school" efforts at the Department of Education. [FN25] Soon after the appointment, we all learned that while Jennings was a teacher he failed to report to authorities that a fifteen-year-old student told him of a sexual relationship with an older man. [FN26] Instead, Jennings apparently encouraged the boy to use a condom. [FN27] As part of GLSEN's efforts to eradicate what it describes as "homophobia" and "heterosexism" in schools, it creates curriculum for teachers to use in schools, encourages students to participate in several special days throughout the school year (including Ally Week, Coming Out Day, No Name Calling Week, TransAction Day, and Day of Silence), and promotes formation of the now more than 4,700 gay-straight alliance clubs in schools around the country. [FN28] In one of its educational ***431** resources, GLSEN discusses "institutional heterosexism" in schools. [FN29] GLSEN defines heterosexism as "the belief that homosexuality is 'wrong' or 'less than [heterosexuality],"' the belief that "heterosexuality is 'better' or more 'normal [than homosexuality],"' or "the assumption that the gender roles today's society assigns to males and females are 'natural' and 'right."' [FN30] "Heterosexism is not a replacement for homophobia. Rather it is a broader term that does not imply the same level of hatred, and which can describe seemingly innocent thoughts and behavior on the belief that heterosexuality is the norm." [FN31] In other words, GLSEN wants our schools to believe that referring to moms and dads when discussing family is heterosexist because it perpetuates stigma against those in same-sex relationships.

· GLSEN's various special days all have the goal of gaining wider public acceptance for those with same-sex sexual attractions or gender identity confusion. Ally Week takes place in October and encourages all students to become allies against anti-LGBT discrimination and harassment. [FN32] GLSEN hosts an Education Allies Network in support of the day and offers educators a Safe Space kit. [FN33] On the Day of Silence, in April each year, students are encouraged to remain silent all day and distribute cards to encourage other students to end the silence about the alleged anti-LGBT discrimination taking place in the schools. [FN34] While everyone should oppose harassment in our schools, GLSEN goes much further. By recognizing these "special days" devoted to LGBT issues, it normalizes same-sex attractions in the minds of our children.

· A fairly recent day created by GLSEN is TransAction Day, which is celebrated in February each year. [FN35] It is a "national day to encourage dialogue about gender, gender roles and the full range of gender identities, ***432** and to advocate for inclusive, safe schools for all students." [FN36] GLSEN makes a variety of resources available to students and teachers, including materials entitled "Beyond the Binary" [FN37] and "Bending the Mold." [FN38] One of the resources also includes a two-page document entitled "Gender Terminology." [FN39] One of the defined terms is, "Genderism: Related to sexism, but is the systematic belief that people need to conform to the gender role assigned to them based on a gender binary system which includes only female and male. This is a form of institutionalized discrimination as well as individually demonstrated prejudice." [FN40] In other words, children are told that it is discriminatory to believe that children should be encouraged to live consistently with their biological sex. "Butch" is used to describe "people of all genders and sexes who act and dress in stereotypically masculine ways." [FN41] The Gender Terminology document also explains that we need to begin using "gender-neutral pronouns" to avoid discrimination. [FN42] Instead of "he" or "she," we are encouraged to

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use "zie"; instead of "his" or "her," we are encouraged to use "hir." [FN43] GLSEN encourages teachers to use the instructional materials in classrooms around the nation. [FN44]

· Another organization that targets our children, PFLAG (Parents, Families and Friends of Lesbians and Gays), markets a brochure called "Be Yourself" to students. [FN45] In it, PFLAG explains to students that "[o]ne or two sexual experiences with someone of the same sex may not mean you're gay . . . . Your school years are a time of figuring out what works for you, and ***433** crushes and experimentation are often part of that." [FN46] It actively encourages students to experiment with their sexuality in their youth. [FN47] PFLAG also tells students that being gay, lesbian, bisexual, or transgender is "as natural" as "being straight"; "it's as healthy to be gay, lesbian or bisexual as to be straight-no matter what some people might tell you." [FN48]

· In one upstate New York school district, when a male high school teacher returned after summer break dressing as a female (as part of his transition period before having sex reassignment surgery), administrators showed students a slideshow presentation entitled Gender Identity Awareness (GID). [FN49] It told students that a person with GID "wake[s] up every day in the wrong body." [FN50] As a result, administrators told students that they were to "respect all people's differences," including addressing the male teacher as "Ms." [FN51]

For those with students in government schools, they quickly learn that no state permits parents to opt their children out of discussion or instruction about same-sex attractions or gender identity issues that are not part of a sex or STD/HIV education class. [FN52] While parents in some states have opt out rights with respect to a sex or STD/HIV curriculum, parents have no such rights when topics related to same-sex attractions or gender identity disorder are discussed outside sex education or HIV courses. [FN53] Thus, if the history, literature, sociology, psychology, or science teacher wishes to discuss these issues with students, parents have no legal right to opt out their children under state law.

Parents have fewer rights under federal law. No federal law grants parents the right to opt children out of any curriculum in government schools. [FN54] As a result, parents have resorted to claims that a state's refusal ***434** to permit an opt-out violates the parents' fundamental right to direct the education and upbringing of their children. [FN55] Unfortunately, those claims have not been successful despite the fact that the United States Supreme Court has long protected parents' liberty interest in making decisions concerning their child's upbringing. [FN56]

A parent's fundamental right has been described as "perhaps the oldest of the fundamental liberty interests." [FN57] The Supreme Court has explained that because "[t]he child is not the mere creature of the state," [FN58] "[i]t is cardinal . . . that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." [FN59]

The importance placed upon the relationship between the child and fit legal parents is also apparent in the higher standard of proof required before the state can substantially interfere with the parents' constitutional rights. [FN60] As the Supreme Court has stated, "the interest of a parent in the companionship, care, custody, and management of his or her children ***435** 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."' [FN61] "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." [FN62] The state's interest in caring for the child of natural or adoptive parents is de minimis if the parents are fit parents. [FN63]

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What appears to be strong protection of parents' rights to decide when and how their children will be exposed to comprehensive sex education, including instruction on sexual and gender identity issues, evaporates in the face of the broad discretion that the courts have given to government school officials. The United States Supreme Court has explained that schools are tasked with educating our youth with the

> fundamental values necessary to the maintenance of a democratic political system. . . . [S]chools must teach by example the shared values of a civilized social order. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . .” [FN64]

In two other cases, the Court further explained:

> [A] sound education “is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” “We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government . . . and as the primary vehicle for transmitting the values on which our society rests. . . . In sum, education has a fundamental role in maintaining the fabric of our society.” [FN65]

***436** The Supreme Court has given “broad discretionary powers” for government schools to teach whatever values they deem appropriate. [FN66]

The obvious question becomes, “What happens when the school's values instruction conflicts with the beliefs of the student's parents?” Several federal courts have concluded that the state, not the parents, will prevail in the conflict as long as the school has a legitimate reason for its instruction. [FN67] One court stated it this way:

> It is axiomatic that competing constitutional claims are found in a school setting. Students, teachers, parents, administrators, and the state as parens patriae, all have legitimate rights to further their respective goals. Sometimes these rights clash. Thus, while there is a constitutional right to freedom of religion, it is not absolute and may be circumscribed by a compelling state interest. [FN68]

In deciding between the two competing interests, courts have decided that the school's obligation to educate trumps parental rights. As a result, “parental requests that their children be exempted from a part of the general public school programs have been frequently denied.” [FN69] The courts have explained that when “parents choose to enroll their children in public schools, they cannot demand that the school program be tailored to meet their individual preferences, even those based on religion or a right of privacy.” [FN70] A review of a few cases in this area highlights the consequences of the broad discretion granted to school boards.

In Brown v. Hot, Sexy and Safer Productions, Inc., [FN71] the parents of two Massachusetts high school students claimed that public school officials violated their right to direct the upbringing of their children when the district sponsored a mandatory school AIDS awareness assembly that featured sexually explicit language and sexually explicit skits with several students selected from the audience. [FN72] The students alleged that during the assembly, presenters advocated and approved oral sex, masturbation, ***437** homosexual sexual activity, and premarital sex. [FN73] In rejecting the parents' claim that the instruction violated their parental rights, the court explained that a parent's right involves

> choosing a specific educational program-whether it be religious instruction at a private school or instruction in a foreign language. . . . [T]he state does not have the power to “standardize its children” or

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> "foster homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education. [FN74]

Parents do not, however, have a

> right to dictate the curriculum at the public school to which they have chosen to send their children. . . . If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. [FN75]

In another case from Massachusetts, the state's highest court was asked whether it violated parents' rights for the school to provide condoms to juniors and seniors without giving parents notice or the right to opt their children out of the program. [FN76] Holding that the "[p]ublic education of children is unquestionably entrusted to the control, management, and discretion of State and local communities," the court concluded that the condom distribution program did not violate the parents' constitutional rights. [FN77]

> [W]e discern no coercive burden on the plaintiffs' parental liberties in this case. No classroom participation is required of students. Condoms are available to students who request them and, in high school, may be obtained from vending machines. The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. . . . For their part, the plaintiff parents are free to instruct their children not to participate. . . . Although exposure to condom vending machines and to the ***438** program itself may offend the moral and religious sensibilities of plaintiffs, mere exposure to programs offered at school does not amount to an unconstitutional interference with parental liberties without the existence of some compulsory aspect of the program. [FN78]

The Ninth Circuit Court of Appeals also rejected a claim that parents' rights were violated when their elementary-age school children in California were exposed to sexual questions in a questionnaire that parents were told was designed to assess trauma resulting from the terrorist attacks on 9/11. [FN79] Some of the questions asked the elementary school students to rate various activities on a scale from "never" to "almost all of the time." [FN80] Those questions included the following: (i) touching my private parts too much, (ii) thinking about having sex, (iii) thinking about touching other people's private parts, (iv) thinking about sex when I don't want to, (v) not trusting people because they might want sex, and (vi) not being able to stop thinking about sex. [FN81] The Ninth Circuit held that the parents' rights were not violated because parents have no rights concerning what their children are taught in school. [FN82] Echoing the rationale of the court in Brown v. Hot, Sexy and Safer Productions, Inc., the Ninth Circuit held that:

> [O]nce parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished. The constitution does not vest parents with the authority to interfere with the public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise. . . . "While parents may have a fundamental right to decide whether to send their children to a public school, they do not have a fundamental right generally to direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the ***439** school . . . these issues of public education are generally committed to the control of state and local authorities." [FN83]

What makes these two decisions particularly disturbing is that in both instances the schools violated state laws mandating that parents receive advance notice specifically informing them about the proposed instruction and telling them that they have the right to opt their children out of the instruction. In other words, the court

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found no violation of parental rights despite the fact that the schools violated state laws that expressly gave parents an opt-out right.

In yet another decision arising out of an incident in Massachusetts schools, the court reaffirmed that parents have no constitutional right to dictate what their children are taught. As part of the Lexington school system's effort to educate its students to understand and respect gays, lesbians, and their families, teachers read to first-grade students a book entitled "King and King," which is a twist on the classic Cinderella story that depicts a prince marrying another prince. [FN84] When parents learned that teachers read the book to their children, they asked the school for a right to opt their children out of future instruction that teaches acceptance of same-sex relationships. [FN85] The court concluded that a Massachusetts law, which gives parents the right to exempt children from any curriculum that primarily involves human sexual education or human sexuality issues, does not cover the type of classroom discussion that the plaintiffs' children encountered. [FN86]

In rejecting the parents' constitutional claims, the court articulated an extremely broad grant of authority to the government schools.

> In essence, under the Constitution public schools are entitled to teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens in our democracy. Diversity is a hallmark of our nation. It is increasingly evident that our diversity includes differences in sexual orientation. . . . It is reasonable for public educators to teach elementary school students about individuals with different sexual orientations and about various forms of families, including those with same-sex parents, in an effort to eradicate ***440** the effects of past discrimination and, in the process, to reaffirm our nation's constitutional commitment to promoting mutual respect among members of our diverse society. In addition, it is reasonable for those educators to find that teaching young children to understand and respect differences in sexual orientation will contribute to an academic environment in which students who are gay, lesbian, or the children of same-sex parents will be comfortable and, therefore, better able to learn. [FN87]

The court explained that if the school were required to permit parents to opt children out of discussions concerning homosexuality, "[a]n exodus from [the classroom] . . . could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students." [FN88]

> [T]he very purpose of schools is the preparation of individuals for participation as citizens and therefore, local education officials may attempt to promote civic virtues that awaken the child to cultural values. Schools are expected to transmit civic values . . . . [T]he state is expected to teach civil values as part of its preparation of students for citizenship. [FN89]

"One of the most fundamental of those values is mutual respect . . . . Students today must be prepared for, citizenship in a diverse society." [FN90]

The court also was quite clear that schools are tasked with changing the minds of our children on the issue of homosexuality, even if such instruction is contrary to parents' religious beliefs on the issue. [FN91] "A key to changing a mind is to produce a shift in the individual's mental representations. As it is difficult to change attitudes and stereotypes after they have developed, it is reasonable for public schools to attempt to teach understanding and respect for gays and lesbians to young students . . . ." [FN92] The problem is that what government schools describe as tolerance many consider an effort to silence those who oppose a radical redefinition of family and marriage.

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The direction the Supreme Court has taken is to give government schools wide discretion to decide what values it wants to teach, while stripping ***441** parents of the ability to prevent their children from exposure to beliefs and values that undermine their parents' values. Contrary to what some think, the solution is not to move government schools in the direction of teaching curriculum from a value-neutral perspective. The reality is that someone's values always will be taught in school. For the same reasons it is impossible to argue or make decisions from a position of neutrality, it is impossible for a school system to teach its curriculum in a moral vacuum. The curriculum and classroom instruction are infused with the values and beliefs of those who establish the curriculum and instruct the children. Certainly, schools could steer clear of sex education to avoid obvious differences of opinion on the controversial subject, but, as the Parker case in Massachusetts demonstrates, the issues arise in other classes, including literature, history, science, and social studies. Schools and teachers decide which books to read, what parts of history to discuss, which view on origins to teach, and what role government has in ensuring "equal rights."

The argument that schools should refrain from values instruction also ignores the fact that, from the outset, schools have been viewed as a means to transmit important moral values to the next generation. The founders of this nation understood that an educated citizenry was vital to our success as a nation and that a vital component of that education was proper morals training. The problem today, however, is that as a nation we have strayed so far from Judeo-Christian moral values that government schools now teach values that directly contradict those that our founders understood were necessary to the preservation of the republic.

President George Washington reminded the nation in his 1796 Farewell Address that there are two indispensable supports to the political prosperity of a republic: religion and morality. [FN93] The Founders also made clear that a particular type of morality was essential to the nation's continued success-morality based on Judeo-Christian principles. [FN94] Benjamin Rush, a signer of ***442** the Declaration of Independence, echoed this sentiment, connecting education and morals with the preservation of liberty: "[T]he only foundation for a useful education in a republic is to be laid in Religion. Without this there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments." [FN95]

As a result, Noah Webster cautioned young people in 1834 about the type of leaders they should elect:

> When you become entitled to exercise the right of voting for public officers, let it be impressed on your mind that God commands you to choose for rulers, just men who will rule in the fear of God. The preservation of a republican government depends on the faithful discharge of this duty; if the citizens neglect their duty, and place unprincipled men in office, the government will soon be corrupted; laws will be made, not for the public good, so much as for selfish or local purposes; corrupt or incompetent men will be appointed to execute the laws; the public revenues will be squandered on unworthy men; and the rights of the citizens will be violated or disregarded. If a republican government fails to secure public prosperity and happiness, it must be because the citizens neglect the divine commands, and elect bad men to make and administer the laws. [FN96]

***443** From the very beginning of our nation, education was viewed as an essential means to properly prepare citizens in our political system. The United States Supreme Court has explained that:

> The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests." "[A]s . . . pointed out early in our history, . . . some degree of education

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> is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. [FN97]

As Alexis DeTocqueville traveled around America for nine months in 1831, studying our political system as a possible model for post-revolutionary France, he also noted the importance of an educated citizenry, particularly an education firmly grounded in proper morals. "It cannot be doubted that, in the United States, the instruction of the people powerfully contributes to the support of a democratic republic; and such must always be the case, I believe, where instruction which awakens the understanding is not separated from moral education . . . ." [FN98] At a time when a battle is raging to destroy the moral foundation of the nation, unique concerns are raised when parents delegate to government schools the authority to transmit proper values.

Language from a 1986 United States Supreme Court opinion swings the door wide open for schools to inculcate those values that the school district determines are appropriate. In Bethel v. Fraser, a school district suspended ***444** a high school student for a sexually graphic metaphor he used in a nominating speech he made at a school assembly. In upholding the school district's decision to sanction the student for his speech, the Court offered this explanation:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.
>
> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers-and indeed the older students-demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . . [FN99]

While the school's decision to punish the student's speech in this case was certainly proper, the Court's opinion raises obvious questions concerning the school's authority to provide sex education, diversity training, and tolerance instruction that directly undermine the values of the students' parents. Specifically, the question is whether in the name of tolerance, diversity, school safety, or health education, government schools can teach children that "[s]ame-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality," [FN100] and that parents should foster a child's desire to explore his or her gender identity.

***445** If the 2009 Report of the American Psychological Association (APA) Task Force on Appropriate Therapeutic Responses to Sexual Orientation is any indication of what children will be taught in the years to come, parents have reason to be concerned. The APA is the organization that declassified homosexuality as a mental disorder in 1973, and then later reclassified pedophilia as a disorder only if the person feels guilt or shame about his conduct. [FN101] The task force, which consisted of medical professionals who all were either

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openly homosexual or actively involved in advancing homosexual causes, [FN102] wrote a report on its beliefs about whether it is appropriate to treat those with unwanted same-sex attractions. [FN103] If schools rely on the APA's conclusions, this is what schools will teach children about homosexuality:

· "Same-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality," without any discussion of the increased physical and mental health risks associated with the homosexual lifestyle. [FN104]

· "Gay men, lesbians, and bisexual individuals form stable, committed relationships and families that are equivalent to heterosexual relationships and families in essential respects," without explaining that there are no solid studies to document that claim. [FN105]

· A student who expresses a desire to want to resist same-sex attractions will be told that his feelings are based on stigma the student feels from religious beliefs of his parents or friends, and that rather than attempt to change his same-sex attractions he should change his friends or religion. [FN106]

· Students should explore their sexual identity "by accepting homosexuality and bisexuality as normal and positive ***446** variants of human sexual orientation," [FN107] and any attempts to resist or change their same-sex attractions could be harmful. [FN108]

In those states that permit "marriage" between same-sex couples, or allow them to enter into some relationship equivalent to marriage, the conflict between tolerance training and parental rights is not new. [FN109] In the remaining states, more than one-third also have laws or policies in place that prohibit discrimination in schools based on sexual orientation. [FN110] In still others, individual teachers, guidance counselors, and local school boards encourage children to accept homosexuality as a positive lifestyle choice to explore. [FN111]

At the same time that a great deal of time, effort, and money is being dedicated to shaping the minds of the next generation to accept same-sex attractions as healthy and normal, there also is a widespread effort to silence those who oppose governmental approval of same-sex relationships.

B. Psychological Associations Seek To Deny Treatment for Those Struggling with Unwanted Same-Sex Attractions

One strategic area where efforts are made to silence the opposition is in the psychological professions. The focus of this effort is to portray homosexuality as normal and healthy, while denying that people can change their same-sex attractions and that they are entitled to therapy for unwanted same-sex attractions. Since 1973, when the APA declassified homosexuality as a mental disorder, there has been a continued effort to silence those who believe people can change their same-sex attractions and deserve therapy to help them. The APA describes itself as "a scientific and professional organization that represents psychology in the United States." [FN112] At the time the APA removed homosexuality from the DSM ***447** (Diagnostic and Statistical Manual of Mental Disorders), it did not publicly admit that the decision was politically motivated. Years later, however, in 2009, the task force that was created to report on therapies related to same-sex attractions admitted the political influences behind the decision. [FN113] Since 1973, and particularly in recent years, there has been an organized effort to prevent mental health providers from counseling patients that they have a choice about whether to live a homosexual lifestyle.

A recent report by the APA task force reached some startling conclusions concerning therapy designed to treat those with unwanted same-sex attractions. In August 2009, the task force, comprised of six members who are active in homosexual causes, [FN114] issued its report entitled the "Report of the American Psychological

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Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation." [FN115] All doctors who held a contrary belief concerning same-sex attractions were rejected for membership on the task force, despite well-established credentials. [FN116] After admitting that there is not enough scientific evidence to reach a conclusion on whether efforts to change sexual orientation are effective, the task force concluded that "same-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality," and that clients should be dissuaded from seeking therapy to deal with unwanted same-sex attractions. [FN117] The task force claims that the reasons people seek to change their sexual orientation are societal and religious stigma. Therefore, according to the task force, the mental health professional's obligation is to identify the underlying prejudices and stigma that have prompted the client's desire for change and then to deconstruct those beliefs to make way for new ones that affirm a gay identity. [FN118]

NARTH (National Association for Research & Therapy of Homosexuality) was founded in 1992 to counter the APA's harmful actions. [FN119] NARTH "upholds the rights of individuals with unwanted homosexual attraction to receive effective psychological care and the right ***448** of professionals to offer that care." [FN120] NARTH explains its purpose and mission as follows:

> The American Psychological Association has assumed an authority it cannot rightly claim. The group claims that science has somehow "proven" that homosexuality and heterosexuality are qualitatively indistinguishable. Thus A.P.A. advocates in the political arena for a broad array of social policies-telling our lawmakers that science supports, if not in fact mandates, gay marriage and adoption-as if any particular social policy could flow directly from the facts (from an "is" to an "ought") without an intervening philosophical judgment.
>
> NARTH has responded to the mental-health professions' [sic] refusal to open itself up to socio-political diversity by advocating here for another view of sexuality and gender. No philosophical position-ours or the A.P.A.'s-is, or can be, scientifically "neutral."
>
> NARTH's function is to provide psychological understanding of the cause, treatment and behavior patterns associated with homosexuality, within the boundaries of a civil public dialogue. [FN121]

As a result of NARTH's efforts, the psychological community is made aware of the facts that there is no scientific evidence for a "gay gene" and that many people have had success with therapy designed to help them with unwanted same-sex attractions. [FN122]

While NARTH seeks to ensure that those patients who want professional help to resist same-sex attractions can receive such help, the APA and ACA (American Counseling Association) seek to squelch those efforts. The ACA has concluded that it is wrong, and potentially harmful, to help people who ***449** desire to change their same-sex attractions. [FN123] Its ethical standards require counselors to inform patients who seek counseling for unwanted same-sex attractions that there is no training for those who seek to counsel people with unwanted same-sex attractions, and that the treatment is not effective and even may cause harm. [FN124] As a result, in the sixteen states and the District of Columbia where the ACA Code of Ethics has been adopted into law, counselors could soon lose their licenses if they agree to counsel a client who seeks to resist same-sex attractions. [FN125] This is ironic, at best, given that the psychological community has protocols in place to assist patients who desire a sex change even though gender identity disorder (the persistent belief that one was born the wrong sex that causes clinically significant distress in the person's life) is still classified as a mental disorder in the DSM. [FN126] Thus, while the APA and ACA seek to deny a patient's request for help to resist unwanted same-sex attractions, they are willing to assist a patient who desires to mutilate his body through hormone therapy and sex reassignment surgery. Unfortunately, some courts rely on the misinformation provided by the APA and ACA. [FN127]

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***450** C. Marriage and Parentage Are Redefined in the Effort To Treat Same-Sex Couples the Same as Opposite-Sex Couples

As already discussed in the context of public education, courts continue to chip away at any rights parents have concerning what is taught to their children in schools. The judiciary's tentacles reach much further than our schoolhouses under the guise of acting parens patriae or in the best interest of the child. Parens patriae is a Latin phrase that means "parent of [one's] country." [FN128] Historically, it has applied to those instances where the government has stepped in to care for an orphaned, abandoned, or abused child. Until recently, it was not understood to give courts authority to make child-rearing decisions that contradict those of the fit parents. Under the guise of acting in the child's best interests, and in reliance on the position that same-sex attractions are immutable, courts are redefining parentage.

Although courts have described it in different ways, the result in several states across the country has been the same-redefining parentage so that two moms or two dads are the same as a mom and a dad. Frequently, somewhere in the decision, the court mentions that it is better for the child to have two loving moms than to be intentionally left with a single parent, thus justifying the court's decision to declare a legal stranger to be the child's second parent. [FN129] That is exactly what happened with Kristina S. when she left her same-sex partner. [FN130] In July 1997, Charisma and Kristina began dating in California and moved in together in August 1998. [FN131] In January 2002, they registered as domestic partners with the State of California. [FN132] Later that year, Kristina became pregnant by artificial ***451** insemination with sperm from an anonymous donor. [FN133] Her daughter was born in April 2003 and given a hyphenated last name, which was a combination of Charisma and Kristina's last names. [FN134] Charisma did not adopt Kristina's daughter even though California permitted second-parent adoption by a same-sex partner. [FN135] In July 2003, when the baby was three months old, Kristina moved out of the home, taking her daughter with her. [FN136] At that time, Kristina ended virtually all contact with Charisma. [FN137] On July 21, 2003, Kristina filed a termination of a domestic partnership. [FN138]

In May 2004, Charisma filed a petition in California to establish a parental relationship with Kristina's daughter. [FN139] In that petition, she stated that she and Kristina had decided to have a child together with the intention that they would both be the child's parents. [FN140] In October 2004, the trial court denied the petition, holding that under then-existing California law, Charisma lacked standing to bring the action under the Uniform Parentage Act. [FN141] In denying standing to Charisma, the trial court relied on three California Court of Appeals' decisions, each of which held that a former same-sex partner lacking a biological tie to a child could not establish a parent-child relationship with the child under the Uniform Parentage Act. [FN142]

Almost a year later, Kristina moved to Texas. [FN143] Two months later, in unrelated litigation, the California Supreme Court held for the first time that a child could have two mothers (without the use of second-parent adoption) ***452** and that the paternity [FN144] presumption-used in determining a child's father-must "apply equally to women." [FN145] Specifically, the court held that California law should apply to a woman in a same-sex relationship the presumption that a man is the "natural father" of a child if "[h]e receives the child into his home and openly holds out the child as his natural child." [FN146] In that decision, the court specifically stated its disapproval of the three Court of Appeals' decisions cited by the trial court in Charisma's case. [FN147] In light of the California Supreme Court ruling, the Court of Appeals remanded Charisma's case to determine, consistent with the California Supreme Court's August 2005 decision, whether Charisma was a presumed parent and, if so, whether this was an appropriate action in which to use scientific evidence to rebut the presumption that Charisma was a parent to Kristina's daughter. [FN148]

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By order dated December 27, 2006, which was more than one year after Kristina moved to Texas with her daughter, the California trial court declared Charisma to be a legal parent to Kristina's daughter pursuant to the paternity presumption. [FN149] The court cited three reasons, based on contested facts, for its conclusion that this was not "an appropriate action in which to rebut" the parentage presumption: (i) Charisma participated in the child's conception with the understanding that she would be a parent; (ii) after the child's birth, Charisma voluntarily assumed parental responsibilities for the short time the three lived together; and (iii) no one else claimed to be the ***453** child's second parent. [FN150] By order dated May 8, 2008, the trial court issued an order concerning child custody and visitation. In that order, the judge granted Kristina sole legal and physical custody of her daughter, who was then five years old, and ordered the parties to meet with a court-appointed psychologist to begin the reunification process between Charisma and Kristina's daughter. [FN151]

Kristina, a Texas resident since early summer 2005, [FN152] faces the question of whether Texas courts, despite a state defense of marriage act and constitutional amendment, [FN153] will permit Charisma to register and enforce the California custody order in the state of Texas. If they do, Kristina could be forced to give visitation to Charisma, a woman with no biological or adoptive relationship with the child. [FN154]

***454** Other courts have adopted different tests to accomplish the same result. Some courts declare the former partner to be a de facto parent to the child, using a multi-part test to decide whether the legal stranger should be declared a parent over the objections of the child's fit parent. Thus, under that test, some courts require the third party to prove

> (1) That the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. [FN155]

Still others create a more lenient test.

For example, a family court in Vermont created a new test in 2004 to determine parentage of a child born by artificial insemination. The court held that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." [FN156] In other words, where a woman uses artificial insemination to become pregnant while in a legal union with another woman, the other woman automatically becomes a second mother to the child as long as that woman intended to raise the child as her own. Nothing more is required-she does not have to live with the child for any minimum period of time or help raise the child. In fact, based on the plain language of the test, the relationship between the biological mother and her partner could end before the child is born, and the other woman could still be declared a second mom to the child.

Other courts have reached similar results simply by using the overarching best interest standard to declare that a child can have three parents: biological mom, biological dad, and mom's former same-sex ***455** partner. [FN157] In total, courts in approximately sixteen states have declared legal strangers to be parents over the objections of the child's fit parent. [FN158] Conversely, courts in approximately thirteen states have expressly refused to do so. [FN159] While courts are redefining parentage in the context of custody battles between former

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same-sex partners, direct constitutional attacks to the marriage laws continue.

The pivotal question in the marriage litigation cases is whether the state has a sufficient interest in continuing to define marriage as the union of one man and one woman. [FN160] What is a sufficient interest turns on whether sexual orientation is treated by the court as a "suspect classification," such as race. As a result of the 1964 Civil Rights Act, classifications based on race are subject to exacting scrutiny (called "strict scrutiny"), which means that a law based on race will be unconstitutional unless the government can show that it has a compelling justification for the law and that the means adopted to achieve that compelling justification are the most narrow ones possible. [FN161] In other words, the law cannot discriminate based on race any more than is absolutely necessary. Virtually every law discriminating based on race fails because there is no compelling reason to do so. Under federal law, only race, national origin, and alienage fall into the suspect classification category. [FN162] Gender falls into intermediate scrutiny, which means the law is unconstitutional unless the government demonstrates that it has an important governmental interest and the means used to achieve that interest are substantially related to the asserted government interest. [FN163] All other laws that discriminate against a group of people are subject to the rational basis test. Under that test, the law will be upheld unless the person challenging it demonstrates that the legislature could have no legitimate basis for passing the law. [FN164] In the marriage litigation, those seeking to have ***456** the marriage laws declared unconstitutional ask the court to treat sexual orientation as a suspect classification. [FN165]

In almost every instance, courts have refused to apply suspect classification to claims of sexual orientation discrimination. [FN166] Some of the reasons for the refusal include the fact that unlike same-sex attractions, there is absolutely no choice involved in one's race or national origin-they are immutable characteristics. Same-sex attractions, on the other hand, have, at a minimum, some element of choice. In addition, none of the categories that receive strict or intermediate scrutiny are based on a person's conduct. Sexual orientation protection would be based on a person's sexual conduct. [FN167]

D. Granting Special Benefits Based on Homosexual Conduct Negatively Impacts Religious Liberties and Free Speech Rights

The impact of the efforts to gain special protections based on homosexual conduct does not solely involve laws related to marriage and family. Rather, the impact is felt by businesses, doctors, social service agencies, schools, individual citizens, and churches. Here are a few examples of what is taking place:

· A fifty-seven-year-old man sued a Catholic-run hospital in California when the surgical coordinator explained to him that the hospital refused to perform breast augmentation on a male-to-female transgendered person as part of the sex reassignment process. His lawyers stated it was unlawful for the hospital to rely on its religious beliefs to discriminate against him. The theory behind the case was that because the hospital permits breast augmentation surgeries (e.g., on women after breast cancer), it is ***457** discriminatory to refuse to perform the surgery on a man who has undergone hormone therapy and surgery to attempt to change his gender to female. [FN168]

· A medical practice in California was sued when one of the doctors refused to artificially inseminate a woman who desired to have a baby with her same-sex partner. [FN169] The court explained that the burden on the doctor's religious beliefs is insufficient to allow him to engage in discrimination based on sexual orientation. [FN170]

· As a result of the Massachusetts court decision redefining marriage no longer as the union of one

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man and one woman, after more than 100 years of placing children in adoptive homes, Catholic Charities of Boston was forced to choose between placing children in the homes of same-sex couples, in violation of its religious beliefs, or no longer placing children up for adoption. It chose to stop placing children in adoptive homes. [FN171]

· A Christian photographer in New Mexico was brought before a human rights commission for refusing, on religious grounds, to photograph a same-sex commitment ceremony. [FN172]

· An Iowa YMCA (Young Men's Christian Association) faces losing a $102,000 grant because it refused to treat same-sex couples the same as opposite-sex marriage couples for purposes of the family membership fee. [FN173]

***458** · A Lutheran high school was sued for expelling two girls who engaged in homosexual conduct. [FN174] Although the school prohibits all sexual immorality, the fact that the two girls were engaged in same-sex conduct made the school an easy target for a claim of discrimination based on sexual orientation. [FN175]

· A PFOX (Parents and Friends of Ex-Gays and Gays) affiliate faced allegations in a Maryland school district that a flyer telling students that change is possible with respect to same-sex attractions constituted hate speech. [FN176]

· The Oakland, California city government declared it a hate crime when female city employees organized a Good News Employee Association and announced the group with a flyer that contained the following language: "Marriage is the foundation of the natural family and sustains family values." [FN177]

· In Canada, (i) pastors have been fined and ordered to cease proclaiming the truth of Scripture concerning homosexuality; (ii) a university professor was fined for expressing to a student his belief that homosexuality is unnatural; and (iii) a city public official was fined for stating that homosexuality is not natural. [FN178]

***459** · Inn owners faced charges before a state human rights commission when they denied a request by two women to host their civil union commitment ceremony reception at the inn. [FN179] The owners were Christians and actively involved their children in running the inn. [FN180] The fact that there were other inns available in the area did not matter to the women, who requested monetary sanctions against the inn. [FN181]

As these cases highlight, in the battle between religious freedoms and rights based on homosexual conduct, there will always be a winner and a loser. There is no neutral ground of compromise upon which to resolve the differences.

## IV. It's a Zero-Sum Game

In probably one of the most surprisingly forthright explanations of how to resolve the conflict between religious liberties and homosexual rights, Professor Chai Feldblum states that it is a "zero-sum game" and that religious liberties must be the loser. [FN182] Professor Feldblum is a Professor at Georgetown University Law Center, previously worked as legislative counsel for the ACLU, served as a judicial clerk to United States Supreme Court Justice Harry Blackmun, and, in 2006, founded the Moral Values Project, which has as part of its mission statement the belief that "[h]eterosexuality, homosexuality and bisexuality are all morally neutral. But the love that is expressed by those who are straight, gay or bisexual is morally good-and all equally morally good. All forms of gender are morally neutral. But lack of gender equity is morally bad." [FN183] In 2009, President Obama nominated Professor Feldblum to serve as one of the five commissioners on the Equal Employment Opportunity Commission. [FN184]

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***460** Professor Feldblum puts to rest the notion that legislation concerning sexuality and sexual orientation (or any other topic) can be morally neutral. She admits that she believes that "heterosexuality and homosexuality are morally neutral characteristics (similar to having red hair or brown hair), and I believe that acting consistently with one's sexual orientation is a morally good act." [FN185] She admits that it is "disingenuous to say that voting for a law of this kind conveys no message about morality at all. . . . [M]oral beliefs necessarily underlie the assessment of whether such equality is justifiably granted or denied." [FN186] "[D]isputes surrounding sexual orientation feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality." [FN187] In making a determination of which belief will prevail, Professor Feldblum explains that "[a] belief derived from a religious faith should be accorded no more weight-and no less weight-than a belief derived from a non-religious source." [FN188]

She also makes clear that a legislative decision to prohibit sexual orientation discrimination does not need to include an exemption for those with sincerely-held religious beliefs that homosexuality is a sin.

> If the "justifying principle" of the legislation is to protect the liberty of LGBT people to live freely and safely in all parts of society, it is perfectly reasonable for a legislature not to provide any exemption that will cordon off a significant segment of society from the antidiscrimination prohibition. [FN189]

She summarized her position as follows:

> Thus, for all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude unmarried, straight couples and all gay couples, this is a point where I believe the "zero-sum" nature of the game inevitably comes into play. And, in making the decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people. Once individuals choose to enter the stream of economic commerce by ***461** opening commercial establishments, I believe it is legitimate to require that they play by certain rules. [FN190]

Once the nation realizes that there will be a winner and a loser, then the only question is whether religious liberties and free speech rights should be suppressed to promote legal recognition of same-sex relationships. For the Christian, the answer must be "no."

## V. Conclusion

Attorneys are trained in the art of compromise and negotiation. In most cases, if each is willing to give up something-to compromise-the parties can reach an amicable resolution. With respect to the efforts to gain special protections based on homosexual conduct, however, there is no room for compromise. In each case, there is a winner and a loser. For example, in the parental rights cases, if the biological parent, who is now a Christian and believes that homosexual conduct is sinful, gives some visitation to the former partner as a compromise position, it results in the un-Biblical position that the child has two moms or two dads and that the child intentionally will be exposed to someone who seeks to teach her that God's ways are wrong.

Recent trial testimony in one of the custody battles between a biological mom and her former same-sex partner highlights this point. Ms. Jenkins, the former partner, unambiguously declared that she believed the biological mother's Christian beliefs about homosexuality were bigoted and hateful. [FN191] The testimony was offered six years after Ms. Jenkins and Ms. Miller separated. [FN192] Although Ms. Miller's daughter was twenty-seven months old at the time Ms. Miller ended her same-sex relationship with Ms. Jenkins, at the time of the testimony, the daughter, Isabella, was seven years old. [FN193] Both Ms. Miller and Isabella are Christians.

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[FN194] At a hearing on Ms. Jenkins' request that she be given full custody of Ms. Miller's biological child, Ms. Jenkins testified as follows:

> ***462** Q: [Y]ou also in-in your expressions of religious tolerance indicated that if a church teaches that homosexuality is a sin-which is an orthodox Biblical belief . . . . that it is teaching hatred and bigotry. Is that what you said?
>
> A: Yes.
>
> Q: Okay. So in other words, if-if we followed you correctly, when you suggest that you'd be happy to go with Isabella anywhere she wants to go, Baptist, Universalist Unitarian, pick a religion, that only goes so far, as long as they don't teach "hatred and bigotry," right?
>
> A: Absolutely. That is my view. [FN195]

There also is no room for compromise in the business world because, as Professor Feldblum made clear, those who seek rights based on homosexuality expect Christians to abandon their beliefs in order to do business. The Bible, however, does not tell Christians to put aside their beliefs in order to do business. Instead, it instructs Christians to do the opposite-to do everything "in the name of the Lord Jesus." [FN196] Thus, the compromise is a loss because it is un-Biblical. In the schools, if Christians allow their children to be exposed to diversity training where children are taught that two moms are just as good as a mom and a dad, they have allowed their children to be taught that what the Bible calls evil is actually good.

Some say that Christians must compromise because it is the pragmatic response to today's ever increasingly secular culture. [FN197] Essentially, they are saying that Christians should allow civil unions and domestic partnerships but fight to preserve only the name of marriage. [FN198] Or, in the context of sex education, children should be taught about condoms and safer-sex practices ***463** because it is unrealistic to expect children to wait until marriage. [FN199] The God of the Bible, however, is not a pragmatic God. He is the God of the impossible who delights in showing Himself glorious through what seems impossible to the human mind. [FN200] The Bible clearly instructs us not to compromise on principle; we are to do what He instructs us to do and leave the results to Him.

Since neutrality is not an option when the quest for rights based on homosexual conduct collides with religious liberties, the choice for Christians is simple and straightforward: they must be set apart by God's truth so that they will not be alienated from God's truth.

[FNd1]. Associate Professor of Law, Liberty University School of Law; Associate Director, Liberty Center for Law & Policy; Special Counsel to Liberty Counsel; J.D., magna cum laude, Brooklyn Law School. I would like to thank my family for their steadfast support and Ben Walton for his insight on what it means to "take captive every thought to make it obedient to Christ." 2 Corinthians 10:5.

[FN1]. Charles Colson, How Now Shall We Live? 13 (1999).

[FN2]. C.S. Lewis, The Screwtape Letters 1-4 (Harper Collins 2001) (1942).

[FN3]. Id. at 1-2.

[FN4]. Id. at 60.

[FN5]. Id. at 60-61.

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[FN6]. Id. at 64-65.

[FN7]. 2 Corinthians 10:5.

[FN8]. Colossians 1:21.

[FN9]. Greg L. Bahnsen, Always Ready: Directions for Defending the Faith 3 (Robert R. Booth ed., Covenant Media Foundation 2008) (1996).

[FN10]. Id. at 4.

[FN11]. Id. at 9.

[FN12]. Id. at 12.

[FN13]. Proverbs 1:7; Psalm 111:10.

[FN14]. 1 Corinthians 2:16.

[FN15]. Ephesians 4:17.

[FN16]. Psalm 111:10; Proverbs 1:7; Romans 1:21.

[FN17]. 2 Corinthians 10:5.

[FN18]. Colossians 1:21.

[FN19]. Isaiah 5:20.

[FN20]. Romans 1:18-32.

[FN21]. Patricia Nell Warren, Future Shock, The Advocate, Oct. 3, 1995, at 80.

[FN22]. School Field Trip to Teacher's Lesbian Wedding Sparks Controversy, Oct. 13, 2008, http://www.foxnews.com/story/0,2933,436961,00.html (last visited May 15, 2010).

[FN23]. San Francisco Unified School District LGBTQ Support Services, http://www.healthiersf.org/LGBTQ/InTheClassroom/voices-susan.html.

[FN24]. Abigail Curtis, State Rules in Favor of Young Transgender, Bangor Daily News, July 2, 2009, at A6, available at http:// www.bangordailynews.com/detail/109732.html (last visited May 15, 2010).

[FN25]. See, e.g., Posting of Mark Tapscott to Beltway Confidential, Obama Appointee Lauded NAMBLA Figure, http://www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Obama-appointee-lauded-NAMBLA-figure-63115112.html (Oct. 1, 2009, 12:40 PM EDT) (last visited May 15, 2010).

[FN26]. Maxim Lott, Critics Assail Obama's “Safe School” Czar, Say He's Wrong Man for the Job, Sept. 23, 2009, http://www.foxnews.com/politics/2009/09/23/critics-assail-obamas-safe-schools-czar-say-hes-wrong-man-job/ (last

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[FN27]. Former Student Defends Obama's “Safe Schools” Czar Against Allegations, Oct. 3, 2009, http://www.foxnews.com/politics/2009/10/03/student-defends-obamas-safe-schools-czar-allegations/ (last visited May 15, 2010).

[FN28]. See Ally Week, http://www.allyweek.org (last visited May 15, 2010); GLSEN, Students Celebrate GLSEN's TransAction! To Educate Peers About Gender, Feb. 27, 2009, http://glsen.org/cgi-bin/iowa/all/news/record/2383.html (last visited May 15, 2010); GLSEN, What We Do, http://www.glsen.org/cgi-bin/iowa/all/what/index.html (last visited May 15, 2010) (providing links to Day of Silence, No Name Calling Week, and Gay Straight Alliances).

[FN29]. GLSEN, From Denial to Denigration: Understanding Institutionalized Heterosexism in Our Schools (2002), http://www.glsen.org/binary-data/GLSEN_ ATTACHMENTS/file/222-1.pdf (last visited May 15, 2010).

[FN30]. Id. at 1.

[FN31]. Id.

[FN32]. See Ally Week, Ally Week FAQs, http:// www.allyweek.com/about/index.cfm (last visited May 15, 2010).

[FN33]. See Ally Week, Student and Educators, http:// www.allyweek.com/studentseducators/index.cfm (last visited May 15, 2010).

[FN34]. See Day of Silence, http://www.dayofsilence.org/index.cfm (last visited May 15, 2010).

[FN35]. See GLSEN, Students Celebrate GLSEN's TransAction! To Educate Peers About Gender, Feb. 27, 2009, http://glsen.org/cgi-bin/iowa/all/news/record/2383.html (last visited May 15, 2010).

[FN36]. Id.

[FN37]. Gay Straight Alliance Network et al., Beyond the Binary (2004), http://www.transgenderlawcenter.org/pdf/beyond_the_binary.pdf (last visited May 15, 2010).

[FN38]. Lambda Legal et al., Bending the Mold: An Action Kit for Transgender Students (2007), http://www.nyacyouth.org/docs/uploads/LL_TransKit_FINAL_ Lores.pdf (last visited May 15, 2010).

[FN39]. GLSEN, Gender Terminology, http:// www.dayofsilence.org/downloads/TransActionGuide-Gender101Workshop.pdf (last visited May 15, 2010).

[FN40]. Id.

[FN41]. Id.

[FN42]. Id.

[FN43]. Id.

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[FN44]. GLSEN, The GLSEN Jump-Start Guide, Part 7, http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/000/972-1.pdf (last visited May 15, 2010).

[FN45]. See Parents, Families and Friends of Lesbians and Gays, http:// community.pflag.org (last visited May 15, 2010); see also PFLAG, Be Yourself: Questions and Answers for Gay, Lesbian, Bisexual, and Transgendered Youth, http://www.pflag.org/fileadmin/user_upload/Publications/Be_Yourself.pdf (last visited May 15, 2010).

[FN46]. PFLAG, supra note 45, at 3-4.

[FN47]. Id. at 4.

[FN48]. Id. at 7.

[FN49]. Batavia High School, Gender Identity Awareness: Presentation for Batavia City High School Students (on file with author).

[FN50]. Id.

[FN51]. Id.

[FN52]. See Guttmacher Institute, State Policies in Brief: Sex and STI/HIV Education, May 1, 2010, http://www.guttmacher.org/pubs/spib_SE.pdf (last visited May 15, 2010) (identifying states that have opt-outs and to which topics the opt-outs apply).

[FN53]. Id.

[FN54]. See Fields v. Palmdale, 427 F.3d 1197, 1208 (9th Cir. 2005) ("Thus, the right of the parents to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs is not protected by the constitutional right to privacy, at least not as that purported right is understood by the parents in this case." (internal quotation marks omitted)), amended by 447 F.3d 1187, 1190 (9th Cir. 2006); Leebaert v. Harrington, 332 F.3d 134, 140-41 (2d Cir. 2003) (rejecting argument that the parental right to direct the upbringing and education of children includes the "right to exempt one's child from public school requirements"); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 534 (1st Cir. 1995) ("We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by Meyer and Pierce do not encompass a broad-based right to restrict the flow of information in the public schools."); Immediato by Immediato v. Rye Neck Sch. Dist., 873 F. Supp. 846, 852 (S.D.N.Y. 1995) ("We find no federal caselaw which recognizes a constitutionally protected parental right for students to opt out of an educational curriculum for purely secular reasons.").

[FN55]. See, e.g., Fields, 447 F.3d at 1190 (dismissing parental rights argument, explaining that parents "do not have a fundamental [due process] right generally to direct how a public school teaches their child" (alteration in original) (internal quotation marks omitted)); Leebaert, 332 F.3d at 139 (rejecting claim that parental rights are unconstitutionally infringed when school refuses to opt out child from mandatory health education curriculum).

[FN56]. See, e.g., Fields, 447 F.3d 1187; Leebaert, 332 F.3d 134; Parents United for Better Schs., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260 (3d Cir. 1998); Brown, 68 F.3d 525.

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[FN57]. Troxel v. Granville, 530 U.S. 57, 65 (2000).

[FN58]. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[FN59]. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[FN60]. See Santosky v. Kramer, 455 U.S. 745, 767-70 (1982) (holding that a "clear and convincing evidence" standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing); Garcia v. Rubio, 670 N.W.2d 475, 483 (Neb. Ct. App. 2003) ("A court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child.").

[FN61]. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (addressing rights of an unwed father).

[FN62]. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (citations omitted).

[FN63]. Stanley, 405 U.S. at 657-58.

[FN64]. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[FN65]. Sheff v. O'Neill, 678 A.2d 1267, 1289-90 (Conn. 1996) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Plyler v. Doe, 457 U.S. 202, 221 (1982)).

[FN66]. Parents United for Better Schs., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260, 271 (3d Cir. 1998).

[FN67]. See, e.g., Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995); Roman v. Appleby, 558 F. Supp. 449 (C.D. Pa. 1983).

[FN68]. Roman, 558 F. Supp. at 456.

[FN69]. Id.

[FN70]. Id.

[FN71]. Brown, 68 F.3d 525.

[FN72]. Id. at 529.

[FN73]. Id.

[FN74]. Id. at 533.

[FN75]. Id. at 533-34.

[FN76]. Curtis v. Sch. Comm., 652 N.E.2d 580 (Mass. 1995).

[FN77]. Id. at 588-89.

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[FN78]. Id. at 586.

[FN79]. Fields v. Palmdale Sch. Dist., 427 F.3d 1197 (9th Cir. 2005), amended by 447 F.3d 1187 (9th Cir. 2006)
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[FN80]. Fields, 427 F.3d at 1201.

[FN81]. Id. at 1202 n.3.

[FN82]. Id. at 1206.

[FN83]. Id. (quoting Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395-96 (6th Cir. 2005)).

[FN84]. Parker v. Hurley, 474 F. Supp. 2d 261 (D. Mass. 2007), aff'd, 514 F.3d 87 (1st Cir. 2008).

[FN85]. Id.

[FN86]. Id. at 264.

[FN87]. Id. at 263-64.

[FN88]. Id. at 265.

[FN89]. Id. at 271-72 (citations and internal quotation marks omitted).

[FN90]. Id. at 274.

[FN91]. Id. at 275.

[FN92]. Id. (citations and internal quotation marks omitted).

[FN93]. George Washington, President of the United States, Farewell Address (Sept. 17, 1796), available at http://avalon.law.yale.edu/18th_ century/washing.asp ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."). The Northwest Ordinance, signed by President Washington in 1789, stated, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance art. 3 (1787).

[FN94]. "Religion is the only solid basis of good morals; therefore, education should teach the precepts of religion and the duties of man towards God." 3 Jared Sparks, The Life of Gouverneur Morris, with Selections from His Correspondence and Miscellaneous Papers 483 (Boston, Gray & Bowen 1832) (from his "Notes on the Form of a Constitution for France, September 14, 1791"). Gouverneur Morris took rough ideas of the United States Constitution at the Constitutional Convention and helped create the final language. Daniel Webster also explained that:

It is not to be doubted, that to the free and universal reading of the Bible, in that age, men were much indebted for right views of civil liberty. The Bible is a book of faith, and a book of doctrine, and a book of morals, and a book of religion, of especial revelation from God; but it is also a book which teaches man his own individual responsibility, his own dignity, and his equality with his fellow man.

1 Daniel Webster, The Works of Daniel Webster 102 (Boston, Little, Brown and Co. 1890) (1851).

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[FN95]. Benjamin Rush, Of the Mode of Education Proper in a Republic (1798), reprinted in The Selected Writings of Benjamin Rush 87, 88 (Dagobert D. Runes ed., 2008); see also The American Enlightenment 239 (Adrienne Koch ed., 1965) ("[L]iberty cannot be preserved without a general knowledge among the people . . . .").

[FN96]. Noah Webster, Advice to the Young (1834), reprinted in Noah Webster's Value of the Bible and Excellence of the Christian Religion 90, 98 (Foundation for American Christian Education 1988) (1834). He also cautioned that: "The education of youth should be watched with the most scrupulous attention. . . . [I]t is much easier to introduce and establish an effectual system . . . than to correct by penal statutes the ill effects of a bad system. . . . The education of youth . . . lays the foundations on which both law and gospel rest for success." David Barton, Original Intent: The Courts, the Constitution, and Religion 340 (4th ed. 2005) (alterations in original) (quoting H.R. Warfel, Noah Webster, Schoolmaster to America 181-82 (1936)).

[FN97]. Plyler v. Doe, 457 U.S. 202, 221 (1982) (alterations in original) (citations omitted).

[FN98]. Alexis DeTocqueville, Democracy in America 342 (Henry Reeve trans., D. Appleton & Co. 1904) (1835).

[FN99]. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (emphasis added) (citations omitted).

[FN100]. Am. Psychological Ass'n, Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation 2 (2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (last visited May 15, 2010).

[FN101]. Linda Ames Nicolosi, The Pedophilia Debate Continues-and DSM Is Changed Again, Nat'l Ass'n for Res. & Therapy of Homosexuality, Sept. 2, 2008, http://www.narth.com/docs/debatecontinues.html (last visited May 15, 2010).

[FN102]. Joseph Nicolosi, Summary of the 2009 American Psychological Association Task Force Report on Sexual Orientation, http:// www.josephnicolosi.com/summary-task-report (last visited May 15, 2010).

[FN103]. Am. Psychological Ass'n, supra note 100.

[FN104]. Id. at 2.

[FN105]. Id.

[FN106]. Id. at 18, 47, 50, 58, 60, 72-73.

[FN107]. Id. at 76.

[FN108]. Id. at 6.

[FN109]. See, e.g., Parker v. Hurley, 474 F. Supp. 2d 261 (D. Mass. 2007), aff'd, 514 F.3d 87 (1st Cir. 2008). Id. at 263-64.

[FN110]. Human Rights Campaign, Statewide School Laws and Policies, Feb. 18, 2010, http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (last visited May 15, 2010) (chart depicting states with laws or policies in place to prohibit sexual orientation discrimination).

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[FN111]. See id.

[FN112]. American Psychological Association, About APA, http:// www.apa.org/about (last visited May 15, 2010).

[FN113]. Am. Psychological Ass'n, supra note 100, at 11; see also Destructive Trends in Mental Health: The Well-Intentioned Path to Harm (Rogers H. Wright & Nicolas A. Cummings eds., 2005).

[FN114]. Nicolosi, supra note 102.

[FN115]. Id.

[FN116]. Id.

[FN117]. Am. Psychological Ass'n, supra note 100, at 2.

[FN118]. Id. at 15-19, 58.

[FN119]. NARTH, Our Purpose: Defending True Diversity, http:// www.narth.com/menus/statement.html (last visited May 15, 2010).

[FN120]. News Release, NARTH, New Scientific Research Refutes Unsubstantiated Claims Regarding Homosexuality (June 10, 2009), available at http://www.narth.com/docs/pressjournal.pdf (last visited May 15, 2010).

[FN121]. NARTH, Our Purpose: Defending True Diversity, http:// www.narth.com/menus/statement.html (last visited May 15, 2010).

[FN122]. NARTH, What the Research Shows: NARTH's Response to the APA Claims on Homosexuality, 1 J. Hum. Sexuality 19 (2009); see also Stanton L. Jones & Mark A. Yarhouse, Ex-Gays?: A Longitudinal Study of Religiously Mediated Change in Sexual Orientation (2007).

[FN123]. Joy Whitman et al., Ethical Issues Related to Reparative or Conversion Therapy, May 22, 2006, http:// www.counseling.org/PressRoom/NewsReleases.aspx?AGuid=b68aba97-2f08-40c2-a400-0630765f72f4 (last visited May 15, 2010).

[FN124]. Id.

[FN125]. See American Counseling Association, State Licensure Boards That Have Adopted the ACA Code of Ethics (2010), http:// www.counseling.org/Counselors/LicensureAndCert.aspx (last visited May 15, 2010) (link to chart is available on this page); see also Truth Wins Out & Lambda Legal, Ex-Gay & the Law, at 10 (2008), http://www.truthwinsout.org/wp-content/uploads/2009/02/exgay_booklet1.pdf (last visited May 15, 2010). For a recent example of a Christian marriage counselor in England who was fired by his counseling service employer, see Adrienne S. Gaines, Christian Counselor Who Refused To Offer Gay Sex Therapy Loses Case, Charisma News Online, Dec. 2, 2009, http://www.charismamag.com/index.php/news/25520-christian-counselor-who-refused-to-offer-gay-sex-therapy-loses-case (last visited May 15, 2010).

[FN126]. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 5352 (4th ed. 1994).

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[FN127]. See, e.g., In re Marriage Cases, 183 P.3d 384, 441 & n.59 (Cal. 2008) (relying on APA's definition of "sexual orientation"); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 435 (Conn. 2008) (relying on APA literature for the conclusion that "homosexual orientation 'implies no impairment in judgment, stability, reliability or general social or vocational capabilities"' (citation omitted)); In re Adoption of Doe, 2008 WL 5006172, at *7 (Fla. Cir. Ct. Nov. 25, 2008) (relying on APA literature concerning stability of same-sex relationships); Varnum v. Brien, 763 N.W.2d 862, 874 (Iowa 2009) (relying on APA literature concerning ability of same-sex partners to parent); Kulstad v. Maniaci, 220 P.3d 595, 600, 602 (Mont. 2009) (relying on APA literature regarding effects of children raised in same-sex households).

[FN128]. Black's Law Dictionary 1144 (8th ed. 2004).

[FN129]. Elisa B. v. Super. Ct., 117 P.3d 660, 669 (Cal. 2005) ("The twins in the present case have no father because they were conceived by means of artificial insemination using an anonymous semen donor. Rebutting the presumption that Elisa is the twin's [sic] parent would leave them with only one parent and would deprive them of the support of their second parent."); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970 (Vt. 2006) ("[T]here is no other claimant to the status of parent, and, as a result, a negative decision would leave [Isabella] with only one parent.").

[FN130]. Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26, 47 (Cal. Ct. App. 2009).

[FN131]. Charisma R. v. Kristina S., 44 Cal. Rptr. 3d 332, 333 (Cal. Ct. App. 2006).

[FN132]. Id. at 333. At that time, under California law, a registered domestic partner was treated as the spouse of a taxpayer for purposes of: (i) several state tax deductions relating to medical care and health care costs; (ii) certain unemployment benefits; (iii) maintaining a cause of action for negligent infliction of emotional distress; (iv) second parent adoption; (v) governmental health care coverage upon death of a partner; (vi) health care decisions; (vii) sick leave; (viii) disability benefits; and (ix) certain probate matters. See Assem. 25, 2001-2002 Sess. (Cal. 2001); Assem. 26, 1999-2000 Sess. (Cal. 1999). It was not until January 1, 2005 that California afforded domestic partners the same rights and benefits as married couples. See Assem. 205, 2003-2004 Sess. (Cal. 2003).

[FN133]. Id.

[FN134]. Id.

[FN135]. Declaration in Opposition to Application for Order for Child Custody and Visitation at 3, Riley v. Sica, No. HF 04-153838 (Cal. Super. Ct. 2004); see also Sharon S. v. Super. Ct., 73 P.3d 554 (Cal. 2003) (permitting same-sex couples to use the second parent adoption statute).

[FN136]. Charisma R., 44 Cal. Rptr. 3d at 333.

[FN137]. Id.

[FN138]. Kristina Sica, Notice of Termination of Domestic Partnership, Cal. Sec'y of State (July 7, 2003) (on file with author).

[FN139]. Charisma R., 44 Cal. Rptr. 3d at 333.

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[FN140]. Id.

[FN141]. Id.; see also Cal. Fam. Code §§ 7600-7730 (West 2004) (Uniform Parentage Act).

[FN142]. Charisma R., 44 Cal. Rptr. 3d at 334; see also West v. Super. Ct., 69 Cal. Rptr. 2d 160 (Cal. Ct. App. 1997) (former same-sex partner lacked standing as parent under Uniform Parentage Act); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991) (same); Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990) (same).

[FN143]. Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26, 32-33 (Cal. Ct. App. 2009).

[FN144]. "Paternity" is defined as "the relation of a father." Noah Webster, American Dictionary of the English Language 722 (1828); see also Black's Law Dictionary 1163 (8th ed. 2004) (defining "paternity" as "[t]he state or condition of being a father"). "Presumption of paternity" and "presumption of maternity" are separately defined, reflecting the inherent differences between a mother and a father. See, e.g., id. at 1225.

[FN145]. Elisa B. v. Super. Ct., 117 P.3d 660, 666-67 (Cal. 2005) (internal quotation marks omitted). Prior to the August 2005 decisions, the court had explained that "the 'parent and child relationship' is thus a legal relationship encompassing two kinds of parents, 'natural' and 'adoptive.'" Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993). In that case, the court refused to declare the surrogate a mother over the objection of the intended parents. Id. It was not until August 2003 that the court declared that a mother could consent to a second parent adoption by her same-sex partner. Sharon S. v. Super. Ct., 73 P.3d 554, 574 (Cal. 2003).

[FN146]. Cal. Fam. Code § 7611(d).

[FN147]. Elisa B., 117 P.3d at 671-72.

[FN148]. Charisma R. v. Kristina S., 44 Cal. Rptr. 3d 332, 337 (Cal. Ct. App. 2006). The court explained that presumed parent status depends upon affirmative findings that Charisma received the baby into her home and openly held her out as her natural child. Id.

[FN149]. Order after Hearing at 2, Charisma R. v. Krinsta S., No. HF0415383 (Cal. Super. Ct. Dec. 27, 2006).

[FN150]. Id. at 3-4. In Elisa B., the Supreme Court explained its decision to declare that a child could have two mommies by emphasizing the importance of two parents to provide emotional and financial support. Elisa B., 117 P.3d at 669.

[FN151]. Statement of Decision and Ruling on Issues of Child Custody and Visitation at 14-15, Charisma R. v. Kristina S., No. HF0415383 (Cal. Super. Ct. May 8, 2008).

[FN152]. Kristina became a Texas resident nearly one year after the trial court held that Charisma lacked standing to seek parental rights, two months before the California Supreme Court held for the first time that a child could have two mothers without the use of second parent adoption, and nearly eighteen months before the trial court, on remand, declared Charisma to be a parent to Kristina's child.

[FN153]. In its constitution, Texas declares that "[m]arriage . . . shall consist only of the union of one man and one woman," and that "[t]his state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage." Tex. Const. art. 1, § 32. By statute, Texas defined "civil union" as "any

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relationship status other than marriage that: (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage." Tex. Fam. Code Ann. § 6.204 (Vernon 2006). The statute then declares that a "marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state" and that the

state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

Id.

[FN154]. See Rena M. Lindevaldsen, Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger To Be a Parent over the Objections of the Child's Biological Parent, 21 Regent U. L. Rev. 1, 44, 49-55 (2008) (discussing various approaches adopted by courts to declare a third party to be a parent).

[FN155]. Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995).

[FN156]. Parentage Order at 11, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 (Rutland, Vt. Fam. Ct. Nov. 17, 2004).

[FN157]. See, e.g., Jacob v. Schultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007); Carvin v. Britain, 122 P.3d 161 (Wash. 2005).

[FN158]. Lindevaldsen, supra note 154, at 16 & n.107.

[FN159]. Id. at 17 & n.108.

[FN160]. See, e.g., Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 422-23 (Conn. 2008); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Hernandez v. Robles, 855 N.E.2d 1, 11-12 (N.Y. 2006).

[FN161]. See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

[FN162]. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[FN163]. See, e.g., United States v. Virginia, 518 U.S. 515, 532 (1996).

[FN164]. See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988).

[FN165]. See, e.g., In re Marriage Cases, 183 P.3d 384, 436 (Cal. 2008); Hernandez, 855 N.E.2d at 10.

[FN166]. See, e.g., Standhardt v. Super. Ct., 77 P.3d 451, 457 (Ariz. Ct. App. 2003); Hernandez, 855 N.E.2d at 10-11; Andersen v. King County, 138 P.3d 963, 975 (Wash. 2006). But see In re Marriage Cases, 183 P.3d at 441-42.

[FN167]. In an effort to bolster the claim that discrimination based on sexual orientation should be subject to strict scrutiny, some argue that religious discrimination is afforded heightened protections (in some circumstances) even though people can choose to change their religious beliefs. While it is true that people can change their religious beliefs, one constitutionally significant difference between religion and sexual orientation as a

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protected status is that religion is expressly protected in the First Amendment to the United States Constitution. Sexual orientation, on the other hand, receives no such express constitutional protection.

[FN168]. Catholic Hospital Sued for Refusing Breast Implants to "Transgendered," Jan. 9, 2008, http://www.catholicnewsagency.com/news/catholic_ hospital_sued_for_refusing_breast_implants_to_transgendered (last visited May 15, 2010).

[FN169]. N. Coast Women's Care Med. Group, Inc. v. Super. Ct., 189 P.3d 959 (Cal. 2008).

[FN170]. Id. at 967.

[FN171]. Patricia Wen, Catholic Charities Stuns State, Ends Adoptions, Boston Globe, Mar. 11, 2006, at A. 1, available at http:// www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/ (last visited May 15, 2010).

[FN172]. Elane Photography, LLC v. Willock, No. CV-2008-06632 (N.M. 2d Jud. Dist. Ct. Dec. 11, 2009), available at http:// www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009 (last visited May 15, 2010).

[FN173]. Lesbian Couple Ready To Take Des Moines Y to Court, June 26, 2007, http://clubindustry.com/news/lesbian-couple-ymca-court (last visited May 15, 2010).

[FN174]. Where's the Discrimination?, Cal. Catholic Daily, Sept. 15, 2007, http://www.calcatholic.com/news/newsArticle.aspx?id=f1b804c0-d29f-4f77-90d5-0c2da25b6687 (last visited May 15, 2010).

[FN175]. Id.

[FN176]. Bob Unruh, Christian Speech Targeted As Hate, World Net Daily, Feb. 9, 2010, http://www.wnd.com/index.php?pageId=124553 (last visited May 15, 2010).

[FN177]. George F. Will, Speech Police, Riding High in Oakland, Wash. Post, June 24, 2007, at B7, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/06/22/AR2007062201704.html (last visited May 15, 2010).

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