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PRINCIPLES TO GOVERN POSSIBLE PUBLIC STATEMENT ON LEGISLATION AFFECTING RIGHTS OF HOMOSEXUALS

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Introduction:

In time it may be desirable for the Church to make a public statement on proposed legislation affecting the rights of homosexuals. The content of such a statement will depend on the nature of the proposed legislation and whether the law-making body is Congress or a state legislature.

This memorandum proposes general principles to guide those who prepare the text of a public statement if one is needed.

I. RELIGIOUS LAW VS. SECULAR LAW

At the outset, it is well to reaffirm the status of sexual sins under religious law. All sexual relations outside the bonds of marriage are sinful. "Thou shalt not . . . commit adultery, nor kill, nor do anything like unto it" (D&C 59:6). The prophets have classified adultery and fornication as "abominable above all sins save it be the shedding of innocent blood or denying the Holy Ghost" (Alma 39:5). Similarly, the scriptures refer to homosexual relations as "vile affections" (Romans 1:26) and as an "abomination" (Lev. 18:22, 20:13).

At the same time, the secular law does not treat some sexual sins with the same gravity. Although next to murder in seriousness under religious law, adultery is hardly ever prosecuted (and if prosecuted, carries only a minor penalty) under secular law. Perhaps this is one reason why Section 42 of the Doctrine and Covenants prescribes that adulterers are to be tried in the first instance by a Church court, whereas, persons who kill, rob, or steal are to be immediately delivered up and dealt with according to the law of the land. (D&C 42:79-80, 84-85). In any event, it is noteworthy that a sin as serious as adultery is treated differently for purposes of Church court action than other serious sins.

Consistent with the distinction suggested in Section 42, which apparently takes account of the extent to which the secular law will enforce penalties against wrongful acts, this memorandum proposes Church positions on proposed legislation that are tied to the relationship of the homosexual behavior to the demonstrable public interests of our secular society, rather than to the seriousness of homosexual behavior as a sin under religious law.

It is also well to emphasize at the outset that, in general, our secular laws impose comparatively few penalties or disadvantages for conduct that is a sexual sin under religious law.

Secular laws provide criminal punishments for some sexual sins, but most sexual sins are not punished by the criminal law. The types of sexual offenses that are punished as crimes are generally:

(1) Those accompanied by force (rape and its lesser variations of sexual fondling);

(2) Those involving a minor victim (so-called statutory rape and its lesser variations);

(3) Those involving sexual relations with close relatives (incest);

(4) Offenses against public decency (pornography, self-exposure and other lewd acts in public); and

(5) Commercialized sex (prostitution or solicitation).

In contrast, sexual acts between consenting adults (including adultery or fornication), though they are crimes in some states (including Utah), are rarely prosecuted as crimes. Similarly, unnatural acts, such as sodomy, are no longer criminal acts in many states, unless their commission involves one of the other factors cited above (such as force or a minor victim). Even in states where sodomy is a crime, it is rarely enforced. Other

sexual sins not punished as crimes include masturbation (unless done in public), lustful thoughts, and filthy language.

Secular laws impose civil disabilities for only a few sexual sins. Adultery is grounds for divorce, and in some states (including Utah) the aggrieved spouse may have an action for damages against the seducer. The adulterous conduct of one parent is a consideration in a contest between parents for the custody of a minor child of their marriage. However, for most purposes the civil law takes no notice of sexual acts that are serious sins under religious law. For example, there is no provision for adulterers or fornicators to suffer civil penalties such as disqualification from employment or housing.

Similarly, the civil laws provide few disabilities for the status of homosexuality or for homosexual relations not constituting a crime. However, homosexuals are discharged from the military and from sensitive government employment, and they may not qualify to enter the United States as immigrants.

II. THE "CONDITION" OF HOMOSEXUALITY VS. HOMOSEXUAL PRACTICES

The word homosexuality is used in two senses: (1) as a condition, and (2) as a practice. Thus, in his pamphlet, Letter to a Friend (1971, revised edition, 1978), President Kimball summarizes as follows:

"Homosexuality can be cured if the battle is well organized and pursued vigorously and continuously.

[This obviously refers to the condition of sexual attraction to persons of the same sex.]

"Homosexuality, like other serious sins, can be forgiven by the Church and the Lord if the repentance is total, all-inclusive, and continuous." (Rev. ed., p. 28.)

[This obviously refers to the practice of sexual relations between persons of the same sex.]

It is important to distinguish between these two different meanings in attempting to communicate on the subject of homosexuality. Condemnations directed at the practice of homosexuality are condemnations of sexual acts, which are sinful. Thus, the First Presidency's letters condemning homosexuality are, by their explicit terms, directed at the practices of homosexuality.

In contrast, condemnations directed at the condition of homosexuality are condemnations of persons who are sinners in thought (like a man who looks upon a woman to lust after her), but not necessarily sinners in deed. Evil thoughts are of course also sinful, but for most purposes we do not consider the evil thinker to be guilty of as grave a sin as the evil doer.

Similarly, in considering our position on legislation affecting "homosexuals" we need to be clear on whether the proposed laws would affect only persons with perverted acts, or whether the proposed legislation and our position on it could be understood also to affect persons guilty of no more than perverted thoughts or tendencies.*

The Roman Catholic Archdiocese of New York has stressed the distinction between acts and tendencies very effectively in its highly publicized recent opposition to New York City legislation forbidding discrimination against homosexuals by any agencies doing business with the city. (This legislation would affect the Catholic Church's social welfare agencies.) A spokesman for the Archdiocese has emphasized that the Catholic Church does not condemn "chaste homosexual inclination," but "would not be able to accept the promotion of active homosexual behavior as acceptable." The Archbishop said he would support legislation against discrimination "as long as it is clear that

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* Elder Boyd K. Packer recognized the important distinction between acts and tendencies and stressed the temporary nature of the tendency ("condition") of homosexuality in his March 5, 1978, BYU Fireside, which is published in pamphlet form under the title "To the One":

> "To introduce [the subject] I must use a word. I will use it one time only. Please notice that I use it as an adjective, not as a noun; I repeat, I accept that word as an adjective to describe a temporary condition. I reject it as a noun naming a permanent one." (p. 2)

this does not include condoning homosexual activity or the teaching of homosexuality." (Dunlap, "Archdiocese Seeks New York Accord," New York Times, June 18, 1984). While we may choose to pursue a different policy, we can learn from the skillful way the Catholic spokesmen have communicated this critical distinction between tendency on the one hand and practice or advocacy on the other.

III. "GAY" RIGHTS PROPOSALS

Skillfully appropriating the rhetoric and tactics of civil rights activists, homosexuals present themselves as an oppressed minority who should be protected by anti-discrimination laws. Among their legislative objectives are (1) to remove criminal penalties against sodomy or other homosexual acts, (2) to forbid discrimination against homosexuals in credit, education, employment, public accommodations and housing, and (3) to permit homosexual marriages.

These three categories correspond to three levels of intensity in the law's treatment of persons in a particular class:

(1) Penalty: Laws imposing penalties on particular conduct that identifies persons as members of a particular class (e.g., criminal penalties for homosexual relations).

(2) Protection: Laws penalizing persons for private actions against other persons who are members of a particular class (e.g., laws forbidding discrimination against homosexuals).

(3) Benefit: Laws conferring benefits on the members of a particular class (e.g., a law expanding the category of permissible marriage partners to include couples of the same sex).

Under the first category the members of the class are the victims of public penalties. Under the second category they are protected from discrimination by other citizens. Under the third category members of the class seek public advantage or approval to benefit their class. Those three categories of objectives will be discussed in that order.

A. Criminal Penalties. (Note that this subject concerns only homosexual practices.)

Criminal penalties on persons with the condition of homosexuality are a thing of the past. The homosexual as a victim of public "persecution" by unique criminal penalties is a phony issue.

The issue is the extent to which homosexual practices should be punished as crimes. It is of course assumed that sexual relations that are criminal between man and woman--because of the element of force, minor victim, family relation, public decency, or commercialization--should also be criminal when involving persons of the same sex. The laws generally provide this.

The question under this heading is whether homosexual relations or conduct need to be more criminal (that is, carry a heavier penalty or constitute a crime in more circumstances) than sexual relations or conduct between a man and a woman? For example, should a private act of sodomy between persons of the same sex be a crime when a similar act between persons of a different sex is not a crime or is not prosecuted as a crime? Anti-sodomy statutes have been repealed in many states, and in others their enforcement is a dead letter because the detection of such crimes almost inevitably involves a violation of some constitutional right of privacy.

The most important concerns of the criminal law, as currently administered in the United States, are achieved if the criminal laws are applied to all types of sexual conduct on the same basis, without special criminal penalties for homosexual relations or conduct. In

addition, the enforcement of special criminal penalties against homosexuals makes them martyrs and wins them public sympathy and some powerful liberal support they can use to their advantage on more important issues, such as those discussed below.

There are strong arguments that concerned legislators can employ in favor of special criminal penalties on homosexual conduct. I have summarized them in my lecture, "The Popular Myth of the Victimless Crime" (BYU Press, 1974), reprinted in The Law Alumni Journal, The University of Chicago Law School, Summer, 1975, pp. 3-14.

Despite the existence of these arguments, I believe there is little to be gained by having the Church enter public debate and take a public position on an expansion or retention of the criminal law to cover illicit homosexual relations to a greater extent than illicit heterosexual relations. The law already covers the most grievous types of behavior that are enforceable, so any additional criminal penalties are likely to be marginal as a practical matter. For this reason, I suggest that the Church take no public position on this subject, reserving its influence for more important matters.

B. Anti-discrimination. (Note that for purposes of the anti-discrimination laws, the term "homosexual" can denote persons who engage in homosexual practices or

persons who merely identify themselves with the condition of homosexuality.)

This is an issue of major current importance. Attempting to ride in on the momentum of civil rights and anti-discrimination efforts, gay rights groups are promoting laws that would preclude any consideration of "sexual orientiation or affectional preference" in decisions on employment and a variety of other matters. Thus, the Democratic Party platform in the current presidential election "promises federal legislation barring job discrimination against homosexuals, assuring them the right to enter the Armed Forces, and preventing the exclusion of immigrants because of their homosexuality." (Reid, "The Democrats Write a Platform that Resembles 'Paradise Lost,'" The Washington Post National Weekly Edition, July 30, 1984, p. 11.) Pitted against these efforts are long-standing practices barring homosexuals from certain kinds of employment, plus public revulsion against homosexuality.

Typically, the proponents and opponents of anti-discrimination legislation affecting homosexuals do not join issue.

The gay rights groups present themselves as victims of intolerance against the condition of homosexuality and of

broad-based discrimination against persons with that condition. However, there is little evidence of such intolerance or such broad-based discrimination. Although homosexuals seek legislation that would guarantee non-discrimination against persons with their condition, what they really seem to crave is public approval of their practices. They want the right to proselyte their lifestyle and to practice it in public without penalty or public disapproval.

Opponents of anti-discrimination laws for homosexuals focus their opposition on the practices of homosexuals. They may sympathize with the abstract plight of a homosexual who cannot get a job, but they will not approve of a law that will permit homosexuals to be employed as teachers or counselors of youth, because they do not want to increase young people's exposure to the risk of homosexual practices.

Opponents and proponents join issue on one question: gay rights advocates want public approval of their lifestyle (including public display of their "condition") and their adversaries oppose this.

If the legislative issue is posed in terms of whether a person with the homosexual condition should be allowed to

have a job, the focus will be on an aggrieved person who wants a job despite discrimination, and the proposed anti-discrimination law will probably win public approval. The public will see the debate as a question of tolerance of persons who are different, like other minorities. Perceiving the issue in those terms, the public will vote for tolerance, and those who oppose may well be seen as unmerciful persecutors of the unfortunate.

However, if the legislative issue is posed in terms of whether the public has a right to exclude from certain kinds of employment persons who engage in (and will teach) practices the majority wish to exclude for the good of society (such as abnormal sexual practices that present demonstrable threats to youth, public health, and procreation), the gay rights proposal will lose. The public will see the debate as a question of whether homosexuality is to be approved and promoted. Perceiving the issue in those terms, the public will reject such approval and the proposed means of promotion.

Properly so. Parents who prefer and a society which prefers male-female marriages and procreation should be able to insist on teachers and youth leaders who will teach and demonstrate (or at least not contradict) those values.

For the reasons suggested above, arguments for job discrimination against homosexuals are strongest in those types of employment and activities that provide teaching,

association and role models for young people. This would include school teachers (especially at the elementary and secondary levels), and youth leaders and counselors (such as scoutmasters, coaches, etc.).

Arguments against job discrimination that would bar homosexuals are strongest when they focus on jobs which pose no threat to youth or the values described above. Such jobs, which would seem to be done the same way by a homosexual as by another person, would include factory and other laboring jobs involving an adult work force. Those seeking laws protecting homosexuals from discrimination are likely to use the examples of these kinds of jobs as a basis for the enactment of a law protecting homosexuals against discrimination in all kinds of jobs.

Since public policy must obviously favor perpetuation of the nation and its people, laws should permit employers to exclude from key positions of influence those who would proselyte and promote the homosexual lifestyle. The public is likely to approve such action by employers like school districts if the argument is presented as an exception to a job-discrimination law, rather than as a proposal to ban homosexuals from all employment (such as by outright opposition to anti-discrimination legislation extending some protection to homosexuals).

It should be noted that the arguments that would permit job discrimination against homosexuals in certain types of employment have no application to permit discrimination in credit, education (admissions), public accommodations, and housing. If there is a basis to approve discrimination in these areas against persons with the homosexual condition, it has yet to be suggested.

Efforts to protect homosexuals from various types of discrimination are succeeding in some measure. The best strategy to oppose further anti-discrimination legislation protecting homosexuals is to propose well-reasoned exceptions rather than to oppose such legislation across the board. Total opposition (that is, opposition to all non-discrimination legislation benefiting homosexuals) would look like a religious effort to use secular law to penalize one kind of sinner without comparable efforts to penalize persons guilty of other grievous sexual sins (adultery, for example).

In contrast, if the opposition to granting job discrimination protection to homosexuals is limited to jobs that expose homosexuals to young people or present homosexuals as worthy role models, this opposition could be explained in terms of secular public policies rather than

religious categories of sin. Such opposition would command widespread support not limited to particular religious philosophies.

An anti-job-discrimination law protecting homosexuals could make an exception for certain categories of persons for certain jobs, such as the teaching and counseling jobs mentioned earlier.* The Civil Rights Law currently has a comparable exception, which permits religious discrimination in certain types of religious employment.

For the reasons discussed above, I recommend that if an anti-job-discrimination law is proposed to protect homosexuals, the Church should oppose the law if it did not contain a youth-protection exception of the type described above. Such opposition should be explained, with careful emphasis on the bad effects of homosexual practices (not homosexuals) and the need--for the good of society--to protect youth from homosexual proselyting and role models among their teachers and counselors. The statement should focus on concerns over homosexual advocacy rather than

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* It would also be desirable to permit employers to exclude homosexuals from influential positions in media, literature, and entertainment, since those jobs influence the tone and ideals of a society. However, homosexuals have such footholds and influence in these areas that such a law would be difficult to enact and almost impossible to enforce.

homosexual seduction, since this argument will be more persuasive to the public and less subject to counter-arguments in which the gay rights advocates present themselves as the victims of a smear.

If the proposed law contained a suitable exception, the Church could remain silent on the proposal; it would not need to support the law--it could just refrain from opposing it.

C. Family Laws. (Note that this subject assumes homosexual practices.)

The major objective of the gay rights homosexual movement is to win legitimacy and public approval for the homosexual "sexual preference" or "lifestyle." Nothing would accomplish that objective as effectively as legal recognition of homosexual marriages. This could be accomplished by constitutional amendment (many believe the proposed Equal Rights Amendment would have done this), legislative action (none has been taken thus far), or court decision (thus far, all courts that have been urged to approve homosexual marriages have refused to do so). The liberal Unitarian Universalist Association recently became the first major Protestant denomination to approve homosexual marriages. (Deseret News, June 29, 1984.)

Recognition of homosexual marriages would entitle homosexual couples to such diverse privileges as child adoption, tax benefits, right to court-enforced support, alimony and property division upon divorce, social security benefits, property rights such as intestate inheritance or spouse's indefeasible share, citizenship privileges, right to sue for wrongful death, access to housing that is restricted to married couples or unattached singles, and pension and group insurance benefits, to name only a few.

In my opinion, the interests at stake in the proposed legalization of so-called homosexual marriages are sufficient to justify a formal Church position and significant efforts in opposition. Such a position could make the following points, which are stated here in secular terms appropriate for public debate on proposed legislation:* (This list is only illustrative, and should be supplemented in the context of the particular proposal being opposed.)

(1) We speak in defense of the family, which is the bulwark of society.

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* We therefore do not mention that, in religious terms, homosexual "marriages" would be a devilish perversion of the procreative purposes of God and the earth life He has granted His children. Homosexual relations are wholly deviant to the procreative purpose of sexual relations. Homosexual marriages are wholly deviant to the patriarchal family.

(2) The legal rights conferred on marriage partners are granted in consideration of the procreative purpose and effects of a marriage between a man and a woman. (Even marriages between men and women who are past the child-bearing years serve this procreative purpose, since they are role models for younger, child-bearing couples.)

(3) Cohabitations between persons of the same sex do not meet the time-honored definition and purposes of "marriage" and therefore should not qualify for the legal rights and privileges granted to marriage.

(4) One generation of homosexual "marriages" would depopulate a nation, and, if sufficiently widespread, would extinguish its people. Our marriage laws should not abet national suicide.

IV. TWO CLOSING OBSERVATIONS.

1. There is an irony inherent in the Church's taking a public position opposing homosexual marriages. This should be mentioned here since it is sure to be noted by others. The leading United States Supreme Court authority for the proposition that marriage means a relationship between a man and a woman is Reynolds v. United States, 98 U.S. 145 (1878).

In that case, in which the United States Supreme Court sustained the validity of the anti-polygamy laws, the Court defined marriage as a legal union between one man and one woman. The court's stress in that case was on one. The modern relevance of the Reynolds opinion is in its reference to marriage as being between a man and a woman. The irony would arise if the Church used as an argument for the illegality of homosexual marriages the precedent formerly used against the Church to establish the illegality of polygamous marriages.

2. This whole subject of homosexual rights in relation to the family is more complicated than first appears. For example, a difficult case likely to arise is whether the law's traditional favoritism for parental rights would allow a natural parent who is homosexual to raise his or her child in a homosexual environment, advocating a homosexual lifestyle? Or, in the alternative, would the law's traditional hostility to homosexuality prevail over parental rights and require the child's custody to be given to a non-parent? The issue is mentioned here since it would be used by the opposition to suggest that in opposing homosexual marriages the Church was also opposing parental rights.

V. SUMMARY

In summary, and for the reasons discussed above, I recommend that the Church:

(1) Tailor its communications on this subject to take account of the formal difference between the condition or tendency of so-called homosexual persons on the one hand and homosexual practices on the other. (Pages 4-7)

(2) Take no position on laws changing the extent to which there are greater criminal penalties for homosexual behavior than for illicit heterosexual behavior. (Pages 8-10)

(3) Oppose job discrimination laws protecting homosexuals, unless such laws contain exceptions permitting employers to exclude homosexuals from employment that involves teaching of or other intimate association with young people. (Pages 10-17)

(4) Take no position on laws barring other types of discrimination against homosexuals, unless there is a secular basis (persuasive public policy) to justify such discrimination. (Page 15)

(5) Vigorously oppose the legalization of homosexual marriages. (Pages 17-19)