The parade that turned into a hotel…

By Andrew J. McCauley

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The ongoing movement to relegate public Catholic presence in America to the closet, took a major step forward Friday, March 11, 1994. On that date, the Supreme Judicial Court of Massachusetts upheld a lower court ruling that the annual Boston St. Patrick's Day Parade had to include a homosexual group with their banner. This group, according to their own testimony, wished to march in order to express their pride in their homosexual identity, and to show their support for a homosexual group seeking to enter the New York St. Patrick's Day Parade.

The five member court upheld the lower court decision of Judge Harold Flannery by a majority vote.

The Catholic League submitted a friend of the court brief on behalf of the parade sponsors, the South Boston Allied War Veterans Council. The Catholic League was the only organization that so assisted the Veterans, who were represented by attorney Chester Darling, a sole practitioner. The homosexual organization (GLIB), on the other hand, was represented by many law firms, including one of Boston's largest and most prestigious.

Although the Supreme Judicial Court has yet to come down with a written opinion, it obviously has to follow the reasoning of Judge Flannery's decision in the lower court, if indeed such tortuous rationalizations can be called "reasoning."

The argument of GLIB was that parades, including private parades, fall under the anti-discrimination provisions of the Massachusetts public accommodation statute, which, among other things, forbids discrimination based on "sexual orientation" in places of public accommodation. The attorneys for GLIB, however, could cite no case in any jurisdiction where a parade was deemed to be a place of "public accommodation." In fact, every case involving a parade has held that parades are an exercise of free speech. The latest such determination was in New York City where the Federal District Court ruled that the New York City St. Patrick's Day Parade was, like all parades, "a pristine form of speech" and that "every parade is designed to convey a message."

How did Judge Flannery circumvent these unanimous rulings? He indicated that the Boston St. Patrick's Day Parade is not a parade at all. He said the parade "is more akin to a social association," comparing it to a dance hall for teenagers that charged admission.

To argue that a parade is not really a parade, but is "more akin to a social organization," evokes a passage from "Alice in Wonderland": "When I use a word, it means just what I choose it to mean . . . neither more nor less. "

Judge Flannery also ruled that the Boston parade – or non-parade as Judge Flannery views i t – is "an open recreational event." Obviously, it is not open to the public. The testimony was that all applications to march had to be approved by the Veterans. If the parade was open to the public, then the Police Department would have no right to keep the public 0n the sidewalk, and out of the parade, which it does.

Judge Flannery also argued that the parade sponsors did not exercise sufficient selectivity in choosing participants and excluding applicants. He said that only two groups had been excluded since 1947. Actually, six groups have been either

excluded or forced to change the content of their message as a condition for marching. We were unaware, until Judge Flannery educated us, that one had to exclude a certain number of applicants before a parade's sponsor could exclude undesirable messages from a parade.

Judge Flannery also argued that the Boston parade was not focused enough to receive First Amendment protection. He ignored all prior case law that a parade is "a pristine form of speech." He sidestepped the free speech issue by treating the parade as an expressive association, such as a club, stating that "an assertion of a right of expressive association requires focus on a specific message, theme, or group – perhaps a temple or parish congregation."

The implication of this is that a parade that does not limit participants to marching groups whose identities specifically reflect the theme of the parade itself, will thereby lose the right to exclude unwanted themes and messages. Thus parades that include diverse groups from the community, such as political clubs, business organization, church groups, bands, unions, etc. would be stripped of their First Amendment right to exclude groups showcasing unwanted themes and messages. Only "focused" groups such as the Ku Klux Klan or the Gay Parade could exclude unwanted themes from their parades under this bizarre ruling.

This decision, if upheld by the U.S . Supreme Court, could turn nearly every major parade in this country into a sexual carnival. This is not just hyperbole. Judge Flannery stated in his decision the following: "Excluding all sexual themes not only contravenes the First Amendment's prohibition on content-based restrictions, but is a form of discrimination itself." This mind-boggling assertion that private parties cannot exclude sexual themes from their expressive activities if other parties wish to interject them, illustrates where Judge Flannery is coming from.

Another issue fudged over by Judge Flannery was whether there was discrimination based on "sexual orientation." The uncontroverted testimony at trial was that no one had ever been excluded from the parade because of their sexual orientation. How did Judge Flannery deal with this problem? Simple. He said that the message and values of GLIB were the same thing as the sexual orientation of its members: "The defendants' final position was that GLIB would be excluded because of its values and its message, i.e. its members' sexual orientation."

It apparently hasn't occurred to Judge Flannery that some heterosexuals may have the same values and messages as GLIB, while some homosexuals may disagree with GLIB's "values and messages." In any event, a person's values, and his or her sexual orientation, are two different things.

The court's decision also side-stepped the fact that the Veterans had a city permit to operate the parade at a certain time and place. The permit specifically reserved the parade route for the use of the parade's sponsors, and under such a reserved permit, the public cannot intrude.

Further, the Supreme Judicial Court, which upheld Judge Flannery's decision, had ruled some years earlier that the Massachusetts anti-discrimination statute applied only to permanent physical plants, facilities, or buildings such as stores, stadiums, etc. As the parade is an event, and not a physical facility, it will be interesting to see what legal sophistry is employed by the Supreme Judicial Court to skirt the limitations of its prior decision.

Further, even if the Veterans' own speech and expressive activities were not involved here, as Judge Flannery maintained, their First Amendment rights would still be at stake. As the U.S. Supreme Court held in *Wooley v. Maynard:* "the right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual

freedom of mind'." As the U.S. Supreme Court held in *West Virginia v. Barnette,* the state has no "power to force an American citizen to publicly profess any statement of belief."

Such is no longer the situation in Massachusetts. The stated purpose of this parade was to honor St. Patrick and to express the Veterans' support for "traditional values." In Massachusetts, however, virtue must pay tribute to vice before publicly expressing itself. The strained analogies, inapposite case citations, and tortuous rationales of the Court indicate that neither the U.S. Constitution nor Supreme Court precedents, were going to deter the Court from arriving at its decision. Pestilence has been given a place in the sun over the prostrate corpse of the First Amendment. In Massachusetts, legal anarchy now poses as the law, and vice presents itself as if it were virtue.

Thomas Jefferson once said "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sin- ful and tyrannical." In Massachusetts, tyranny is alive and well. So is sin.

The Veterans intend to appeal this decision to the U.S. Supreme Court. I f they do, the Catholic League will again submit an amicus brief on their behalf. It is no exaggeration to say that if Massachusetts prevails at the Supreme Court level, the First Amendment will become all but meaningless, and our moral climate, under duress from the state, will undergo an unnatural inversion.