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Matt Coles

UC Hastings College of the Law, colesm@uchastings.edu

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# The Right Forum, the Right Issue: Initiatives and Family Values

Matt Coles†

I sort of had a little brain short circuit, trying to figure out how to do what I thought I was being asked to do here today. I thought, "How do I pull the Oregon and Colorado initiatives, family values, and litigation and legislation about lesbian and gay families together in a way that is coherent, if not grandly philosophical?" I'm going to start with the easy part, which is talking about litigation and legislation. I'll start with litigation, because litigation is really easy. I think I am going to use a lot of what Maria said<sup>1</sup> as sort of the data to make a couple of sweeping statements.

I think, as a general proposition, that trying to use litigation to obtain acknowledgement for, or protection for, lesbian and gay families is a pretty forlorn activity with which to get involved. That's partly because the courts these days are so conservative.

Here's an example of just how conservative the courts are. There was a case decided earlier this week by the Tenth Circuit called *Jantz v. Muci*.<sup>2</sup> The case involved a teacher who claimed he was turned down for a job because the principal thought, mistakenly as it turns out, that he was gay. Jantz sued the school district; the defendant appealed from the district court's refusal to grant summary judgment in his favor, and the case went up to the Tenth Circuit. In a lot of ways, what this case comes down to is whether you could get rid of, or not hire, a gay person solely because of hostility to him based on his sexual orientation.<sup>3</sup> It comes

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† Staff Attorney, American Civil Liberties Union of Northern California; Adjunct Professor, University of California, Hastings College of Law; Lecturer, University of California at Berkeley (Boalt Hall). B.A., Yale University, 1973; J.D., University of California, Hastings College of Law.

<sup>1</sup> See Maria Gil de LaMadrid, *Expanding the Definition of Family: A Universal Issue*, 8 BERKELEY WOMEN'S LAW JOURNAL 170 (1993).

<sup>2</sup> *Jantz v. Muci*, 976 F.2d 623 (1992).

<sup>3</sup> The court's discussion focussed on the defendant's qualified immunity from liability.

down to that because the case has got to receive lower level Equal Protection analysis.

The school district gave us what I thought of as a wonderful gift. At the summary judgment level, they didn't try to defend the rationale of not hiring a gay school teacher. They just said they didn't do it. As soon as Jantz came forward with evidence of discriminatory intent, he won on summary judgment. In light of the evidence presented by Jantz, all the school district could say was that they can fire, or fail to hire, somebody who is gay, even if they don't have a rational basis; pure hostility will do.

Well, the court said, "You are right."<sup>4</sup> It may be the case that, as a general matter, you cannot discriminate out of hostility.<sup>5</sup> But it is not clearly established law that this is true when we are talking about lesbians and gay men. And the fact that the Tenth Circuit says that if you look at *Bowers v. Hardwick*<sup>6</sup> and the notion that morality is a sufficient basis for legislation—well, it looks to me as though people can legislate and disadvantage lesbians and gay men solely on the basis of hostility based on sexual orientation.

There is another reason the courts are not a great place to try to protect or affirm lesbian and gay families, aside from, yet related to the fact that they are so conservative. When we ask them to recognize or affirm lesbian and gay families, we're asking them to make sweeping social change. And I think the really sad news is even if we were to have a bunch of courts that were appointed by Democrats, we would have a very difficult time getting them to do that. I think courts are institutionally disinclined to do that. And very bad at it when they try. That may be because they are all run by lawyers. It may be because they are institutionally designed as dispute resolving mechanisms. However you look at it, they don't do it very well.

Although I think that litigation is not a great place to be affirming or trying to protect lesbian and gay families, I do think there is an exceptional, small class of cases where sometimes we actually can do some good for lesbian and gay families. They share three characteristics, and if you see one of these coming along in your practice, you should think about it.

First, the result must be capable of being very narrowly confined. The more it looks like you are asking the court to recognize families in a way that is going to sweep out into all sorts of areas, the more difficult it is going to be. When you ask courts to recognize alternative families for the purpose of health insurance, or in a way that says that someone who is not a biological parent can come in and perhaps establish parental

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<sup>4</sup> The Tenth Circuit remanded the case for entry of summary judgment in favor of the defendant.

<sup>5</sup> See *Palmore v. Sidoti*, 466 U.S. 429 (1984).

<sup>6</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

rights, it scares the hell out of them. But when you can get a case that is narrowly confined like the *Braschi* case in New York,<sup>7</sup> you can make it seem like it has to do with rent control regulations and who gets evicted. In fact, the more you can make it look like a status quo right—somebody who has the apartment and doesn't lose it—that is narrowly confined, the better the chance you have.

The second characteristic I think you need (and this again was suggested by Maria, and I think she is absolutely right) is the ability to hitch your wagon to somebody else's. Coalition politics really means something in litigation—I think again of the *Braschi* case and some of the cases Maria was talking about. If it looks like it's not only lesbian and gay families that need to be protected, but other kinds of extended families, as it did in the *Braschi* case, I think you've got a much better chance of getting the court to look at it more extensively.

And finally, a very unexceptional idea: I think you need to have some widows and orphans present. I think you need to have somebody who is going to be seriously hurt if the court doesn't do the right thing. The courts are less willing to take chances with more abstract cases. For example, Roberta Achtenberg and I worked together on a case about when the state had to extend dental benefits to lesbian and gay people. Dental benefits just do not have a lot of sex appeal to begin with, and the client in that case did not even need bridge work. There was no immediate danger of injury, as opposed to cases like *Braschi*, where somebody is going to lose an apartment.

Compare the dental benefits case to a case Roberta did several years ago, where someone had lost his job to care for a dying lover. The question there was, "Did he get unemployment benefits as a member of the family who was doing the care?" We got great results in that case, like in the *Braschi* case. So there may be little pockets of things that I think we can accomplish in litigation, but, basically, I think litigation is pretty much a lost cause. The courts are not a good forum because they are institutionally ill-suited to sweeping social change.

The second thing I would like to talk about is to what extent legislation is a place where we can do something about protecting or firming up lesbian and gay families. But first, I want to focus on the kind of legislation I *don't* think will do that: anti-discrimination laws based on sexual orientation.

Generally speaking, there are two reasons why anti-discrimination laws won't work in protecting lesbian and gay families. First, to construct a model that says, "Not to recognize my family is to discriminate on the basis of sexual orientation," which seems strikingly obvious to people who are on the wrong end of it, is, to a lawyer who thinks about it

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<sup>7</sup> *Braschi v. Stahl*, 74 N.Y.2d 201 (1989).

as a legal matter, not strikingly obvious at all. And the reason it's not strikingly obvious is because the discriminatory impact is the result of a state law—a law passed by a local lobby. A discriminatory impact case, where the impact is the result of an act of the same body that's supposed to be protecting you, is a difficult thing to get a court to bite on.

What's more, most states that have laws that prohibit sexual orientation discrimination also have laws that prohibit marital status discrimination. Laws based on marital status go directly to the classification that creates the discriminatory impact. So courts are more likely to recognize a violation of a law on the basis of marital status than one on the basis of sexual orientation.

I just don't think that anti-discrimination laws are going to provide much of a vehicle or protective venue. And most of them, the sad news is, say just that in so many words. As a matter of fact, a lot of them—the worst of them—make the situation even worse, by saying on their face, "Nothing in this law requires recognition of alternative relationships or lesbian and gay relationships." You know, there's always the chance that marital status discrimination laws will, if you use them correctly, require such recognition of alternative relationships. But the wording of some anti-discrimination legislation bars such a possibility.

The other legislative area, which Maria mentioned and I'm going to discuss much more briefly and in a slightly different way, is domestic partnership. This is legislation that is designed, I think, to protect lesbian and gay relationships; although as Maria pointed out, the best kind of legislation is not focused on lesbian and gay families at all, but on alternative families. Some of that legislation is painfully hard to write. But certainly, the best legislation isn't restricted to lesbian and gay relationships, and the more ambitious and intriguing thing is trying to take on that larger conception of family. I don't think I've seen it done wonderfully yet, but I've seen some wildly interesting, awesome attempts. Makes my head hurt every time I read it.

Let me say this about domestic partnership laws: I think domestic partnership laws and the way they work for families voice four different agendas we're trying to accomplish in terms of acknowledging and protecting families. And so far, because they're so new and somewhat general, I think they've been able to accommodate all four of those agendas fairly well. They may keep doing that.

One of those four agendas is the agenda of marriage. People think domestic partnership laws are a stepping-stone to marriage. And they may be; it will take us a while to see that. I'm just not entirely convinced that the best way to acknowledge lesbian and gay families is through marriage. And I can say I'm almost absolutely convinced that the best way to protect them may not be through marriage. Be that as it may, I don't think marriage ought to be the first thing up there, and I don't

think it's about to happen. I will bet domestic partnership laws, if they are a stepping-stone, are a very short stepping-stone.

Health benefits is a thing I think people focus on when they think about domestic partnership, especially using it as a way of getting employers, businesses and other institutions to extend health plans and take in alternative families. I think that's just the most stunning example of rearranging the deck chairs on the Titanic that I've seen in a long time. Anybody who thinks about our health care system will recognize that it's insane to determine whose health care needs will be filled on the basis of whether or not they are in a qualifying relationship. The system isn't working for anyone. And I hate to spend enormous effort trying to get the last open place on the Titanic before it sails. I think our relationships ought to get recognized in health plans just as I think the military ought to stop discriminating against lesbians and gays. It's something I hope will happen soon. But I'll tell you, it's not up there at the top of my own personal agenda.

The third agenda, which I think gets subsumed, is simply setting up a mechanism to begin recognizing families and relationships that don't fit into what has become a very American legal model—thinking like a computer: on/off, married/unmarried. My hope about domestic partnership laws is that they will survive ultimate changes in the marriage laws, and they will get society used to the idea that we can't think about people solely in terms of being married or not married, and being related by blood or not related by blood. Emotion, commitment, and things that count don't necessarily fit into those categories—they shouldn't fit into those categories. We can come up with something a little more general, a little less constricting, and hopefully without some of the baggage that marriage carries, as a way of beginning to open up society's ideas. I think that's an agenda that gets lost.

My final agenda, and maybe the most important goal of domestic partnership laws, is that of making lesbian and gay relationships more visible. Now, it is not because I think that being in a relationship is better than being single. There are times when we start talking about families and relationships, and I feel we almost genuflect, as if they are something really great, and there were something second-class about living single. There isn't necessarily something second-class about living single.

The reason I want to make lesbian and gay relationships much more visible is not because I think that there's something really intrinsically better, or first-class, about them. Rather, it's because I think that making them more visible really gets at the core of discrimination against lesbians and gay men. I've been sort of critical of the way society is able to separate gay people into "Them", and the rest of society into "Us". That separation is essential to any kind of systemic, ongoing prejudice. Soci-

ety makes that separation by conceiving of lesbians and gay men as people who are fundamentally emotionally shallow, not capable of serious commitment, and not capable of strong feeling. I can run through all the clichés about both lesbians and gay men to try and convince you that this really is very much a major element of the way society thinks about gay people and makes that separation, but I'll spare you that. One of the most powerful tools we have to combat that fundamental aspect of prejudice is making lesbian and gay relationships visible. In that way, we can challenge the basic notion that lesbians and gay men are people who are incapable of serious emotion and serious feeling.

And that's what brings me to the Oregon and Colorado initiatives and the fact that the people fighting them present them as family values issues. Although it's hard to see this sometimes, I think the right wing may be doing us a great favor through these initiatives. I say that as a survivor of 8 or 9 initiatives over the years. They're very unpleasant when you're in them. But, it's the right forum for the issue about lesbian and gay families; it's the right forum for the question about lesbian and gay men. It's the right forum because, ultimately, courts are resistant to taking on questions of sweeping social change. And even when they take them on, they don't really change things.

Declarations from courts that the world is going to be different, even when they make them, rarely have much real impact. We didn't end school segregation with all deliberate speed in 1954.<sup>8</sup> We did not take women out of cages or off of pedestals as *Frontiero v. Richardson*<sup>9</sup> said in 1973. I just don't think we change society when the courts tell us to. I think we change society by changing people's minds. And I think when you're involved in an initiative, you do a lot more organizing in your own community and changing people's minds in other communities than you do when you wind up in court.

So, in a lot of ways, I think initiatives put us into the right forum. Moreover, they have focused on the right issue: family values. We've been trying to frame it as a family values issue all along. Because the ultimate issue really is: are lesbians and gay men members of the human family? Do they have the same capacity for emotion, the same capacity for joy, the same capacity for sorrow, the same capacity for achievement that other people do? That is what the Colorado and Oregon initiatives are about. So, in an odd sort of way, we're in the right forum, on the right issue. We may lose one or two of these as we go along; over the years as we look at back them we have lost a few. But, ultimately, we usually wind up winning them back again. If we keep hammering away at the fact that we are a part of the human family, we will eventually win.

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<sup>8</sup> *Brown v. Board of Education*, 349 U.S. 294 (1955).

<sup>9</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).