CHAPTER 11

Sowing the Dragon’s Teeth: Materialization in Lesbian and Gay Anti-discrimination Rights

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ABSTRACT

This chapter accounts for some of the political dynamics constituting the limits to public support for gay and lesbian anti-discrimination rights. Public ambivalence about these rights is revealed to “materialize” the legal subject at the same time that it constitutes the political body in ways that prevent the easy resolution of (sometimes imputed) rights demands. This materialization is explored within several tropes common to this public concern: the language of special rights, the suspicion of elites and the jurisprudence of wealth, and the rationality of the neoliberal marketplace.

INTRODUCTION

“I oppose affirmative action. I think it divides us rather than joins us. I would oppose any effort to add sexual orientation as a protected class under the Federal affirmative action programs. That being said, I unequivocally oppose discrimination.”

Representative Thomas Bliley

“I am against discrimination. My support for the Defense of Marriage Act does not lessen in any way my commitment to fighting for fair treatment for gays and lesbians in the workplace.”

Senator Barbara Mikulski

Public commitments such as these opposing discrimination against lesbians and gays are ironically entangled with the slow and painful development of

1 The colorful phrase was spoken by Senator Robert Byrd in opposition to “the potential cost involved here” of failing to curtail the effects of same-sex marriage. Congressional Record (Senate, Wednesday, February 9, 1994 [Legislative day of Tuesday, January 25, 1994] 103rd Congress 2nd Session) 140 Cong Rec S 1250.
2 Representative Thomas Bliley Congressional Record (Wednesday, August 5, 1998, 105th Congress, 2nd Session) 144 Cong Rec H 7250.
3 Senator Barbara Mikulski, Congressional Record (Senate, Tuesday, September 10, 1996, 104th Congress 2nd Session) 142 Cong Rec S10115.
anti-discrimination policy and jurisprudence. Local citizen action groups and the political referenda they often champion promise to “take back” Maryland or Vermont, “the schools,” and “the culture” from “homosexuals,” “liberals,” and courts advocating rights advances, drawing the line at domestic partnership, same-sex marriage, and sometimes even taunting in the schools and employment nondiscrimination. At the national level, recent mobilizations behind the Defense of Marriage Act targeting same-sex marriage litigation, the Riggs Amendment opposing San Francisco’s domestic partnership contract requirement, and the annual struggles against the proposed employment nondiscrimination act (ENDA), among others, have rhetorically valorized the national commitment to civil rights while proclaiming protections for lesbians and gays to be excessive, unnecessary, invasive, and unwarranted. To many opponents, rights protections for lesbians and gays go beyond defensible ideas of equal protection, forcing a choice “between civil and uncivil rights.”

The political fault-line running through these rights debates signals a changing legal culture. The implicit values of equality and nondiscrimination against which lesbian and gay identities and demands are assessed have displaced medicalized pathologies and dogmatic moralism, opening up the very possibility of rights claims. Parallel to these discursive changes, a growing social acceptance of gay and lesbian political demands has emerged. Strong public support for employment anti-discrimination protection is regularly voiced in opinion polls. Many employers have instituted benefits for same-sex partners, and unions increasingly bargain for these advances (Hunt, 1999; Santora, 2001). Cultural acknowledgement of gays and lesbians has become commonplace. Despite this growing liberalization—indeed, in its very enunciation—the public discourse of anti-discrimination frequently declares the limits to the acceptable. For nearly every voice supporting the propriety of nondiscrimination in employment, there is another raised against same-sex marriage, and referenda on other civil rights issues—particularly regarding gays and lesbians—remains common, volatile, and limiting (Gamble, 1997; Wolfe, 1998, 77 pp. ff.). Public opposition to a broader rights agenda is articulated within this ambivalent sentiment: although discrimination is opposed and the democratic values of anti-discrimination extolled, some rights demands are seen as a hyper-extension of the law and a mockery of its authority.

This chapter seeks to account for some of the political dynamics constituting these limits to public support for gay and lesbian rights. I argue that discourse about gay and lesbian anti-discrimination rights works to “materialize” the legal subject at the same time that it constitutes the political body in ways that make it difficult to resolve these (often imputed) rights demands. This irresolution leaves no room for

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4 Testimony of the Hawai‘i Catholic Conference against same-sex marriage, before the Hawai‘i Senate Committee on the Judiciary, Honolulu, 22 February, 1996. Letter in possession of the author and in collected papers, University of Hawai‘i.

5 For example, the Harris Poll, 13 June 2001 finds 2 to 1 support for employment nondiscrimination that includes sexual orientation, from 61–20% to 58–29% depending on the specific questions asked. Referenda in Hawai‘i and Alaska in 1998 showed 69% of voters opposed to same-sex marriage, a figure only slightly moderated in national polls since then.