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# GAY RIGHTS THROUGH THE LOOKING GLASS: POLITICS, MORALITY AND THE TRIAL OF COLORADO'S AMENDMENT 2

Suzanne B. Goldberg\*

Courts have long struggled to resolve the question of how far a community may go in exercising its power to treat minority members differently. Popular prejudice, "community morality" and invidious stereotypes repeatedly have had their day in court as judges work to reconcile equal protection and privacy rights with their own attitudes about the place of people of color, women and gay people in society.<sup>1</sup> In the early 1990s, the tension between the American ideal of equality and the reality of human diversity starkly emerged. A national wave of citizen-sponsored initiatives seeking to amend state constitutions and local charters to prohibit governments from protecting lesbian, gay and bisexual citizens from discrimination spread across the country.

On November 3, 1992, the citizens of Colorado passed Amendment 2 to the Colorado constitution, a voter initiative promoted by

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I wish to thank the plaintiffs of *Evans v. Romer*, for their extraordinary personal commitment to the struggle for lesbian and gay equality, the witnesses who offered their time and expertise to developing the record in the case, and, of course, the tremendous team of lawyers, paralegals and administrative assistants who have all devoted countless hours to the trial, the appeals and the politics of this litigation. Among the many people to be thanked are my Lambda Legal Defense colleague Mary Newcombe, Lambda's cooperating attorney Clyde Wadsworth, the ACLU's Matt Coles, Bill Rubenstein and David Miller, Jean Dubofsky and her associates, Jeanne Winer, Gregory Eurich, Natalie Bocock-Turnage and others at Holland & Hart in Denver, and the Colorado Legal Initiatives Project. I am also grateful to Elizabeth Bachman and the other editors of the Fordham Urban Law Journal for their editorial and research assistance. And, always, I thank my partner, Paula Ettelbrick, for her insight and support.

1. See, e.g., *Bradwell v. State*, 16 Wall. 130 (1872)(sustaining a law denying to women the right to practice law); *Plessy v. Ferguson*, 163 U.S. 537 (1896)(establishing the doctrine of "separate but equal"); *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954)(holding that segregated public school facilities violate the Equal Protection clause of the Fourteenth Amendment); *Frontiero v. Richardson*, 411 U.S. 677 (1973)(sustaining an Equal Protection challenge to a law requiring servicewomen to prove that their husbands were dependent before receiving a dependency allowance from the armed services); *Steffan v. Cheney*, 920 F.2d 24 (D.C. Cir. 1991)(holding that alleged homosexual conduct was not a relevant inquiry for discovery); *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994)(holding that discharge of National Guard Officer on basis of sexual orientation violated her constitutional rights).

an organization called Colorado for Family Values. The Amendment, which forbids any state or local government entity, including school districts, from prohibiting discrimination against lesbians, gay men or bisexuals, provides:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be self-executing.

This essay recounts the struggle that ensued following the passage of Amendment 2. At the time of its passage, Amendment 2 was one of several voter initiatives that appeared on the ballot in various states.<sup>2</sup> First made famous at a national level by Colorado's Amendment 2 and Oregon's Measure 9,<sup>3</sup> these initiatives were developed and promoted by organizations with radical right wing affiliations.<sup>4</sup> Radical right organizations sought support for

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2. In 1992, the most publicized anti-gay voter initiative campaigns took place in Colorado, Oregon, and Maine. See, e.g., Timothy Egan, *Anti-Gay Backlashes are on 3 States' Ballots*, N.Y. TIMES, Oct. 4, 1992, § 4, at 4. Since the 1992 elections, statewide initiatives have been attempted in Arizona, Florida, Idaho, Michigan, Missouri, Nevada, Oregon and Washington. Movements have also sprouted in many local communities, including Cincinnati, OH, Lewiston, ME, Springfield, MO and Austin, TX. See, e.g., Jim Simon, *Gay Rights Fight Takes National Stage — Conservative Groups See 'Clash of Two Belief Systems'*, SEATTLE TIMES, May 28, 1994, at B1.

3. Both initiatives sought to prohibit passage of any legislation or policies protecting lesbians, gay men and bisexuals from discrimination and repeal any such existing laws. Additionally, Measure 9 would have declared homosexuality to be "abnormal, wrong, unnatural and perverse." See Egan, *supra* note 2, at 4.

4. While this Essay focuses on the legal consequences and justifications for Colorado's Amendment 2 presented at trial, a general understanding of the origins of the national phenomenon of anti-gay initiatives is critical to assess the initiatives' goals and the threat they pose.

The radical right in the United States is grouped loosely within a national umbrella group, the Christian Coalition. It has a multi-pronged agenda that includes attacks on women's reproductive freedom, multicultural curricula, education about evolution and sexuality in schools, as well as active opposition to laws against sexual orientation-based discrimination. In addition, organizations affiliated with the radical right promote prayer in schools and school voucher programs that enable public school students to attend private parochial schools with state funding. Ultimately, many of these organizations aim to reduce or eliminate the constitutional separation of church and state. See, e.g., Craig Hines, *Campaign '94: Conversion in South Carolina; Ex-Dem Leader, Now GOP Hopeful, Wows Christian Right*, HOUS. CHRON., Sept. 4, 1994, at A20 (describing the leading players of the religious right and their programs); David E. Anderson, *Watchdog Group Looks to Right, Surveys Plans*, ST. PETERS-

their anti-gay rights campaigns by alternately highlighting religious themes, such as the Bible's alleged condemnation of homosexuality, with campaigns based on popular myths about gay people. They also appealed to a sentiment common among moderate voters: while all citizens should enjoy equal rights, no single group should be afforded "special rights."<sup>5</sup> Such an approach succeeded in Colorado.

The passage of Amendment 2 by a majority of Colorado voters awakened many lesbians and gay men across the country whose last awareness of an anti-gay initiative campaign was Anita Bryant's 1977 movement to overturn a Dade County, Florida ordinance against sexual orientation discrimination.<sup>6</sup> An otherwise local transgression of lesbian and gay civil rights took on additional national significance as a group of citizens brought suit in the Colorado District Court, challenging the constitutionality of Amendment 2.

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BURG TIMES, Jan. 16, 1993, at 6E (surveying the activities of a number of prominent religious right groups).

With the election of Bill Clinton to the presidency in 1992, radical right organizations lost much of the access to and support of the White House previously provided by the Reagan and Bush administrations. See, e.g., Larry B. Stammer, *Religious Right is Outside White House Looking In; Lobbying: After 12 Influential Years, Conservatives Meet Reversals. Some Expect Setbacks to Be Rallying Point*, L.A. TIMES, Feb. 2, 1993, at A1 (describing the strategic adjustment made by the conservative right in response to Clinton election). Many organizations turned instead to local politics, including the initiative process at issue in this Essay.

See generally, PEOPLE FOR THE AMERICAN WAY, *TEACHING FEAR: THE RELIGIOUS RIGHT'S CAMPAIGN AGAINST SEXUALITY EDUCATION* (1994); PEOPLE FOR THE AMERICAN WAY, *PROTECTING THE FREEDOM TO LEARN: A CITIZEN'S GUIDE* (1989). For further information, organizations that track the agenda and activities of the radical right include: The Institute for First Amendment Studies, Great Barrington, MA; Political Research Associates, Cambridge, MA; and, People for the American Way, Washington, D.C.

5. The Colorado Amendment 2 campaign was successful largely because it centered on the "No Special Rights" theme. By characterizing protection against sexual orientation discrimination as "special rights" for lesbians and gay men, the movement succeeded in appealing to voters who cared little about homosexuality, but who held a general aversion to civil rights protections for any group. The misrepresentation of civil rights as protective laws which benefit only minority groups (hence the term "special rights") has long been used as a strategy to attack those laws. After the success of the "special rights" rhetoric in Colorado, other state organizers used the same strategy, having concluded that it is better to try for "the 20-yard gain rather than the 100-yard touchdown every time." See *Simon, supra* note 2, at B1 (quoting David Welch, director of the Washington State Christian Coalition).

6. See, e.g., John Donnelly, *Colorado Gay Rights Battle Is a Test of Will, New Tactics*, MIAMI HERALD, Jan. 10, 1993, at 1A (describing Bryant's "Save Our Children" crusade as the "nadir" of the gay rights movement).

Ultimately, Colorado District Court Judge Jeffrey Bayless declared Amendment 2 unconstitutional and ordered a permanent injunction to bar its enforcement.<sup>7</sup> Still, for the historical record and the benefit of future litigation in this area, it is critical that the story of Amendment 2 be told. By examining the multifaceted issues that come into play as the majority of a community is pitted against a minority of its members, we can move toward a greater understanding of some driving forces behind the American political process.

The following brief account is intended to provide a sense of the trial's scope and tempo rather than its jurisprudential underpinnings. Thousands of pages of transcripts provide ample material for future versions of this significant event.

### I. Outside the Courtroom: The National Response to Amendment 2

While Amendment 2 subjected Colorado citizens most directly to its impact, its shock waves reverberated around the country. Responding rapidly to the election's outcome, concerned citizens mounted a national boycott of Colorado. Endorsements emerged from a wide variety of people and organizations—from the entertainment industry to the American Public Health Association to the U.S. Conference of Mayors and the National League of Cities.<sup>8</sup> Many groups, recognizing that lesbians and gay men were not the only ones threatened by Amendment 2, joined in the public outrage and called for the provision's repeal.<sup>9</sup>

In addition to the calls for a boycott, advocates responded to Amendment 2's passage with concerted efforts to educate lesbians, gay men and other civil rights supporters on strategies for coun-

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7. *Evans v. Romer*, CIV.A.No. 92 CV 7223, 1993 WL 518586, at \*13 (Colo. Dist. Ct. Dec. 14, 1993)(hereinafter *Evans III*).

8. See, e.g., A.C.R.Res.4., California (1993)(proposing a ban on travel to Colorado by California public employees); Kelly Richmond & Michael Booth, *Mayors' Group To Move Meeting Out of Colorado*, DENVER POST, Dec. 18, 1992, at 24A(reporting decision by the U.S. Conference of Mayors to move its meeting in protest of Amendment 2); Michael Booth, *Amendment 2 Boycott of State Spreads*, DENVER POST, Nov. 20, 1992, at 1A, 14A (hereinafter Booth, *Amendment 2 Boycott*).

9. See Booth, *Amendment 2 Boycott*, *supra* note 8, at 14A. At the same time, the idea of a boycott was debated hotly in and outside of Colorado and gay communities. Some condemned the boycott as divisive while others objected to the boycott's punitive effects on those who opposed Amendment 2. See Michael Booth, *Boycott May Divide Gay Community*, DENVER POST, Dec. 6, 1992, at 1C, 5C.

Still others believed that supporters of gay and lesbian rights should not avoid Colorado but rather flood the state, vocally, with their messages. See Michael Booth, *Boycott Alternatives Discussed*, DENVER POST, Dec. 7, 1992, at 1B, 4B.

tering a national spate of similar initiatives being unleashed by radical right organizations under the Christian Coalition umbrella.<sup>10</sup> Community meetings, training programs and weekend strategy sessions proliferated as groups around the country prepared for battles that lay ahead.

Above all, it had become clear that gay rights had moved fully into the eye of the storm over "community values." Indeed, the Amendment 2 campaign, and the litigation strategy mounted in the amendment defense, clearly illustrated the grand proportions of the radical right's strategy to dismantle civil rights protections and eviscerate the separation between church and state.<sup>11</sup>

## II. Initiating the Litigation

### A. Preview: The Preliminary Injunction

Before the trial of Amendment 2 finally commenced at 8:30 a.m. on Tuesday, October 12, 1993, in a Denver district court room, it was difficult to imagine exactly what a trial of the anti-gay measure would look like. Less than a year earlier, Lambda Legal Defense and Education Fund, the American Civil Liberties Union and some of Colorado's premier civil rights attorneys had been before the same judge, Jeffrey Bayless. At that time, we sought to enjoin Colorado Governor Roy Romer and Attorney General Gale Norton from enacting or enforcing Amendment 2 pending a trial on the merits.<sup>12</sup>

During those five days of the preliminary injunction hearing in mid-January 1993, a palpable tension filled the courtroom. Fundamental constitutional rights—and the basic question of whether lesbians, gay men, and bisexuals would remain full and equal Colorado citizens—were at issue. Late on the Friday afternoon of January 15, Judge Bayless announced his decision to grant a preliminary injunction, ruling from the bench that the plaintiffs had met the necessary burden to obtain a grant of preliminary injunction.<sup>13</sup> Al-

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10. See *supra* note 4.

11. See generally Suzanne Goldberg, *Facing the Challenge: A Lawyer's Response to Anti-Gay Initiatives*, 55 OHIO ST. L.J. 665 (1994) (chronicling the author's experiences litigating against anti-gay initiatives).

12. *Evans v. Romer*, No. 92 CV 7223, 1993 WL 19678 (Colo. Dist. Ct. Jan. 15, 1993)(hereinafter "*Evans I*").

13. *Id.* at \*12. The threshold for obtaining a grant of a preliminary injunction is a showing that there is an urgent necessity for the injunction. Once that threshold is met, the court must weigh six factors: whether the side seeking the injunction has a reasonable probability of winning the case on the merits; whether there is a danger of real, immediate, and irreparable injury which would be prevented by a preliminary

ternatively, waves of relief and elation as well as pain and anger, swept through the gay community in the courtroom as well as throughout the state and the country.

### **B. Prelude to Trial: The Colorado Supreme Court Ruling and The State's Burden**

By the time of trial, the governing legal standard was set firmly in place by the Colorado Supreme Court. In denying the state's appeal of a preliminary injunction against Amendment 2's enactment or enforcement, the Colorado Supreme Court ruled that the measure left gay men, lesbians and bisexuals "out of the political process through the denial of having an 'effective voice in the governmental affairs which substantially affect their lives.'" <sup>14</sup> Finding that "Amendment 2 singles out and prohibits this class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process," the Court held that the amendment could survive constitutional review only if it was narrowly drawn to achieve a compelling state interest. <sup>15</sup>

Although each side's burden was clear by the time of trial, with the state having to identify and support a compelling interest, decisions about the direction of the litigation were not simple. Attorneys preparing for trial debated the propriety of making certain arguments or pursuing particular evidentiary points. Among those opposing Amendment 2, for example, the question of whether and how to address the origins of sexual orientation was a subject of serious disagreement. <sup>16</sup> Other strategy decisions, such as the state's use of moral philosophers to justify the amendment as a reasonable expression of community morality, caused the trial to

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injunction; whether there is an adequate remedy at law; whether a grant of preliminary injunction would be in the public interest; whether the balance of the equities favors the injunction; and whether the grant of injunction will preserve the status quo until the case is decided on the merits. *See id.* at \*3. *See also Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982)(en banc)(discussing the requirements for obtaining a preliminary injunction).

14. *Evans v. Romer*, 854 P.2d 1270, 1285 (Colo. 1993)(en banc)(citation omitted)(hereinafter "*Evans II*").

15. *Id.* at 1285-86.

16. *See Donna Minkowitz, Trial by Science*, THE VILLAGE VOICE, NOV. 30, 1993, p. 26, col. 3. *See generally Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994)(critiquing scientific reports that purport to show a biological basis for homosexuality); Janet E. Halley, *The Politics of the Closet: Toward Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 U.C.L.A. L. REV. 915 (1989).

swerve into ancient Greek history and other areas, contributing to the trial's sprawling qualities.

### III. Moving to Trial

Less than a year after the granting of the preliminary injunction, the challengers were back in court for a trial on the ultimate question posed by the Colorado Supreme Court: does the state have a compelling interest in enacting a constitutional amendment that restricts the political participation of its lesbian, gay and bisexual citizens?

During the back-and-forth of pre-trial briefing, the state outlined the justifications for Amendment 2 that it intended to present. The proffered reasons reflected a significant shift from the pre-election campaign, during which Colorado Governor Romer publicly opposed the amendment and many public officials distanced themselves from the vitriolic anti-gay rhetoric of Colorado for Family Values ("CFV"), the primary sponsor of the voter initiative.<sup>17</sup> By the time of trial, the state's position had begun to mirror CFV's campaign strategy.

#### A. The Opening Arguments

The state advanced six justifications for the discriminatory amendment, arguing that Amendment 2: 1) deters factionalism; 2) preserves the integrity of the political process; 3) preserves the state's ability to remedy discrimination against deserving groups; 4) prevents government from subsidizing the political objectives of a special interest group; 5) prevents interference with personal, familial and religious privacy; and 6) promotes the physical and psychological well-being of children.<sup>18</sup>

Responding to each of these points in the opening argument, trial co-counsel Gregory Eurich identified the prejudice and irrational hostility against lesbians, gay men, and bisexuals reflected in each of these justifications. He explained that the reasons advanced were code words for the view that "Amendment 2 is justified because we don't like gays and lesbians."<sup>19</sup> In response to reason number 6 — protection of children — he queried, "Do you

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17. Governor Romer was the honorary chair of the EPO Colorado campaign against Amendment 2. Numerous elected officials joined him on the committee.

18. Defendant's Trial Brief, at 3-4, *Evans III* (No. 92 CV 7223)(on file with *The Fordham Urban Law Journal*).

19. Trial Tr. at 75, *Evans III* (No. 92 CV 7223) (on file with *The Fordham Urban Law Journal*).



influence a six-year old child's sexuality by permitting discrimination against adults in housing, employment and public accommodations?"<sup>20</sup>

Opening the defense of Amendment 2, Colorado's Deputy Solicitor, Timothy Tymkovich, told the Colorado district court that Amendment 2 must take effect because the state is not ready to equate homosexual and heterosexual orientation in the areas of marriage, familial or business relations or education policy.<sup>21</sup> He added that gays and lesbians do not meet the traditional indicia of discrimination and compared the income of "average" households, black households and homosexual households to support his allegation that alleged high income levels prove that gay people do not suffer significant discrimination.<sup>22</sup>

Paradoxically, moments before reporting on his estimates of gay citizens' financial assets, the Deputy Solicitor told the court that a chief problem with laws prohibiting sexual orientation discrimination is that gay men, lesbians, and bisexuals are not identifiable as a class. Shortly after that, the Deputy Solicitor urged that gays are a politically powerful class. To prove his point, Mr. Tymkovich brought out a map of the United States with blue shading filling in each state and municipality with laws barring sexual orientation discrimination. With only eight states and one hundred-odd municipalities having such protections, the skeletal blue spots conveyed, if anything, the gross nature of the Deputy Solicitor's overstatements.<sup>23</sup>

## **B. The Plaintiffs' Arguments Against Amendment 2**

### *1. The Politics of Anti-Discrimination Laws*

As the first witness to testify against Amendment 2, Denver Mayor Wellington Webb attested to society's interest in promoting equality and reducing discrimination.<sup>24</sup> Rejecting the state's effort on cross examination to equate civil rights with special rights, Mayor Webb explained that civil rights protections have a positive effect on all citizens of Denver.<sup>25</sup> Next, the plaintiffs called Le-Anna Ware, the Director of the Wisconsin Civil Rights Bureau. Ms. Ware testified that enforcement of Wisconsin's sexual orienta-

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20. Trial Tr. at 72.

21. *Id.* at 90-91.

22. *Id.* at 106-07.

23. Trial Tr. at 98-99.

24. *Id.* at 120-21.

25. *Id.* at 137-40.

tion anti-discrimination law, the oldest such law in the United States<sup>26</sup>, did not dilute respect for or enforcement of civil rights laws that ban discrimination based on a range of classifications — effectively countering the state's "dilution" argument.<sup>27</sup>

Testifying two days later, Brenda Toliver-Locke, Denver's compliance officer for the human rights agency that enforces the city's anti-discrimination ordinance, took the stand. She told the court that from her vantage point, there is a definite need for protection against sexual orientation-based discrimination<sup>28</sup>, and that as an African-American woman, she felt strongly that such discrimination should not be tolerated for any reason.<sup>29</sup>

## 2. *A Lesbian and Gay History Lesson*

University of Chicago historian George Chauncey detailed a lengthy history of discrimination against lesbians and gay men in the United States, starting with colonial America and following through to the then raging debate over gays and lesbians in the military.<sup>30</sup> He highlighted for the court the historical trend of repression and pathologization of lesbians and gay men in American society.<sup>31</sup> During cross-examination of Professor Chauncey, the State sought to minimize the history of repression of gay and lesbian Americans by contrasting it with the history of racism in the United States.<sup>32</sup> In response, Professor Chauncey stated simply that discrimination is not a contest, and reinforced his earlier testimony regarding extensive government-endorsed discrimination.

## 3. *Homo 101: A Psychological/Scientific Study*

Richard Green, a psychiatry professor at University of California, Los Angeles, who specializes in human sexuality and psychosexual development in children, took the stand next. Dr. Green identified for the court the elements comprising sexual orientation, which include a sexual or erotic attraction or fantasy life, overt sexual behavior, and self-identification, and then testified

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26. Wisconsin's civil rights law prohibiting discrimination based on sexual orientation took effect in 1982. *Id.* at 150.

27. *Id.* at 151-52.

28. Trial Tr. at 439-40.

29. *Id.* at 445.

30. *Id.* at 185-205.

31. *Id.* Professor Chauncey explained that until the 1960s and 1970s the medical establishment viewed homosexuality as a disease or mental disorder, and treated it accordingly; as a result a significant "gay subculture" developed. *Id.* at 187-190.

32. *Id.* at 220-39.

about the development of sexual orientation in men and women.<sup>33</sup> He stated his view, widely shared in the medical community, that sexual orientation is not consciously chosen and explained some of the recent scientific studies of homosexuality's origins.<sup>34</sup> Responding to some of the state's arguments, Dr. Green rejected both the scientific basis and the ethics of so-called conversion therapies that purport to change the sexual orientation of gay men.<sup>35</sup> Dr. Green affirmed as well that homosexuality is not a mental illness and described the decision-making process of the American Psychiatric Association when it depathologized homosexuality twenty years ago.<sup>36</sup>

Dr. Marcus Conant, a leading medical expert on treatment and care of people with HIV/AIDS, next explained to the court that Amendment 2 could not possibly benefit the State's public health policy.<sup>37</sup> Referring to his practice, he testified to a simple equation he had seen repeatedly: discrimination against people who are gay or have HIV leads to concealment of sexual orientation and HIV status. This secrecy results in augmentation of the disease.<sup>38</sup> In response to numerous questions on cross examination about "the gay agenda," Dr. Conant explained again and again to the State's attorney that AIDS is not a gay disease.<sup>39</sup>

The next witness was Dr. Judd Marmor, the past president and life fellow of the American Psychiatric Association, to explain his role in the process that produced the APA conclusion that homo-

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33. *Id.* at 247-48.

34. Trial Tr. at 252. Among the studies explained by Dr. Green were those involving both genetic and hormonal influences on sexual orientation, and those measuring distinctions in brain structure between homosexuals and heterosexuals. *Id.* at 253-262.

35. *Id.* at 272-79.

36. *Id.* at 278-79.

Cross-examination provoked a classic moment of courtroom humor. Attempting to challenge Dr. Green's testimony, the State's attorney pursued a line of questions about the sexuality of rats. Dr. Green explained repeatedly that one cannot draw direct conclusive comparisons between the sexuality of rats and that of human beings. Finally, tripping over terminology that would be challenging to anyone not experienced in research science, the State's attorney asked Dr. Green whether it was true that gay men had reduced levels of "testosterony?," a chemical that one reporter noted sounded suspiciously like a pizza topping. Lawyers for both parties along with reporters and others could be seen around the courtroom attempting to stifle their laughter in the midst of this most serious scientific discussion. *Id.* at 309-16.

37. *Id.* at 360-61. Dr. Conant testified that the the Amendment would serve to drive AIDS further underground by discouraging persons who may be infected from coming forward and by forcing the State to cover the expense of caring for people with AIDS who have lost their health insurance. *Id.*

38. *Id.* at 352-53.

39. *Id.* at 362-63.

sexuality is not a mental illness.<sup>40</sup> Dr. Marmor also testified that prejudice and stigmatization damage the mental health of lesbians and gay men. Explaining that religious teachings,<sup>41</sup> ignorance,<sup>42</sup> and people's insecurity about their own sexuality<sup>43</sup> are all sources of homophobia, Dr. Marmor then debunked common myths that fuel anti-gay attitudes such as the equation of homosexuality with pedophilia.<sup>44</sup> After informing the court that the American Psychiatric Association, the American Psychological Association, the American Medical Association and the American Bar Association have all condemned discrimination based upon sexual orientation, Dr. Marmor added that Amendment 2 promotes homophobia and injures the psychological health and self-image of thousands of men and women with homosexual orientations.<sup>45</sup>

Early morning on Day Three, the court and most of the attorneys received a lesson in genetics from Dean Hamer, a leading researcher at the National Institutes of Health, who testified about his research on the influence of human genetics on sexual orientation.<sup>46</sup> Dr. Hamer told the court that his research has identified a portion of a gene that bears some link to male homosexuality.<sup>47</sup> His cross-examiner also received a lesson. In response to questions that attempted to minimize the significance of the genetic studies, Dr. Hamer explained that while 99.9% of DNA is common to all human beings, 99% is also common to human beings and chimpanzees.<sup>48</sup> In other words, a seemingly small genetic difference may have a great influence.

#### 4. *Gays, Lesbians, and the Political Process*

Professor Kenneth Sherrill, a political scientist who has studied the role of lesbians and gay men in the political process, testified

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40. Trial Tr. at 391-98.

41. *Id.* at 387-88. Dr. Marmor expressed curiosity over the tendency of many persons who interpret the anti-homosexual sentiments in the Old and New Testaments as the word of God, to ignore other biblical passages concerning attitudes toward women and the eating of pork or shellfish. *Id.*

42. *Id.* at 388. Dr. Marmor explained that prejudice develops because many people do not know any gay men or lesbians due to the pressure on homosexuals to remain closeted, stating succinctly, "prejudice is to be down on something you are not up on." *Id.*

43. *Id.* at 387.

44. *Id.* at 388-89 (characterizing the "role modeling theory" as "unsubstantiated by the scientific evidence").

45. Trial Tr. at 399.

46. *Id.* at 473-83.

47. *Id.* at 475.

48. *Id.* at 511-12.

about how one determines whether a group has power in the political process. Professor Sherrill identified various assets called "power resources" that enable a group to achieve political power or influence,<sup>49</sup> and then described the particular barriers faced by the gay community in organizing politically. He explained that the fear of many lesbians, gay men and bisexuals of identifying themselves and coming together for public advocacy inhibits political organizing. He testified as well about the "spiral of silence," which leads people to refrain from speaking out for fear of being cast out for having unpopular views.<sup>50</sup> Reporting on the "Feeling Thermometer," a device used by political scientists to assess the popularity of various groups in American society, Dr. Sherrill demonstrated that the spiral of silence inhibits lesbian, gay and bisexual organizing because gay people have historically received the thermometer's chilliest (lowest) rating.<sup>51</sup> Responding then to the State's assertions that gay people are disproportionately wealthy, Professor Sherrill explained the inaccuracy of the state's statistics both because of the population studied and the survey techniques that did not assure respondents of confidentiality in their responses.<sup>52</sup>

### 5. *Debunking the Child Sexual Abuse Myth*

Because the state listed as one of its justifications for Amendment 2 the desire to "protect the physical and psychological well-being of children,"<sup>53</sup> Dr. Carol Jenny, an expert in child sexual

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49. Trial Tr. at 543-50. Professor Sherrill defined power resource as "anything that a group might use . . . or a person might use to advance a political goal to try to achieve a political end." *Id.* at 543. Examples of these resources are wealth, reputation, respect, trust, safety, group cohesion and accessibility to the public and to persons in power. *Id.* at 546-550.

50. *Id.* at 560-61 (describing a theory advanced by Elizabeth Nowell Noma[sic.]).

51. *Id.* at 562-63. The "feeling thermometer" is a test given by the scholars at the University of Michigan Institute for Social Survey Research Center. The scholars ask persons to imagine a thermometer which measures the warmth or coldness they feel to certain groups of people. One hundred degrees is the highest temperature on the scale and zero degrees is the lowest. Lesbian and gay men belong to one of the few groups included in the survey about which more than 50% of persons feel coldly about. The only group receiving a lower overall average score in 1992 was that of illegal aliens, but more persons placed lesbians and gay men at zero on the thermometer than illegal aliens. *Id.*

52. *Id.* at 579-83. To support its argument that gay people are disproportionately wealthy, and therefore do not suffer negative effects of discrimination, the state relied upon two marketing surveys, both of which had been undertaken to help convince advertisers to buy space in gay publications. *Id.* at 579-80.

53. See *supra* text accompanying note 18 (listing the State's justifications for Amendment 2).

abuse, was called to the stand to provide the court with information to counter the state's suggestion that gay people are somehow harmful to children.<sup>54</sup> During the Amendment 2 campaign, Dr. Jenny had heard CFV's frequent allegations that gay men are disproportionately responsible for child sexual abuse. As supervisor for much of the medical care in Colorado for children who have experienced sexual abuse and neglect, Dr. Jenny decided to research the question for herself.<sup>55</sup> Her study, based on Colorado cases, found that 2 of 269 perpetrators were lesbians or gay men, and that heterosexual male family members of children were over 100 times more likely than lesbians or gay men to molest children.<sup>56</sup> On cross examination, Dr. Jenny told the state's attorney, "[T]o say we're going to pass a state law to protect children, we might as well pass a law against heterosexuals."<sup>57</sup> She quickly added that although she does not advocate such a law, it is absolutely clear that "homosexual abuse is a very small part of the problem,"<sup>58</sup> and therefore, Amendment 2 will not help to protect children from abuse.

#### 6. *Title 7 and the Civil Rights Tradition*

Toward the close of plaintiffs' case-in-chief, Yale law professor Burke Marshall, who served as assistant attorney general in charge of the United States Civil Rights Division and was the chief drafter of Title VII of the Civil Rights Act of 1964, testified eloquently by video deposition about the nature of discrimination.<sup>59</sup> According to Professor Marshall, civil rights protections bring those discriminated against "safely into the mainstream of American society" and enable them "to participate fully in the life of the United States, including its economic life."<sup>60</sup> When asked about the need for protections against sexual orientation discrimination, Professor Marshall stated that lesbians, gay men and bisexuals experience "rampant discrimination and . . . violent retaliation simply because of what they are" all of which render them vulnerable as a group.<sup>61</sup> He added that the purpose of anti-discrimination laws is to upset a

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54. *Id.* at 679-90.

55. *Id.* at 681-82.

56. *Id.* at 686-88.

57. *Id.* at 698.

58. *Id.*

59. See generally deposition transcript of Professor Burke Marshall, *Evans III* (No. 92 CV 7223), on file with the *Fordham Urban Law Journal*.

60. *Id.* at 13.

61. *Id.* at 20.

social norm of discrimination<sup>62</sup> and “to create a society that respects and complies by the value of equality . . . which is made a constitutional norm by the . . . 14th amendment and is part of the American tradition of fairness . . . .”<sup>63</sup> In response to a cross-examination question about whether gay people could escape discrimination by not identifying themselves, Professor Marshall said that hiding sexual orientation has a “very grievous” effect on people<sup>64</sup> and that the purpose of civil rights laws is that persons should not have to hide their sexual orientation to avoid retaliation.<sup>65</sup>

### 7. *Moral Philosophy and Amendment 2?*

Anticipating the state’s discussion of the attitudes of ancient societies toward homosexuality and the role of morality in law, the plaintiffs called classics scholar Martha Nussbaum to the stand.<sup>66</sup> Testifying that in ancient Mediterranean societies homosexual acts “took place with social approval,”<sup>67</sup> Professor Nussbaum added that such information is relevant to contemporary society because it adds an historical perspective from Greek culture which in many ways remains respected today.<sup>68</sup> She concluded that the attitudes of ancient Greeks regarding homosexuality leave us little basis for interpreting the ancient texts to mean that homosexual relations subvert family or society.<sup>69</sup>

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62. *Id.* at 24-25.

63. *Id.* at 25-26.

64. *Id.* at 75.

65. *Id.* at 74.

66. Professor Nussbaum was called to the stand to respond to the opinions of Princeton University political science Professor Robert George, and philosopher John Finnis, who testified by affidavit for the State as to the moral basis for Amendment 2. Trial Tr. at 794, *Evans III* (No. 92 CV 7223). As described by Nussbaum, Finnis argued “the [P]latonic Aristotelian tradition of moral philosophy” that the State has a legitimate public interest in discouraging all sexual acts not performed within marriage. *Evans III*.

Nussbaum criticized Finnis for basing his opinion on weak translations of classical texts. Finnis relied on translations that were published when British and American cultures promoted a high degree of shame with regard to homosexuality and are therefore inaccurate in their reading of sexual attitudes in ancient times. *Id.* at 796. As a trained classicist rather than merely a philosopher, Professor Nussbaum maintained that she provided a more accurate interpretation.

67. Trial Tr. at 797.

68. *Id.* at 797-99.

69. *Id.* at 798-99 (describing a discussion in Plato’s *Symposium* in which Aristophanes muses that both homosexual and heterosexual persons offer positive contributions to society in their search for sexual unity).

Professor Nussbaum further explained that the Finnis view of sexuality and marriage is based not on the Greek tradition but on the Catholic moral philosophy first espoused by St. Thomas Aquinas. *Id.* at 799. She also noted, however, that while

### C. In Defense of Amendment 2: The State's Case

#### 1. Amendment 2's Creators—Colorado for Family Values

Representing the state's first line of Amendment 2's defense, Colorado for Family Values' founders—Colorado Springs used car salesman Will Perkins, and his colleagues Tony Marco and Kevin Tebedo—took the stand to explain their motivation for introducing Amendment 2 in the state. Mr. Perkins told the court that “the objective of the homosexual proponent is to blend the gender issue to where . . . it's not an important thing,”<sup>70</sup> adding that the potential for group bathrooms<sup>71</sup> is one reason for his organization's intention “to deny protected class status to . . . homosexual[s].”<sup>72</sup> In response to questions by Boulder attorney Jeanne Winer on cross-examination, Mr. Perkins admitted that he knew that the phrase “No Special Rights”<sup>73</sup> was not included in the actual text of Amendment 2, but that CFV used the phrase anyway in promotion of the amendment to convince voters to support it.<sup>74</sup> At the conclusion of cross-examination, as Mr. Perkins admitted in response to a series of questions that his strong views about the dangers of homosexuality did not stem from training in medicine or psychol-

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Aquinas based his views on ancient texts, “[he] was well aware that he was using some of their contents for rather different religious purposes.” *Id.* at 800.

70. *Id.* at 753.

71. *Id.* Perkins claimed that group bathrooms would be one result of the “gender blending” that lesbians and gay men allegedly espoused. He had testified earlier as to a conversation he had with a school superintendent in which Perkins asked what the superintendent would do if a group of parents demanded that the school provide separate bathroom facilities for heterosexual children and homosexual children and that the homosexual children's facilities be supervised to prevent any children from having sexual relations in the bathrooms. *Id.* at 752 (recounting the hypothetical posed by Perkins to the superintendent).

Perkins returned to the bathroom hypothetical in his testimony to assert that if protected status were granted on the basis of sexual orientation, lesbian and gay advocates would be able to demand group bathrooms to prohibit the discrimination inherent in supervising some bathrooms but not others. *Id.* at 753 (mentioning the bathroom hypothetical as a situation where advocates might attempt to “blend the gender issue”).

72. Trial Tr. at 751.

73. See *supra* note 5, and accompanying text.

74. A representative of the National Legal Foundation, legal advisors to CFV, wrote a letter to CFV co-founder Tony Marco advising the following: “If language denying special privileges to homosexuals is in the amendment, it could possibly allow homosexuals to argue that they are not asking for any special privileges, just those granted to everyone else. I believe that “No Special Privileges” is a good motto for the amendment's public campaign, but I fear the possible legal ramifications if it is included in the amendment itself.” Trial Tr. at 763 (excerpt of letter read in court by Ms. Winer)(emphasis added).



ogy,<sup>75</sup> he added, “I am a good car salesman.”<sup>76</sup> “I’ll bet you are, sir,” said Ms. Winer.<sup>77</sup>

Tony Marco elaborated on CFV’s goal in promoting Amendment 2, telling the court that the organization’s intent “was to resist statewide aggression on the part of gay militants against the fundamental rights of Colorado citizens.”<sup>78</sup> However, he too agreed that the “No Special Rights” theme used to promote Amendment 2 has no legal meaning since it is not in the actual text of the amendment and is irrelevant to the real debate.<sup>79</sup> Still, he reiterated that the purpose of the statewide initiative was to “[close] the lid on the entire issue,” by preventing gay advocates from gaining protections one by one through town and city ordinances and then “using these as leverage to then approach state legislators with concepts of . . . larger scale measures.”<sup>80</sup> Playing on a theme common to anti-gay initiative battles—that all gay people are white and wealthy, and intend to strip people of color of civil rights—Marco told the court that if lesbians and gay men were granted protected class status, it would have a devastating effect on “truly disadvantaged minorities” and that “it [wouldn’t] be long before the Blacks are sitting in the back of the bus again.”<sup>81</sup>

The third CFV leader, Kevin Tebedo, articulated a theme common to the anti-gay initiative campaigns: “I don’t believe that somebody who chooses to have sex with members of the same gender . . . [deserves special] . . . civil rights status.”<sup>82</sup> He added that as a business person he was concerned about protecting employers from lawsuits and the problems of “granting . . . protected status to a group that has no identifiable characteristics . . .”<sup>83</sup> As a father, Mr. Tebedo said, he was “concerned about the effect that granting civil rights status to this group would . . . [condone] homosexuality

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75. *Id.* at 780-81.

76. *Id.* at 781.

77. *Id.*

78. *Id.* at 846.

79. Trial Tr. at 854-55 (explaining that the real issue was whether lesbians and gay men constituted a protected class).

80. *Id.* at 853. Marco cited the local ordinances in Boulder, Denver and Aspen as examples of the “gay militant contingent’s” successful use of this strategy. He maintained that the statewide measure would protect against the legislature’s vulnerability to the contingent’s formidable lobbying power. *Id.* at 852.

81. *Id.* at 865-66 (describing the effect of ordinances protecting sexual orientation as a protected class on racial and ethnic minorities).

82. *Id.* at 1043.

83. *Id.* at 1045 (expressing his fears that as a human resource manager he would be unable to protect his own employer from possible discrimination claims brought against it).

as being okay and beneficial in society.”<sup>84</sup> On cross-examination, Mr. Tebedo asserted that homosexuals were 11 times more likely to molest children than heterosexuals.<sup>85</sup> After listening to a tape of his statements at a Colorado Springs public forum, Mr. Tebedo also admitted that he described Amendment 2 as being “about whose authority takes precedence . . . the authority of man . . . . Or . . . the authority of God?”<sup>86</sup>

## 2. *Gay Political Power, According to Colorado*

Taking the stand to counter Professor Sherrill’s testimony, political science professor James Woodard testified that gay political action committees (PACs) are some of the fastest growing,<sup>87</sup> and are “quite powerful.”<sup>88</sup> He added that the media’s attention to gays and lesbians also evidences gay political power,<sup>89</sup> although he admitted that he had never studied the quality or tenor of the coverage lesbians and gay men receive.<sup>90</sup> He based his testimony on the State’s blow-up chart, entitled “Growing Power: Funding Up For The Big Six Homosexual Political Groups,” which was adapted from a similar chart in a *Washington Blade* article that reported on the total budgets of the six largest lesbian and gay national organizations.<sup>91</sup> Professor Woodard testified that the combined budgets of the six organizations evidenced the gay community’s political power.<sup>92</sup> Later, on cross-examination, Professor Woodard was asked to comment on an exhibit that featured the State’s chart highlighting gay groups alongside the other chart featured in the same *Blade* article—the budgets of the top six Christian right orga-

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84. Trial Tr. at 1045.

85. *Id.* at 1052 (relying on an unnamed psychological report).

86. *Id.* at 1062. Mr. Tebedo’s admission came in reponse to Ms. Winer’s questioning of Mr. Tebedo’s testimony on direct, that the opposition to Amendment 2, and not CFV, had made religion an issue during the pre-election campaign. *Id.* at 1061. After much denial Mr. Tebedo also conceded that he had told Colorado voters that the Bible called homosexuality an abomination of God. *Id.* at 1064.

87. *Id.* at 933-34 (testifying as to the rapid growth of the Human Rights Campaign Fund over a two year period).

88. *Id.* at 907.

89. Trial Tr. at 914-17 (discussing his study on the prevalence of media stories concerning lesbians and gay men). Professor Woodard explained that media exposure affects the political power of lesbians and gay men because it raises awareness among the general public. *Id.* at 916.

90. *Id.* at 917.

91. *Id.* at 933.

92. *Id.* at 933. Although Professor Woodard did not specify the amount on direct examination, he testified on cross-examination that the total combined budgets of the gay groups in the *Blade* article was \$12.5 million. *Id.* at 958.

nizations including the Christian Coalition—whose combined total budgets amounted to \$213 million.<sup>93</sup> Despite the obvious power differential between \$12.5 million and \$213 million, Professor Woodard did not alter his opinion. Instead, he continued to assert that because gays and lesbians amount to only one percent of society<sup>94</sup> and do not suffer a disproportionate amount of discrimination,<sup>95</sup> they do not warrant protection against discrimination. Amendment 2 was justifiable in his view as a response to gays and lesbians who were “looking for special rights.”<sup>96</sup>

### 3. *Amendment 2 as a Moral Solution*

Turning to the state’s “political morality” defense, Harvard government professor Harvey Mansfield described Amendment 2 as the best solution to a situation where “an inflamed minority [had tried to] get its way . . . to the disadvantage of other minorities.”<sup>97</sup> Stressing that lesbians, gay men, and bisexuals could attempt to repeal Amendment 2, Professor Mansfield rejected the plaintiffs’ argument that the measure unfairly fences lesbians, gay men and bisexuals out of the political process as “an objection to democracy itself.”<sup>98</sup> He later explained that “[d]isapproval of gays is not like racial or gender discrimination. There is nothing wrong with being black or being a woman but it is perfectly reasonable to think that there is something wrong with being gay [even if it is not] the fault of gays.”<sup>99</sup> Adding that gay people are not “as happy as they would be if they weren’t gay,”<sup>100</sup> Professor Mansfield conceded that he had stated in his deposition that gay people are self-centered although “this might not be entirely their fault.”<sup>101</sup> Elaborating on this point, Professor Mansfield answered affirmatively to a question which posed whether, “homosexuality, [if] respectable, undermines human civilization.”<sup>102</sup> Nonetheless, he said, “gays

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93. *Id.* at 958-59.

94. Trial Tr. at 962-63. The one percent estimate advanced by Professor Woodard is well below estimates made by several studies, including the Kinsey Report. *Id.*

95. *Id.* at 961-62.

96. *Id.* at 985-86.

97. *Id.* at 1003. Professor Mansfield also described Amendment 2 as “a [state-wide] attempt to reduce the danger of local fascist majorities who would pass intrusive anti-gay ordinances [at the local level].” *Id.* at 1002.

98. *Id.* at 1006-07.

99. Trial Tr. at 1016 (excerpting from Professor Mansfield’s expert witness summary).

100. *Id.* at 1018.

101. *Id.* at 1020 (quoting Professor Mansfield’s deposition).

102. *Id.* at 1028.

contribute . . . to our national life” by excelling in the arts and being unconventional.<sup>103</sup>

#### 4. *Amendment 2 and Religious Freedom*

The pastor for the Second Baptist Church in Boulder, Reverend Hasford Van, was next to take the stand. Although the state apparently called Reverend Van to establish that laws prohibiting sexual orientation discrimination infringe upon the freedom of religious organizations to exercise their views, the strategy backfired. Reverend Van testified pointedly that his church had never had a problem with Boulder’s anti-discrimination ordinance and that “we . . . believers . . . [have] a mandate to love and to care for people no matter what walk of life . . . .”<sup>104</sup>

#### 5. *The Decline of Civil Rights?*

The supervisor for all regional offices of the Colorado Civil Rights Commission, Thomas Duran, who supported Amendment 2 during the campaign, told the court that laws prohibiting discrimination based on sexual orientation dilute respect<sup>105</sup> and resources available for enforcement of other civil rights laws.<sup>106</sup> Additionally, he testified that sexual orientation anti-discrimination measures create confusion because such laws are not uniform throughout the state but rather vary by city and county.<sup>107</sup> Explaining that the “underpinnings of . . . our whole form of government [are] predicated on the Judeo-Christian ethic,” Mr. Duran testified that the personal religious beliefs of Coloradans must be protected against infringements by sexual orientation anti-discrimination laws.<sup>108</sup> Agreeing that it would be “okay” to fire someone for being gay,<sup>109</sup> Mr. Duran admitted on cross-examination that he had never tried to achieve statewide uniformity for any other classification protected under Colorado’s civil rights laws.<sup>110</sup>

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103. *Id.* at 1031-32.

104. Trial Tr. at 1077.

105. *Id.* at 1098-99 (noting that the majority vote in favor of Amendment 2 “speaks well . . . [for the public’s] . . . lack of respect for this group . . .”).

106. *Id.* at 1094-95 (explaining that the Division would not receive any Federal funds to handle sexual orientation-based discrimination cases because federal statutes do not address sexual orientation, and that the State’s funds would therefore have to finance any related enforcement).

107. *Id.* at 1099-1101.

108. *Id.* at 1102.

109. Trial Tr. at 1111 (recounting Mr. Duran’s deposition testimony).

110. *Id.* at 1113.

The former chair of the Colorado Civil Rights Commission, and another major supporter of Amendment 2, Ignacio Rodriguez, testified that there is no empirical evidence that gays and lesbians experience discrimination as a group. In justifying his view, he also noted, "I don't consider the group a class. I consider it a special interest group."<sup>111</sup> He added that inclusion of sexual orientation in civil rights laws is a drastic departure from tradition and "would weaken and dilute those civil rights protections that had been earned by [minorities] over the years."<sup>112</sup> Commenting on the Amendment 2 "No Special Rights" campaign theme, Mr. Rodriguez told the court that a special right is a right to be treated equally with others.<sup>113</sup> Although he testified to his personal belief that people are entitled to equal treatment, Mr. Rodriguez explained that he just did not think it should be provided under civil rights laws.<sup>114</sup>

Joseph Broadus, a constitutional law professor at George Mason University School of Law, added his view that inclusion of sexual orientation would breed disrespect for civil rights laws.<sup>115</sup> By not just helping the truly needy, Professor Broadus testified, "we are evolving into a society of victimization . . . ."<sup>116</sup> Amendment 2, he explained, deals with "local governments that have been . . . completely reckless [in areas of] constitutional . . . privacy and freedom of association" and is therefore a necessary limitation on those intrusions.<sup>117</sup>

## 6. *Gay Power and the Colorado Boycott*

To demonstrate the political power of lesbians and gay men, the state subpoenaed lesbian activist and Boycott Colorado president Terry Schleder to testify about the size and impact of the post-Amendment 2 national boycott of Colorado. Ms. Schleder's testi-

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111. *Id.* at 1154 (explaining why he chose to vote against adding sexual orientation to the list of protected classes under the Colorado Civil Rights law).

112. *Id.* at 1156.

113. *Id.* at 1167-68 (applying the concept of special right to himself, as a Mexican-American).

114. Trial Tr. at 1169.

115. *Id.* at 1192.

116. *Id.* at 1193. Professor Broadus criticized not only the inclusion of sexual orientation as a protected class but also the definition of disability within the Americans with Disabilities Act, and the escalation of cohabitation as a protected status regardless of marriage in the form of protections against marital status discrimination. *Id.*

117. *Id.* at 1198-99. Professor Broadus testified that Amendment 2 sends a message to "reckless" localities that "if you don't know how to play with your toys, we are going to take them away from you." *Id.* at 1199.

mony made clear, however, that the boycott was hardly a high organized, well-funded strategy, but rather was a response to Amendment 2 that grew out of "desperation," and was being promoted by a "small group of people in touch with a powerful sentiment."<sup>118</sup> She also told the court that boycotts have a history of use by oppressed groups, such as farm workers, to send a strategic message, often when ordinary political routes are closed off.<sup>119</sup>

### 7. *View from a Gay Rights Movement Monitor*

Robert Knight, the Director of Cultural Research Studies at the Family Research Council,<sup>120</sup> and the author of "Sexual Disorientation: Faulty Research in the Homosexual Debate,"<sup>121</sup> and "Why Homosexuality is Not a Civil Right,"<sup>122</sup> offered his observations on the gay rights movements influence on the media. As part of his work for the Family Research Council, Mr. Knight's self-described background in lesbian and gay civil rights is as an "opponent of the gay rights movement."<sup>123</sup> Turning to the media, Mr. Knight testified that lesbians and gay men have access to the media that would not be accorded other groups,<sup>124</sup> adding that all major media shows enormous bias in favor of lesbian and gay civil rights.<sup>125</sup> Mr. Knight concluded by drawing analogies for the court between gays,

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118. *Id.* at 1144 (responding on cross-examination to whether the boycott resulted from "enormous political power").

119. Trial Tr. at 1145 (analogizing to boycotts to compel better treatment for California farmworkers, the end of apartheid in South Africa, and the legalization of a Martin Luther King holiday in Arizona).

120. Mr. Knight characterized the Family Research Council as a pro-family organization that believes "that the gay rights movement is seeking to fundamentally change the morals and laws of this country . . ." *Id.* at 1237.

121. "Faulty Research" was published in *FAMILY POLICY*, a bi-monthly journal of the Family Research Council. *Id.* at 1239.

122. "Why Homosexuality Is Not a Civil Right," is a paper analyzing the claims made by gay rights advocates as to the legitimacy of granting protected class status based on sexual orientation. *Id.* at 1239.

123. *Id.* at 1236. He further stated that much of his work involves "writing papers to counter what we (the Family Research Council) believe are myths that have been debated in the media concerning homosexuality and the gay rights movement in particular." *Id.*

124. *Id.* at 1244-46. Mr. Knight offered as an example, a reception held for the National Lesbian and Gay Journalists Association, which was presided over by New York Times publisher Arthur Ochs Sulzberger, Jr. and which included major figures such as Tom Brokaw and Robert McNeil as panelists. He asserted that the media would not have met "with other identifiable special interest groups in quite this manner." *Id.*

125. Mr. Knight stressed that none of the major media provided a forum to opponents of gay rights. He asserted that both print and broadcast journalists view gay rights as a civil rights issue, "and since journalists by and large believe in civil rights

pedophiles and necrophiliacs, concluding that most gay people are generally promiscuous.<sup>126</sup>

#### 8. *Sensitive to Sensitivity Training*

Apparently in another effort to demonstrate the political power of lesbians and gay men, the State called to the witness stand Pat Romero, Personnel Director for the Department of Education in Colorado and active P-FLAG member. Ms. Romero had conducted work-place sensitivity trainings on gay, lesbian and bisexual issues prior to Amendment 2's passage.<sup>127</sup> She explained that these trainings were held to help all employees realize their full potential by challenging discrimination in the work-place and to sensitize workers to the needs of clients, particularly lesbian and gay youth who are at high risk of suicide.<sup>128</sup> At the close of Ms. Romero's testimony, the strategic decision to rely on Ms. Romero to strengthen the State's case clearly backfired. Concluding his direct examinations, the State's attorney queried, "Amendment 2 would not act to stop sensitivity training . . . would it?" "Yes," Ms. Romero answered, explaining that the Executive Director of the Department of Institutions had prohibited her from giving the training any longer after the election because of Amendment 2.<sup>129</sup>

#### 9. *Anti-Gay Morality*

Contributing to the state's defense, Princeton University political science professor Robert George took the stand to testify about the moral ecology of communities and the role of morality to justify government action such as that mandated by Amendment 2. Although Professor George admitted that he is not a classics scholar, he testified that Greek society condemned homosexuality as shameful and damaging to a person's integrity,<sup>130</sup> and rejected

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protections, they don't accord objections to aspects of the gay rights agenda as having any legitimacy at all." Trial Tr. at 1246.

As for television coverage, Mr. Knight was unable to come up with concrete examples of a pervasive pro gay sentiment but settled on the following indictment: "I don't think anyone would seriously question that Donohue, Geraldo Rivera, Oprah and Jerry Springer all reflect a pro gay bias in their program[s]." *Id.* at 1247.

126. *Id.* at 1262-64.

127. *Id.* at 1270.

128. *Id.* at 1277-78 (responding to question about the particular issues covered by the training program).

129. *Id.* at 1281.

130. Trial Tr. at 1300-02.

Professor Nussbaum's interpretation of ancient history.<sup>131</sup> He went on to explain his view that even today, use of contraception is morally wrong, as is masturbation or any form of non-marital sexual conduct, including lesbian or gay sexual relations.<sup>132</sup> He concluded that Amendment 2 is an appropriate approach to civil liberties because it elevates moral decisions about civil rights protections for lesbians, gay men and bisexuals to the state constitutional level.<sup>133</sup> On cross-examination, Professor George agreed that Colorado would be better off if its citizens were free to discriminate against lesbians, gay men and bisexuals who are sexually active.<sup>134</sup> Indeed, he added, the State would be better off if its citizens were free to discriminate against others who engage in any sort of sex outside of marriage.<sup>135</sup>

#### D. The Plaintiffs' Rebuttal

Although most of the state's arguments had been thoroughly addressed during the case-in-chief, the plaintiffs called two witnesses at the close of the State's case to reaffirm that there is no rational, let alone compelling, justification for Colorado to limit the civil rights protections available to lesbians, gay men and bisexuals. Responding to the State's argument that inclusion of sexual orientation protections endangers the civil rights of racial and other minorities, Joe Hicks, Executive Director of the Southern Christian Leadership Conference in Los Angeles, affirmed that civil rights protections against sexual orientation discrimination strengthen the rights of all people.<sup>136</sup> Supporting Mr. Hicks' point and challenging Professor George's pronouncements on the role of morality to justify discriminatory laws, Duke University Law School professor Jerome Culp testified that "if we can't fight social norms, we won't deal with the oppression that exists in America."<sup>137</sup>

#### E. Closing Arguments

Each side concluded the case with its strongest arguments — the State arguing strenuously that the court must respect the voters'

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131. See *supra* notes 66-69 and accompanying text (summarizing Professor Nussbaum's testimony).

132. *Id.* at 1311-13.

133. *Id.* at 1313-14.

134. *Id.* at 1331.

135. Trial Tr. at 1332.

136. *Id.* at 1364-70.

137. *Id.* at 1386.



decision to pass Amendment 2<sup>138</sup> and the plaintiffs, represented at closing by Jean Dubofsky, maintaining that the state has no legitimate justification whatsoever for allowing the public to vote away the fundamental rights of any group of citizens.<sup>139</sup> Moreover, the challengers argued, Amendment 2 reflects an irrational bias and an intent to harm a particular group of citizens; these are simply unacceptable motives for government action.<sup>140</sup>

## F. Resolution

Nearly two months after close of trial, the Colorado district court ruled that "Amendment 2 is unconstitutional as being violative of the fundamental right of an identifiable group to participate in the political process without being supported by a compelling state interest."<sup>141</sup> The court held that of the six allegedly compelling interests presented by the state,<sup>142</sup> only the promotion of religious freedom and the promotion of family privacy were actually compelling.<sup>143</sup> As to those interests, however, the court concluded that the Amendment was not narrowly drawn to promote them "in the least restrictive manner possible."<sup>144</sup> As a result, the court ordered a permanent injunction against the enforcement of Amendment 2.

The State appealed the decision, but in a point-by-point rejection of the State's justifications for Amendment 2's discrimination, the Colorado Supreme Court upheld the District Court's grant of a preliminary injunction.<sup>145</sup> The State immediately announced its intention to seek review of the ruling by the United States Supreme Court.

## III. Conclusion

The trial of Amendment 2 represents a profound moment in the history of lesbians and gay men and American civil rights jurisprudence. Lawyers, political scientists and historians will have to struggle for some time to come to grips with what it means to put a segment of society on trial for its basic rights.

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138. Trial Transcript at 1465-1500 (closing argument of Timothy Tymkovich).

139. *Id.* at 1433-65 (closing argument of Jean Dubofsky).

140. *Id.*

141. *Evans III*, at \*9.

142. *See supra* text accompanying note 18.

143. *Evans III*, at \*9.

144. *Id.*

145. *Evans v. Romer*, Nos. 94-SA48 and 94-SA128, 1994 Colo. LEXIS 779 (Colo. Oct. 11, 1994).

Even as the courtroom defeat of Amendment 2 took its important place in the string of litigation victories over anti-gay initiatives, radical right groups were in the midst of mounting campaigns in nine states to place Amendment 2-like measures on November 1994 ballots.<sup>146</sup> The clear message from the Colorado courts, as well as courts in California and Cincinnati—that the anti-gay measures violated fundamental constitutional rights of lesbian, gay and bisexual citizens<sup>147</sup>—seemed to have little effect on the enthusiasm of initiative promoters. Still, the victory provided a critical affirmation to lesbians, gay men and others that a minority group cannot be excised from constitutional protections at the majority's whim. The litigation served also as a backstop for Colorado civil rights advocates by enabling them to turn their attention to the all-important tasks of public education and organization on lesbian and gay issues and on civil rights issues generally.

Still, as the trial of Amendment 2 has delineated, the underlying tension between the community's desire to restrict those it despises and the individual's desire to live freely and equally will remain a challenge, as it has been since the time of this country's founding. Ultimately, it is the hearts and minds of the public, not the courts, that hold the key to a peaceful resolution.

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146. The radical right organizations were largely unsuccessful in placing anti-gay initiatives on state ballots in 1994. Of the nine attempts made, only two were successful. Initiative organizers in Arizona, Maine, Michigan, Missouri, Nevada, and Washington failed to obtain the requisite number of signatures necessary to gain a place on the ballot. An initiative in Florida was ruled invalid in March 1994. Only Idaho and Oregon voters will address the issue in November. A tenth movement was expected in Ohio, but never materialized. *Gay-Rights Groups "Relieved" But Wary as 8 Initiatives Fail*, ARIZ. REPUBLIC, July 17, 1994, at A19. Organizers in several states have promised to place anti-gay initiatives on state and local ballots in coming years.

147. *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr.2d 648 (Cal. Ct. App. 1991); *Equality Found. of Greater Cincinnati v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746 (S.D. Ohio Aug. 9, 1994).

