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“COMING OUT”: THE PRACTICAL BATTLES OF BEING VISIBLE AS A LESBIAN

BARBARA J. COX*

When I decided to speak at the Symposium on the topic of practical battles, I was unsure what I could cover that might be interesting to you. As the days passed, I discovered that the theme of “coming out” and being visible as a lesbian is at the root of all the practical battles I fight. Those practical battles have two aspects: ones that are personal and ones that are professional. First are the personal experiences I have almost daily which require me to “fight” some battles based on openly expressing my lesbianism; second are the legal battles that I choose or am asked to fight. It seems that having the courage to express our sexual orientation in our personal lives informs our struggles when we pursue legal battles. Just as we demand space to live in the world when we openly express our lesbianism to the people we encounter, so too do we demand a space in the legal system and ask for those rights and benefits granted to non-lesbians but denied to us, or ask for the elimination of harms inflicted simply because we are lesbian.

When writing this essay, I found that each personal experience I wanted to discuss had a corresponding legal battle. That dynamic serves as the outline of this essay.

I. BATTLES ENCOUNTERED AS PART OF A LESBIAN COUPLE

Every year, California Western School of Law (“CWSL”), where I am a law professor, has a formal dinner/dance to which faculty, staff and students are invited. I have been at CWSL for eight years now,

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but have never attended the dance. Part of the reason for my reservation is my fear of formal gowns, which I am sure is based on my experiences buying clothes as a woman who is six feet tall.¹ But even more overpowering has been my hesitation to dance with my female partner, at a formal dance, especially in front of the majority of the student body.

I cannot quite figure out my hesitation. I am out at school; I frequently talk in my classes about being a lesbian or about lesbian or gay issues that arise in class; my biography in the school bulletin states that I am past chair of the AALS section on gay and lesbian issues; and the comics and buttons outside my door would clearly inform anyone that I am gay. So where does this internalized homophobia about dancing in a heterosexual environment with my lesbian partner come from?

By dancing with my partner, I will be "seen" as a lesbian and will be "acting" as a lesbian. When I talk in class, even telling stories about my encounters, I can maintain a certain distance between myself and my students because we are "talking." But dancing at a formal dance in formal attire feels much more "exposed."²

Perhaps my problem is similar to the one that plagues the FOX network with its character, "Matt," on *Melrose Place*. Matt is out on the show as a gay man and has had story lines including getting fired from his job working with children because he is gay, being gay-bashed and helping a Naval officer come out to his family and deal with the fallout when he is discharged. However, Matt still has not had a sexual relationship.³ In a show where every other character is constantly dealing with sexual relationships, Matt's lack of one is all the more startling. Somehow, I too must find it easier to "be" out and to "talk" about being a lesbian than to express my affection and sexuality physically by dancing with my partner in front of a primarily

1. Cf. Maureen J. Arrigo-Ward, *No Trifling Matter: How the Legal System Supports Persecution of the Obese*, 10 WIS. WOMEN'S L.J. 27 (1995) (examining the bias faced by "large" women).

2. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law & Society*, 83 CAL. L. REV. 1 (1995). One of the gay men at work indicated that he was attending the ball this year in "drag," wearing a long slinky black ballgown. He wondered if he would draw some negative reactions. I told him I hoped not, but that I expected he might. I told him that I too was attending in "drag," wearing a tuxedo, but that I believed this reversal in sex-appropriate attire would not be nearly as threatening or provocative as his choice of wearing a slinky black dress.

3. Gregory Flood, *Letters to the Editor*, THE ADVOCATE, Feb. 7, 1995, at 6 (responding to Chris Bull, *Acting Gay*, THE ADVOCATE, Dec. 27, 1994, at 44).

straight audience. My partner and I have had numerous discussions about going to this dance and each one leaves us committed to going and yet uneasy at the prospect. But why should it be so difficult to dance?

The same week that I was pondering whether to go to the dance and eliciting commitments from my gay or lesbian colleagues to attend with their partners, my partner was notified that she would be laid off from her job in two weeks. For those of us working and living in Southern California over the past few years, this announcement is not particularly novel. But the fear and dismay we felt was not lessened by its familiarity.

We had to face and determine what was going to happen to us, and our ability to pay our bills, once my partner was not working. We also had to address the question of how to maintain her health insurance coverage once she was unemployed. This issue of insurance and its seemingly inevitable attachment to employment was one of the major concerns in the national debate on health care and insurance reform.⁴

Thankfully, we are among the lucky few who are eligible to receive domestic partner insurance benefits. Most employers assess whether the beneficiary is the "spouse" or "dependent" of the employee as the basis for eligibility to receive insurance and other benefits such as sick leave to care for an ill partner, bereavement leave to mourn the death of one's partner or a member of one's partner's family, membership in health clubs and access to married person's housing or housing allowances.⁵

Due to my work in prior years on domestic partner issues,⁶ when I arrived at CWSL I began urging the administration to adopt a

4. Anthony C. Beilenson, *How Congress Should Operate on Health Care System*, L.A. TIMES, Sept. 25, 1994, at B17; David R. Olmos, *Health Care Industry Anticipates Friendly Climate, Modest Reform*, L.A. TIMES, Nov. 12, 1994, at D1.

5. Steven Briggs, *Domestic Partners and Family Benefits: An Emerging Trend*, 1994 LAB. L.J. 749, 749-50.

6. See Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986) [hereinafter Cox, *Alternative Families*]; Barbara J. Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choice of Intimate Relationship?*, 8 ST. LOUIS U. PUB. L. REV. 299 (1989) [hereinafter Cox, *Choosing One's Family*] (based on my experiences as Chair of the Alternative Families Taskforce and President of the Madison Equal Opportunities Commission during the partially successful attempt to pass an alternative families ordinance in Madison, Wisconsin).

domestic partners' benefit policy that would provide insurance benefits to same-sex partners of employees. With the help of my colleagues,⁷ the school adopted a policy which provides domestic partner health and dental insurance to the same-sex partners of employees.⁸ While it took quite some time and delicate negotiations, both with the school's administration and then between its benefits officers and our health and dental carriers, CWSL now provides benefits to same-sex couples which opposite-sex married couples assume are theirs as entitlements or rights.⁹

Because of CWSL's progressive policy and because of the efforts of its gay and lesbian faculty to obtain these benefits, my partner and I did not have the additional concern about insurance coverage once her job ended. Although COBRA rights do exist,¹⁰ continuing that insurance would cost us significantly more than adding her to my policy.¹¹

These two experiences remind me of the battles I continue to wage as a member of an out, lesbian couple. While we may feel uncomfortable attending the dance in our matching tuxedos, we have chosen to attend as another step in the "coming out" process and to support others in the law school community who are also willing to challenge the notion that formal dances are reserved for opposite-sex couples. And we know that should we have an accident on the way to the ball, both of us will be covered by insurance provided by my employer.

7. Particularly involved were Professors Scott Ehrlich and Frank Valdes, with support from Chief Financial Officer Lenore Fraga.

8. The school opted to provide coverage only to same-sex domestic partners because it reasoned that opposite-sex couples had the option to marry, which is denied to all same-sex couples. Briggs, *supra* note 5, at 750 n.3. It is now rethinking its policy at the behest of unmarried opposite-sex couples who believe they are equally entitled to these employer-provided benefits. In our debates in Madison, the task force took the position that the alternative family definition should not be limited to same-sex couples, but should extend to all couples who met the definition of "two adults . . . plus dependents." Cox, *Choosing One's Family*, *supra* note 6, at 304 n.12. A majority of academic institutions offering domestic partner benefits limit those benefits to same-sex couples although some do offer benefits to opposite-sex couples as well. See M. V. Lee Badgett, *Equal Pay for Equal Families*, ACADEME, May-June 1994, at 26; *Benefit Availability Growing But Not Universal*, CUPA NEWS, May 15, 1995, at 1.

9. Cox, *Alternative Families*, *supra* note 6, at 2.

10. *Consolidated Omnibus Budget Reconciliation Act*, 26 U.S.C. § 4980B(f) (1995).

11. For example, paying for my partner's insurance using her continuing COBRA rights would cost us \$197 per month; adding her to my employer-based health insurance will cost us \$60 per month, for a savings of \$1644 a year.

II. BUT CAN MY PARTNER BE MY WIFE?

Although many employers and municipalities are beginning to recognize alternative families and domestic partners, same-sex couples still cannot legally marry in any state in the United States. In fact, only three countries — Denmark, Sweden and the Netherlands — recognize anything resembling marriage; they permit "registered partnerships" of same-sex couples with many, but not all, of the benefits afforded opposite-sex married couples.¹²

Despite the fact that same-sex couples cannot marry, many lesbian or gay couples choose to have public or private ceremonies celebrating their lifetime commitment to one another.¹³ My partner and I had a commitment ceremony in April 1992 to celebrate our decision to live together in a long-term relationship.¹⁴ After our ceremony, we have on occasion referred to each other as our "spouse." In fact, our wedding invitations included a line from a lesbian singing group: "We're going to have a happy life, both of us are going to be the wife."¹⁵

In early February, I was at the store looking at Valentine's Day cards for my partner.¹⁶ After looking through all the generic cards — the ones with bears and other androgynous critters on them — I

12. Barbara J. Cox, *Same-Sex Marriages and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 Wis. L. Rev. 1033, 1034 n.9. For example, in Denmark, same-sex couples cannot adopt or share custody of children, one member of the couple must be a citizen of the country and they cannot have the partnership recognized outside the country. See Shaugn Morgan, *Legal Recognition of Gay and Lesbian Relationships*, 3 AUSTRALASIAN GAY & LESBIAN L.J. 57, 64-65 (1993). It is the author's understanding that Denmark, Sweden and the Netherlands have begun negotiations to consider recognizing each other's "partnerships" by same-sex couples.

13. See generally, LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES (Suzanne Sherman ed., 1992) (examining the state of same-sex marriages); Tess Ayers & Paul Brown, THE ESSENTIAL GUIDE TO LESBIAN AND GAY WEDDINGS (1994) (etiquette and wedding planning guide).

14. For a discussion of the author's reasons for having a commitment ceremony, see Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, 1 NAT'L J. SEX. ORIENT. L. 87 (1994) (available via internet at <http://sunsite.unc.edu/gaylaw>).

15. TWO NICE GIRLS, *Let's Go Bonding*, on CHLOE LIKES OLIVIA (Rough Trade).

16. During my *Women and the Law* course, I teach a section on understanding privilege. We discuss male privilege, white privilege, class privilege and heterosexual privilege. Using questions developed by Peggy McIntosh, Associate Director of the Wellesley College Center for Research on Women, from her presentation, "*Understanding Correspondences Between White Privilege and Male Privilege Through Women's Studies Work*," I discuss with my students some of the types of heterosexual privilege that are denied to me as a lesbian. One of those is that I cannot "easily buy posters, post-cards [sic], picture books, *greeting cards*, dolls, toys and children's magazines featuring people" of my sexual orientation. PEGGY MCINTOSH, WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES

turned to the section of cards for "my wife." I spent several minutes looking through the numerous cards in that section, trying to find one that did not refer to the giver of the card as a male or a husband. During that time, I was conscious of each new man who came to the card section and started looking for a card for his valentine. I felt conspicuously out, even blatantly so, as a woman looking for a valentine card for "my wife." Although I feel comfortable being out in virtually all circumstances, I was once again struck with the discomfort of being out to anonymous strangers. I was afraid that any one of them might make an unpleasant comment or start to harass me. I kept shifting from section to section trying to decrease the chance that someone might realize that I am a lesbian. I ended up buying a card with an androgynous bear on it, partially because I could not stand looking in the wife section any longer and partially because it was better suited to the sentiment that I wished to express than the cards I found in the wife section. Apparently unlike many of my male counterparts, I do not leave my socks all over the floor and have not forgotten to tell my partner how important she is to me at times other than Valentine's Day.

This experience coincides with the work that I have done over the past eighteen months regarding marriages of same-sex couples. As many of you know, the Hawaii Supreme Court remanded the case of *Baehr v. Lewin*¹⁷ to the trial court to determine whether Hawaii's marriage statutes violate its constitutional prohibition against discrimination based on sex. The Hawaii Supreme Court held that the marriage statutes were presumptively unconstitutional unless the State could establish that the statute was justified by a compelling state interest and was narrowly drawn so as to avoid unnecessary abridgment of the plaintiffs' constitutional rights.¹⁸

The question I have been researching is whether same-sex couples who marry in Hawaii will be afforded similar recognition in their own domiciles.¹⁹ Answering this question requires analyzing the issue under two separate doctrines.

One analysis considers whether other states must recognize a same-sex couple's marriage under the Full Faith and Credit Clause of

THROUGH WORK IN WOMEN'S STUDIES, (Wellesley College Center for Research on Women, Working Paper no. 189, 1988) (emphasis added).

17. 852 P.2d 44, 66 (Haw. 1993).

18. 852 P.2d at 68. The plaintiffs were two lesbian couples and one gay male couple. *Id.* at 48.

19. See Cox, *supra* note 12.

the United States Constitution.²⁰ Establishing that the Full Faith and Credit Clause requires all states to recognize a valid marriage performed in another state would not only resolve this question, but would also provide the most immunity from legislative tampering.²¹ Such marriages could qualify for recognition under each prong of the clause,²² and would be consistent with prior Supreme Court precedent.²³ However, the Supreme Court has never decided whether marriages must be accorded respect under the Full Faith and Credit

20. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."). On a personal note, I am grateful for the assistance and research of Evan Wolfson, Senior Staff Attorney at Lambda Legal Defense and Education Fund, for my understanding of the full faith and credit issue. See Deborah Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 J. FAM. L. 551 (1993-94) (examining the legal status of same-sex marriages).

21. The type of legislative tampering that is dangerous to the rights of same-sex couples to marry can be seen from a bill recently passed by the South Dakota Assembly which reads: "Be it enacted by the legislature of the state of South Dakota . . . any marriage between persons of the same gender is null and void." S.D. H.B. 1184, 70th Leg. (1995). After being passed by the Senate, the bill was vetoed by the Governor of South Dakota. A similar bill has been adopted by the Utah legislature and signed into law. UTAH CODE ANN. § 30-1-4 (1995). Utah law already prohibited marriages of same-sex couples. UTAH CODE ANN. § 30-1-2(5) (1995). House Bill 366 amended Utah's marriage validation statute, section 3-1-4, to read:

A marriage solemnized in any other country, state, or territory, if valid where solemnized is valid here unless it is a marriage that: (1) would be prohibited or declared void in this state, under Subsection 30-1-2(1), (3), (5); or (2) would violate Section 30-1-1 because the parties are related to each within and including three degrees of consanguinity.

UTAH CODE ANN. § 30-1-4 (1995). Thus, although its validation statute would have otherwise recognized out-of-state marriages of same-sex couples, this amendment indicates that those marriages are unlikely to receive the validation that most other marriages receive. Additionally, staunch conservatives are currently attempting to rush through anti-marriage bills in several other state legislatures which would deny recognition of same-sex marriages which occur in other states.

22. Creating a marriage can qualify as a "public act" because it occurs under a state's statutory scheme, is performed by an official designated by the state and is an act or "res" created by the state. The marriage certificate is the "record" of that "act," establishing that the parties are married and have met the state's qualifications to marry. (Other public records, of presumably lesser importance, such as birth certificates and automobile titles, have been accorded full faith and credit.) Celebrating a marriage could also be seen as a "judicial proceeding" in those states where judges, clerks or justices of the peace officiate. Evan Wolfson & Gregory v. S. McCurdy, 'Let No One Set Asunder': Full Faith and Credit for the Validly Contracted Marriages of Same-Sex and Different-Sex Couples 15-16 (Sept. 10, 1994) (unpublished manuscript on file with the *Southern California Review of Law and Women's Studies*).

23. For example:

[The Full Faith and Credit Clause] altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral

Clause.²⁴ Numerous state and federal courts have recognized out-of-state marriages, using the full faith and credit analysis, even when those marriages would not have been recognized under the forum state's laws.²⁵ Winning recognition for marriages which are validly contracted by same-sex couples through the Full Faith and Credit Clause will provide the strongest foundation for legal acceptance of marriages of same-sex couples.

The choice of law doctrine also fails to provide any definite answers to whether a state will recognize the marriage of a lesbian or gay couple. Many states, like Colorado, have marriage validation statutes adopted from the Uniform Marriage and Divorce Act which recognize out-of-state marriages:

All marriages contracted within this state prior to January 1, 1974, or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state.²⁶

States that have adopted this or similar language should not be allowed to use public policy reasons to exclude marriages of same-sex couples from validation under the statute.²⁷ Thus, in these states one

part of a single nation, in which rights judicially established in any part are given nationwide application.

Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943), *partially overruled on other grounds* by *Thomas v. Washington Gas Light*, 448 U.S. 261 (1980).

24. This may be a result of the country's history of racism and aversion to interracial marriage. See Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 7 (1945) (explaining that the Clause was not used in marriage cases and other contexts because "the slavery question and [Jim Crow laws] had begun to distort men's view of government and of law. Talk of 'state sovereignty' became involved in the issue.").

25. *Wolfson & McCurdy*, *supra* note 22, at 13; see, e.g., *Pennsylvania ex rel. Alexander v. Alexander*, 289 A.2d 83 (Pa. 1971) (Jones, J., concurring) (suggesting that in the majority decision, the court neglected to explicitly give full faith and credit to Georgia marriage certificate); *Orsburn v. Graves*, 210 S.W.2d 496 (Ark. 1948) (holding that Arkansas must give full faith and credit to validly contracted Texas common-law marriage); *Parish v. Minvielle*, 217 So.2d 684, 688 (La. Ct. App. 1969) (stating that although Louisiana does not recognize or permit common-law marriages, it must give effect to them when validly contracted in Texas); see also, e.g., *Guidry v. Mezeal*, 487 So.2d 780, 781 (La. Ct. App. 1986); *Succession of Rodgers*, 499 So.2d 429, 495 (La. Ct. App. 1986). Although New York does not recognize common-law marriages, it gives full faith and credit to marriages that are valid under the laws of other states. See *Thomas v. Sullivan*, 922 F.2d 132, 134 (2d Cir. 1990); *Ram v. Ramharack*, 571 N.Y.S.2d 190 (N.Y. Sup. Ct. 1991).

26. COLO. REV. STAT. ANN. 14-2-112 (1994). This language is virtually identical to that found in the Uniform Marriage and Divorce Act § 210, 9 U.L.A. 176 (1987).

27. The comments to the Uniform Marriage and Divorce Act indicate that § 210 "expressly fails to incorporate the 'strong public policy' exception of the Restatement [Second] and hence may change the law in some jurisdictions. *This section will preclude invalidation of many marriages which would have been invalidated in the past.*" 9 U.L.A. 176 cmt. (1987) (emphasis added).

would expect that marriages in Hawaii of same-sex couples should be validated unless public policy exceptions are used to refuse recognition.²⁸

Additionally, many states, like Vermont, have marriage evasion acts which prohibit couples from avoiding restrictive marriage laws by marrying in another state:

If a person residing and intending to continue to reside in this state is *prohibited* from contracting marriage under the laws of this state and such person goes into another state or country and there contracts a *marriage prohibited and declared void by the laws of this state*, such marriage shall be null and void for all purposes in this state.²⁹

Whether an evasion statute applies depends on whether marriage of a same-sex couple is "prohibited and declared void" by the domicile state. At this time, only six states explicitly prohibit marriage of same-sex couples.³⁰ States which do not prohibit these marriages should not be able to use their marriage evasion statutes to nullify them.

Although the question of whether to recognize the marriage of a same-sex couple may be determined under a state's validation or evasion statutes, it is likely that courts will consider the forum state's choice of law principles to decide whether to recognize such an out-of-state marriage. These theories are presently used by courts when they are faced with conflicting laws or a controversy that involves more than one state's laws.³¹ Thus, the court would use the state's choice of law theory, as applied in other areas such as contracts or torts, to determine whether or not to recognize the Hawaii marriage due to the domiciliary state's refusal to permit marriage of same-sex couples.

28. But see *supra* note 21, for a discussion of how the Utah Legislature amended its validation statute to not apply to marriages of same-sex couples, in response to the *Baehr* case.

29. VT. STAT. ANN. tit. 15, § 5 (1993) (emphasis added). This language is adopted from the Uniform Marriage and Divorce Act § 210, 9 U.L.A. 176.

30. Those states are Indiana, Louisiana, Maryland, Texas, Utah and Virginia. See Cox, *supra* note 12, at 1033 n.216. Thus, Utah and Virginia may attempt to use their marriage evasion statutes to nullify out-of-state marriages of same-sex couples. Six others have ambiguous language regarding marriages of same-sex couples. Those states are Connecticut, Idaho, Kansas, Minnesota, Nevada, Ohio and Wyoming. *Id.* at 1070 n.217. Of these six, only Kansas and Minnesota have marriage evasion statutes. Because the language is ambiguous, marriage of same-sex couples is not expressly prohibited, so same-sex couples leaving the states to marry in Hawaii may not violate those states' marriage evasion statutes.

31. For a more detailed discussion of choice of law theories and how these theories would likely be used when addressing marriages of same-sex couples, see Cox, *supra* note 12, at 1083-99.

But what result? Choice of law commentators consider marriage to be a settled subject,³² but none have anticipated what will happen when a state is faced with conflicts regarding marriages of same-sex couples. The overwhelming tendency of courts to validate out-of-state marriages³³ will be countered by the homophobia existing in the judiciary today.³⁴ If courts use choice of law theory to validate or reject the marriage, those cases will occur on a state-by-state basis and could continue for years.

Furthermore, same-sex couples will be subjected to the "marriage visa" which they will have to have "stamped" as they move from state to state. They will never know whether a state where they choose to reside will recognize their marriage and provide them with the same benefits which opposite-sex couples assume follow them as they move from state to state.

A decision by the U.S. Supreme Court determining that these marriages are entitled to full faith and credit would be the quickest way to resolve the issue and would prevent the "hideous" problem that results when one's marital status varies from state to state.³⁵

Because of these complex "second generation" questions about recognition of validly contracted marriages of same-sex couples, the Lambda Legal Defense and Education Fund, members of the American Bar Association Section on Individual Rights and Responsibilities, and several law professors and students are researching these questions. I am helping write a manual which will compile the information from this research. This manual will provide guidance on a state-by-state basis to attorneys who will bring marriage recognition cases once Hawaii or some other state becomes the first to allow marriage of same-sex couples.³⁶ This battle will determine whether I will

32. See ROBERT A. LEFLAR, ET. AL., *American Conflicts Law* §§ 219-221, at 603 (4th ed. 1986); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* § 116, at 362 (2d ed. 1993); EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 13.5, at 436 (2d ed. 1992).

33. See LEFLAR, *supra* note 32, § 220, at 603; RICHMAN & REYNOLDS, *supra* note 32, § 116, at 362; SCOLES & HAY, *supra* note 32, § 13.5, at 436.

34. See Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

35. RICHMAN & REYNOLDS, *supra* note 32, § 116, at 362.

36. For an interesting article discussing the economic benefits that will accrue to the first state to solemnize marriages of same-sex couples, see Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995). Brown estimates that this "first-mover" state could receive over four billion dollars in tourism revenue from same-sex couples traveling to that state to marry. *Id.* at 747.

have a legal basis for looking through the "wife" section for Valentine's Day cards in the future.

III. COMING OUT VIA THE MEDIA

In late November, I received a call from Bill Manson of the *Reader*, a well-read local newspaper which provides alternative news coverage and reviews of theater, dance, music and restaurants in San Diego. He wanted to interview me for a feature story about lesbian co-parents. He got my name by "surfing" the Internet and had run across news stories in which I was quoted. As a volunteer attorney for the National Center for Lesbian Rights, I wrote an amicus curiae brief in the case of *Holtzmann v. Knott*,³⁷ which was pending at that time before the Wisconsin Supreme Court. Oral arguments were held in November 1994 and the Wisconsin newspapers contacted me then to discuss the case.

Manson's article, *Court Date No Holiday for Feuding Lesbian Mothers*, appeared in the December 22, 1994 edition of the *Reader*. He discussed the case and me, who he described as "an avowed lesbian" whose partner has "raised a daughter who is happily heterosexual."³⁸ I have always wondered why all lesbians and gay men who are willing to be out are described as "avowed." It sounds so strident. Looking up the term in *Webster's Dictionary*, I discovered that it means "to declare openly, bluntly, and without shame."³⁹ I do not think I was all that blunt in answering his question whether I am a lesbian; but I did declare my lesbianism openly and without shame, at least without any more shame than any one would feel having grown up in our heterosexist society.

Acknowledging one's lesbianism in a paper that is most heavily read by people the age of my students has allowed me to understand, on a whole new level, what it means to be out. While I have never hidden my lesbianism, (except while living next door to my girlfriend

37. *In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

38. Bill Manson, *Court Date No Holiday for Feuding Lesbian Mothers*, *READER*, Dec. 22, 1994, at 10. I am unsure why it is relevant that my partner's daughter, for whom she is a co-parent, is heterosexual. He asked me and I told him that she is heterosexual. I assume it is related to the fear that if lesbians and gay men raise children, they will all turn out to be lesbian or gay themselves, a seemingly shocking result. That idea, while not shocking to me, is absurd; lesbians and gay men are homosexual, despite most having heterosexual parents. It would seem just as likely that children of lesbian or gay parents would similarly be as likely to be heterosexual.

39. *WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY* 120 (Meriam-Webster 1987).

in college who was a resident assistant in a women's dormitory), I did not realize what it meant to be "avowed" in the popular press. When meeting members of the incoming January class at CWSL at a school sponsored reception, several students to whom I would soon teach Civil Procedure told me they had read the article. That announcement left me struggling for follow-up conversation with them. Should I discuss the Wisconsin case, thereby keeping our conversation on a distant, legal foundation, or should I discuss my "avowed" status, wondering if they were raising the article as a way of "signaling" to me that they too were either lesbian or gay?

I felt exposed, meeting people who knew intimate details of my life, without having at least similar knowledge about them. I came to realize that being an "avowed lesbian" in a heterosexist society made their information about my sexual orientation much more "relevant" than my assumption that ninety percent of them were likely to be heterosexual. Knowing they are straight means little; knowing I am lesbian is highly important. So, too, it was important to the *Reader's* reporter and editors that my partner's daughter is heterosexual, despite being raised by two lesbian mothers. One's location on the sexual orientation continuum is only important to a society that attaches great meaning to that location.

The case that gave me "avowed" status is one among countless others which establish that one's location on the sexual orientation continuum is also important to our legal system. Ms. Holtzmann and Ms. Knott were in a long-term committed relationship. They decided they wanted to raise a child together and Ms. Knott was artificially inseminated. After five years of raising their child, the relationship between the two women disintegrated. At that point, the legal system gave Ms. Knott the right to prevent Ms. Holtzmann from having any contact with their son. Ms. Holtzmann sued to gain either custody or visitation of the child. The Wisconsin Supreme Court was to decide whether she would be allowed to see her son anytime before his eighteenth birthday.

Unfortunately, this is not the first time the appellate courts have wrestled with this complex issue of who is a "parent" for custody or visitation purposes. After numerous years of rejecting the idea, countless courts have ruled that a stepparent whose marriage with the biological parent dissolves is entitled to petition for visitation with the children who were part of their "blended" family. Using doctrines such as equitable parenthood, equitable estoppel, in loco parentis and

de facto parenthood, courts have recognized the parental relationship between a stepparent and the spouse's biological children.⁴⁰

But, until *Holtzman*, courts had consistently refused to apply these same doctrines to protect the parental relationship between a co-parent in a lesbian or gay relationship and the partner's biological children.⁴¹ The only difference between a stepparent and a lesbian or gay co-parent is that stepparent was married to the children's parent, while a co-parent who was denied the right to marry was not. This difference, of the nonbiological parent's location on the sexual orientation continuum, has been enough to shatter the relationship between this co-parent and the children.

Fortunately, the Wisconsin Supreme Court reversed its earlier decision in *In re Interest of Z.J.H.*,⁴² and held that Ms. Holtzmann should be given the opportunity to prove that she had a "parent-like relationship" with her son and that "a significant triggering event" justified state intervention in the child's relationship with Ms. Knott, his biological mother.⁴³ While the court refused to recognize that "parent-like relationship" as sufficient to support a claim for

40. See Barbara J. Cox, *Love Makes a Family — Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J. LAW & POLITICS 5, 19-22 (1991).

41. See, e.g., *Nancy S. v. Michelle G.*, 228 Cal. App. 3d 831 (Cal. Ct. App. 1991) (finding that a partner is not a parent under the Parentage Act); *In re Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (holding that a woman with a live-in relationship with a child's mother was not a "parent" within meaning of statute which allowed "either parent" to apply for writ of habeas corpus); *In re Interest of Z.J.H.*, 471 N.W.2d 202 (Wis. 1991), *overruled by In re H.S.H.-K.*, 533 N.W. 2d 419 (ruling that a co-parenting contract between the plaintiff and adoptive parent was not enforceable insofar as it concerned physical placement of the child).

42. 471 N.W.2d 202 (Wis. Ct. App. 1990).

43. The court held that to demonstrate the existence of a parent-like relationship with the child, Ms. Holtzmann must prove:

(1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

In re H.S.H.-K. at 421. In order to establish a significant triggering event justifying state intervention in the child's relationship with its biological or adoptive parent, the petitioner must prove "that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference." *Id.* at 436. Once the petitioner establishes both elements, the trial court has the discretion to consider whether visitation with the petitioner is in the best interest of the child. *Id.*

custody,⁴⁴ the Wisconsin Supreme Court rendered a ground breaking decision that may lead the way for other courts to recognize the parental relationship between lesbian and gay co-parents and their children. No longer will children be forced to lose one of their parents simply because the legal system cannot accept that parent's location on the sexual orientation continuum.

IV. CAN BEING OUT CAUSE HARM?

I took my new truck into the dealership in early February to get its first oil change and to have a few minor adjustments made. I had recently met an assistant service manager there who is a lesbian, although she is not "out" at work. I took my truck to her and asked her to supervise the work on it. While driving there, I wondered whether asking her "service crew" to do the work would in any way jeopardize her closeted status on the job, or her job, since it would be obvious we were friends when I dropped the truck off. I was concerned because when I first got the truck, I put a rainbow flag on the bumper and a black triangle on the rear window.⁴⁵

I was worried that having a friend who had such "blatant" symbols of lesbianism on her truck might "out" her at work. I would have hated to put her at risk, knowing that she chooses not to be out at work because she feels it is unnecessary information for the men with whom she works to have about her. While we disagree on whether it is worthwhile to be out at work, I did not want *her* to be harmed by *my* decision to be out. Although many in the lesbian and gay community believe it is valuable to out others, especially those who are in positions of power and use that power to harm us,⁴⁶ I do not choose to out anyone who has not made that choice herself or himself. I worried all the way to the dealership that morning whether my truck was too blatant to be serviced "safely."

44. The court held that "[a] person who is not a biological or adoptive parent may not bring an action to obtain custody of a minor unless the biological or adoptive parent is 'unfit or unable to care for the child' or there are compelling reasons for awarding custody to a nonparent." *Id.* at 423. The court affirmed the trial court's finding that Holtzmann had not shown a triable issue regarding Knott's fitness or ability to care for the child and that she had not shown the existence of compelling circumstances that would warrant transferring custody from Knott to Holtzmann. *Id.* at 424.

45. The rainbow flag, based on Jesse Jackson's Rainbow Coalition, is an accepted symbol of the lesbian and gay civil rights movement. The black triangle was the symbol lesbians were forced to wear in Nazi Germany's concentration camps.

46. See MICHELANGELO SOGNORILE, *QUEER IN AMERICA: SEX, THE MEDIA, & THE CLOSETS OF POWER* 77 (1993).

The following weekend, my partner and I had dinner with this woman and two other friends. We also watched a videotape of *Serving in Silence*, the TV-movie about Margarethe Cammemeyer. Colonel Cammemeyer was discharged from her position as Chief Nurse of the State of Washington National Guard when she honestly answered the question of whether she was a lesbian during an investigation for a heightened security clearance.⁴⁷ As the movie depicted, Cammemeyer made it clear that she was not going to lie about her sexual orientation and when asked whether she was a lesbian, she simply answered yes. Despite her excellent career, including numerous medals and commendations, the Army did not hesitate to discharge her. The highest ranking officer ever discharged for lesbianism,⁴⁸ Cammemeyer was ordered reinstated into the National Guard following a federal district court trial.⁴⁹ The case is currently on appeal at the Ninth Circuit Court of Appeals.

Watching the movie with my friend made me realize that all of us encounter these issues throughout our daily lives. Both Colonel Cammemeyer and my friend are lesbians; both have legitimate concerns about whether their jobs will be put at risk simply by announcing to their colleagues that they are lesbian, and each of them has chosen the option that seems most appropriate to her for handling this situation. Both of them are brave women, trying to live in a world which cannot forgive them for their sexual orientation. Each of them has chosen a path that has its own difficulties, balancing the personal and professional reasons for coming out or remaining silent. Neither of them is wrong.

V. CONCLUSION

Members of the Symposium panel discussed whether they agreed with my view that "neither is wrong." One stated that it is incumbent on all gay men and lesbians to come out in order to make any meaningful progress toward ending the discrimination and hostility that heterosexual society feels comfortable heaping on us. She is right. Only by coming out to those closest to us, to our daily acquaintances and to anonymous strangers, will we finally convince this society that one's location on the sexual orientation continuum is not an acceptable basis for causing harm to people.

47. See *Cammeyer v. Aspin*, 850 F. Supp. 910, 912-13 (W.D. Wa. 1994).

48. *Id.* at 913 n.6.

49. *Id.* at 929.

Another panelist concluded that, while she agreed with this sentiment, she knew for herself that she had not been able to come out until she was ready. Despite being prodded by friends and despite being convinced logically by their arguments, she still felt the fear that we all know underlies our decision to remain in the closet. Once she realized that being out could cause her little more pain than what she already felt by hiding herself from the people around her, she came out and now is another one of us "professional lesbians."⁵⁰ Once she was ready, coming out was easy and even felt like walking into a freedom that she had not expected would be so marvelous. But after telling this story, she remained convinced that none of us can or should be pushed to take the step to be out until we are ready and can feel the sunshine and warmth that will be ours once we exit the closet for good.⁵¹

She too is right. While I sometimes grow impatient with my friends' timetables for coming out, I try to be gentle in my expectations of them. I realize, as this discussion illustrates, how difficult it is to be out; how many times each of us has to come out, over and over, in vastly different situations; and how tiring it becomes to fight the fear and intolerance that we so often feel. Only through coming out can we be free, and until our lesbianism is accepted by society, we will continue to fight these practical battles, both personally and professionally.

Having fought each of these battles myself, I am relieved that I did not have to fight yet another one while trying to find a law journal to publish this paper. Normally, I would wonder whether any journal would publish an article on the practical battles lesbians face. But I do not have to fight that battle, thanks to the students from the *Review of Law and Women's Studies* at the University of Southern California Law Center. By holding the first ever symposium on *Lesbians in the Law*, they are fighting that battle for us and probably having their own battles with "guilt by association" for dedicating a volume of their journal to lesbian issues. We are all thankful to them for their courage to sponsor this Symposium and wish them luck in fighting these battles alongside us.

50. "Professional lesbians" are those of us who spend a portion of our work time being out and addressing gay and lesbian rights issues at work or in our society.

51. B. Kay Schafer, *Hate Crimes and Other Practical Battles*, 5 S. CAL. REV. & WOMEN'S STUD. 131 (1995).