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Robert Salem

University of Toledo College of Law

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THE STRENGTHS AND WEAKNESSES OF LOCAL HUMAN RIGHTS ORDINANCES

ROBERT SALEM¹

Good morning. It's an honor being here today to participate in discussions on such an important topic. Ratna's presentation provided a comparative and global perspective on sexuality. My presentation deals with a very local issue, but an issue that has global implications. This panel will discuss the prospects and perils of local human rights initiatives. Specifically, I will talk about the nature of these local initiatives and their advantages and disadvantages. Time permitting, I will also talk about our successful effort last year in Toledo, Ohio to pass a human rights ordinance that includes sexual orientation as a protected category, and why it is so crucial that lawyers and law professors become involved in these local campaigns. Toledo is not considered by most people to be a center of enlightenment, so many were surprised that we passed an ordinance that protects people from discrimination on the basis of sexual orientation and gender identity. The ordinance also includes a hate crimes provision, which I believe is the most important component because of the alarming statistics on the increase in violence against our community. I believe that with determination, most communities can achieve what we did in Toledo.

Local human rights ordinances (HROs) take a variety of forms, and can greatly differ from each other in substance, scope and enforcement. During the last decade, there was a surge in the adoption of HROs that include sexual orientation as a protected category. While most in the gay and lesbian community see these laws as important in our struggle to gain equality, some in the community feel that they are generally ineffective and would rather see our community devote more time to statewide and national efforts to gain protection. It is important to note that state and federal legislation is always preferable to local legislation because of the broader scope, more appropriate penalties, and better enforcement mechanisms. However, until we gain the kind of prominence needed to achieve broad based protections, we must take full advantage of well-crafted local initiatives. I will provide you with an overview of the pros and cons of local initiatives, and conclude that these initiatives are of great importance to gays and lesbians worldwide.

First, let us consider the good news about HROs. What are some of the advantages that are derived from these laws? Two obvious advantages are that they help to deter discrimination against gays and lesbians, and that they provide remedies for victims of discrimination. In addition, I will identify four subtle advantages of HROs.

1. Momentum

Gay activism on the local scene is currently where it's at. We have accomplished very much in the last few years, and much more will be accomplished in the near future because of the increased momentum of local gay activism. As of October 23, 1999, 186 local communities have passed some form of an HRO that includes sexual orientation. Eighty percent of those were passed in this decade alone. Thirteen communities in Ohio have managed to get some type of protection approved by their

¹B.A., J.D., University of Toledo. Staff Attorney, University of Toledo College of Law.

legislatures. As of 1997, approximately one-fifth of the population of the United States was living in communities that have passed HROs. These local laws account for most of the anti-discrimination protection afforded to sexual minorities in this country.

It is much more difficult to get statewide initiatives passed for reasons including but not limited to the following: a large amount of resources needed for campaigning, difficulty mobilizing activists around the state, and overcoming likely opposition from small or rural communities. The current political landscape in Ohio, like the majority of other states, makes it unlikely that statewide legislation could be passed. Conversely, larger metropolitan areas usually have high concentrations of gays and lesbians, and tend to be more progressively governed. Incidentally, Ohio is one of the 39 states that does not have a statewide law protecting gays and lesbians from discrimination. Furthermore, Governor Taft recently renewed former Governor Celeste's Executive Order barring discrimination against state employees, but he deleted sexual orientation from the list of protected categories. We can see we have a lot of work to do in Ohio. However, the momentum is clearly on the side of local activists, and given the current political realities, it is important to seize every opportunity we have.

2. Slippery Slope

The more local communities speak out against discrimination, the more larger communities will listen. It is much more likely that states and the federal government will adopt anti-discrimination laws if they observe a groundswell of support for such measures from municipalities and counties around the country. Without local initiatives it would be far too easy to dismiss any effort to pass statewide and federal legislation. I do not believe that the Employment Non Discrimination Act and the Hate Crimes Prevention Act would be so seriously considered in Congress if it were not for related local and statewide laws that have thrust these issues into the national consciousness. In Ohio, the same types of legislation are being considered partly because of the message sent by the thirteen Ohio communities that have taken a stand against discrimination.

After passage of the HRO in Toledo, the county commissioners requested a meeting with the HRO committee to plan for a county-wide resolution prohibiting discrimination against county employees based on their sexual orientation. The City of Toledo Affirmative Action Office also requested a meeting to determine how it may modify its policies.

It would be nice if we could bypass local communities and go straight to the state or to Congress with our proposals. In some cases there may be good reason to do so, and it may be successful. However, our chances for success are greatly enhanced if we have established a foundation from which to build.

3. Energy

One of the biggest problems encountered with statewide campaigns is that it is hard to mobilize activists from around the state. Most of the activists that are working on legislation before the Ohio legislature are from Columbus. Beyond Columbus, activists are generally drawn from Cleveland and Cincinnati. Communities like Toledo, Dayton and Akron are often left out of the political scene. Too seldom do we hear of activists from these smaller communities. These cities have a relatively small gay and lesbian population and are drained of resources. The

reality is that many gays and lesbians living in smaller cities feel disconnected from the larger gay community and become politically isolated. While we do not hear much coming out of these communities, they are no doubt filled with motivated and talented people who have much to offer to the larger gay community. The question is how do we motivate gays and lesbians in smaller towns, and big ones for that matter, to become more active in politics and social change. One way is to launch an effective local HRO campaign that highlights some of the injustice that gays and lesbians endure, and proves to the local gay community that change is possible.

My experience in Toledo showed me that we can generate an extraordinary amount of energy and enthusiasm in a small town by convincing people that a positive change is likely, even if we do not achieve all of our goals, and that they can have a direct influence on the outcome. This was done by having public forums where all are encouraged to express their views. Through these public forums, a community-wide consensus was reached about the needs of the community, and how best to satisfy those needs. All that were involved felt that they had contributed, and were therefore more likely to devote their time and effort to the campaign. An incredible amount of energy was generated which had a major impact on the result. Best of all, the energy lasted, and several volunteers have adopted gay rights activism into their lives.

4. Symbolism

Local ordinances send a strong message to the community that discrimination against anyone, including gays and lesbians, is not acceptable conduct and will not be tolerated. Even if the ordinance has little impact on actually combating discrimination, the message remains powerful and one on which to build. The struggle to change negative attitudes about homosexuality should be multifaceted. We should work to accomplish this goal through education, effective use of the media, face-to-face interaction, and certainly through the political and legal process.

As I mentioned earlier, some activists believe that our energies would be better spent on larger campaigns that have a greater impact. Despite the many advantages of local ordinances, there are several problems with them. I will identify four disadvantages of local ordinances.

1. Symbolism

Although the symbolic nature of local ordinances is seen as a strength by some, to others it appears that many ordinances are ineffective and therefore purely symbolic -- a definite weakness. This may be true of some, but certainly not the majority of these ordinances. It is difficult to find one that is purely symbolic. I believe that most, if not all enacted ordinances are to some degree effective in combating discrimination and serving as a deterrent.

2. Inconsistency

Another criticism of local ordinances is that they are inconsistent, and vary too greatly in their scope and liability. Critics believe that the nonuniform nature of ordinances around the country contributes to the confusion about scope and liability. For example, some ordinances are criminal statutes while others impose civil liability. The scope of protection might include any or all of the following: housing, employment, public accommodations, credit agencies, business facilities, schools and hate crimes. Generally, religious organizations and larger employers are

exempt. Rarely do ordinances cover all the areas that need regulation. The confusion is understandable, but the same can be said about other types of ordinances and statutes around the country. I do not believe that we want uniform laws all over the country without any regard to the circumstances of the particular locality. It is also unrealistic to expect cooperation and uniformity on such a divisive issue. The answer to alleviating some of the confusion is education and campaigns to raise awareness about available protection.

3. Lack of Awareness

That brings me to the next criticism. Local communities have generally done a poor job of raising awareness of the problem of discrimination and local legislation designed to combat such discrimination. As a result, local ordinances are not used by victims of discrimination as often as they should. For example, in Tampa, between October 1995 and October 1997, only one to two percent of claims brought under the local human rights ordinance were for discrimination based on sexual orientation. In Chicago, it was seven percent of the total. In New Orleans, there were only sixteen claims of sexual orientation discrimination between 1992 and 1996. These statistics do not accurately reflect the magnitude of the problem. There are a variety of reasons that gays and lesbians do not report discrimination or incidents of violence, but with increased awareness, reportings will likely increase.

4. Lack of Resources

Smaller communities often do not have the resources to enforce their ordinances. Prosecutor offices around the country are usually understaffed and overworked. Therefore, violations of criminal ordinances are designated as low priority and often go unprosecuted. In the civil arena, investigative and enforcement agencies tend to have the same problem. Some of these agencies are created by statute but are never funded or staffed. Enforcement of local ordinances will continue to be weak until it is made an issue by gay rights activists.

A rundown of the pros and cons of local ordinances is helpful because it reminds us as activists where to focus our energies. I believe that encouraging local activists to wage these campaigns is an important step to full protection on a national level. I also believe that these ordinances, despite their shortcomings, remedy discriminatory behavior and deter such behavior. In addition, they bring out local activists who would not otherwise participate in the political process.

Many of the problems associated with local ordinances could be alleviated if more lawyers and law professors became involved in the drafting of the legislation and campaigns for passage. Some ordinances have been found to be unconstitutionally broad or vague. In the case of hate crimes legislation, some have been struck down on First Amendment grounds. These problems usually arise because political activists are not necessarily legal experts, nor are they expert drafters. Lawyers can be of great assistance by ensuring that the proposed ordinance language satisfies constitutional standards. Lawyers, assuming they have been properly trained in legal writing, can also assist by drafting relevant, clear and concise language. The effectiveness of many ordinances is diminished because it is difficult to determine the intent of the drafters, or because of needless repetition or redundancies. Consider the following examples of poor drafting. The ordinance of one small Michigan town defines "minority" as "a person who is African-American, Native American, Spanish-surnamed or Asian." (I assume they did not intend to

exclude Hispanics with non-Spanish surnames). The ordinance of an Oregon city includes a definition of “sexual orientation” that goes as follows: “A person’s belief in or practice of any type of sexual relationship or conduct that is not prohibited by the laws of the state of Oregon or this city. Sexual relationship or conduct as these terms are used herein has the ordinary meaning and include but are not limited to the actions described in ORS 163.305(1), (7), (8), without regard to whether the sexual relationship or conduct occurs between members of the same or opposite sex, and also includes any other conduct that may cause someone to believe that another person believes in or practices such sexual relationship or conduct.” (If they intended to confuse, they’ve done a great job).

Lawyers can also be valuable campaigners. Political campaigns and trial preparation are similar in many respects. Lawyers have been trained to be methodical and to never lose sight of the big picture. They also know how to anticipate and deflect the arguments of the opposition. Like successful litigation, successful campaigns involve: an early start, intensive investigation of fact and law, skilled writing that conforms to the customs of the receiving entity, regular communication with all involved persons, gathering of evidence and witnesses, organizing the evidence and testimony in a logical manner, and presenting a compelling case in written and oral form. All of this is done while constantly evaluating the case and adjusting strategies when necessary.

In conclusion, I believe that grassroots campaigns are the most effective campaigns that produce the most enduring results. Because of the hard work of thousands of local activists around the country, we have been able to bring our human rights issues before the entire nation. It was a pleasure to speak to you today. Thank you for your attention.