

RESPONSES

THE MORAL RHETORIC OF LEGISLATION

CHAI R. FELDBLUM*

I miss Tom Stoddard terribly. I feel the loss of him in so many ways—as a thoughtful scholar, a fellow activist, an eloquent speaker, and most importantly, a dear friend. I would have loved to hear his reactions to the thoughts I set forth in this Essay. Tom was both the consummate politician and the thoughtful philosopher. Had he lived, we would have sat up to the wee hours of the morning discussing his Essay and mine—considering and analyzing the best political, legal, and moral steps to take in achieving the goal of gay and lesbian equality. This Essay is my attempt to hold a conversation with Tom, albeit one-sided. I know Tom would be pleased the conversations are happening. And let's hope Heaven gets the *NYU Law Review*.

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In his Essay, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, Tom Stoddard set out to answer a question that challenges many of us who work to advance our view of social justice: “When and how, if ever, can the law change society for the better? . . . Is the law an effective tool for social change? (Or should I have become a social worker instead of a lawyer?)”¹

Stoddard's answer is that law can be an effective tool for social change, but only when it achieves the goal of “culture-shifting” and not simply “rule-shifting.” In Stoddard's view, law has the capacity to achieve a number of rule-shifting goals: it can create new rights and remedies for victims, it can alter the conduct of the government, and it can alter the conduct of citizens and private entities. But law also has the potential to result in “culture-shifting”—it can express a new moral ideal or standard and can change cultural attitudes and patterns.²

* Associate Professor of Law, Georgetown University Law Center; Director of the Georgetown Federal Legislation Clinic. Many thanks go to Henry John Gutierrez and Joan Mulhern for their able research assistance and to Robin West, Louis Michael Seidman, Bill Rubenstein, Roy Schofland, and Peter Byrne for helpful insights and reaction.

¹ Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. Rev. 967, 970 (1997).

² See *id.* at 972-73.

Stoddard was a social justice lawyer who spent a good part of his career litigating gay rights cases in the courts and advocating for gay equality in the legislative arena.³ Based on his experiences, Stoddard concluded that legislative enactments are more effective than adjudicatory victories in achieving law's potential of culture-shifting. As Stoddard noted with regard to the fifteen-year effort to pass a gay civil rights law in New York City:

Immediate passage of New York City's gay rights bill as early as 1971 or 1972 would have afforded immediate political gratification to me and my colleagues (I would have been very gratified indeed), but immediate passage would also have deprived the city and its residents of the extended exploration of the subject of gay people and their rights. And, I am now convinced, it is the city-wide debate of the subject, rather than mere passage itself, that has helped to open eyes and hearts. Mere passage would have added up to "rule-shifting" when "culture-shifting" is what this controversial and often misunderstood issue really required.⁴

One of the reasons Stoddard concluded that legislative enactments are more likely to result in culture-shifting is that they generate greater public awareness of the desired change in the law. According to Stoddard, several factors are essential for a rule-shifting law to have culture-shifting effect. The law must affect a wide range of people; people must be aware of the change in law; people must believe the change is legitimate; and the government must engage in overall and continuous enforcement of the new rule.⁵

I agree with Stoddard that law has the capacity to cause culture-shifting as well as rule-shifting. I also agree with him that the social goal of achieving equality for gay men and lesbians requires acts of culture-shifting, and not merely rule-shifting, and that legislative enactments may hold greater potential for achieving such culture-shifting. But I believe there are certain unique challenges posed in

³ See, e.g., *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991) (challenging ERISA medical benefits discrimination); *In re New York State Soc'y of Surgeons v. Axelrod*, 77 N.Y.2d 677 (1991) (opposing mandatory HIV testing in New York); *Under 21 v. City of New York*, 65 N.Y.2d 344 (1985) (supporting executive order barring employment discrimination by city contractors). In the legislative arena, Tom Stoddard was active for many years in the ultimately successful effort to pass a gay rights law in New York City. See Stoddard, *supra* note 1, at 981. He was also a leader of the Campaign for Military Service (CMS), a short-term coalition effort to lift the ban on the service of gay men and lesbians in the military. I worked closely with Tom in the CMS effort (I served under him as legal director) as well as in countless other federal legislative battles concerning AIDS and gay rights.

⁴ Stoddard, *supra* note 1, at 981-82.

⁵ See *id.* at 978.

achieving the goal of equality for gay people that are not fully explored in Stoddard's analysis.

For the public to believe in the legitimacy of a change that prohibits discrimination against gay people, whether that change is enacted by a legislature or decided by a court, there must be an engagement with the morality of gay sexual conduct that is almost uniformly absent from the rhetoric of those supporting gay rights either in courts or in legislative debates. For example, debate surrounding passage of a law prohibiting employment discrimination on the basis of sexual orientation may well result in public awareness of the proposed change in law. But the rhetoric that surrounds that debate—what is said and what is not said by proponents of the bill—may well be critical to the ultimate goal of culture-shifting.

The idea that rhetoric matters is not new. Legal commentators have noted that judges have the ability, through the rhetoric and reasoning they employ in their judicial opinions, to shape the moral discourse surrounding a disputed issue.⁶ But similar cognizance of the power of rhetoric in legislative debates to shape moral discourse seems strikingly absent from advocates in the legislative arena. The focus of advocates seems rather to be almost exclusively on collecting the requisite number of votes to pass the desired legislation.

I am not, by any means, suggesting that advocates stop "keeping their eyes on the prize" of achieving their desired legislative goals. After all, my principal educational work entails training law students to understand and manipulate the political and legal nuances that shape the development of legislation and legislative history.⁷ But I am suggesting we take seriously Stoddard's insight that the "prize" to be sought is a culture-shift, and not simply a rule-shift, with regard to gay equality. If a culture-shift is indeed the prize, the type of rhetoric that surrounds a legislative enactment designed to achieve gay equality may have an impact on the type of culture-shift (if any) that will result from a change in the law.

I use as an example a bill that has been introduced for consideration by the U.S. Congress to remedy discrimination on the basis of sexual orientation in the workplace: the Employment Nondiscrimination Act of 1997⁸ (ENDA). ENDA is similar to Title VII of the Civil Rights Act of 1964 in that it would prohibit employers with fifteen or

⁶ See, e.g., Tom Stoddard, *The High Court Erases a Stigma*, *Nat'l L.J.*, June 3, 1996, at A19; Owen M. Fiss, *Comment, Against Settlement*, 93 *Yale L.J.* 1073, 1085 (1984).

⁷ See Chai Feldblum, *Five Circles of an Effective Coalition* (unpublished manuscript, on file with author); Chai Feldblum, *The Concept of Legislative Lawyering: An Autobiographical Account* (unpublished manuscript, on file with author).

⁸ H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997).

more employees from discriminating against applicants or employees on the basis of sexual orientation, much as Title VII currently prohibits such employers from discriminating on the basis of race, sex, religion, or national origin.⁹ Sexual orientation is defined in the bill as homosexuality, heterosexuality, or bisexuality, whether real or perceived.¹⁰

A law such as ENDA, were it enacted, would affect a broad range of people across the country. Gay men, lesbians, bisexuals, and heterosexuals, as well as people perceived to be gay, lesbian, bisexual, or heterosexual, would be granted a new remedy when they confront unequal treatment in the workplace. But not only gay people (and people perceived to be gay) would feel the effect of the change. Every employer with more than fifteen employees would need to be aware of the new legal rules prohibiting discrimination on the basis of sexual orientation.

Achieving equality for gay people in the workplace through the enactment of ENDA would also ensure public awareness of the change. The year-and-a-half long drafting process that led to the development of ENDA's language has already generated awareness of gay rights as a civil rights issue on the part of the mainstream civil rights community.¹¹ The first introduction of ENDA was accompanied by much fanfare, and hearings were held in committees of both the Senate and the House before packed audiences.¹² Opponents of the bill have taken its potential passage seriously and have ensured that a steady stream of commentary and analysis is distributed to their constituents.¹³

⁹ See 42 U.S.C. § 2000e-2(a)(1) (1994).

¹⁰ See H.R. 1858, 105th Cong. § 3 (1997); S. 869, 105th Cong. § 3 (1997).

¹¹ A legislative drafting group, consisting of representatives from gay rights litigation and lobbying groups and general civil rights litigation and lobbying groups, worked on the development of ENDA from January 1993 to May 1994. As a legal consultant to the Human Rights Campaign, a gay rights lobbying group, I was an active member of this drafting group. I have continued to be involved in the drafting and negotiating of the provisions of ENDA.

¹² See, e.g., Bill Would Prohibit Discrimination Based on Workers' Sex Orientation, Salt Lake Trib., June 24, 1994, at D8; Dave Skidmore, Coretta Scott King Endorses Kennedy Gay Employment Rights Bill, Associated Press, June 23, 1994, available in 1994 WL 10120484; Support for Gay Workers' Rights: AFL-CIO Among Groups Backing Ban on Sexual Orientation Bias, S.F. Chron., June 24, 1994, at A8; see also Employment Non-Discrimination Act of 1994: Hearings on S. 2238 Before the Senate Comm. on Labor and Human Resources, 103d Cong. 703 (1994) [hereinafter Senate Hearings].

¹³ See, e.g., Robert H. Knight, *The Employment Non-Discrimination Act: An Unwarranted Expansion of Federal Power* (Family Research Council 1996) (on file with author); Joseph E. Broadus, *Homosexual Jobs Bill: Government Power Grab in the Workplace* (Family Research Council 1994) (on file with author).

But what is the rhetoric being used to support passage of this law? I have noted previously that while opponents of ENDA often invoke the immorality of homosexual activity as grounds to oppose the bill, proponents of the bill invariably choose to ignore the issue of whether gay sexual activity is moral or immoral.¹⁴ Proponents ordinarily find it easy to skirt this issue because they are rarely asked serious questions regarding the relevance of morality in the legislative debates. Instead, concerns about morality are usually brought up by opponents of the bill in the context of testimony that is so exaggerated and distorted that their moral claims are easily lost and ignored.¹⁵

One serious question about morality has, however, been posed in a hearing on ENDA. The manner in which the question was phrased, and, more interestingly, the manner in which the question was answered by proponents of the bill, is illuminating in terms of the rhetoric currently characterizing legislative debate on ENDA.

The scene was the Subcommittee on Governmental Programs of the House Committee on Small Business in July of 1996.¹⁶ The senior Democrat on the subcommittee, Congressman Glenn Poshard, a Southern Baptist from Illinois with a career in education, began his opening statement in this way:

I have been dreading this hearing. I know for many people this is a simple question of dealing with discrimination in the workplace, as it ought to be, but for others, like myself, who were born and raised in very traditional faiths—I am a Southern Baptist

It is not a simple matter at all. . . .

. . . .

. . . I have a concern. I struggle with a faith that teaches me that the homosexual life-style is essentially unacceptable and a faith that teaches me at the same time to do justice, to love mercy, to walk humbly with my God and to love other people unconditionally in the way that Christ loves me. I am taught that . . . we are to love one another . . . a love that compels us not to condone the life-style but to do justice to our fellow human beings.

¹⁴ See Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237, 300-04 (1996).

¹⁵ See, e.g., Senate Hearings, *supra* note 12, at 90-94 (statement of Robert H. Knight, Family Research Council); *id.* at 28-31 (statement of Joseph Broadus, Family Research Council); cf. Michael Pakaluk, *Homosexuality and the Common Good*, Address at the American Public Philosophy Institute (APPI) Conference on "Homosexuality and American Public Life" (June 20, 1997) (audio tape on file with author) (providing reasoned assessment of moral implications of ENDA).

¹⁶ Employment Non-Discrimination Act: Hearings on H.R. 1863 Before the Subcomm. on Gov't Programs of the House Comm. on Small Business, 104th Cong. 87 (1996) [hereinafter House Hearings].

So, Mr. Chairman, forgive me for asking the question, but it is a question with which many people struggle

Are we condoning a life-style if we condemn discrimination against those that practice that life-style? That is what many people think we are doing. If we pass a law preventing discrimination against homosexuals in the workplace, does this mean then that we as a society give more legitimacy to the practice of the life-style? Does equal standing under the law mean equal standing in terms of the norms of what is acceptable in society . . . with respect to institutions of marriage and so on?

. . . .

. . . [O]ur school teachers rank very high in influencing our children.

Will the passage of a law such as this allow teachers, for instance, who happen to be homosexual, a greater comfort zone in advocating that the homosexual life-style is on an equal footing with more traditional family structures when that life-style may conflict very directly and deeply with those whose children sit in the classroom? . . .

. . . If we pass a law preventing discrimination against homosexuals in the workplace, does this mean that we, as a society, give more legitimacy to the practice of the life-style itself?¹⁷

Congressman Poshard's candor in asking his question was remarkable in terms of the usual debate on ENDA. Opponents of ENDA have usually argued that there is not a major problem of discrimination on the basis of sexual orientation because gay people are an "elite" economically advantaged group.¹⁸ They then argue that even if some discrimination does exist, it is not the type of discrimination that is appropriately remedied by federal civil rights laws. Such laws, they argue, are intended for individuals who experience discrimination based on a benign, immutable characteristic. Sexual orientation, by contrast, is a behavioral characteristic—and indeed, it is a behavior that people should be encouraged to change.¹⁹

Poshard was presenting a different argument against passage of ENDA. He was not arguing that discrimination against gay people did not exist in the workplace. Nor was he arguing that such discrimination was necessarily a good thing or even warranted. Finally, Poshard was not claiming that the characteristic of sexual orientation was so inherently different from other protected characteristics that it

¹⁷ *Id.* at 3-4.

¹⁸ See Senate Hearings, *supra* note 12, at 93 (statement of Robert H. Knight, Family Research Council).

¹⁹ See *id.* But see *id.* at 38-44 (statement of Chai Feldblum rebutting these assertions).

was absurd even to consider the idea of a law to protect individuals from discrimination based on sexual orientation.

Rather, Poshard was explaining that, for him, providing legal protection against discrimination on the basis of sexual orientation posed a unique moral dilemma. He appeared to believe such discrimination was unwarranted and presumably would have liked to live in a country in which most employers would not discriminate on the basis of sexual orientation. But if he voted for a federal law prohibiting such discrimination, was he necessarily sending a message that engaging in gay sexual activity (what Poshard calls "the homosexual life-style") was legitimate in the eyes of society?

Responses to Poshard's question came only from the first panel of witnesses, consisting of four members of Congress. Their answers can be characterized along a spectrum, but most fell comfortably within a classic liberal response that fails to engage directly with the morality of gay sexual activity. The final answer flirted with the issue of morality, but retreated from direct engagement.

Congresswoman Connie Morella, a Republican from Maryland, had this to say in response to Poshard: "I commend the candor that Congressman Poshard exemplified, and I thank him for honestly expressing his concerns, because I believe this bill is consistent with the tenets of every religion; it is simply saying, treat all of God's people the same way."²⁰

While this was the extent of Morella's response to Poshard, the rest of her testimony was consistent with the message that ENDA "protects only the fundamental right to be judged on one's own merits."²¹ As Morella explained, "I never understand why there would be any inquiry about whether someone is homosexual, heterosexual, bisexual; I don't think that enters into how one performs one's responsibilities in the workplace."²²

Congressman Gerry Studds, a Democrat from Massachusetts, had much the same response as Congresswoman Morella, although he was a bit more effusive in his reaction to Poshard. He noted:

I want to thank you [Congressman Poshard] and express my respect and appreciation for what you said and, most particularly, for the way you said it, and I hope fervently you will be able to stay for some of the witnesses who will follow us. There are real people coming after Members of Congress and you will hear real things.²³

²⁰ House Hearings, *supra* note 16, at 6.

²¹ *Id.* at 5.

²² *Id.*

²³ *Id.* at 7.

Studds then proceeded to explain how ENDA would ensure that workers would simply be judged "on the strength of the work they do," and not be "deprived of their livelihood because of the prejudice of others."²⁴ Echoing Congresswoman Morella, he noted that this is a "principle with which every American can identify," and indeed "it is hard to understand how any fair-minded person could reach any other conclusion."²⁵ Studds concluded with a recap of the civil rights struggle on behalf of African Americans and ended with the following eloquent proclamation:

That struggle [for racial equality] is far from over, but it has achieved a hard-won consensus among right-thinking Americans that racial discrimination is wrong, as slavery was before it. We have a long way to go before we achieve a similar degree of public understanding, but achieve it we will; and together we will write the last chapter in our Nation's long journey toward justice and equality for all.²⁶

The testimony of Studds and Morella seems designed to achieve the goal of ensuring public acceptance of the legitimacy of ENDA by invoking the principles of "fairness" and "equality of opportunity." Studds reinforces the principle of fairness by exhorting Poshard to listen to the stories of "real people" who will graphically exemplify the unfairness experienced by gay and lesbian individuals in the American workplace.

But invocation of a principle of fairness, consideration of real-life examples of unfairness, and an analogy to the movement for racial equality all leave Poshard's underlying question unanswered: what moral message is sent when government decides that the principle of employment "fairness" for individuals trumps the moral discomfort some employers may feel regarding the gay sexual activity of their employees? To Morella and Studds, the answer seems to be simple: it is immoral and unfair to discriminate. But that leaves Congressman Poshard's underlying question still unanswered: what are the moral implications of government trumping an employer's moral objections to an employee's conduct in order to achieve the moral goal of non-discrimination? In other words, is there not a potential clash of moral principles implicated in the passage of ENDA?

Congressman Barney Frank, another Democrat from Massachusetts, chose to answer Poshard's question differently. He asserted that passage of ENDA should not be interpreted as the *government* mak-

²⁴ Id.

²⁵ Id.

²⁶ Id. at 8-9.

ing *any* moral statement, one way or another, regarding homosexuality. Frank's response went as follows:

When people argue that if the Government bans discrimination against something, it is therefore giving it a stamp of approval, it seems to me to make an argument that conservatives, people who believe in limited Government, should profoundly oppose. . . . There are people who find a lot of things offensive. It should not be argued that there are only two choices, either something is illegal and prohibited and legally disaffirmed or that it is being approved.

I would think conservatives would want to argue for a level of Government on neutrality [T]he Government isn't approving it or disapproving it; it is giving [a] right [to] the individual.

I think conservatives are making a very big mistake saying, anytime we ban discrimination, we are somehow approving something. . . . If we were to say that whatever the Government protects against arbitrary discrimination is therefore being approved by the Government, we would be making a great mistake.²⁷

Frank's theoretical construct, albeit a bit unclear (this was, after all, testimony delivered orally and extemporaneously) appears to be as follows: according to Frank, government should operate on the basis of neutrality. Government has no business passing moral judgments, and, indeed, conservatives who advocate for limited intrusion by government should not hand the authority over to the government to make moral judgments. All government does, under Frank's construct, is pass laws that ensure society operates effectively. At times, these laws take the form of granting rights to, or removing rights from, individuals.

Thus, a government might decide to prohibit a particular activity and to remove the right of an individual to engage in that activity. While presumably this could be conceived as meaning the government disapproves of that activity, the language of disapproval (which sounds like a moral judgment) is misplaced with regard to governmental activity. The law means nothing more, and nothing less, than that the government has decided that society is better off with the activity being made illegal.

The converse, then, is also true with regard to an activity the government decides should not be made illegal, or should not be allowed to serve as a basis for private employer discrimination. It does not follow from such a decision by the government, asserts Frank, that the government "approves" of the activity at issue. To say that every time the government prohibits "arbitrary discrimination" it also necessarily

²⁷ *Id.* at 11-12.

approves of the underlying activity or characteristic being protected, explains Frank, would be a "great mistake."

It may or may not, in fact, be a "great mistake" for laws passed by the government to carry a necessary implication of moral judgment.²⁸ But nowhere does Congressman Frank explain why it is that when government passes a law prohibiting discrimination based on a particular activity, it is illegitimate for the public to assume the legislature has implicitly relied on some moral judgment about that activity. Frank has told us it would be a "great mistake," and apparently a great mistake particularly for "conservatives," if the public were to assume such a thing—but he has not told us *why* it would be wrong for the public to make that assumption.

Certainly, on an intuitive level, Frank's proposition seems disconnected from the reality of the average person. Assume the government legislates that incest is illegal. I would assume an average member of the public would deduce from such an action that members of the legislature believe incest is "bad," that they believe it is important for society to prohibit incest, and that they disapprove of incest. Conversely, assume the government legislates that incest is not only permitted, but that people who practice incest cannot be denied employment opportunities. I would assume an average member of the public would deduce from such an action that members of the legislature believe incest is "o.k." (or legitimate), that they do not believe it is important for society to prohibit incest, and that they disapprove of employers who think the fact that employees commit incest is relevant to employment decisions. Granted, this is not the same as deducing from the law that members of the legislature actively support incest. But it does mean deducing, at a minimum, that government does not believe incest is inherently illegitimate.

A final, alternative answer to Poshard was given by Congressman Tom Campbell, a Republican from California and a former law professor at Stanford University. Campbell responded to Poshard as follows:

Here is how I look at it. There are always laws against religious discrimination in employment. A teacher comes into a public school who might be a Muslim or a Jew or a Christian. It is quite unfair to assume that the presence of such a teacher automatically proselytizes for his or her faith. Indeed, the application of that judgment is unfair except in one wonderful sense: Suppose you are such a wonderful, good person that your students know that, and your students may somehow find out what your religion happens to

²⁸ See Feldblum, *supra* note 14, at 304-12 (examining debate over whether morality should determine the substance of laws enacted by government).

be because it shines forth. That is not proselytization, but it is an experience that a student then has that a person of your particular faith gave to that student, a learning experience.

It would be against the law for a public school teacher to say in class, well, I am a born-again Christian and therefore I am going to use my position as a fifth grade-sixth grade teacher to proselytize for our Lord and Savior; but if it shows by reason of his or her actions, that is all to the good, it seems to me.

Now, you might say homosexuality is not immediately observable; well, neither is religion. . . . [Y]ou should not fear that an end to discrimination will lead to what you and I would consider impermissible proselytization. We have lived with that since 1964. That is the law, except, as I say, in the sense that we educate children to know that there are good, moral people who happen to have a faith different from ours, and in my judgment, good, moral people who happen to have an orientation different from mine. But if somebody uses the position to proselytize, it would be wrong.

I point this out as a practical answer to your concern. Ending discrimination does not lead to proselytization.²⁹

What a fascinating response. Unfortunately, if one unpacks Campbell's answer, one discovers that Campbell has reinforced exactly what Poshard is afraid of—without ever engaging Poshard directly on *why* he is so afraid of the feared result.

Poshard's fear was that passage of ENDA might allow a gay teacher "a greater comfort zone in advocating that the homosexual life-style is on an equal footing with more traditional family structures when that life-style may conflict very directly and deeply with those whose children sit in the classroom."³⁰ Campbell chose to interpret this concern as one of gay teachers actively "proselytizing" the goodness of being gay, much as a born-again Christian might actively proselytize the goodness of accepting Christ as the Savior.

Campbell then reassures Poshard that teachers who proselytize religion can be legitimately dismissed from their jobs, even though Title VII prohibits discrimination based on religion. Similarly, were ENDA to pass and discrimination based on sexual orientation be prohibited, a gay teacher who proselytized for homosexuality could also be dismissed.

Campbell's answer is unsatisfying at several levels. Proselytization of religion by a public school teacher presumably would be illegitimate because of constitutional limitations imposed by the First Amendment—limitations that could not be superseded by a statute

²⁹ House Hearings, *supra* note 16, at 10.

³⁰ *Id.* at 3-4.

passed by Congress. Given the complicating factor of the First Amendment, a better analogy for Campbell's use would have been other characteristics protected by federal civil rights laws, such as race, sex, national origin, disability, or age.

But had Campbell used such other characteristics, his example would have quickly fallen apart. Assume a Hispanic history teacher discussed in the classroom her pride in being Hispanic and the cultural contributions Hispanics have made to American society. Would Campbell have considered that to be inappropriate "proselytization" of Hispanic people that would justify dismissal of the teacher? Unlikely. Or assume a math teacher who used a wheelchair discussed with a group of students the ways in which his mobility impairment had enriched his understanding of how the soul meets physical challenges and how he now considers himself to be "disability proud." Would Campbell consider that to be inappropriate "proselytization" of wheelchair usage? Again, unlikely. And finally, assume an older female music teacher told her students how happy and proud she was to be a woman in today's world where opportunities for women had expanded. Would Campbell consider that to be "proselytization" of women and feminism that would justify dismissal of the teacher? Unlikely.

Presumably, these conversations would all be seen as teachers legitimately sharing with students some perspective on themselves and society. The ordinary meaning of "to proselytize" is to try to convert someone to become something he or she is not. A born-again Christian, a Muslim, a Jew, or a Buddhist might try to actively convince other individuals to accept their respective religions. If they did that, we would legitimately call those actions proselytization. But because there is little or no possibility that students who are not Hispanic, women, or wheelchair users can become members of such groups by choice, we are not likely to characterize comments by teachers who are proud or content with being Hispanic, female, or a wheelchair user as proselytization. In the same manner, it would seem inappropriate to characterize a gay teacher who states he or she is happy or content to be gay as engaging in proselytization of homosexuality.³¹

³¹ Some opponents of ENDA, of course, might believe it is possible to convert heterosexual students to become gay, and therefore that inappropriate proselytization by gay teachers is theoretically possible. But Poshard was not expressing such a concern. Poshard might well accept the scientifically accepted consensus that young adults do not actively choose their sexual orientations, and, therefore, that it is very unlikely that heterosexual individuals will become gay or gay individuals heterosexual. See generally Chandler Burr, *A Separate Creation: The Search for the Biological Origins of Sexual Orientation* (1996).

While Campbell's transformation of Poshard's question into one concerning proselytization was an interesting sleight of hand, I am not sure it advanced the real conversation. Poshard's stated concern was that ENDA might allow a gay teacher to "advocate that the homosexual life-style is on an equal footing with more traditional family structures."³² Poshard's concern with such advocacy was that families might then be forced to have their children exposed to a moral viewpoint about society that was different from their own.

Campbell's answer was, nonetheless, accurate in one respect. He correctly anticipated that few gay teachers would actively "advocate" that a gay committed relationship is on an equal footing with a traditional marriage. But students do not learn solely through hearing words. Notice this part of Campbell's response:

Suppose you are such a wonderful, good person, that your students know that, and your students may somehow find out what your religion happens to be because it shines forth. That is . . . an experience that a student then has that a person of your particular faith gave to that student, a learning experience.³³

Presumably, the same experience may occur for students with a gay teacher. The teacher may not "advocate" anything about gay relationships. But the students may know, for example, that their history teacher Sally has lived with her partner Ruth for fifteen years, just like their English teacher Sam has lived with his wife Rebecca for fifteen years. The students may have met both Ruth and Rebecca on various field trips. The students may know Sally as a smart, funny, caring, ethical, happy person—and a great teacher. Without "advocating" anything, Sally will have conveyed to her students that it is possible to be a happy, ethical, caring—and gay—person.

This fact does not pose a problem for Campbell. As he noted: "[W]e educate children to know that there are good, moral people who happen to have a faith different from ours, and in my judgment, good, moral people who happen to have an orientation different from mine."³⁴ But is that not, in essence, exactly Poshard's concern? What if families want to educate their children that one cannot be both gay and a good, moral, happy, contented person?

None of the witnesses, to my mind, ever answered this question directly. In the rhetoric of the debate, no person acknowledged that ENDA could mean that an employee—through simply being allowed to go about his or her business as an openly gay person, a happy per-

³² House Hearings, *supra* note 16, at 3-4.

³³ *Id.* at 10.

³⁴ *Id.*

son, a moral person, a person in a committed long-term relationship—might challenge conventional societal beliefs that gay people are promiscuous, unhappy, suffering from emotional wounds, or simply inherently immoral. And no one acknowledged the possibility that passage of ENDA by the legislature meant the legislature was sending a message that such societal beliefs about gay people are legitimately challenged.

Many gay rights advocates in the political arena would cringe at the idea of such acknowledgments. This is not because they agree with negative societal beliefs about gay people and gay sexual conduct. But they fear that directly challenging such beliefs might undermine passage of the law. Is it not better, they would argue, to simply assert that ENDA is about “fairness,” about a simple rule-shift in employment law? If there is to be a culture-shift in societal beliefs, why not let that occur as a natural outgrowth of the law?

Why not indeed? This is not an easy question. Perhaps advocates should continue to answer the type of question posed by Poshard with the type of answers given by Representatives Morella, Studds, Frank, and Campbell. Certainly a majority of the public, when polled, say they believe people should not be fired from their jobs simply because of their sexual orientation.³⁵ The reason for the public’s stance seems to be a belief in a basic principle of fairness, so why push the debate further?

Ultimately, I think there are reasons to push the debate. Perhaps Congressman Poshard felt his concerns were adequately addressed by the answers he received. But he might have felt the responses sidestepped the moral dilemma he had expressed. What do we lose, and indeed what might we gain, if we answered Poshard’s question with a response that acknowledged his moral dilemma, but then challenged him on the legitimacy of the moral views that gave rise to the dilemma in the first place?

Such a dialogue would require Poshard to explain the moral grounds that make it inappropriate for the government to pass a law that sends a message that an individual who has a physical, emotional, and sexual relationship with a person of the same gender can also be a moral, happy, and contented individual. If Poshard were to answer that religious mandates preclude the government from sending such a message, or acting on such a premise about gay people, the dialogue

³⁵ See The Tarrance Group & Lake Sosin Snell & Assocs., *Americans Strongly Support the Employment Non-Discrimination Act (ENDA) and Equal Job Opportunities for Gay and Lesbian People 1-2* (Apr. 14, 1997) (on file with author) (reporting that 80% of voters agree that homosexuals should have equal rights in terms of job opportunities).

might be truncated, albeit still possible.³⁶ But it is more likely that Poshard would acknowledge that public policy determinations must be justified by secular concerns regarding the moral fabric of society and not simply by religious mandates.³⁷

Once we agree that the relevant framework is one of secular concerns regarding the moral fabric of society, I believe a strong case can be made that passage of ENDA is consistent with a strong moral fabric. Making such a case would require taking seriously the range of moral concerns that have been raised by opponents of gay rights, subjecting those concerns to rigorous analysis, and determining whether those concerns are justified under secular, moral principles.

The range of possible moral arguments against gay rights was well represented at a three-day conference on "Homosexuality and American Public Life," sponsored by the American Public Philosophy Institute (APPI) in June 1997. These arguments include claims about the inherent good of male-female unions in a marital context,³⁸ fears of gender nonconformity,³⁹ and analogues between homosexuality and developmental disabilities and alcoholism.⁴⁰ Simply starting a dialogue that took such concerns seriously, and then challenged them rigorously, would result in a very different rhetoric around ENDA than currently exists.⁴¹

³⁶ The dialogue would not be nonexistent, but it would require resort to the books and analyses that discuss why the religions that hold this viewpoint should reconsider their views. See, e.g., Robert Nugent & Jeannine Gramick, *Building Bridges: Gay & Lesbian Reality and the Catholic Church* (1992); *Peculiar People: Mormons and Same-Sex Orientation* (Ron Schow et al. eds., 1991); John Shelby Spong, *Living in Sin? A Bishop Rethinks Human Sexuality* (1988); Thomas Thurston, *Homosexuality and Roman Catholic Ethics* (1996); *Voices of Hope* (Jeannine Gramick & Robert Nugent eds., 1995).

³⁷ Indeed, most opponents of gay rights make a point of claiming that the moral reasons for their opposition are justified on secular concerns. See Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 *Geo. L.J.* 261, 262 (1995) (describing conservative arguments against homosexuality). Indeed, given Establishment Clause concerns, such an assertion would seem essential.

³⁸ See, e.g., Robert George, *Contemporary Natural Law Theory and Homosexuality*, Address at the APPI Conference on "Homosexuality and American Public Life" (June 20, 1997) (audio tape on file with author).

³⁹ See, e.g., George Rekers, *The Causes of Homosexuality, and Some Notes on Prevention*, Address at the APPI Conference on "Homosexuality and American Public Life" (June 19, 1997) (audio tape on file with author).

⁴⁰ See, e.g., Joseph Nicolosi, *Homosexuality as a Developmental Disorder*, Address at the APPI Conference on "Homosexuality and American Public Life" (June 19, 1997) (audio tape on file with author); Christopher Wolfe, *Developing a Sound and Effective Rhetoric on Homosexuality*, Address at the APPI Conference on "Homosexuality and American Public Life" (June 21, 1997) (audio tape on file with author).

⁴¹ I began an effort to make the affirmative case for the moral good of a gay rights law in Feldblum, *supra* note 14. I did not, however, analyze in that article the range of moral arguments against such laws that was represented at the APPI conference. While space

What would we gain from having such a dialogue? I believe we would gain a more honest and forthright conversation about why a gay person who has consensual sex with an adult person of the same gender is acting as legitimately, under moral principles, as a heterosexual person who has consensual sex with an adult person of the opposite gender. Justifying the normative moral equality of gay and heterosexual sex seems to me essential to justifying the legitimacy of a public policy that refuses to draw distinctions between heterosexual and gay individuals and couples. Yet many gay rights advocates go to great lengths to avoid making this normative claim. Instead, some in the judicial arena applaud distinctions by courts between "being gay" and "engaging in gay sexual conduct,"⁴² and others in the legislative arena retreat behind principles of "fairness" and "equality of opportunity" whenever anyone wants to talk about the immorality of gay sexual conduct.

What might we lose by engaging in an explicit dialogue about the morality of same-sex sexual conduct? Some might believe, as a matter of political philosophy, that governmental actions should never be justified by or based on principles of morality, and therefore even inviting such a dialogue is wholly inappropriate.⁴³ Others might believe, as a matter of political pragmatism, that it is ludicrous to invite such a conversation because the American public is ready for a law such as ENDA but is not ready to accept the moral equivalence of gay sexual conduct and heterosexual sexual conduct.

I do not think we know yet the answer to the real pragmatic costs and benefits of avoiding such a dialogue. And I have serious doubts about the credibility of a political philosophy that depends on an absolute separation between government and morality. After reading Tom Stoddard's Essay, I am left thinking: perhaps to achieve the culture-

limitations preclude me from subjecting those arguments to a critical analysis in this Essay, I plan to undertake that enterprise in an upcoming article or book.

⁴² See, e.g., *Meinhold v. Department of Defense*, 34 F.3d 1469, 1478-80 (9th Cir. 1993) (finding that Meinhold's statement, "I am in fact gay," does not express a desire to engage in homosexual acts); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 920 (W.D. Wa. 1994) ("The Court concludes that plaintiff's acknowledgement of her lesbian orientation itself is not reliable evidence of her desire or propensity to engage in homosexual conduct."); *Steffan v. Perry*, 41 F.3d 677, 710-12 (D.C. Cir. 1994) (en banc) (Wald, J., dissenting); cf. *Able v. United States*, No. 94CV0974, 1997 WL 369504, at *8 (E.D.N.Y. July 2, 1997) (rejecting the status-conduct distinction). The status-conduct distinction has also been used in the political arena, most notably by President Clinton in his embrace of a policy for the service of gay people in the military that rests entirely on a distinction between tolerance of some amorphous gay identity and nontolerance of actual or desired gay sexual conduct. See *Able*, 1997 WL 369504, at *1.

⁴³ See, e.g., H.L.A. Hart, *Law, Liberty and Morality* (1963). Congressman Frank appeared to endorse this political philosophy in his response to Congressman Poshard.

shift Tom worked so passionately for in his life, those of us who wish to continue his legacy must alter the rhetoric of the legislative arena in a manner that finally begins to claim the moral legitimacy of gay sex.