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Civil Rights Under Attack By the Military

Sylvia Law*

Professor Harlon Dalton of Yale spoke at Washington University a few weeks ago on Martin Luther King Day. He shared his passion about the evil of persistent racial discrimination and the fatigue in the community of people concerned with Dr. King's vision of racial equality. I share Professor Dalton's concerns. The fatigue in the community of people concerned with the discrimination of gay people in the military, however, is even greater.

Like Professor Dalton, I began my professional and political life animated by outrage against racial discrimination. As I matured, my concern extended to outrage at discrimination against the poor, women, people with disabilities, and gay people. As a result, I specialize in exploring the similarities and differences in these forms of discrimination. I discovered that each form of discrimination is grounded in and inspired by the struggle for racial equality. The slogan: "Gay/straight, black/white, same struggle/same fight" captures the idea.

A current area for engagement on gay rights issues is the resistance to the Department of Defense's effort to force schools and universities to abandon non-discrimination policies and accommodate military recruiters.

First, I will describe the issues surrounding the discrimination against gay people in a larger social and legal context. Second, I will discuss the recent changes in federal policies in relation to federal funding for universities and federal coercion to pressure universities to abandon anti-discrimination policies. Finally, I will describe the range of responses either considered or adopted in schools around the country.

For centuries, most gay men and lesbian women silently accepted

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and internalized state and cultural condemnation, just as women historically accepted exclusion from and subservience in public and economic life, as well as state control of their reproductive capacity. Then, in the late 1970s, many women and gay people asserted “rights” to sexual expression and an affirmative cultural identity. Women and gay people appeal to venerable liberal values of individual liberty and equal personhood.¹

The gay liberation movement found much to protest. Many states made it a crime for consenting gay adults to engage in sexual practices that are both common and legal when done by a man and a woman. For example, in 1986, the Supreme Court, in its infamous decision in *Bowers v. Hardwick*, rejected a challenge to a Georgia criminal law punishing gay sexual activity.² Validation of that criminal law sanction encourages other, more pervasive, forms of disapprobation of gay people. For example, criminal condemnation supports legal rules that shatter the familial relations of gay people. Gay people are at special risk in relation to child custody, visitation, and adoption. Most states prohibit people of the same sex to marry, whatever the depth or duration of their personal commitment to one another.³ Further, Congress declared that if a state recognized gay marriage, the federal government would not follow its normal policy of looking to state law to determine who is married for federal purposes, such as taxes and social security.⁴ Violence targeted at gay people is epidemic and, in many places, police do not treat it seriously.⁵ Employment discrimination against gay people, both in hiring and in benefits, is widespread and is not prohibited by Title

1. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. REV. 187 (1988).

2. *Bowers v. Hardwick*, 478 U.S. 186, 190-96 (1986).

3. JUDITH AREEN, FAMILY LAW 42 (4th ed. 1999); see also D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW, 180-82 (Aspen Law & Business 1998) [hereinafter WEISBERG & APPLETON]. Vermont, however, adopted An Act Relating to Civil Unions in 2000 recognizing civil unions between gay and lesbian couples. 2000 Vt. Acts & Resolves 91.

4. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

5. A REPORT OF THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, TRANSGENDER AND BIXSEXUAL VIOLENCE IN 2000 1-3, 12-22 (preliminary ed. 2001); HUMAN RIGHTS WATCH, WORLD REPORT 2001, available at <http://www.hrw.org/wr2k1/usa/index.html> (last visited Dec. 16, 2001).

VII of the Federal Civil Rights Act.⁶ Few openly gay people are legislators, judges, or high government officials.⁷

At the same time, the past decades have seen remarkable victories in the struggle against discrimination on the basis of sexual orientation. Several states, dozens of localities, and hundreds of companies adopted policies prohibiting employment discrimination on the basis of sexual orientation and extended benefits to straight and gay domestic partners.⁸ President Clinton issued an Executive Order prohibiting discrimination against gay people in federal employment, except in the military.⁹ In family law, I think that equality for gay parents is accepted as the rule rather than the exception.¹⁰ Most striking are changes in the general culture. Last year, for the first time, an openly gay person spoke at the Republican National Convention. Vice President Cheney and Senator Liberman discussed the need for tolerance and inclusion in their Vice-Presidential debate. The 2001 presidential inauguration included a breakfast for gay Republicans, at which the conservative former Senator Alan Simpson said, “[n]ot one of us doesn’t have someone close to us who is gay or lesbian.”¹¹ These examples show progress for the gay rights movement.

In light of the foregoing, the military stands out as an anomaly as it pursues an open, explicit policy of discrimination on the basis of sexual orientation. The “don’t ask, don’t tell” policy adopted by the Clinton administration in 1996 has been a disaster. Even though official U.S. policy condemns harassment of military personnel who are gay, or suspected to be gay, the failure of military leaders to

6. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 231-38 (1999).

7. The National Gay and Lesbian Task Force reports that in September 2001, Michael Guest became the first openly gay person to be confirmed by the Senate as a U.S. Ambassador, and the second openly gay person to be appointed by George W. Bush. Press Release, National Gay and Lesbian Task Force, Bush Appoints Openly Gay Man as U.S. Ambassador to Romania (Sept. 25, 2001) *available at* <http://ngltf.org/news/printed.cfm?releaseID=417>.

8. WEISBERG & APPLETON, *supra* note 3, at 56-57; Eskridge, *supra* note 3, at 356-61.

9. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

10. WEISBERG & APPLETON, *supra* note 3, at 830-32. In child custody disputes involving gay and lesbian people “the emerging consensus” will deny custody “only on proof that the parent’s sexual orientation has, or will have, an adverse impact on the child.” *Id.* at 830-31.

11. Elizabeth Becker, *Wariness and Optimism Vie as Gays View New President*, N.Y. TIMES, Jan. 25, 2001, at A1.

enforce the policy has produced “a pervasive and hostile anti-gay climate within each of the services.”¹² While some lower courts held that the “don’t ask don’t tell” policy violates basic principles of both equality and free expression, eventually courts rejected constitutional challenges.¹³

Let me turn to the history of anti-discrimination policy and military recruiters. In 1978, New York University School of Law (N.Y.U. Law) became the first in the United States to deny access to placement services for employers who openly discriminate on the basis of sexual orientation (1978 policy).¹⁴

N.Y.U. Law is committed to a policy of equal treatment of its faculty, students, and staff members, without regard to sex, sexual orientation, marital or parental status, race, color, religion, national origin, age, or handicap. The facilities of N.Y.U. Law placement offices are not available to employers whose practices are inconsistent with that policy.

The 1978 policy was adopted despite the vigorous opposition of the N.Y.U. University Senate and Office of General Counsel. In a pattern that is common around the country, the University condemned discrimination, including discrimination on the basis of sexual orientation, within the University. The University, however, believed that it was not administratively feasible to apply the non-discrimination policy to external actors who use university facilities and services. Further, the University asserted that it, rather than the law school faculty, had authority to control the N.Y.U. Law placement office policies and practices. Nonetheless, the law school faculty adopted the 1978 policy over the University’s objections.¹⁵

In the 1980s, a number of law schools adopted similar anti-

12. See STACEY L. SOBEL ET AL., CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS,” 101 *at* www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/256.pdf (last visited Mar. 15, 2001), for the most recent data. A modest reduction in the number of “Don’t Harass” violations occurred in 1999-2000. *Id.*

13. JANET HALLEY, DON’T: A READERS GUIDE TO THE MILITARY’S ANTI-GAY POLICY 40-56 (1999).

14. E-mail from Dean John Sexton, to New York University Law School faculty (Sept. 28, 2001) (on file with author).

15. Gabriel Ross, *JAG Recruiter Here Oct. 16*, N.Y.U. L. SCH. COMMENTATOR, Oct. 4, 2000, at A1.

discrimination policies. In 1990, the American Association of Law Schools (AALS) voted unanimously to add “sexual orientation” to the list of protected categories under the AALS’s nondiscrimination policies. Consistent with this practice, the AALS required accredited law schools to give notice to employers seeking use of the law school placement office that they are precluded from using the school’s placement office if they discriminate based upon sexual orientation or any other of the protected categories.¹⁶

In 1995, Congress enacted the Solomon Amendment, denying funding from the Department of Defense to institutions of higher education that prevented military recruitment on campus. The Solomon Amendment provides:

[n]o funds . . . may be provided by contract or by grant . . . to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents [military recruitment on campus].¹⁷

The Solomon Amendment posed no problem for law schools or the AALS. The Department of Defense interpreted the quoted language to mean that if a sub-element of a university, for example, the law school, denied access to military recruiters, then only the sub-element and not the entire institution would lose Department of Defense funding (Sub-element Rule).¹⁸ Law schools generally do not benefit from grants or contracts from the Defense Department—so it seemed law schools would remain unaffected.

In 1997, Congress extended the rule denying federal funds to sub-elements of universities that denied access to military recruiters to grants and contracts provided by the Departments of Labor, Health

16. Memorandum 91-28 from Betsy Levin, Executive Vice President and Executive Director of the Association of American Law Schools, to Deans of Member Schools and Assistant Deans or Directors of Career Services Offices (Mar. 25, 1991) (regarding “Implementation of AALS Bylaw Section 6-4(b) and Executive Committee Regulation 6.19”).

17. 10 U.S.C. § 983(b) (1994).

18. Sub-element Rule, 61 Fed. Reg. 7739, 7740 (Feb. 29, 1996).

and Human Services, Education, and Transportation.¹⁹ In contrast to the Sub-element Rule, this modification affected law schools because it threatened to deny law students some forms of student financial aid. In 1997, the AALS stated that because

some schools would find it extremely difficult to forgo these funds, it has decided to excuse non-compliance with the anti-discrimination policy only for military recruiters, as long as a school provides ‘amelioration’ in a form that both expresses publicly the law schools’ disapproval of the discrimination against gays and lesbians by the military and provides a safe and protective atmosphere for gay and lesbian students.²⁰

N.Y.U. Law responded to this new rule by reaffirming the 1978 policy. Even though the AALS permitted N.Y.U. Law to allow discriminatory military recruiters, N.Y.U. Law decided not to allow them. N.Y.U. Law recognized that the consequence of its continued commitment to non-discrimination was the loss of some federal funding including Perkins Loan Funds and work study funds, totaling approximately \$75,000 a year.²¹ As a result of the Sub-element Rule, N.Y.U. Law’s decision to prioritize principle over money did not impact the University as a whole. In contrast, other law schools with tighter budgets, abandoned their commitment to anti-discrimination and allowed the military to recruit.²²

In the fall of 1999, Congress passed a bill introduced by openly gay member, Barney Frank of Massachusetts, and co-sponsored by Tom Campbell of California, providing that the Solomon Amendment penalties do not apply to funds “available solely for student financial assistance or related administrative costs” (Frank-Campbell Amendment).²³ In response to the Frank-Campbell

19. The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009-233, 3009-270 (1996).

20. Memorandum 96-15 from Carl Monk, Executive Vice President and Executive Director of the Association of American Law Schools, to Deans of member and fee-paid schools (May 28, 1996).

21. Rose Payyapii, *Law School Sacrifices Funding for Morals*, WASH. SQ. NEWS, Oct. 7, 1998, at A1; see Ross, *supra* note 15.

22. Rose Payyapii, *Law School Sacrifices Funding for Morals*, WASH. SQ. NEWS, Oct. 7, 1998, at A1.

23. Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, 113 Stat.

Amendment, the AALS reinstated its policy requiring that accredited schools prohibit discriminatory employers, including the military, from using law school placement office facilities and services.²⁴ Hundreds of people in dozens of law schools worked hard for this 1999 amendment that allowed all law schools to return to their anti-discrimination policies. Consequently, at the January 2000 AALS meeting this victory caused great jubilation.

In the fall of 1999, however, the Senate Armed Services Committee opposed the Frank-Campbell Amendment.²⁵ It urged Congress to change the law to deny Department of Defense funding to an entire university even if only a sub-element of the university denied access to military recruiters. Neither house adopted such a change in the federal statute.²⁶

Nonetheless, on January 13, 2000, the Department of Defense adopted interim regulations, *effective immediately*, to define an “institution of higher education” to include “all sub-elements of such an institution,” thereby eliminating the pre-existing policy that treated schools and colleges within a university as independent actors for purposes of determining whether financial sanctions were applicable to universities at which one school or college excluded military recruiters.²⁷ The AALS again suspended their policy requiring that member schools bar discriminatory employers, including the military.²⁸

In response to the foregoing regulations, law schools are presented with a range of responses to this new policy. These responses fall into three categories: “just say no”; “go to court”; and “engage in struggle on the ground.”

1260 (1999).

24. Memorandum 00-02 from Carl C. Monk, Executive Vice President and Executive Director of the Association of American Law Schools, to Deans of member and fee-paid schools (Jan. 24, 2000) (concerning “Executive Committee Policy Regarding ‘Solomon Amendment’”).

25. S. REP. NO. 106-05 (2000); *see also infra* note 24.

26. H.R. REP. NO. 106-301 (1999).

27. Defense Federal Acquisition Regulation Supplement: Institutions of Higher Education, 65 Fed. Reg. 2,056 (Jan. 13, 2000).

28. Memorandum 00-6 from Carl Monk, Executive Vice President and Executive Director of the Association of American Law Schools, to Deans of member and fee-paid schools (Feb. 9, 2000) (concerning the “Suspension of Recent Executive Committee Policy Regarding ‘Solomon Amendment’”).

First, we could just say no. This response is demonstrated well by an analogy to a recent experience in an unrelated area. George W. Bush's first official act reinstated a rule that prohibited international family planning organizations that also provided legal abortion services with private funds from receiving federal funds designated for contraceptive services.²⁹ The press falsely described this policy as ending U.S. funding for abortion.³⁰ In fact, the United States has long refused to fund abortions either at home or abroad.³¹ Rather, George W. Bush's policy made clear to international family planning organizations that if they provide legal abortions with private funds, they may not receive U.S. foreign aid for contraception.³² All of the major international family planning organizations just said no. While they desperately need U.S. aid for contraception, as a matter of principle, they are not willing to abandon their commitment to also provide abortion services, with private funds where legal.³³

Similarly, law schools can choose to "just say no" to the Department of Defense's demand to abandon anti-discrimination principles. This refusal would be significantly easier for schools like Vermont or Brooklyn that are not part of a university and hence do not receive significant federal funds, apart from the direct student aid that is protected by the Frank-Campbell Amendment. In schools that are part of a university, the university warns the law school that the financial cost of a law school commitment to anti-discrimination will be unfairly born by others. This argument has power, and therefore,

29. On January 22, 2001, President George W. Bush issued a memorandum to the Administrator of USAID instructing him to deny federal funds for contraception to international family planning organizations that provide abortions with private funds. 66 Fed. Reg. 17,309 (Mar. 28, 2001); Daniel E. Pellgrom, *A Deadly Global Gag Rule*, N.Y. TIMES, Jan. 27, 2001, at A1 (revealing that on President Bush's second day in office, he issued an executive order denying family planning funds that advocate or provide abortions with private funding).

30. Robin Toner, *Critics Seek to Overturn Abortion Rule*, N.Y. TIMES, Feb. 16, 2001, at A1.

31. The Helms Amendment of 1973 prohibits the use of USAID or international development funds to pay for abortions. 22 U.S.C. § 2151(f) (1988). On domestic funding, see *Harris v. McRae*, 448 U.S. 297 (1980) (approving the Hyde Amendment providing that no federal funds shall be spent for abortion).

32. The federal district court dismissed a challenge to the global gag rule. *Ctr. for Reprod. Law and Policy v. Bush*, No. 01 Civ. 4986, 2001 U.S. Dist. LEXIS 10903 (S.D.N.Y. July 31, 2001). This case is now on appeal before the Second Circuit.

33. Melanie Conklin, *The Gag Rule's Victims; Health Issues and Women in Nepal*, THE PROGRESSIVE, Aug. 1, 2001, at 23.

the majority of law schools are reluctant to follow Vermont's lead.

Consequently, there is another way in which law schools may "just say no."³⁴ The federal government funds universities to research specific things. Realistically, the government probably does not want to deny major research universities the capacity to do vital work to enforce its commitment to discrimination against gay's in the military. The government could, of course, redirect funds from Washington University or N.Y.U. to Harvard or Stanford. On the other hand, what if a group of law schools in leading research universities said, "We pledge to just say no to discriminatory military recruiters at the point when six or ten law schools in leading research universities have done so?" The details of such a plan would need work. Perhaps, it raises antitrust problems, but it is an idea worth exploring.

Second, we could go to court and challenge the new regulations. The AALS, the American Council on Education, and the American Association of State Colleges and Universities submitted comments to the Department of Defense arguing that the regulations are illegal on two grounds.³⁵

First, the Administrative Procedure Act (APA) ordinarily requires federal agencies to provide a notice of proposed rulemaking, an opportunity for public comment, and a statement of the basis and purpose for the rule.³⁶ In the instant case, the Secretary of Defense determined "that *urgent and compelling* reasons exist to publish this interim rule prior to affording the public an opportunity to comment."³⁷ While the APA does provide for a "good cause" exemption from the notice and comment requirements, none of the situations covered by the "good cause" exemption is present in this case.³⁸ Second, the regulation is a radical revision of a long accepted

34. I am indebted to Professor Jane Aiken at Washington University School of Law for this idea.

35. Memorandum 00-11 from Carl Monk, Executive Vice President and Executive Director of the Association of American Law Schools, to Deans of member and fee-paid schools (Mar. 20, 2000) (concerning "AALS Comments on Interim Solomon Amendment Regulations").

36. *Id.* at 9.

37. *Id.* at 10.

38. *Id.* at 10-11.

understanding of the meaning of statutory language, and hence, not authorized by the statute.³⁹ While neither of these arguments guarantees success, both provide for a strong and colorable legal claim.

There are several responses to the suggestion that the regulations should be challenged in court. First, even if the APA claim succeeded in court, the Department of Defense could simply reissue the regulations after opportunity for comment. The same is true whenever affected parties file claims under the APA. Nonetheless, people often challenge illegally promulgated regulations. Victory opens the door to a new and open regulatory and political process.

Second, even if a court held that the regulations were not authorized by the current statute, Congress could amend the statute to authorize the regulations. This option is true whenever a lawyer brings a claim arguing that a regulation or an administrative practice is not authorized by statute. We bring these claims frequently, and sometimes, the legislature amends the statute to authorize the challenged policy.

Third, a school that chooses to file suit may put their programs at risk of retaliation. This risk is not persuasive. First, a wise lawyer would seek, and probably get, a preliminary injunction at the time a suit was filed, thereby protecting her client from retaliation while the suit is pending. This tactic is standard operating procedure. After all, a welfare-rights lawyer cannot assure clients that they will win at the end of the day, but she can promise that the court will prohibit the government from retaliating against individuals who raise legal claims. Second, if the AALS filed a suit on behalf of its member schools, the claim might have greater political clout and little risk of retaliation. Alternatively, similarly situated law schools may opt to file suit jointly.

A fourth response to the suggestion that law schools should file a suit involves a number of practical considerations of university politics and litigation costs. The pattern I noted in relation to N.Y.U. Law, that the law school policy prohibiting discriminatory recruiters is much stronger than comparable university policy, is common

39. *Id.* at 12-18.

throughout the United States. I believe that the AALS is the only professional accreditation organization that prohibits the use of facilities by recruiters who discriminate on the basis of sexual orientation. University officials, understandably, are more concerned with avoiding risks to federal grants. Relations between universities and law schools are complex, and there is interest on both sides in avoiding unnecessary conflicts.

Finally, litigation costs money, time, and resources. If it is the case that a court would find these regulations illegal, it seems tragic that the regulations would be allowed to control, simply because no one had the courage or resources to challenge them.

Further, there are another set of legal challenges to the regulations that a new regulation or statute could not reverse easily. That challenge is a constitutional claim. The AALS comments did not suggest that the regulations were unconstitutional. Some cases have affirmed that the government is free to condition the availability of federal funds on the sacrifice of what would otherwise be constitutionally protected rights. For example, in *Rust v. Sullivan*, the Supreme Court held that doctors working in federally funded family planning clinics could be ordered to say nothing in response to a patient's request for information about abortion.⁴⁰ Recently, however, in *Legal Services Corp. v. Velazquez*, the Court found similar gag rules imposed on legal services lawyers illegal.⁴¹ Consequently, *Velazquez* may provide a basis for creating a constitutional challenge to the Department of Defense regulations.

Obviously, this course entails many costs, both in terms of the law school relationship with the university and the emotional, administrative, and financial burdens of litigation. If the faculty wishes to explore this alternative, it would be wise to obtain more comprehensive and unbiased advice about the strength of the claim that the regulations are illegal. This discussion is based on the analysis of the AALS, a group long committed to promoting non-discrimination and barring recruiters who discriminate from law

40. *Rust v. Sullivan*, 500 U.S. 173 (1991).

41. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547-49 (2001) (holding 5-4 that funding restrictions prohibiting legal services lawyers from challenging the legality of welfare policies violates the First Amendment).

school facilities.

At present, most law schools decided to comply with the regulations. Under the AALS accreditation standards, schools remain obligated to take steps to ameliorate the damage to those protected by the non-discrimination policy. Therefore, a third response at law schools is to “engage in the struggle on the ground.”

Some schools limit the days in which the military is allowed to come on campus to recruit. This limitation facilitates the organization of amelioration programs by the administration and protests by students. It also minimizes the disruption caused by military recruiters.

Furthermore, the AALS suggests that schools should post notices that military practices are inconsistent with the school’s non-discrimination policy. N.Y.U. Law includes such notices on all e-mails and general announcements from the placement office.

Moreover, some of the most effective means of amelioration come, not from the administration, but from the students. At N.Y.U. Law two military recruiters scheduled on-campus interviews. On Monday, October 16, 2000, for the first time in twenty-two years, the N.Y.U. Law School placement office allowed one of these recruiters access to the facilities.⁴² In protest, gay and lesbian students signed up for all of the interview slots. Some used the opportunity to discuss issues with the recruiter. One woman painted her toe nails and said nothing, others interviewed “straight.” A couple hundred people, gay and straight, demonstrated and spoke about the issues outside the interview room. The day’s events received wide coverage in the media.

When the second military recruiter scheduled to interview, student leaders urged a boycott. No one signed up. The JAG recruiter cancelled his visit and the school celebrated. For the gay and lesbian students, this scheme was a tough strategic choice. Should the recruiter’s visit be an opportunity to boycott or an opportunity for mobilization and education? There is also the possibility that an attempted boycott will fail.

42. Karen W. Arenson, *After 22 Years, N.Y.U. Allows an Army Recruiter to Visit*, N.Y. TIMES, Oct. 17, 2000, at B8.

The law school faculty and administration can support such student led amelioration efforts. Most importantly, lines of communication must be open between student leaders and placement office staff. On the one hand, students obviously have a right to speak and organize, within the confines of school time, place, and manner restrictions. On the other hand, the law school administration has an important interest in providing security and access to the recruiter and minimizing disruption to other law school activities.

After the huge and successful fight to win Congressional passage of the Frank-Campbell Amendment in 1999, many people in the leadership of American legal education appear to be tired of the Solomon Amendment. We are discouraged that the political climate in Washington is even less receptive than it was before January 2001. There is a sense of despair and hopelessness. Just as the bus boycott and the sit-in movement were vital in sparking action in Congress and the courts in the 1960s, I believe that the most important factor in changing a national sense of apathy is a grass roots effort from students to establish that coerced discrimination against gay people is unacceptable and will not be tolerated.

