

Clarifying the Muddled Message

To the Editor:

Thank you for running a front-page story about the teach-in on September 30th about the Solomon Amendment. It is really sad that we still have such blatant, explicit government-mandated discrimination in the military against those of us who are openly lesbian, gay, bisexual, or transgendered (LGBT).

But your reporter misunderstood my statement about the Georgetown administration's message being muddled. I said at the teach-in (and I continue to believe) that we have an incredibly supportive administration and faculty on a range of LGBT issues, including disgust and outrage over the military's ban on openly gay service members. Indeed, I can't think of a school I would rather teach at as an openly lesbian professor.

At the same time, I understand the desire of students to see more administrators and faculty at these protest events. I also think they are correct to ask that the administration and/or faculty members themselves organize an event on the day the military comes to recruit. And it precisely because of the strong personal support of our administration and faculty that I believe such changes could happen next year if we ask for them.

But no matter how strongly our administrators and faculty members express their support of non-discrimination based on sexual orientation, that message will necessarily be muddled as long as the administration permits the military to recruit on campus together with all other employers. That is because the law school administration and faculty have not chosen to ask the main campus to forfeit thousands of dollars of federal funding in order to stand up for the principle of non-discrimination based on sexual orientation.

As I said at the teach-in, I believe that is the correct choice. There are several faculty members who believe we should "stand on principle" and suffer the loss of federal funds. I am not one of them.

I believe our society is at a different place right now with regard to discrimination based on race, religion and gender as compared to discrimination based on sexual orientation and transgender status. It is still "more ok" for the military to reject for service a lesbian who is honest about her sexual orientation -- in a way that it would no longer be acceptable for the military to reject for service a Jew who is honest about his religion, or a woman or an African-American who cannot hide his or her gender or race.

That's the reality. I wish it were different. It is a reality that makes me both sad and furious. And it is because of that reality that we have a ban on openly gay

service members to begin with. I don't think this country would ever stand for a similar ban on the basis of race and certain religions today.

That reality is also why I don't think we will ever have schools "standing on principle" and forgoing millions of dollars of federal funds because the military discriminates against gay people.

But my reaction to this reality is not to demand something I know I won't get. My preference is to turn my time and resources to changing the outside cultural landscape -- so that we can achieve a new social norm in which discrimination on the basis of sexual orientation will be considered as objectionable as discrimination based on race.

But we should not lose sight of the important legal point here. The school's *speech* (in which the school has pronounced that discrimination on the basis of sexual orientation will not be countenanced) *has* been "muddied" by the school's position of taking federal funds instead of banning military recruiters. Indeed, that is the basis of the First Amendment claim being made in *FAIR v. Rumsfeld* on behalf of law schools and law faculties. Our argument is that as long as the coercive arm of the federal government makes standing up for the principle of non-discrimination on the basis of sexual orientation incredibly costly, and as long as schools succumb to that huge financial cost by allowing military recruiters on campus – any statement (speech) by the school about the importance of non-discrimination against gay people will necessarily be muddied and harder to believe. (By the way, GULC is not a party to this suit. The GULC faculty voted to join FAIR, a membership organization of law school and law faculties. FAIR, the membership organization, is the party to the suit.)

The district court judge in the FAIR case did not buy our First Amendment argument. He ruled that law schools' messages about non-discrimination were still coming through just fine because the message of non-discrimination was "at the heart of the annual controversy, and [was] therefore re-played and re-endorsed every time there is a controversy on any law school campus." So, according to the district court judge, events like our teach-in were sufficient to counteract any dilution of the school's speech and message about non-discrimination.

Well, it doesn't feel that way to many students. They clearly experience GULC's message of non-discrimination on the basis of sexual orientation as a bit hard to believe given the reality of military recruitment. The fact that I told them I thought our administration and faculty really cared about LGBT issues can only go so far. And I can't fault them for that.

The answer, in my view, is to go to the source. We need every LGBT person to be open and honest and clear about who he/she is (including if she's gone from a "he" to a "she" or if she dresses more like a "she" while remaining a "he"). We

need to start changing people's minds and people's hearts. We need people to be outraged at the small and large ways in which LGBT people are harmed, demeaned, harassed, and not valued in our society today. If you're not sure how this is still happening in today's world, just ask one of your LGBT friends. I am sure they will give you examples. And if you don't have any LGBT friends (that you know of), I hope you make a point of finding some. There is an unfinished civil rights struggle in this country for LGBT people, and anyone who cares about justice should care about working with us to remedy it.

Sincerely,

Chai Feldblum
Professor of Law