

States, 1940-1970

edman)

n

CREATING CHANGETM

SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS

E D I T E D B Y

John D'Emilio

William B. Turner

Urvashi Vaid

ST. MARTIN'S PRESS NEW YORK

THE FEDERAL GAY RIGHTS BILL: FROM BELLA TO ENDA

CHAI R. FELDBLUM

ON MAY 14, 1974, CONGRESSWOMAN BELLA ABZUG, an outspoken feminist congresswoman from New York, introduced a sweeping and comprehensive antidiscrimination bill that aimed to change dramatically the face of federal civil rights law. The bill prohibited private employers, some private businesses, state governments, and educational facilities from discriminating on the basis of sex, marital status, or sexual orientation. The only public notation of the bill was a brief sentence at the back of the *Congressional Record*, in the list of public bills and resolutions introduced that day. Apart from some coverage in the gay press, nobody in America noticed.¹

Twenty years later on June 23, 1994, the Employment Non-Discrimination Act (ENDA), a significantly more modest bill prohibiting private employers from discriminating on the basis of sexual orientation, was introduced on the same day in both the United States Senate and House of Representatives.² The introduction came replete with a major news conference attended by Democratic and Republican members of Congress and the leading luminaries of the civil rights movement. This time, America noticed. Over 180 mainstream news outlets carried stories covering introduction of the bill or later activities surrounding the bill.³ Two years later, in September 1996, the United

States Senate voted on ENDA and failed to pass it by just one vote.⁴ And in January 1999, for the first time ever, endorsement of a gay civil rights bill was part of the President's State of the Union message.⁵

The effort to pass a federal gay civil rights bill has come a long way in the past twenty-five years. The saga is rich with stories about the gay rights movement and with lessons for the future of the movement. It is a story of increasing political activism and political savvy on the part of both national and local gay rights groups. It is a story of making slow, but steady, headway against the public's discomfort with homosexuality and with politicians' fears of allying themselves with gay civil rights. And it is a story of the impact the AIDS epidemic has had on reshaping the priorities of the gay rights movement on the national level.

While the story of the federal gay civil rights bill is one of remarkable political change and growth, it is also a story of remarkably static rhetoric and analysis. The basic concern raised by those opposing passage of a gay civil rights bill has remained the same over the past twenty-five years: passage of such a law would result in the government's legislating a moral view of homosexuality at odds with the majority's. The official response of gay leaders and nongay allies has also remained remarkably the same: passage of such a law says nothing about the moral goodness of homosexuality, but simply legislates equal rights for gay people.

Over the years, a greater number of politicians have accepted this response of gay rights leaders as sufficient to justify their vote and calm their fears. Indeed, we may be poised for passage of a gay employment civil rights bill in the next few years based on the tried-and-true answers of the past quarter century. But the question remains: Are those answers correct? Does passage of a gay civil rights law really not say *anything* about whether "gay is good"? At the very least, should we be arguing that it does? As the wheels of time so often demonstrate, our answers to those questions may simply return the gay rights movement to where it began twenty-five years earlier.

I. 1965-74: FIRST A REVOLUTION. THEN REFORM

The latter half of the 1960s and the early 1970s witnessed the establishment of a range of new gay rights organizations. Some, such as the Gay Liberation Front (GLF), patterned directly after antiwar and black nationalist organizations, were concerned with system-wide oppression and were fiercely democratic and consensus-based. Others, such as the Gay Activists Alliance, focused primarily on gay oppression, but were still run by nonhierarchical consensus. Finally others, such as the National Gay Task Force, were explicitly re-

formist and mainstream. For the reform-oriented organizations, a federal gay civil rights bill epitomized their hopes and dreams for a gay civil rights movement.

In 1966, three years before the famous riot at Stonewall, fifteen gay (they were often then called homophile) organizations joined together to form the North American Conference of Homophile Organizations (NACHO).⁶ NACHO published studies on homosexual law reform and employment discrimination, supported court cases that challenged antigay policies in immigration law and the military, and helped form local homophile groups. In 1968, inspired by the Black Is Beautiful motto of the burgeoning radical black civil rights movement, NACHO adopted Gay Is Good as its motto and distributed buttons with that proud and defiant message.⁷

On June 27, 1969, the rhetoric of defiance came to life with a riot against police raiding the Stonewall bar. Shortly thereafter, in July 1969, the Gay Liberation Front (GLF) was founded in New York City. The group's mission was explicitly radical. GLF's first statement announced: "Gay Liberation Front is a revolutionary group of homosexual women and men formed with the realization that complete sexual liberation for all people cannot come about unless existing social institutions are abolished." Part of the group's political theory was that the sexist and racist capitalist system had to be undermined if gay liberation were truly to be achieved.⁸

Some activists, unhappy with GLF's radical agenda and often chaotic decision-making process, left to form the Gay Activists Alliance (GAA), an organization explicitly devoted exclusively to gay issues. The agenda of GAA was intentionally more reformist than radical, with a strong emphasis on law reform and heavy involvement in electoral politics. For example, in 1971, GAA started the struggle for passage of a gay rights bill in New York City. But the tactics of the group still borrowed significantly from the confrontational, passionate politics of the era, with direct-action tactics known as zaps intended to embarrass and shake up political officials.⁹

In 1973, the National Gay Task Force (NGTF) was established in New York by several members of GAA. The founders of NGTF wanted a more structured organization that would work to advance gay rights on a national level. They wanted a board of directors, a paid staff, and membership, and they actively sought to establish the mainstream respectability of the group by recruiting prominent, openly lesbian and gay professionals to NGTF's board.¹⁰

The reform-oriented approach of gay groups came to dominate the movement in the early 1970s. Energy and focus was devoted more to the struggle to achieve gay civil rights rather than to the struggle to liberate all human sexuality from the oppression of societal structures. As historian John D'Emilio has pointed out, the movement "returned to the reform-oriented perspective of the pre-Stonewall homophile movement. Rather than a struggle for liberation, the

movement had become, once again, a quest for "rights." Nevertheless, as D'Emilio also points out, the movement had absorbed the lessons of pride and self-acceptance taught by the lesbian and gay liberation movement. As D'Emilio observes, "Many gay activists remained as bold and brazen as their GLF predecessors had been. They expected and demanded acceptance for who they were, without apology."¹¹

Congresswoman Bella Abzug's introduction of a gay civil rights bill on the federal level in 1974 fit right in with the reformist political agenda of groups such as NGTF. Abzug introduced the bill six months before her November 1974 reelection bid and campaigned on a promise to fight for such legislation. But political support for such a bill was clearly lacking on Capitol Hill. Indeed, the capacity even to *speak* about gay rights in the U. S. Congress was minimal. The next eight years would bring an increased role and visibility of reformist gay political groups in Washington, D.C., and a slowly, but steadily, heightened capacity on the part of politicians to address the need for a gay rights bill on the federal level. It would also bring to the fore the focused opposition of a reinvigorated conservative and religious right.

II. 1974-82: THE EARLY YEARS OF THE FEDERAL GAY CIVIL RIGHTS BILL

A. Speaking about Gay Civil Rights

Members of Congress ordinarily love to talk about the bills they introduce. Indeed, introducing bills and talking about them consumes a significant amount of time in Congress. But in the area of gay civil rights, the challenge was simply to find members of Congress willing to speak about the issue. From 1974, when Congresswoman Abzug first introduced a gay civil rights bill, until 1978, the primary goal for a group such as NGTF—the single national group lobbying on behalf of the bill—was to raise the visibility of the gay rights issue and to encourage members of Congress to take up airspace on the issue.

The bill Abzug introduced in May 1974, entitled the Equality Act of 1974, reflected her commitment to feminism, as well as to lesbian and gay equality. Federal law at the time prohibited discrimination based on race, color, religion, and national origin in employment, private housing, in a few selected areas of private commerce known as public accommodations (places of lodging, eating, and recreation), by any business that received federal financial assistance, and by public schools and facilities.¹² The only protection for women, at the time, was in employment and education.¹³ Abzug's bill thus aimed to expand the scope of civil rights laws for women, as well as for gay men, lesbians, and unmarried people. First, Abzug's bill made it illegal to discriminate on the

basis of "sex" in public accommodations, federally assisted programs, public facilities, and the sale and rental of private housing. Second, the bill made it illegal to discriminate in those same areas on the basis of "marital status" or "sexual orientation," and also prohibited discrimination on those bases in private employment and education.¹⁴

Congresswoman Abzug's broad equality bill never made it past the House Judiciary Committee (where it was referred for consideration), and when Abzug returned to Congress in 1975, she bifurcated the bill—one dealing with sexual orientation and one dealing with sex and marital status. There is no indication whether Abzug did this because she felt a bill with only sex and marital status as prohibited grounds of discrimination would be more politically palatable than a bill that also included sexual orientation, or whether she did it because groups like NGTF wanted a more targeted, narrow approach to sexual orientation. In any event, in January 1975, Abzug introduced a gay civil rights bill on behalf of herself and four other members of Congress. The bill, entitled Civil Rights Amendments of 1975, added "affectional or sexual preference" to the same sections of civil rights law that the broad equality bill had covered.¹⁵

Much of the activity on the gay civil rights bill would consist, over the years, in slowly convincing additional members of Congress to cosponsor the bill. The only way to officially demonstrate the existence of additional cosponsors on a bill, however, was to reintroduce the bill, with a new bill number and a new list of cosponsors. Hence, much of the activity around the gay civil rights bill in early years consisted simply of frequent reintroductions of the bill, with a slowly increasing number of cosponsors.

While Abzug's bill ultimately garnered twenty-seven cosponsors by the end of 1976, there was minimal coverage or movement on the gay civil rights bill. But 1976 did witness the beginning of an important organization in the life of the federal gay rights bill and the end of Abzug's congressional career. In 1976, the Gay Rights National Lobby (GRNL) was created at a private conference called by David Goodstein, a wealthy gay businessman and owner of *The Advocate*, a national gay newsmagazine.¹⁶ The mission of GRNL was to lobby on the federal level. Although GRNL's efforts during its first two years were less than impressive, it was to become an important organization in advancing the gay civil rights bill from 1978 to 1982 under the leadership of Steve Endean. But 1976 also saw Abzug's defeat in a four-way primary for a New York U.S. Senate seat. Thus, in January 1977, Congress began with Ted Weiss in Abzug's former congressional seat, and with Congressman Ed Koch of New York taking up leadership of the gay civil rights bill.

Koch followed the pattern of introducing a gay civil rights bill early on in the congressional session and then frequently reintroducing the bill with additional cosponsors. Koch's bills were initially referred solely to the House Judiciary Committee, as had been Abzug's bills. This made sense, given that the

bills amended existing civil rights bills that were under the jurisdiction of the Judiciary Committee. But the gay civil rights bill was clearly going nowhere fast in that committee. Neither Peter Rodino (D-NJ), chair of the Judiciary Committee, nor Don Edwards (D-CA), chair of the Judiciary's Subcommittee on Civil and Constitutional Rights, were cosponsors of the gay civil rights bill, and neither seemed inclined to move the bill forward.

By contrast, the House Education and Labor Committee seemed a much more attractive location for the bill. Augustus (Gus) Hawkins, a Democrat from California, was chair of that committee's Subcommittee on Employment Opportunities. A case could certainly be made that the gay civil rights bill (which covered employment, as well as a host of other areas) could legitimately be considered by the Education and Labor Committee.

Members of Congress who chair committees ordinarily guard their jurisdictional turf jealously. The only exception is when they would rather not deal with a bill ordinarily under their control. In such a case, the member may be more than willing to share the bill with another committee. This seems to have been the situation with regard to the gay civil rights bill. In March 1977, Congressman Rodino, chair of the House Judiciary Committee, asked for and received the unanimous consent of the House of Representatives for the gay civil rights bill to be jointly referred to the Judiciary Committee and the Education and Labor Committee.¹⁷

The gay newspaper in Washington, the *Blade*, viewed all this activity with enthusiasm. In the April 1977 issue of the paper, in a story titled "Gay Civil Rights Bill Gathers Momentum," the paper reported the bill now had thirty-nine cosponsors, including two Republicans. The story, which carried no byline, asked readers to urge their congresspeople to cosponsor the bill, and to send copies of those letters to the "Congressional File" c/o the UFMCC (Universal Fellowship of Metropolitan Community Churches) Washington office.

Despite the enthusiasm of the *Blade*, Koch's bill had little momentum behind it, and there was no active and sophisticated gay rights group organizing the lobbying activity in Washington. The very fact that the current state of lobbying consisted primarily of sending copies of letters of support to a "Congressional File" at the Washington office of the UFMCC should itself have been a bit disheartening. Presumably, the letters were sent there because NGTF used the Washington offices of the MCC when it did its federal lobbying.

State and local events, however, soon catapulted the issue of gay rights into the national consciousness, resulting in both a focus on, and a heightened opposition to, the federal gay civil rights bill. On January 18, 1977, the Dade County Commission, in Dade County, Florida, voted 5-3 to prohibit discrimination based on sexual orientation in housing, public accommodations, and employment. In doing so, Dade County was following the lead of a number of localities and municipalities that had recently passed such ordinances.¹⁸ But

Dade County's action triggered a backlash. An effort to repeal the gay rights ordinance, led by Anita Bryant, succeeded on June 7, 1977, by a 69 percent vote. The campaign to repeal the ordinance triggered broad national attention and galvanized both supporters and opponents of gay rights.

The Dade County controversy led Gallup to run its first poll on the public's attitudes to homosexuality in July 1977. The results were intriguing, as would be the relative stability of polling results on identical questions over the next twenty years. Gallup reported that 56 percent of respondents believed gay people should have equal job rights. Only 43 percent of respondents, however, felt homosexual relations should be legal.²⁰ In explaining this disparity, Michael Kagay, a polling consultant for *The New York Times*, observed that it reflected a familiar pattern of attitudes toward nonconforming groups. As Kagay explained, "Americans may tolerate the abstract idea of equal rights for homosexuals, but do not want to sanction their behavior legally."²¹

A similar view was articulated by William Safire, a former speechwriter for Richard Nixon, in an op-ed column, "Now Ease Up, Anita," which appeared two days after the successful Dade County repeal effort. Safire cautioned Bryant that she had not been given a mandate "to put the gays on the run," since no "bluenose moralizer should have the power to tell consenting adults of the same sex" what they can do in private. But the private/public distinction was key to Safire. He chastised the "militant leaders of the gay rights movement" for framing the issue as "civil rights versus outright bigotry," when the overwhelming majority "did not see it that way." As Safire explained:

Most of the voters framed the issue, as I did, between tacit toleration and outright approval of homosexuality. Most Americans are inclined to let consenting adults do what they like, short of injury, in private; but the gay activists want more: the basic "right" they sought was the assertion by society that what they were doing was right.

But they are wrong. In the eyes of the vast majority, homosexuality is an abnormality, a mental illness, even—to use an old-fashioned word—sin. Homosexuality is not the "alternative lifestyle" the gay activists profess; it may be tolerable, even acceptable—but not approvable.

Thus, according to Safire, when gay people seek ordinances stating they may not be discriminated against on the basis of their sexual orientation, they essentially want "the seal on their housekeeping to say good." But while that is a moral judgment, gay people are free to make, Safire explained, it is not a moral judgment gay people have the right "to insist upon from the rest of society, which has the right to make its own contrary judgment and to persuade its children of its value."²²

In the meantime, on Capitol Hill, supporters and opponents of gay rights

were responding in different ways to the heightened focus on gay rights engendered by the local gay rights ordinances and repeal efforts. In June 1977, Koch reintroduced his gay rights bill with a new section, titled "To Prevent Misinterpretation." This section provided that gay people could not claim their rights had been violated simply because of a statistical disparity between the number of gay people in the general population and the number of gay people in a particular workplace.²³ The provision also provided that if discrimination on the basis of sexual preference was proven, a court could not fashion a remedy that required a quota of hiring a set number of people of a particular sexual preference.²⁴

In introducing his new version of the bill, Koch explained that one of the scare tactics successfully used by opponents of the Dade County ordinance was to argue that the law "required employers to engage in affirmative action which would result in the compulsory hiring of homosexuals in order to make up for the prior years of discrimination."²⁵ The same false allegation, Koch noted, was being made against his gay civil rights bill. While the bill would have no such result, Koch explained he was introducing a new version of the bill that explicitly prohibited affirmative action and quotas.

Koch did not respond to the question of whether passage of a gay civil rights law would send the message that gay relations were morally good, the complaint raised by Safire in his column. Rather, in what would become a time-honored tradition of avoiding such questions and focusing instead on the moral correctness of "equality," Koch observed he had taken up the cause of human rights his whole life, beginning with fighting in World War II against the Nazis, and "[homosexuals] are sons and daughters of people we all know and it is simply wrong to turn our back upon them and deprive them of equality before the law."²⁶

Koch also invoked the maxim that "the state has no business in the bedrooms of this nation."²⁷ To Koch, what people did in the privacy of their homes was not government's business, and as a logical corollary, if such activity became the basis for discriminatory action, government should legitimately intervene to prohibit such discrimination. To opponents of gay rights, however, this corollary was neither logical nor correct. Many of them were more than willing to let gay people do what they wished to do in the privacy of their own homes. But when such individuals decided to be *open* and *honest* about what they were doing in the privacy of their own homes, and *then* subsequently demanded protection against the understandable moral outrage that followed (including adverse, discriminatory actions), then gay rights advocates were going too far. In response to such demands by militant gay activists, opponents believed it was imperative for the government, at all levels, to make clear its *condemnation*, and *non-support*, of homosexuality.

While the latter view may not have been the actually held majority view

among members of Congress in 1977, it was certainly the view the majority would take if pushed to a public vote. For example, in June 1977, Congressman Larry McDonald (R-GA) offered an antigay amendment to the bill that funded the Legal Services Corporation. The amendment provided that no money in the bill could be used "to provide legal assistance with respect to any proceeding or litigation arising out of disputes or controversies on the issue of homosexuality or so-called gay rights."²⁸ A voice vote on the amendment was called as a "no" vote by the presiding Speaker, and McDonald asked for a division vote, in which members stand and are counted. (A division vote includes only those members who are on the House floor at the time.) On that vote, McDonald's amendment again lost, 39–80. McDonald then called for a recorded vote. A recorded vote summons all members of the House to the chambers for the vote and is taken by electronic device. On that vote, the McDonald amendment passed 230 to 133, with seventy members not voting.²⁹

One of the most striking elements of the vote on the McDonald amendment was the lack of *any* debate on the amendment—either pro or con. McDonald and other supporters of the amendment were apparently supremely confident their amendment would pass, with no need for persuasive debate, as long as members were subjected to a public, recorded vote. For their part, opponents of the amendment seemed to have no stomach to engage in a discussion of the provision. Indeed, it is unclear what the provision was even intended to do—would a gay person be precluded from using a Legal Services attorney in a landlord-tenant dispute, or were Legal Services attorneys simply precluded from bringing "so-called gay rights" cases? Whatever the effect of the provision, while 133 members were willing to vote no, none was willing to engage the issue in public debate.

In July 1977, Bruce Voeller and Jean O'Leary, codirectors of NGTF, met in Senator Alan Cranston's office to discuss common strategy with representatives from the ACLU, the League of Women Voters, the National Organization of Women (NOW), the National Women's Political Caucus, and the Women's Action League. O'Leary observed that NGTF and other groups were "facing common enemies," as a "new right" had formed to challenge the Equal Rights Amendment, abortion, and gay rights.³⁰ But the truth was that the general civil rights community did not view "gay rights" as part of its mandate. Indeed, in 1977, when NGTF applied to become a member of the leading civil rights coalition in Washington, the Leadership Conference on Civil Rights (LCCR), its membership application was rejected.³¹

Gay rights groups would have a long road ahead of them in building bridges and connections to the general civil rights community. But it would be next to impossible for gay rights groups to do that without lobbyists in D.C. who could become team players and contributors to the general civil rights struggles taking place on the federal level. A visit from NGTF's codirectors was

a fine start, but a New York-based organization, without a Washington office, would be inherently limited in its capacity to form a real partnership with the civil rights community.

B. Building Political Savvy and Collecting Votes

In 1978, the gay civil rights bill received a significant jumpstart when Steve Endean came to town as executive director of the Gay Rights National Lobby (GRNL). Under Endean's persistent lobbying, the bill would garner sixty cosponsors in the House of Representatives by 1982, a companion Senate bill would be introduced, and the House bill would be the subject of two congressional hearings. Over four years, a bill—and an issue—that had been greeted with relative silence and obscurity would become a legitimate topic of political discourse. Indeed, in 1982, it would seem as if passage of the bill was actually possible.

Endean had been a leader in the successful lobbying effort to pass gay civil rights ordinances in Minneapolis and St. Paul and had worked on a statewide gay rights bill that had come within two votes of passage in the Minnesota state legislature in 1977.³² When Endean joined GRNL, the organization was on its last legs. The organization's phone was disconnected, the mail unopened, and the treasury depleted. The group's executive committee conceded that, while the group had provided information on gay rights to members of Congress, it had done no direct lobbying in the previous two years.³³

Endean's stated priority, when he joined GRNL, was to contact and work "with all progressive elements" of Congress and the Washington establishment. Endean presumably knew from his successful work in Minnesota the importance of engaging in coalition work, strategic thinking, building grassroots support, and persistent vote gathering to create a successful legislative result. In 1978, Endean embarked on just those activities in pursuit of passage of a federal gay rights bill.

By 1978, Congressman Weiss had decided he should be the leader on the gay civil rights bill because Ed Koch had left Congress to successfully run as mayor of New York City. So, following the usual pattern, in February 1979, Weiss introduced essentially the same version of the gay civil rights bill with no additional cosponsors. But Endean had clearly been planning to break from the usual pattern and had been having discussions with the office of Congressman Henry Waxman (D-CA) about introducing a separate gay rights bill that might be more limited in scope. As Bruce Wolpe, a Waxman staffperson at the time, recalls, "Tip O'Neill was Speaker and liberalism was at an apogee, so of course you could talk about two gay rights bills, in an effort to get more support for the more centrist bill."³⁴ Ultimately, however, Waxman chose not to introduce a

separate piece of legislation, but instead became a lead sponsor of Weiss's bill and worked with GRNL to add cosponsors to that legislation.

Endean proceeded one step at a time on the bill, lining up cosponsors and getting to know other civil rights lobbyists in town. He also clearly wanted to shape a specific political message for the bill: that passage of a gay civil rights bill need not be equated with an endorsement of homosexuality. For example, Congressman Paul McCloskey (CA) and William Green (NY), two of only three Republican cosponsors of the bill, wrote their Republican colleagues in November 1979 to urge them to sponsor the bill. The two congressmen stressed for their colleagues that endorsement of civil rights for gays did not necessarily mean an endorsement of homosexuality.³⁵ While there is no official record indicating that Endean worked with the offices of McCloskey and Green to pen this letter, it would be surprising if Endean had not been a major player in having this "Dear Colleague" letter drafted and circulated.

Another of Endean's efforts came to fruition in December 1979 when Senator Paul Tsongas (D-MA) introduced a gay rights bill, with Senators Lowell Weicker (R-CT) and Daniel Moynihan (D-NY) as cosponsors. The Senate bill was quite different from the House bill, in that it covered private employment and no other area. From a strategic perspective, having a gay rights bill with a more limited scope presumably made sense. While the more limited scope of the Senate bill could have been controversial, this aspect was neither commented upon nor criticized in any of the gay media coverage.

During 1980, Endean focused on building GRNL's political, lobbying, and grassroots capacities.³⁶ He worked with NGTF to help start the National Convention Project, which worked successfully with local gay Democratic groups to help elect openly gay delegates to the Democratic convention and ultimately resulted in the inclusion of support for a federal gay civil rights bill in the Democratic Party's national platform.³⁷ Endean also commissioned a research study on the political fate of state and local legislators who had supported gay rights. The study concluded that "gay rights is not the 'kiss of death' which some politicians still believe it to be."³⁸ Finally, together with the offices of Congressmen Waxman and Weiss, Endean helped organize the first House briefing on the gay civil rights bill in the spring of 1980. Virginia Apuzzo, a member of GRNL's board of directors, spoke at the briefing, as did John Spiegel, former president of the American Psychiatric Association, and Eleanor Smeal, president of NOW.³⁹

Early in 1980, Weiss asked Hawkins, chair of the Subcommittee on Employment Opportunities, for a hearing on the gay rights bill, and in September 1980, Hawkins announced that a hearing would be held in San Francisco the following month.⁴⁰ Held on October 10, this first congressional hearing on a federal gay civil rights bill was an event. Even the dry pages of the transcript

seem charged with the electricity of the moment. While no congressional opponents attended the hearing, the subcommittee's Republican counsel, Jim Stephens, peppered witnesses throughout the hearing with questions that reflected the key legal and political concerns of those opposed to the bill.

The hearing opened with testimony from Art Agnos, a member of the California State Assembly who had been active in the successful effort to pass a nondiscrimination law based on sexual orientation in San Francisco in 1977. Agnos pointed out that "the reason we have worked so hard on this issue . . . is because we believe no request is more legitimate in our society than the freedom to live and work in peace and dignity, free from discrimination." He also emphasized that empirical research indicated no candidate had ever been defeated because of a vote in favor of gay rights and concluded, "So I think it is a political myth that this can hurt you in your reelection, and I hope this is carried through to your colleagues in the Congress." Finally, Agnos pointed to the experience in San Francisco, in which a total of 584 cases had been filed under its ordinance from 1977 to 1979, to conclude that discrimination based on sexual orientation was indeed live and well.⁴¹

While these aspects of Agnos's testimony followed the usual line of support for a gay civil rights bill, Agnos's testimony was unusual and refreshing in its straightforward engagement with issues of character and sin. Agnos noted that, in light of the separation of church and state, "what we must do as legislators is differentiate between crime and sin." As Agnos explained, "Some religions claim it is a sin to drive a car; still others say it is sinful to eat pork; still others say it is sinful to drink Coca-Cola, tea, or milk. Yet despite that, no one is denied the right to work because of that activity." Agnos also challenged the assertion that being gay comprised a morally fatal flaw as a secular matter. As Agnos put it, "Sexual orientation does not comprise one's character; it only states one's sexual relationships with members of one sex or another."⁴²

Perhaps given Agnos's candor, it is not surprising that the first question directed to him by minority counsel Jim Stephens focused on the issue of homosexual marriage. Stephens noted he was concerned about the overall "political agenda" of the gay community, and he quoted from a booklet from the Libertarian Party that called for the legalization of gay marriage. Stephens asked whether Agnos could "make a distinction between prohibiting discrimination in the workplace, on the one hand, and continuing, on the other hand, the historic prohibition against homosexual marriage," and whether Agnos himself would support a bill that authorized homosexual marriage.

While Stephens's questions were not surprising, Agnos's responses were. To the latter question, regarding support of legislation to allow gay marriage, Agnos's answer was a simple yes. Moreover, his response indicated his understanding that the distinction between an antidiscrimination law with regard to employment and housing (for example), and an antidiscrimination law

with regard to marriage, is really more of degree than of kind. As Agnos explained:

I think that [passing a law authorizing gay marriage] will take the same kind of educational process we are having to deal with now about the mythology that involves gay people in employment. I think that extends into other areas. What gay marriages really mean, as I understand it, is an expression of affection—that is what homosexuality is all about—for someone of the same sex. It is a kind of predetermined, in my judgment, natural preference. I think that marriage is merely the ultimate expression of that kind of love.⁴³

How refreshing! And how utterly unusual to hear such a response in a congressional hearing on an employment, housing, and public accommodations antidiscrimination bill. But, of course, how utterly frightening to the politically savvy lobbyists sitting in the audience who wished to present the civil rights bill as a matter of "simple equality," manifesting no view on the moral goodness of this particular "expression of love" and certainly no view on gay marriage. Indeed, as soon as Congressman Ted Weiss could get control of the microphone, he was quick to point out that he was "concerned that when the record is complete, that we will have lost some loose ends which will then become part of the myth considered by some who have not been present." Weiss emphasized that "regardless of one's view of the issue of marriage among gays, it has nothing at all to do with this specific piece of legislation."⁴⁴

Stephens's other principal question to Agnos was one that would continue to be raised by opponents to the bill over the next twenty years: whether it was legitimate to consider discrimination based on homosexuality as analogous to discrimination based on race, since gay people seemed to have clear economic advantages over the general public—in striking contrast to the economic disadvantages that had been suffered by black people. To support his proposition, Stephens quoted a survey from *The Advocate*, a gay magazine, indicating that the average income of a gay person was \$23,000, about 50 percent above the national average; that 70 percent of gay people were college graduates; and that projections suggested gays controlled 19 percent of the spendable income in the United States.⁴⁵

Agnos was not prepared, at that moment, to rebut Stephens's statistics—and thus, while evidencing some doubt about the figures, Agnos's basic response was that they were irrelevant to the issue posed by the legislation. As Agnos explained, "Those same people are vulnerable to the kinds of discrimination this legislation would wipe out. My analogy to blacks is not to create the historical comparisons, but the legal comparisons." A short time later, having received a note from David Goodstein, the editor of *The Advocate*, Agnos also

clarified that Stephens's statistics came from a survey that had been done solely of *Advocate* subscribers. As Agnos explained, "magazine subscribers tend to be more affluent," and hence the statistics are "really reflective of [*The Advocate's*] readership and subscribers rather than the entire gay community."⁴⁶

What is fascinating about this exchange is the durability of this line of questioning during the twenty-five years that Congress has struggled with a gay civil rights bill. The validity of such statistics, developed to encourage companies to market to the gay community, have been rebutted in almost every hearing held on a gay civil rights bill—by Agnos in 1980, and three times by this author in 1994, 1996, and 1997. Economists, such as Lee Badgett, have undertaken studies that directly contradict these survey results with regard to the gay community overall, and a more statistically valid survey done by Yankelovich Partners in 1994 also rebuts these statistics.⁴⁷ Moreover, as a matter of common sense, it seems intuitively obvious that gay people will occupy all strata of society—from poor to low income to middle income (these are probably the bulk of the magazine buyers) to wealthy to superwealthy.

Finally, as Agnos's answer clarified (and the answers of advocates throughout the coming years would continue to clarify), even for those gay people who are middle income or affluent, the prospect of discrimination remains terrifying. Indeed, it is often precisely because such individuals have hidden their sexual orientation that they have been permitted to remain in high-paying jobs. As long as the ability to remain in a job—whether a low-paying one or a high-paying one—remains at the whim of an employer who can fire anyone for allegedly being gay, the *legal* need for an antidiscrimination law seems intuitively obvious.

But the key objection to a gay civil rights bill has always been that it endorses immorality, and such objections came to the fore forcefully during the 1980 hearing. The Reverend Charles A. McIlhenny, whose First Orthodox Presbyterian Church in San Francisco had recently enjoyed some prominence because it had fired an organist who was gay,⁴⁸ testified that homosexuals were not a "bona fide minority," because while minorities cannot change their color, national origin, or sex, "homosexual behavior can be changed if the individual really desires such change." Thus, according to McIlhenny, not only would gay rights legislation set a "new and dangerous precedent—the protection of a form of behavior as a civil right," it would do so for behavior that is *immoral*. As McIlhenny exclaimed:

Homosexuality poses a substantial threat to the real meaning of civil rights. It places an unfair burden on those who endeavor to be moral by forcing them to accept such immoral behavior. . . . It is unjust to impose on the citizenship of our country a law which discriminates against morality. The government will now decide what is relevant morality.⁴⁹

The members of Congress listening to McIlhenny chose not to engage this issue directly. Rather, they focused primarily on McIlhenny's comments about the ability of homosexuals to change their behavior. Both Congressman Phillip Burton (D-CA) and Congressman Weiss asked McIlhenny whether it was not equally true that people could change their religion. But McIlhenny brought the moral question to the fore once again by challenging his questioners as to whether they were "equating religion with homosexuality." Neither congressman chose to answer that question.⁵⁰

The remainder of the hearing consisted largely of witnesses testifying in support of the legislation, and Stephens throwing questions at them about morality, various kinds of sexual behavior, and cross-dressing. The hearing closed with an eloquent statement from Gwen Craig, representing the Harvey Milk Gay Democratic Club. Craig reported on a series of compelling instances of employment discrimination against gay people. Craig was also direct about the unique oppression of "the closet," with some echoes of the Gay Is Good motto of the late 1960s:

We know at times that behind the protestations of disbelief [about the fact of discrimination] that come from those that oppose gay rights is sincere confusion, confusion that results from the issue of the closet. . . . Yes, the closet allows you to hide. But hiding isn't non-discrimination, it is merely a more invidious form of discrimination. . . . Must gay people hide from discrimination? Must we treat our personal lives as if they were dirty little secrets to be cloistered in secrecy, as if our greatest prizes, our personal relationships, were our greatest vices?⁵¹

The 1980 hearing provided the gay civil rights bill with the type of visibility that provokes response. In late October 1980, Jerry Falwell pronounced his opposition to the gay civil rights bill at a speech at the National Press Club on the grounds that "if it were to pass—and it will not—it would establish homosexuality as a legitimate minority such as Hispanics and blacks." Falwell explained that "one does not choose to be a black or Hispanic, but homosexuality is a lifestyle choice." Steve Endean's response to Falwell, as noted in the *Washington Blade*, was not to argue that gay people were a "legitimate minority," but simply to observe that "the reality is that civil rights laws are not designed as a Good Housekeeping seal of approval."⁵²

If it seemed essential in October 1980 to people like Endean to downplay any potential radical aspects of the gay civil rights bill (beyond the radical aspect of its very existence), the elections of November 1980 served only to reinforce such concerns. Ronald Reagan won the presidency, and the Republican Party won a majority of the U.S. Senate. There was a perceived rightward

turn in the country, with negative campaigns having been waged against several liberals in 1980, and that was taking its toll on gay rights support.⁵³

Prospects for either a House or Senate bill in 1981 and 1982 were not particularly promising. Just a week before the Senate bill was introduced in October 1981, the House had voted overwhelmingly to overturn the D.C. Sex Law Reform Act, which would have decriminalized sodomy in the District of Columbia. In the Senate, the gay rights bill was referred to the Senate Labor and Human Resources Committee, chaired by Senator Orrin Hatch, a Republican Mormon senator from Utah. Hatch's committee was also due to take up consideration of the Family Protection Act, a bill that, among other provisions, denied federal funds "to any public or private individual, group, foundation, commission, corporation, association, or other entity for the purpose of advocating, promoting, or suggesting homosexuality, male or female, as a lifestyle."

Gay rights advocates were thus forced to play mostly on the defensive during 1981, as they attempted to counter conservative efforts to condemn homosexuality through governmental action. But Democratic control of the House of the Representatives meant that, in January 1982, another hearing could be held on the bill—this time in an ordinary hearing room in Washington, not at a field hearing in San Francisco.

The hearing was again convened by a sympathetic Gus Hawkins. Unlike in 1980, the Republican counsel did not participate in questioning the witnesses. But tension and drama nevertheless ran high throughout the hearings. The testimony was led off by Jean O'Leary, executive director of Gay Rights Advocates, a board member of GRNL, a former coexecutive director of NCTE, and a former Catholic nun. O'Leary was quick to tell the members what the legislation would do "and more importantly, what it would not do."⁵⁴ What the legislation would do, according to O'Leary, was provide individuals the right to work secure in the knowledge that an irrelevant criterion—sexual orientation—would not be used against them. What it would *not* do was impose a quota system or affirmative action, affect the marriage laws in any way, or condone homosexuality. As O'Leary put it:

H.R. 1454 will not condone homosexuality. Legislation to protect gay people from discrimination will not endorse or approve homosexuality, any more than the inclusion of religion in civil rights legislation indicates support for any particular religion, religion in general, or even an absence of religion. The overwhelming support of religious leaders and organizations, many of whom continue to hold reservations on the lifestyle, speaks clearly to this point.⁵⁵

O'Leary was correct that several religious denominations had endorsed a gay civil rights bill while maintaining reservations about the moral correctness

of homosexuality itself. Moreover, GRNL had clearly decided this premise should be a prominent part of its choreographed message on the bill. But O'Leary's analogy to civil rights coverage of religion had some logical flaws. It is true that the prohibition on taking religion into account in employment, as set forth in Title VII of the Civil Rights Act of 1964, does not indicate support for any particular religion. But, contrary to O'Leary's assertion, such inclusion could well be seen as indicating support for "religion in general, or even an absence of religion." For example, with Title VII as part of the law, an individual can be proudly religious, or proudly nonreligious, and the law will protect that individual from being fired for either. The same cannot be said for someone who proudly insists he beats his wife. Such people can be fired with impunity by most employers in this country. The absence of a law protecting individuals who beat their spouses certainly seems to indicate a governmental policy of *not* affirmatively supporting such an activity. Thus, while passage of Title VII does not indicate support for any particular religion, it *does* indicate governmental support in favor of people who are either religious or not religious.

The logical flaw in O'Leary's analogy was exposed during an exchange between O'Leary and Congresswoman Millicent Fenwick, a feisty Republican from New Jersey with a longtime record of supporting civil rights. O'Leary had directly addressed the issue of gay teachers in her testimony and had asserted that the issue of concern to parents was "teacher misconduct, not sexual orientation." And, as O'Leary explained, "teachers can be fired for misconduct, whether heterosexual or homosexual, with or without this law." Moreover, O'Leary had pointed out, over 90 percent of child molestation occurs between adult males and young girls.⁵⁶

But Congresswoman Fenwick had a different concern about teachers. Fenwick noted she had struggled for years to ensure children had black role models in schools, as teachers and as superintendents. These role models were important "to show children what they could become." Fenwick worried, therefore, about the "proclaimed homosexual." As she put it, "If we could somehow frame this legislation so that this would be an impossibility, that nobody could parade in a small town on Sunday for homosexual rights and expect to teach in the classroom on Monday."

O'Leary was adamant that the legislation could not be modified in the manner Fenwick suggested, but was reduced to the sole argument that she could not believe that what someone did outside the classroom for political reasons should have an impact inside the classroom. To that, Fenwick had a clear and adamant response of her own:

We were brought up on the Bible. . . . You cannot expect to proclaim something that is called an abomination in the Book we live by, proclaim it, and then expect to be guaranteed your right to teach the children of

that town. . . . It seems that one can in privacy keep one's private life to oneself, and that is what I think the community has a right to ask. This cannot be proclaimed.⁵⁷

Thus, Fenwick did understand that passage of a gay civil rights law would allow gay people to be proud and open about their sexual orientation, just as Title VII allows people to be proud and open about their religion or lack of religion. And yet, because Fenwick could not—as a moral matter—bring herself to equate religion and homosexuality (indeed, it was *because* of religion that she could not make this equation), the logical implications of a gay civil rights law were too much for Fenwick to accept.

Apart from this exchange between Fenwick and O'Leary, and the testimony of Connie Marshner of the National Profamily Coalition that would come later in the hearing, there was little talk during the hearing about the morality or immorality of proclaiming one's homosexuality. The hearing consisted primarily of a solid lineup of support for the bill. Senator Paul Tsongas testified that it made "good economic and business sense not to discriminate," and that the issue was simply one of "equal rights and privacy." Jane Wells-Schooley, representing the National Organization of Women, focused on the diatribes and misrepresentations about the bill emanating from the Christian Voice and Jerry Falwell. Dr. Martin Weinberg, director of the Sex Research Center, testified that "gay people are just as likely as heterosexuals are to be productive, constructive, and well-adjusted members of American society." Dr. Avery Post, president of the United Church of Christ (UCC), repeated the oft-stated view that "one did not need to make an ethical judgment about same-gender relationships" in order to support the bill. And Craig Christensen, a law school dean, attacked the two premises he saw as underlying opposition to the bill: that there is a monolithic gay lifestyle, and that the goal of antidiscrimination law is to "provide a statutory imprimatur for the conduct chosen by the practitioners of that lifestyle."⁵⁸

Opponents of the bill, at least as represented at the hearing by Connie Marshner from the National Profamily Coalition, seemed most frightened by the prospect of out-of-the-closet gays. Marshner noted her organization's members were simply advocating that their "right of privacy be respected: that the homosexual lifestyle not be flaunted in [their] neighborhoods." As Marshner put it, "The public has a right to be protected from the promotion and glamorization of something that is by its nature antithetical to the social order."

According to Marshner, the claim by homosexuals that they are not at fault for their orientation (just as people are not at fault for their ethnic origin or skin color), while "in doubt scientifically," was also "irrelevant to the present debate." Mere orientation was not the issue, Marshner explained, "overt sexual

behavior is the issue." And that overt sexual behavior was an issue because it is *immoral*. As Marshner explained:

Mere homosexual orientation, without overt behavior, has never caused discrimination or disadvantage. . . . Discovered homosexual behavior has caused disadvantage because we in the Judeo-Christian tradition regard such behavior as immoral. . . . Therefore, to ask us to regard militant and practicing homosexuals as a minority is to ask us, the majority, to abandon our morality. It is to ask us to consider "unfairly disadvantaged" a group which our morality commands us to regard as fairly and justly disadvantaged. For the same reason, we will refuse to consider those prone to wife beating [or racism] a legitimate minority. . . . Do not say these comparisons fail, because wife beating and racism are immoral activities, while homosexuality is not. For whether homosexuality is moral is precisely the issue.⁵⁹

As polls had indicated, while a majority of Americans agreed with Marshner that homosexuality was not an activity to be condoned, they disagreed with Marshner by simultaneously believing gay people should not be punished for their conduct through the loss of jobs or housing.⁶⁰ To the extent that logic could be discerned in this dual position, it seemed to be that while a majority of the public believed homosexuality to be "immoral," a majority did not concomitantly believe it to be *such* an evil that the government needed actively to repress it, or that gay people needed to be punished through loss of jobs or other discrimination. The divergence between the presumed majority view and Marshner's view was illuminated during the hearing. For example, responding to questions, Marshner compared homosexuality to child slaughter.⁶¹ Polls certainly did not indicate that a majority of the public similarly viewed homosexuality in this extreme manner.

The key challenge for gay rights groups, therefore, was to translate public support of *some* protection for gay people into tangible antidiscrimination legislation. To do so, the gay rights movement would need to forge bonds with the mainstream civil rights community and would need to become more sophisticated in electoral politics. Initial steps toward both these goals were taken in 1982. During that year, Endean formed the Human Rights Campaign Fund, a political action committee (with Endean as its head) operated out of the GRNL office to raise money for candidates sympathetic to gay rights. In addition, in July 1982, GRNL and NGTF applied for admission into the Leadership Conference on Civil Rights (LCCR) and were accepted.⁶²

GRNL's and NGTF's admission into LCCR in 1982 marked a significant moment in the effort to establish a solid relationship with the civil rights

community. Several factors distinguished this successful effort from NGTF's failed effort to gain admission into LCCR several years earlier. As noted above, the civil rights community had not initially viewed gay civil rights as part of its mandate. Moreover, some of the leading organizations in LCCR either had strong institutional objections to homosexuality (such as the U.S. Catholic Conference) or had leaders who were unsympathetic to gay rights (such as George Meany of the AFL-CIO). To overcome the expected opposition from such groups, and to enlist the support of other groups on LCCR's Executive Committee, would require a lengthy period of working with those other groups on a range of civil rights issues. That "bonding period" had clearly not happened by 1977 when NGTF first applied for admission to LCCR.

By 1982, by contrast, the necessary groundwork had been laid through Endean's coalition work with LCCR on various non-gay-related civil rights issues, such as the campaign to extend the Voting Rights Act and the effort to block approval of one of President Reagan's nominations to the U.S. Civil Rights Commission.⁶³ Moreover, the leadership of some of the influential groups that had blocked NGTF's earlier admission had changed; of particular importance, George Meany had been replaced by Lane Kirkland as head of the AFL-CIO, and the labor organization was beginning to move toward a pro-gay-rights position. Finally, Ralph Neas, the relatively new executive director of LCCR, was ready to be helpful to GRNL and NGTF in navigating the political mazes of LCCR. Neas helped contrive a strategy that placed some restrictions on GRNL and NGTF as conditions of their admission. As Neas recalled over ten years later:

When gays first joined, we had to discuss strategy and work out a compromise. We agreed they would not ask LCCR to take a position in regards to a gay civil rights bill. The reasoning was to get the gay organization in first, then build bridges of understanding, give the other organizations a chance to see that gays were talking about fundamental civil rights. They had to compromise in the short term to get long-term support.⁶⁴

By the end of 1982, things were looking good for the gay civil rights bill. A record number of sixty members in the House of Representatives had cosponsored the bill, HRCF had raised \$500,000 and had contributed \$150,000 directly to candidates in the 1982 elections, and the results of those elections were positive for continuing work on a gay rights bill. All House and Senate cosponsors of the gay civil rights bill who ran for reelection were successful, and the records of some of the newly elected members indicated that as many as seventy-five cosponsors could be enlisted for the bill in the upcoming Congress.⁶⁵

But by the end of 1983, everything looked different. GRNL was in chaos,

Endean had resigned as executive director, and work on the gay civil rights bill had taken a backseat to the emerging, intense fight against AIDS led by a reinvigorated and politically sophisticated Washington office of NGTF. The next ten years would see an explosion of activity on the AIDS front, with fights against anti-AIDS amendments being waged alongside affirmative efforts to fight the epidemic with both money and positive policies. New AIDS organizations and coalitions would form, GRNL would merge with HRCF, and NGTF (soon to become NGLTF) would continue to be a leading voice on AIDS until 1989. Not until 1991 would serious efforts once again be taken to move a gay civil rights bill forward in the U.S. Congress.

III. 1983-90: THE WANE OF GAY CIVIL RIGHTS AND THE RISE OF THE FIGHT AGAINST AIDS

The year 1983 started much as any other year for the gay civil rights bill. First in January, and then again in April, Weiss introduced the gay civil rights bill—the second time with fifty-nine cosponsors. The Senate bill, again limited solely to employment, was introduced by Senator Tsongas with four Senate cosponsors in February 1983. In a *Washington Blade* story on the House and Senate bills, Endean was optimistic about obtaining a record number of supporters for both bills.⁶⁶ Life seemed to be proceeding on track.

But by early 1983, reports had begun to surface that GRNL had accumulated a mounting debt and that HRCF had virtually no funds with which to start working on the 1984 election cycle. Endean came under increasing attack for his financial and management capacities and was forced to resign as executive director of HRCF.⁶⁷ But the deeper conflict concerning Endean revolved around his lobbying efforts on the emerging AIDS epidemic. By 1982, Virginia Apuzzo had become executive director of NGTF, and in 1983 she hired Jeff Levi to be the director of its Washington office. Together with Tim Westmoreland, a staff person for Congressman Henry Waxman, Levi and Apuzzo began to put together a detailed and sophisticated response to the problem of underfunding for AIDS research and treatment. This response included creating relationships with key individuals in the Reagan administration and on the Hill, developing a sophisticated knowledge of what was necessary to advance research and treatment in the AIDS arena, and establishing NGTF as a credible and respected source for information on AIDS policy.⁶⁸

Gay press reports at the time began to fault Endean and GRNL for not being similarly focused on and sophisticated about the lobbying required for combating the AIDS epidemic. As a *Washington Blade* story several years later noted:

Critics accused Endean of failing to grasp the importance of the worsening AIDS epidemic. The critics noted that GRNL's lobbying operation, while geared for promoting a gay rights bill, failed to set up a mechanism for monitoring and influencing Congress's highly complex appropriations process, which was involved in approving funds for AIDS programs.⁶⁹

Larry Bush, a writer for *The Advocate*, was a careful observer and reporter of the strategic battles surrounding AIDS funding.⁷⁰ He reported, in some detail, on the differences in approach and strategy with regard to AIDS lobbying that were apparent between GRNL and NGTF. For example, at a June 1983 meeting of the U.S. Conference of Mayors, GRNL testified before the mayors and asked them to endorse a proposal for a \$50-million AIDS budget for 1984. "This was significantly lower than the \$100-million figure NGTF was lobbying for on the Hill and with the administration. GRNL's deputy director noted in his testimony that 'while more than this [\$50 million] is clearly needed, and some groups may ask for \$100 or \$200 million, GRNL feels that in terms of political realities on Capitol Hill, \$50 million is a reasonable, winnable figure.'"⁷¹

While it is always important to be politically reasonable, what might have been politically reasonable for the substance of a gay civil rights bill might not necessarily have been politically reasonable in an appropriations fight over AIDS funding. Moreover, GRNL had declined a request from NGTF for an advance strategy discussion on the presentation (Jeff Levi from NGTF had resided before the mayors as well), had not discussed its budget target figure with other gay groups, and had arrived at its proposed figure by simply doubling the existing federal budget amount, rather than consulting with AIDS groups and medical researchers.⁷² In fights over appropriation figures, a united front from affected interest groups is often critical to success on Capitol Hill. Hence, Endean's and GRNL's independent and sometimes ill-informed positions on AIDS were beginning to rankle observers of the federal legislative scene.

In June 1983, David Goodstein, publisher of *The Advocate*, printed an editorial calling for Endean to resign from GRNL. Goodstein noted that he had "lost confidence" in Endean's capacity to manage the organization professionally, to plan a political agenda for the 1984 elections, and to address effectively current problems regarding AIDS. As Goodstein put it, "Events have moved faster than [Endean's] ability to handle them," and "what sufficed in 1981 will not do now."⁷³

Following four months of controversy, including public criticism and mounting private criticism by influential gay activists, Endean announced in October 1983 that he would resign as executive director of GRNL.⁷⁴ Up until his last days at GRNL, however, Endean continued to focus primarily on gathering support for the gay civil rights bill. Indeed, Endean noted to the press

that his priorities during the transition period before his departure were to get GRNL back in shape financially, continue its programs on Capitol Hill, and seek additional cosponsors for the gay civil rights bill. For example, during his last week on the job in January 1984, Endean traveled to Atlanta to lobby a congressman to cosponsor the gay civil rights bill and helped draft a "Dear Colleague" letter seeking support for the bill.⁷⁵

While presidential primary politics in 1983 and 1984 gave the gay civil rights bill its customary preelection boost, with Democratic nominee contenders Senator Fritz Hollings, former vice president Walter Mondale, and Senator Gary Hart all endorsing the bill,⁷⁶ the focus of gay groups such as NGTF was not primarily on passage of a gay civil rights bill. Throughout 1984 and 1985, NGTF (which became NGLTF in 1986) was the premier gay rights group engaged in Washington lobbying, and under Jeff Levi's leadership, it focused its energies primarily on getting increased funding for AIDS research and treatment—not on seeking passage of a gay civil rights bill. Starting in 1986, both NGTF and HRCF (which had absorbed GRNL in 1985 as its lobbying arm) focused their collective energies on defeating the spate of anti-AIDS amendments that were beginning to be offered regularly in both the Senate and the House of Representatives. Moreover, both NGLTF and HRCF continued to spend energy and resources seeking increased funding for AIDS research, treatment, and prevention, and the passage of legislation that would provide confidentiality and antidiscrimination protection for people with HIV/AIDS.

I entered this political scene in September 1987, as the legislative research director for AIDS Action Council, one of the new groups that had sprung up to address the challenges of the AIDS epidemic.⁷⁷ Two weeks into the job, I got my first taste of how anti-AIDS and antigay amendments were intertwined on Capitol Hill in the late 1980s. Senator Jesse Helms offered an amendment to an appropriations bill for the Department of Health and Human Services (HHS) (which included millions of dollars for AIDS testing and counseling) providing that none of the funds could be used for AIDS educational materials if they "directly or indirectly promoted or encouraged homosexuality." The amendment passed by a vote of 94-2, with only Senators Moynihan and Weicker voting against the provision.⁷⁸ The best my colleagues and I could do that year was to get the word *indirectly* dropped from the provision when the House and Senate met in conference on the bill.

The next year, we were better prepared for the HHS appropriations bill. In one of my first forays into the arena I would come to call "legislative lawyering,"⁷⁹ I drafted an amendment to be offered before Senator Helms offered his amendment again. This amendment provided that no federal funds could be used for AIDS educational materials that were *designed* to promote or encourage homosexuality or heterosexuality.⁸⁰ This provision gave members of

Congress the political cover they needed to vote for a provision that sounded tough on homosexuality, but was, in practice, an evenhanded provision designed to have a less detrimental effect on the development of AIDS educational materials.

While there was little activity on passage of a gay civil rights bill through the late 1980s, the years from 1987 to 1990 did see a significant rise in legislative activity focused on establishing antidiscrimination protection for people with disabilities, including people with HIV/AIDS. These efforts gave those opposed to antidiscrimination protection on the basis of HIV status (and/or on the basis of sexual orientation) a ready catalyst for advancing amendments that would exclude protection for such individuals. AIDS and gay rights advocates were thus kept busy fighting off such amendments, as well as helping to pass the underlying legislation.

Antidiscrimination protection for people with HIV/AIDS in the 1980s was derived from laws that protected people with disabilities generally. In February 1987, the Supreme Court had ruled that a teacher with tuberculosis was protected from discrimination under Section 504 of the Rehabilitation Act, a law that prohibited discrimination based on handicap by recipients of federal financial assistance.⁸¹ Although the case concerned tuberculosis, the media trumpeted the fact that people with AIDS would similarly be protected under the law. Two days after the Supreme Court handed down its decision, Senators Robert Dole (R-KS) and William Armstrong (R-CO) introduced a bill to exclude individuals with "contagious diseases" from the protection of Section 504.⁸²

At around the same time, the Senate was considering legislation to amend Section 504 and three other civil rights laws that applied to recipients of federal funds. This bill, the Civil Rights Restoration Act of 1987 (CRRRA), was designed to overturn a restrictive Supreme Court ruling on the scope of such laws,⁸³ and was a high priority for the mainstream civil rights community led by LCCR. When the Civil Rights Restoration Act was considered by the Senate Labor and Human Resources Committee, Senator Gordon Humphrey (R-NH) offered an amendment designed to exclude people with AIDS from the protection of Section 504.⁸⁴ Although that provision failed easily in committee, it was not clear to gay rights and AIDS advocates (including me) that it would similarly fail easily on the Senate floor. Hence, in another foray into legislative lawyering, we drafted a provision excluding only those individuals with contagious diseases or infections who posed a "direct threat" to others.⁸⁵ Again, we managed to provide political cover for members of Congress, while drafting a provision that ensured no legal harm to people with HIV/AIDS, who would not meet the required legal standard of posing a "direct threat."

While it was important, of course, to achieve the successful outcome of maintaining protection for people with HIV/AIDS in a civil rights law, the

coalition effort involved in winning that fight was itself of significant, long-term importance. Three coalitions converged in the fight on the Civil Rights Restoration Act: the National Organizations Responding to AIDS (NORA), a coalition of consumer and provider groups devoted to AIDS policy issues;⁸⁶ the Civil Rights Task Force of the Consortium for Citizens with Disabilities (CCD), a coalition of disability groups; and the Leadership Conference of Civil Rights (LCCR), the lead coalition in Washington on civil rights issues. All three coalitions participated in the lobbying effort to defeat an exclusion of people with HIV/AIDS from the law. This joint effort helped solidify political connections between the primary AIDS and gay rights groups of the time (AIDS Action Council, NGLTF, HRCF, and the ACLU's AIDS and Lesbian and Gay Rights Projects) and the mainstream disability and civil rights organizations—CCD and LCCR.

This joint effort of AIDS and gay rights groups with disability and civil rights groups occurred as well during the following two years, during passage of the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990. The Fair Housing Amendments Act prohibited discrimination on the basis of disability in the sale or rental of private housing. Again, attempts were made to exclude people with HIV and AIDS from the protection of the new law, and again, those attempts were defeated through joint coalition efforts.⁸⁷ By the time disability and civil rights groups began working for passage of the Americans with Disabilities Act, a bill that would prohibit discrimination in private employment and private businesses on the basis of disability, the mainstream civil rights and disability coalitions were firmly in support of covering people with HIV/AIDS under a disability civil rights law. Indeed, I served as the chief legislative lawyer on the ADA for the overall CCD coalition, while working as a legislative counsel for the ACLU's AIDS Project. A difficult challenge on the ADA arose when an amendment passed on the House floor that excluded people with contagious diseases (including people with HIV/AIDS) solely from food handling jobs.⁸⁸ Yet, even with that more targeted amendment, the disability and civil rights groups remained firmly in support of people with HIV/AIDS, even when that position threatened passage of the ADA itself. Through another legislative-lawyering maneuver, we neutralized that amendment, and the ADA became law in 1990.⁸⁹

The latter half of the 1980s was thus a busy time for gay rights groups. Their energy and resources, however, were not directed at advancing a gay civil rights bill. Rather, they were devoted to seeking affirmative responses to the AIDS epidemic, through passage of laws such as the Ryan White CARE Act and the ADA, and to warding off challenges and attacks arising from the AIDS epidemic. The gay civil rights bill itself continued to be introduced in each new congressional session from 1985 to 1990, with the House bill continuing to be an omnibus bill covering many areas, and the Senate bill a more targeted bill

focused on employment. While HRCF and NGLTF continued to seek and obtain additional cosponsors of the bill during this time, no hearings were held on the bill and there were no significant increases in the number of cosponsors.⁹⁰ But the fact that HRCF and NGLTF fought anti-AIDS and antigay attacks together with the civil rights and disability communities during this period helped the gay rights groups solidify their political relationship with the mainstream civil rights community. These relationships would play an essential role in convincing that community to finally embrace the goal of civil rights for gay men and lesbians.

IV. 1991-99: THE CIVIL RIGHTS COMMUNITY ENGAGES: THE FINAL PUSH?

By 1991, federal legislative activity on AIDS and disability rights had settled into a relatively manageable routine. The Americans with Disabilities Act had become law, and efforts in that area shifted to enforcement. The Ryan White CARE Act had passed as well, and those efforts also shifted to funding and implementation. While anti-AIDS amendments periodically surfaced on annual funding bills, responses to such amendments now followed a more predictable pattern. We had developed the content of those responses through legislative lawyering, and we had established lobbying mechanisms for carrying out those responses through the staffs of HRCF and NGLTF.

The time was ripe, therefore, for the focus to shift back to gay rights. The election of President Bill Clinton in 1992 gave that focus particular momentum and energy. Clinton had explicitly stated his strong support for gay and lesbian rights during the campaign, and the gay community was energized and exhilarated by his victory. But instead of a forceful push on a federal gay civil rights bill in 1993, the focus came to rest on lifting the ban on the service of gay men and lesbians in the military.

In a sense, the focus on the military ban in 1993 was a fluke. While campaigning, Clinton had promised to lift the ban, and shortly after his election, he reaffirmed that promise. Although the powerful chair of the Senate Armed Services Committee, Senator Sam Nunn (D-GA), had immediately announced his opposition to lifting the ban, both gay rights organizations and individual gay friends of Clinton's encouraged him to move forward. The fight to lift the military ban would not only consume time and resources that would otherwise have been devoted to work on the gay civil rights bill, but the defeat of that effort in July 1993 would ultimately affect the substance of the gay civil rights bill itself.

A. The Gay Military Ban Campaign and a New Beginning at LCCR

In the fall of 1992, I was beginning my second year as a visiting professor at the Georgetown University Law Center in Washington, D.C. With passage of the ADA in 1990, I had come to Georgetown to coauthor a book on disability law and to teach classes on gay rights, disability rights, and legislation. But in the spring of 1993, I found myself in the midst of the campaign to lift the military ban on gay men and lesbians.

I had been part of Clinton's transition team for the Department of Justice in December 1992 and had written an internal memo counseling that Clinton not immediately move forward on lifting the military ban. Given Senator Nunn's opposition, I had suggested that Clinton instead establish a one-year interagency task force to explore the issue. That would allow the administration to get through its first year without a congressional vote on the military ban, and would allow the relevant political organizations time to develop a coherent lobbying strategy.

Events were moving too fast for any memo buried in the bowels of a transition plan to change, however, and work moved forward on helping the president in his stated desire to lift the ban. A new short-term organization, the Campaign for Military Service (CMS), was created in January 1993 solely to assist the president in his effort. Tom Stoddard became the volunteer executive director of the group, and I became the consultant legal director.

During the following six months, gay rights activists in Washington were consumed with research, drafting, lobbying, and negotiating on the gay military ban. Most of the cards were stacked against our effort from the beginning. With the key Democratic congressional player, Senator Sam Nunn, orchestrating the opposition, with a White House never fully engaged in pushing a truly acceptable compromise on the issue, and with limited lobbying capacity on the part of the gay rights organizations (exacerbated by tensions between CMS, an upstart new organization, and the long-term organizations of HRCF and NGLTF), it is no wonder that the effort finally failed. In my vision of an effective legislative advocacy effort, a campaign needs a visionary strategist, persistent lobbyists, a creative legislative lawyer, a talented media director, and grounded grassroots organizers.⁹¹ CMS and the other gay rights organizations had some of these components in 1993, but not all. And one needs all of them to win.

The effort to lift the gay military ban came to a dismal end in July 1993 when President Clinton announced the Don't Ask, Don't Tell, Don't Pursue policy. Although presented as a compromise, the policy was actually a reaffirmation of the current ban. Matters took an even worse turn when the ban,

which had always been solely an administrative policy, was codified by Congress in a defense bill in the summer of 1993.

Although the campaign to lift the military ban ultimately failed, and although momentum for gay rights on Capitol Hill was seriously affected by its defeat, 1992 and 1993 were critically important years for the development of a gay civil rights bill. But most of that development took place behind the scenes, in strategy sessions and drafting meetings.

In the summer of 1992, before the gay military ban campaign was even a glimmer in anyone's eye, Patrisha Wright, a lobbyist for the Disability Rights Education and Defense Fund and the lead strategist on the ADA, and Tim McFeeley, then executive director of HRCF, met with Ralph Neas, executive director of LCCR, to discuss the possibility of LCCR supporting a gay civil rights bill. When HRCF and NGLTF had been admitted to LCCR in 1982, the deal had been struck that LCCR would not be asked to take a position on gay rights legislation right away. But ten years had passed, and the gay rights groups had worked side by side with LCCR on a range of other civil rights issues during that time. Wright and McFeeley felt the time was right to raise the question of LCCR support.

Neas was open to raising the question of supporting gay rights legislation with LCCR's twenty-three-member Executive Committee, but wanted time to prepare the groundwork for an affirmative answer to the question. All decisions of the Executive Committee are made by consensus, and so the next several months witnessed a series of careful conversations with key players on the committee. The end result was a classic incrementalist strategy—classic because it so often works so well. At its November 1992 meeting, the Executive Committee voted to add "supporting gay and lesbian antidiscrimination legislation" to its list of new issue priorities, but explicitly noted that the "specific legislative vehicle" for the issue would be "determined later." The Executive Committee also voted to establish a new LCCR steering committee that would be responsible for drafting the proposed "gay and lesbian antidiscrimination legislation."⁹²

The Executive Committee vote was brilliant. It allowed LCCR to begin focusing on a gay civil rights bill without committing the organization to any particular piece of legislation. This provided those LCCR members that might have had some concern with endorsing such legislation, such as the U.S. Catholic Conference, the sense that no final vote to endorse legislation had yet been taken. While that day of reckoning would come, there would be time to build bonds and create trust during the drafting period.

The LCCR Executive Committee's vote in the fall of 1992 changed the legal landscape of the gay civil rights bill in one other dramatic way: it ensured, for the first time in the bill's history, that gay rights lawyers and mainstream civil rights lawyers would come together to develop the content of the bill. This

partnership would ultimately affect every provision in the bill, but would also ultimately result in the broadest range of support a gay rights bill had ever garnered.

B. Drafting a New Gay Rights Bill

Late one night in December 1992, I received a call from Tim McFeeley. Would I be willing, McFeeley asked, to work as HRCF's consultant in helping to draft a gay civil rights bill with the LCCR steering committee? The committee had met once or twice already, and McFeeley wanted HRCF to have a strong legal presence at those meetings. The committee was meeting again the next day, and McFeeley wanted to know how quickly I could start.

I jumped at the chance to be involved. I had spent three years researching, drafting, and negotiating the Americans with Disabilities Act and had developed the concept of "legislative lawyering" based on that experience. I was more than happy to turn that knowledge now to the development of a gay civil rights bill. But I hated going to meetings that did not have materials available to move a meeting forward productively. I had seen the previous gay civil rights bills and knew from my experience with the ADA that the civil rights community would never accept legislation that amended existing civil rights laws. That approach was simply too dangerous as it exposed existing civil rights laws to unfriendly changes, and it was the reason the ADA had been written as a free-standing piece of legislation.

The previous spring, I had written a broad gay civil rights bill as an exam for my legislation class. I had used the ADA as a template and then inserted a number of mistakes into the legislation as the basis for my exam questions. I pulled up the old exam, fixed the mistakes, and brought copies of a proposed omnibus gay civil rights bill to the LCCR drafting session the next day. Because no one else in the group had yet offered legislative language to begin the discussion, the text from the old exam became the basis for our deliberations.

The proposed bill we were considering covered most of the same areas that had been covered in previous bills: employment, housing, federally funded programs, and public facilities. These areas were identical to those covered in the Civil Rights Acts of 1964 and 1968, but simply described the areas directly instead of through an amendment. In the area of public accommodations, the bill explicitly followed the ADA, rather than the Civil Rights Act of 1964, because the ADA's coverage of private businesses was much broader.

During the early part of 1993, the time and resources demanded by the gay military ban fight made it difficult for the gay rights advocates on the LCCR drafting committee to find time to work on the omnibus civil rights bill. Nevertheless, work on the bill proceeded sporadically, and some of the key

issues that would need to be resolved began to surface. Key among these were the type of exemption for religious organizations the bill would include, how the bill would address health benefits for same-sex partners in employment settings, and how the legislation would deal with issues of affirmative action, statistical disparities, and quotas. Other issues that would later come to dominate discussions on the bill were given short shrift. For example, in one early meeting, the decision was made not to include marital status or transgendered status as prohibited grounds for discrimination. While the group felt such discrimination was wrong, the LCCR mandate had been to develop legislation that dealt with "gay and lesbian discrimination" and the group chose to adhere strictly to that mandate.

Work on the omnibus civil rights bill heated up during one month in 1993. A major gay and lesbian march on Washington had been planned for April 1993, and gay rights advocates wanted the bill to be introduced prior to the march. Jeff Blattner and Michael Iskowitz, Senator Kennedy's staff people, began to work closely with the LCCR drafting committee members in March 1993 to try to finalize the bill's substance. But major issues remained in contention. About two weeks before the march, the drafting committee finally concluded it would not be possible to get a bill ready in time. With the pressure of the march lifted, the drafting sessions were again put on a back burner.⁹³ The gay rights advocates from the committee returned our full focus to the gay military ban fight, where it remained until the fall of 1993 when the final said vote on codifying the gay military ban was taken.

C. The Birth of the Employment Non-Discrimination Act

By the fall of 1993, prospects for a broad gay civil rights bill did not look good. Indeed, it was unclear what was feasible to achieve at all on the federal legislative front. Washington politics are fickle. If an issue is perceived to have momentum, more people will support it; conversely, if an issue is perceived to have "lost momentum," people who should support the issue will desert it.

It is fair to say that gay rights was not perceived, in the fall of 1993, as having any momentum on Capitol Hill. The loss of the gay military ban had weakened the perceived political power of the gay rights organizations. Given the reality of the political situation, many gay rights advocates (including me and HRCF's newly hired political director, Daniel Zingale) felt the omnibus gay civil rights bill was no longer a viable proposal to present to LCCR and to members of Congress. Rather than gathering any momentum, that bill would likely sink upon introduction.

So the painful decision was made to excise all portions of the omnibus bill other than the employment section. Polls had consistently indicated the highest level of public support for employment nondiscrimination, and pre-

senting a narrowly targeted bill that had the greatest public support would be seen as pragmatic and welcome by our friends on Capitol Hill.⁹⁴

The first six months of 1994 was thus an active period of research, drafting, phone calls, meetings, and negotiations on a range of issues in an employment-only gay rights bill. A broad religious exemption was finally agreed to, although the for-profit, taxable activities of a religious organization remained covered under the bill. The bill explicitly stated that "quotas" and "preferential treatment" based on sexual orientation would not be allowed under the law. The bill also disallowed any "disparate impact" claims. In other words, a claim could not be based on statistical disparities between the number of gay people in a particular workplace and the number of gay people generally. Finally, the bill avoided two potential areas of serious conflict: it chose not to address the issue of benefits for same-sex partners, and it excluded the military from its coverage.

And the bill finally got a name sometime in May 1994. We had been calling the omnibus gay civil rights bill the Civil Rights Act of 1993, based on the Civil Rights Act of 1991 that had been most recently passed by Congress. But we now wanted the title to make clear the more limited scope of the proposed bill. After several attempts, we settled on the Employment Non-Discrimination Act, with the acronym ENDA.⁹⁵

There was still the important issue of LCCR endorsement. While the broad religious exemption was critical to obtaining that endorsement, some LCCR members were still not comfortable with supporting the legislation. Ralph Neas led the way in negotiating with these organizations a statement of LCCR endorsement with which they felt comfortable. Used a few times in LCCR's history, this type of endorsement ultimately made clear that while a majority of LCCR members supported the legislation, the endorsement could not be presumed to reflect the position of every one of the 185 organizational members of LCCR.⁹⁶

The press conference at which ENDA was introduced, in June 1994, was an electrifying moment. For the first time in history, the broad range of the civil rights community stood with gay rights advocates to proclaim their endorsement of a nondiscrimination bill based on sexual orientation. As Coretta Scott King proclaimed eloquently during the press conference:

I support the Employment Non-Discrimination Act of 1994 because I believe that freedom and justice cannot be parceled out in pieces to suit political convenience. As my husband, Martin Luther King Jr., said, "Injustice anywhere is a threat to justice everywhere." On another occasion he said, "I have worked too long and hard against segregated public accommodations to segregate my moral concern. Justice is indivisible." Like Martin, I don't believe you can stand for freedom for one group of people and deny it to others.⁹⁷

The press conference was notable not only for the range of mainstream civil rights support on display, but for the number of senators and members of the House of Representatives who had signed on to the bill as original cosponsors. The theory that a more limited, targeted piece of legislation, with many significant concessions made early in the process, would garner a broader range of support and momentum had proven true. In June 1994, ENDA was introduced by Senators Edward Kennedy (D-MA) and John Chafee (R-RI) with twenty-eight cosponsoring senators, and by Representatives Gerry Studds (D-MA), Barney Frank (D-MA), and Connie Morella (R-MD) with 107 cosponsors. This was the highest number of cosponsors that had ever been achieved for a gay civil rights bill upon introduction.

One month after the press conference, Senator Kennedy held a hearing on ENDA in the Senate Labor and Human Resources Committee. Because none of the gay rights advocates working on ENDA in 1994 had been present at the hearings in either 1980 or 1982, a sense of historic momentum was in the air. Indeed, it was historic in the sense that this was the first time a hearing had been held on a gay civil rights bill that had a realistic chance of passage.

The hearing was marked by moments of passion, rationality, law, and simple heroism. People had lined the hallways for several hours before the hearing in an effort to ensure a spot in the hearing room. A group of African American men wearing orange stickers that proclaimed "There is no compartment" had arrived with antigay activist Lou Sheldon. When it became clear the hearing room had already filled up and this group would not be able to enter, one of the Republican staff members led the group into the hearing room through a staff entrance, and the group lined the entire back wall during the hearing.

But supporters of ENDA clearly outnumbered opponents, both in the hearing room and on the witness list. As always occurs in Congress, the majority party controls the substance of the hearing. Because Senator Kennedy was the Chair of the Labor and Human Resources Committee, and the chief sponsor of ENDA, it was no surprise that most of the hearing was dominated by supporters of the legislation. This time, the hearing started out with compelling, personal cases of discrimination. Cheryl Summerville, her voice cracking at times, recounted how she had been fired by Cracker Barrel Old Country Store in Douglasville, Georgia, after the chairman of Cracker Barrel sent a memo directing the firing of all employees "whose sexual preference fails to demonstrate normal heterosexual values." Ernest Dillon recounted how he had been subjected to antigay harassment, and ultimately beaten, by coworkers at his post office job. Dillon explained he had sued under Title VII of the Civil Rights Act, only to be told by the Sixth Circuit Court of Appeals that "these actions, although cruel, are not made illegal by Title VII."⁹⁸

The hearing then moved to a steady drumbeat of support for the legisla-

tion by civil rights leaders and business leaders. Justin Dart Jr., the Republican chairman of President George Bush's Committee on Employment of People with Disabilities, testified against "acquiescing in vicious discrimination against American citizens because you disagree with their personal views and activities, activities which in no way infringe on the rights of others." Warren Phillips, the chief executive officer of Dow Jones and Company, and publisher of *The Wall Street Journal* for fifteen years, testified that while many businesses had voluntarily adopted policies of nondiscrimination based on sexual orientation because it made good business sense, the lack of explicit legal protection for gay men and lesbians "leaves a gaping hole in America's commitment to equal opportunity and is an invitation to the perpetuation of prejudice and stereotypes." His views were echoed by Steve Coulter, vice president of Pacific Bell. Finally, Richard Womack, director of civil rights for the AFL-CIO, reaffirmed the unions' support for employment nondiscrimination legislation, noting that "gay and lesbian Americans do not want to be ushered in secretly through the servants' entrance; they want to walk through the front door."⁹⁹

The hearing concluded with a legal panel that included the only opponents to the legislation, Joseph Broadus from George Mason School of Law and Robert Knight from the Family Research Council. I was also on that panel, representing LCCR, and had the job of answering the opponents' objections. Broadus's main claim was that the bill would prohibit employers from firing employees who engaged in bizarre sexual activity (on or off the job) or those who engaged in child molestation.¹⁰⁰ Broadus also claimed the bill would ultimately require employers to adopt quotas based on sexual orientation.

In his written testimony, Broadus used the old marketing statistics to claim that gay people were "an elite" who had no need of special civil rights legislation. During one of the more emotionally charged moments of the hearing, Senator Paul Wellstone (D-MN) challenged Broadus's focus on the economic status of gay people, noting that, as a Jew, he had a real problem with that approach because "that is precisely the kind of argument that was made [about Jewish people] in Germany." Broadus's only response was that Congress had to answer the "basic question of whether . . . engaging in various kinds of sexual acts . . . reflects upon character."¹⁰¹

Robert Knight's testimony was more coherent than Broadus's, but was premised on the same moral concerns. As Knight explained, his organization saw ENDA "as less about tolerance than about the federal government forcing acceptance of homosexuality on tens of millions of unwilling Americans." As Knight clearly and correctly explained, "The bill essentially takes away the right of employers to decline to hire or promote someone who openly acknowledges . . . indulging in behavior that the employer or the employer's customers find immoral, unhealthy, and destructive to individuals, families, and soci-

My testimony did not directly engage either opponent on their moral assessments of homosexuality. Rather, my testimony systematically answered all the other objections raised by Broadus and Knight. I explained the methodological flaws in studies used by opponents to claim that gay people are an economic elite; I pointed out that a legislative policy decision to ban discrimination need not depend on a "hierarchy of oppression" (that is, have gay people suffered more than African-Americans), but rather should depend on whether evidence exists that employment discrimination is occurring based on a characteristic that has no relevance to job performance (I had lengthy appendices demonstrating this fact); and finally, I noted that employees could certainly be disciplined for bizarre or disruptive sexual acts under ENDA, as long as both gay and straight employees were similarly disciplined for similar sexual acts.

On the moral question of homosexuality, I never explicitly agreed with Knight that passage of ENDA reflects a governmental policy that "gay is good," and that *because* "gay is good" employers may not use sexual orientation as grounds for employment discrimination. But I also refrained from asserting that passage of ENDA could not possibly be seen as an endorsement of homosexuality, a statement supporters of the gay civil rights bill repeated often in 1980 and 1982. Instead, I stayed with the tried-and-true rhetoric of tolerance and liberalism. Thus, in response to a question from Senator Nancy Kassebaum about whether ENDA was unique and dangerous because it would be the first civil rights law to protect "behavior," I first explained that civil rights law already protected religious behavior. But instead of then pushing the point that religious behavior and gay sexual behavior are *equally morally neutral*, I retreated to endorsing the schizophrenic position consistently manifested in public opinion polls. I explained that "a lot of people in America . . . do not want their sons and daughters to be gay. A lot of them do not like their behaviors. But they think it is wrong for people to be fired from their jobs. And that is really all that we are saying with this piece of legislation."¹⁰

The 1994 hearing on ENDA felt momentous to gay civil rights advocates. For the first time, we were working hand in hand with the general civil rights community, we had an administration that had conveyed its support for the bill, and we seemed to be in striking distance of a majority of the House and sixty senators (enough to block a filibuster). But everything changed in November 1994. In a surprising election result, the Democratic Party lost control of both the House of Representatives and the Senate. This transfer of power was particularly devastating for ENDA's prospects in the House, where strict procedural rules make it practically impossible for any legislation ever to be considered by the full body without the approval of the leadership of the party in power.

The two years following the Republican congressional takeover in 1994 were hard years for progressive organizations generally. The legislation that

made up the Contract with America, including welfare reform, occupied much of Congress's time. Gay and civil rights organizations in Washington again found themselves fighting an array of antigay and anti-AIDS amendments that now found more fertile legislative ground in which to flourish.¹⁰⁴ And on ENDA, a new internal war was being waged. Members of the transgender community were outraged when ENDA was introduced in 1994 without explicitly providing employment protection to individuals whose birth sex did not match their internal feelings of gender identity. Over the previous year, the transgender community had become politicized over this issue and had waged a mini-war against HRCF, protesting through the Internet and through public demonstrations their exclusion from ENDA.

Early in 1995, a summit meeting was held between HRCF and representatives of the transgender community to see if a resolution on the issue could be reached. Although HRCF refused to agree that ENDA would include protection based on gender identity when it was reintroduced, HRCF did agree not to oppose any amendment that added such protection were such an amendment to be offered. HRCF also agreed that I, as their legal consultant, could work with members of the transgender community to help develop such an amendment. Because ENDA needed little legislative-lawyering work by that point, I spent the majority of 1995 meeting with several transgender advocates to develop such an amendment.

With Congress held so tightly in the Republican grasp during this time, it was hard to do any proactive work on ENDA. After much effort, a hearing was convened in June 1996 by Congressman Peter Torkildsen, the Republican chairman of the Subcommittee on Government Programs of the House Small Business Committee. Although the subcommittee could barely claim jurisdiction over ENDA, Torkildsen was the one sympathetic Republican who could be found to hold a hearing. Once again, the hearing was compelling because of individual cases of discrimination recounted by five separate witnesses.¹⁰⁵ It was also memorable because the ranking Democrat on the subcommittee, Congressman Glenn Poshard, was unusually direct in exposing his personal, moral struggle about voting for ENDA. Poshard noted that, as a Christian, he believed that the "homosexual lifestyle is essentially unacceptable," and yet also that he must "do justice." But to Poshard, doing justice by voting for ENDA created a significant moral dilemma: "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 lifestyle?"

I had recently written an article on sexual orientation, law, and morality and had briefly explored in that piece the manner in which advocates such as myself shrank from answering such questions about ENDA.¹⁰⁶ But, although I testified that day at the House hearing and acknowledged the force of Poshard's question, I did not feel prepared to depart publicly from the "party

line" on the bill. Indeed, everyone else who testified that day delivered to Poshard the same message advocates have consistently delivered: passage of ENDA would convey no endorsement of homosexuality, and thus Poshard could continue both to believe homosexuality was morally wrong and to vote for ENDA. To me, however, those answers lacked both resonance and credibility, and I began to question more seriously whether advocates would do better to modify their moral rhetoric regarding ENDA.¹⁰⁷

An unlikely confluence of events pushed ENDA suddenly to the fore in the summer of 1996. In 1993, the Hawaii Supreme Court had ruled that denying marriage licenses to same-gender couples presented a possible violation of the state's constitutional guarantee of equal protection based on gender. Throughout the spring of 1996, the case was pending in the Hawaii court system, where the state had been forced to present "compelling reasons" to justify its refusal to recognize same-gender marriages. Although final resolution of the case would be years away, congressional Republicans decided the fall of 1996 (conveniently situated just before the November 1996 election) would be an excellent time to put Congress on record as opposing same-sex marriage. Hence, during the summer of 1996, Congress took up the Defense of Marriage Act (DOMA), a bill providing that no state would be required to give effect to a same-sex marriage legally recognized in another state and providing that the term *marriage or spouse* in federal law would apply only to a union between a man and a woman.

Among the strategies we considered in the fight against DOMA was to propose a host of unrelated amendments to the bill. Procedurally, it would be next to impossible to offer such amendments in the House of Representatives. But in the Senate, any amendment—no matter how unrelated to the underlying bill—could be offered. Thus, we began to develop a series of amendments, based on pending Democratic legislation on issues ranging from gun control to health care, that we felt could pose embarrassing votes for Senate Republicans. During this process, Daniel Zingale, political strategist for HRC, posed a question to a small group of gay and civil rights advocates: "What about offering ENDA as an amendment to DOMA?"

Zingale's idea was dramatic, and ultimately brilliant. The decision was made that ENDA would be offered as an amendment to DOMA only if vote-counting indicated the amendment could garner affirmative votes in the mid-to-high forties. While we did not need to have ENDA necessarily pass, we did need to know it would make a respectable showing. The strategic, lobbying, and grassroots teams of the LCCR organizations (of which the gay rights organizations were now an integral part) swung into action to begin collecting votes; the legislative-lawyering team began to develop a few modifications to ENDA to respond to concerns that the opposition had raised. By August 1996, we had an ENDA ready that was rapidly gaining support.

The biggest break for the vote on ENDA resulted from the political machinations surrounding DOMA. The Republican leadership wanted to bring DOMA up for a vote, but were not interested in subjecting the bill to potentially embarrassing votes on gun control or health care. Thus, the Republican leadership offered Senator Edward Kennedy, who was leading the fight for ENDA, a simple deal: an up-or-down vote on DOMA, with no extraneous amendments to be offered to DOMA (other than ENDA), in return for an up-or-down vote on ENDA, with no extraneous amendments to be offered to ENDA. Senator Kennedy took the deal, with the agreement of LCCR and the Washington-based gay rights organizations. The opportunity to have a "clean" vote on ENDA, without amendments on teachers or youth or religion or whatever, would be remarkable, and worth giving up the opportunity to offer extraneous amendments on DOMA that might not have made any difference to ultimate passage of the legislation.

Indeed, the debate and vote on ENDA was remarkable. In September 1996, the United States Senate debated ENDA for two days in a serious and comprehensive fashion. For the first time in history, televised proceedings of a full body of the U.S. Congress relayed to the American people discussions related to a *positive* piece of legislation about gay people. The silence of sixteen years ago was gone; the quiet acquiescence to antigay amendments of ten years ago was gone.

But the gut-wrenching aspect of the debate was that a serious, positive discussion of employment discrimination against gay men, lesbians, and bisexuals was sandwiched between a debate and an affirmative vote on DOMA—an explicitly antigay bill. Indeed, if anything demonstrates the limitations of the rhetoric on ENDA, it is the juxtaposition of the debates on DOMA and ENDA. Numerous senators had no problem voting for *both* DOMA and ENDA, and proudly proclaiming the consistency of their votes. A vote for DOMA, after all, was seen as an endorsement of the good of heterosexual marriage, and implicitly, as a rejection of the good of gay coupling. Since a vote for ENDA had consistently been described (even by advocates) as *agnostic* on whether gay people and gay coupling were good, a senator could logically vote for both bills. What a far cry from Art Agnos's assessment in 1980 that an antidiscrimination law on employment and housing and a law allowing same-sex marriage are different only in degree, not kind.

The debate on ENDA culminated with a heartbreaking vote of 50-49 against the legislation. Senator David Pryor (D-AR) had indicated he would vote in favor of the bill, but was absent the day of the vote because his son was undergoing surgery. And while Vice President Al Gore was standing ready to cast the tiebreaker if the vote was 50-50, Pryor's absence deprived Gore of that opportunity.¹⁰⁸

Despite ENDA's failure to pass in the fall of 1996, the close Senate vote

gave the bill important political legitimacy. This was no longer a bill that did not have the slightest chance of passage. Rather, it was a bill that simply needed the right opportunity in the Senate and had a realistic hope of passage in the House were the Democrats to again take control. So work on ENDA proceeded slowly and steadily. The bill was reintroduced in the Senate in 1997 with Senator Jim Jeffords, a Republican from Vermont, as the lead sponsor, and in the House with Congressman Christopher Shays, a Republican from Massachusetts, as one of the lead sponsors. Senator Jeffords held a hearing on ENDA in October 1997, which followed the usual pattern of previous hearings.¹⁰⁹ And over the following two years, various provisions of ENDA were tinkered with and changed as new questions arose from potential sponsors or opponents of the legislation. For example, during the first six months of 1999, we worked solely on modifying one provision of ENDA that prohibited affirmative action on the basis of sexual orientation. Although a policy decision about affirmative action had been made six years before, questions about the technical, legal impact of the bill necessitated hours of tinkering and negotiation.

On June 24, 1999, ENDA was reintroduced by Senators Jeffords and Kennedy with thirty-six cosponsors, and by Representatives Shays, Morella, and Frank with 166 cosponsors. By that point, some of the internal fights on ENDA had broken into the open, with NGLTF noting it could not endorse the bill without inclusion of antidiscrimination protection for transgendered people. But the game plan on ENDA remains the same: a slow and steady effort toward collecting votes. And the official line on the bill remains the same: one can vote for ENDA without such a vote indicating anything about one's view about whether gay is good.

So what have we learned in the twenty-five years from Bella to ENDA? Some of our lessons are similar to those learned by other social movements. First, we have learned that change usually occurs only in incremental steps. Indeed, if one tries to achieve change too quickly, one often achieves no change at all. Moreover, positive legislation usually depends on some positive change having already occurred in societal attitudes and beliefs. For gay people, creating that societal change has been inextricably linked with coming out and being coming visible. The presence of gay people living open and honest lives has inevitably affected, in a positive manner, the attitudes of nongay people. And that the gay community has been represented in Washington over a number of years by people who are proudly out and comfortable has made a profound difference in changing the attitudes of other civil rights advocates with whom the gay rights advocates have worked in coalition.

Second, we have learned that change usually occurs most readily when we build coalitions with other groups, and that we must pay our dues with those groups to become full members of the team. Becoming sophisticated

members of the team has also meant becoming politically savvy and involved in electoral politics—both through financial contributions and through the mobilization of votes.

But taking incremental legislative steps, forming coalitions with other groups, and using electoral power require patience, pragmatism, and compromise. These are not easy characteristics to adopt when one yearns for a complete victory in the shortest time possible. Moreover, these characteristics are sometimes in tension with frankness. For me, the most difficult tension has been between the rhetoric surrounding ENDA, which consistently proclaims that a vote for ENDA displays no affirmative position that gay sex is a moral good, and my personal belief that being gay is as morally neutral as being heterosexual, and that the love manifested in *both* heterosexual and gay relationships is a moral good.

Pragmatism counsels that the rhetoric around ENDA remain the same, since many members of Congress apparently feel comfortable voting for the bill only as long as they are permitted to make the assertion that such a vote carries no moral message about gay sexuality. But the rhetoric supporting ENDA seems somehow behind the times. In so many venues, we are essentially proclaiming that gay love and gay coupling is a moral good. Indeed, the more that gay people and gay couples live open and honest lives, the more we are living embodiments of the moral goods of love, caring, pleasure, and commitment.

So perhaps, beyond Capitol Hill, we are beginning to change the world a little. ENDA may well pass based on the old rhetoric, and passage of the law will then help other gay people to continue to change the world by coming out and changing the attitudes of others across the country. But we should hope for an even better outcome. We should hope ENDA itself will be welcomed into a new world where both rhetoric and beliefs have *already* changed, and where the idea plastered on buttons in 1969—Gay Is Good—is not so revolutionary anymore.