

Moral Argument, Religion, and Same-Sex Marriage

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Advancing the Public Good

Edited by
Gordon A. Babst, Emily R. Gill, and Jason Pierceson



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Conclusion

The Moral Values Project: A Call to Moral Action in Politics

Chai R. Feldblum*

MORAL ARGUMENTATION: SHOULD WE EVEN GO THERE?

Anyone interested in pursuing a line of moral argumentation on behalf of gay equality would do well to read (or reread) Michael Sandel's brief fifteen-page article, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, first published in the *California Law Review* in 1989.¹ In that article, Sandel makes the argument that solidifying the right to an abortion or the right to engage in homosexual sex might require engaging with normative moral assessments of such activities. In this concluding chapter, I refer back to that groundbreaking article and intermix political argument with my own experience in the legislative and judicial arenas to make the claim for infusing moral action in politics. By doing so, I hope to add some additional poignancy to the claims made in this book that complete and full equality for sexual minorities will be achieved only on the basis of moral argumentation.

In this volume, R. Claire Snyder-Hall forcefully presents the counter-story to Sandel, arguing that the moral values inherent in political liberalism are sufficient to justify full gay equality.² Carlos Ball, in his succinct and targeted contribution to this volume, sets forth the counterarguments to those claims, highlighting the problems many of us believe remain intractable if complete and full equality for LGBT people is sought solely based on the moral values of political liberalism, without the concomitant substantive claims that LGBT

* Parts of this chapter are derived from a monograph written for a meeting convened by the National Gay and Lesbian Task Force in 2006. That monograph benefitted from the work of Michael Boucai, Amy Simmerman, and Alyssa Rayman-Read.

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people are *good* and that government has a role in supporting the advancement of certain normative goods.³

In his 1989 article, Michael Sandel considered the ways in which people argue for laws against abortion and homosexual sodomy, as well as how they argue against antiabortion and antisodomy laws. People make what Sandel noted might be called “naïve” and “sophisticated” arguments:

The naïve view holds that the justice of laws depends on the moral worth of the conduct they prohibit or protect. The sophisticated view holds that the justice of such laws depends not on a substantive moral judgment about the conduct at stake, but instead on a more general theory about the respective claims of majority rule and individual rights, of democracy on the one hand, and liberty on the other.⁴

Sandel’s goal was, as he put it:

to bring out the truth in the naïve view, which I take to be this: The justice (or injustice) of laws against abortion and homosexual sodomy depends, at least in part, on the morality (or immorality) of those practices. This is the claim the sophisticated view rejects. In both its majoritarian and its liberal versions, the sophisticated view tries to set aside or ‘bracket’ controversial moral and religious conceptions for purposes of justice. It insists that the justification of laws be neutral among competing visions of the good life.⁵

Sandel proceeds to make his argument by dissecting the analysis of the Supreme Court in both its abortion and sodomy cases, with the latter focused on *Bowers v. Hardwick*. I had started my judicial clerkship with Justice Blackmun in July 1986, just after the *Hardwick* decision had been handed down in June 1986, replete with (from my perspective) an eloquent and commanding dissent from Justice Blackmun. I was particularly struck, therefore, by how Sandel unpacked and critiqued Justice Blackmun’s dissent in that case.

In *Hardwick*, Justice White had easily dismissed the asserted constitutional right of privacy to engage in homosexual sodomy by cavalierly announcing: “No connection between family, marriage, and procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.”⁶ His assumption, of course, was that whatever was common among activities such as having a family, getting married, and having children—all activities that had previously been held by the Supreme Court to be protected under a constitutional right of privacy—was definitely not present when people were engaged in the activity of homosexual sex.

But as Sandel points out, the panel of the Eleventh Circuit Court of Appeals in that case had argued precisely for recognizing a similarity between such activities. As Sandel summarized the lower court’s analysis:

The marital relationship is significant, wrote the court of appeals, not only because of its procreative purpose but also "because of the unsurpassed opportunity for mutual support and self-expression that it provides." It recalled the Supreme Court's observation in *Griswold v. Connecticut* that "marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." And it went on to suggest that the qualities the Court so prized in *Griswold* could be present in homosexual unions as well: "For some, the sexual activity in question here serves the same purpose as the intimacy of marriage."⁷

In stark contrast to the line of reasoning adopted by the Eleventh Circuit, however, which relied on a positive normative assessment of the goodness inherent in intimate same-sex relationships, the dissent by Justice Blackmun (the eloquent and commanding dissent of my Justice!) was strikingly timid and shrinking in Sandel's view.

Justice Blackmun's dissent did conclude that there was a constitutional right of privacy that protected homosexual sodomy and prohibited its criminalization. But, as Sandel trenchantly points out, Blackmun rested his analysis on a voluntarist and individualist line of reasoning—one that had its intellectual roots in *Stanley v. Georgia*,⁸ a case that protected a person's right to read pornography at home, rather than in *Griswold v. Connecticut*,⁹ the case which rested on a ringing endorsement of the human good of marriage. Under this approach, while there was a constitutional right of privacy to engage in homosexual sodomy, that was not because sex between a gay couple should be understood as partaking of the same moral good as sex between a married couple. Rather, it was because our society protects our right to engage in intimate, personal activities in private that do not harm others—even if those activities are somewhat distasteful, such as the reading of pornography.

Of course, timid reasoning or not, had Justice Blackmun been able to convince just one more Justice to adopt his reasoning and join his opinion, the Supreme Court in 1986 *would* have recognized a constitutional right to privacy to engage in homosexual conduct and laws criminalizing sodomy across the nation *would* have been invalidated. That is *not* a small matter.

Moreover, had Justice Blackmun grounded his opinion on the rationale that gay sex was morally equivalent to heterosexual sex, he would probably not only have had difficulty pulling in a fifth Justice, he probably would have had difficulty pulling in *himself*. During July and August of 1986, the first few months of my clerkship, Justice Blackmun talked a fair amount about homosexuality to his clerks, given the large amount of mail he was receiving at that time as a result of his dissent in *Hardwick*. Based on his comments, it was clear to me that Justice Blackmun was not particularly comfortable with the idea of homosexuality. He seemed to view homosexuality as an unfortunate aberration that afflicted some people and for which they should not

be punished. But he did not view homosexuality as a way of being that was morally equivalent to, and equally healthy as, heterosexuality.¹⁰

Sandel himself sets out the utility and appeal of an approach that brackets the morality of homosexuality. Of key importance, people do not have to change their views as to whether gay sexual activity is morally problematic, or even to engage in such a conversation, in order to extend rights to gay people. "By insisting only that each respect the freedom of others to live the lives they choose, this toleration promises a basis for political agreement that does not await shared conceptions of morality."¹¹

And yet, I remain uncomfortable with the timid approach of the Blackmun dissent. There is something incredibly important that is absent in the pure voluntarist case for toleration. First, as a practical matter, Sandel argues, "it is by no means clear that social cooperation can be secured on the strength of autonomy rights alone, absent some measure of agreement on the moral permissibility of the practices at issue."¹² That is, perhaps people are really only ready to extend toleration once they have *already* come to believe that the underlying activity is morally permissible. And second, there is a real difficulty in "the quality of respect [the voluntarist case for toleration] secures."¹³ By definition, a moral bracketing approach leaves all negative views of homosexuality unchallenged. How much respect does that ultimately gain for gay people?

Sandel concluded his 1989 article as follows:

Defining privacy rights by defending the practices privacy protects seems either reckless or quaint; reckless because it rests so much on moral argument, quaint because it recalls the traditional view that ties the case for privacy to the merits of the conduct privacy protects. But as the abortion and sodomy cases illustrate, the attempt to bracket moral questions faces difficulties of its own. They suggest the truth in the "naïve" view, that the justice or injustice of laws against abortion and homosexual sodomy may have something to do with the morality or immorality of these practices after all.¹⁴

I was convinced by Sandel's arguments—hook, line, and sinker. It is not that I did not perceive the many tangible political advantages in arguing for gay equality through resort to the moral values of political equality, espoused by thinkers such as John Rawls and Ronald Dworkin, and articulated so well in their application to gay equality by Claire Snyder in this volume. Indeed, in the almost twenty years since reading Sandel's article, I have operated in the legislative and judicial worlds in various roles—helping to write pro-LGBT legislation, arguing against anti-LGBT legislation, negotiating deals on both types of legislation, and writing amicus briefs. Invariably, I have used almost solely the tried and true political arguments of neutral equality. Those arguments are *very* powerful, and they often *work*.

For example, when I testified on behalf of the Employment Nondiscrimination Act (ENDA) in 1994, I turned to the power of moral bracketing in responding to a line of questioning from Senator Nancy Kassebaum (R-KA) about the possible ramifications of passing a nondiscrimination law that protected behavior. After trying to assert that the sexual behavior of a gay person should be seen as equivalent to the religious behavior of a person of faith (and getting nowhere fast with that line of argument), I then asserted:

There are clearly people . . . who believe that it is entirely appropriate for employers to be able to fire someone just because he or she is gay. [But] you know, 70 percent of the American public when they are surveyed say they do not think so. *They do not like gay people particularly, . . . they do not really want their sons and daughters to be gay. . . . 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.* (emphasis added.)¹⁵

Matt Coles, Director of the ACLU Lesbian and Gay Rights Project, tells a perfect story about moral bracketing. Coles talked about a visit he made to a black fundamentalist congregation in California. The audience, deeply biased against his position, finally “got it” when he insisted that “you can’t make my housing, my job depend on whether you *like* me.”¹⁶ And James Esseks, a lawyer with the ACLU Project, noted that many people who accept the principle of nondiscrimination in employment do not accept that straight and non-straight people are or should be equal. In Esseks’ view, “ENDA could pass without ‘gay is good.’”¹⁷

Coles and Esseks are correct that moral bracketing is very much in play when a gay civil rights law is being considered. For example, the reality is that many Americans still believe homosexuality is immoral. In a Gallup poll taken in May 2007, 49 percent of respondents said they found “homosexual relations” to be “morally wrong,” while 47 percent called such relations “morally acceptable.” While the percentage of people who are saying that homosexual relations are morally acceptable has been slowly growing over the years, it has not yet topped 50 percent.¹⁸

And yet, from 1996 to 2008, nineteen polls by five different public opinion monitors have found that more than 80 percent of Americans believe gay people should have equal rights in terms of job opportunities. Indeed, a Gallup poll in May 2008 found 89 percent approval for allowing equal job opportunities for gays and lesbians.¹⁹

Assuming antigay animus largely or primarily expresses a moral sentiment, the public *must* be bracketing its moral opinion of homosexuality when it comes to at least certain issues, such as employment discrimination. As one poll analyst observes: “People have learned they need to be more tolerant of gays and

lesbians. On that most scholars agree. This tolerance is believed to be rooted in a sense of fairness, not necessarily support for the group. Americans understand that, 'you treat people equally even if you don't approve of them. You do not fire people or discriminate against them because they are different.'"²⁰

Moral bracketing is what allows people to say both that homosexuality is wrong *and* that antigay discrimination is wrong. How bad can that be?

Let me be clear—moral bracketing makes a lot of sense for the LGBT civil rights movement. The essence of moral bracketing is that it does not matter if a majority in this country does not like a particular minority (or does not like the activities of a particular minority), as long as the people in that minority and/or their behavior are not hurting anyone else. That approach is very helpful in the march towards equality for LGBT people.

And, as Synder makes clear in this volume, moral bracketing is not a politics that is devoid of *moral values*. To the contrary, it is an approach that values pluralism deeply and cherishes the ethical principles of respecting people's individualism and autonomy. Under a political approach respecting such values, it is understood that individuals living in a pluralist society will inevitably hold divergent normative and moral beliefs. The important role of law and government, therefore, is to safeguard equally and adequately the rights necessary for each individual to pursue his or her own normative view of "the good life"—but not otherwise to affirmatively advance one moral, normative view of "the good" over others.

And yet, the challenges that Sandel raised with regard to the ultimate utility of moral bracketing continue to resonate for me as an advocate for LGBT rights.

First, although many individuals who vote for a gay civil rights bill claim that they are not making a moral assessment about homosexuality, that position must be disingenuous at some level. The only way to justify prohibiting private employers, landlords, and business owners from discriminating against gay people is to have made the prior moral assessment that acting on one's homosexual orientation is not *so* harmful to the moral health of the community (because it might harm the individual or others) as to *justify* discrimination against such individuals in the public domain.

While people may not consciously acknowledge they have made this prior moral judgment, it is hard to see how such a judgment is not a necessary precondition for voting in favor of such laws. In other words, while people may describe their position in favor of such laws solely in terms of neutral tolerance, the path they have taken to arrive at that stage of neutral toleration might well have required a prior shift in their moral assessment of homosexuality. That shift was not necessarily to a position that gay sexual activity is morally equivalent to heterosexual sexual activity. But it

was at least a shift to the position that gay sexual activity is not so morally problematic that employers may justifiably use that activity as the basis for granting or withholding job opportunities. Perhaps there would be some utility in enabling and/or forcing people to acknowledge they have reached that point in their moral assessment of homosexuality if they are supporting an antidiscrimination law.

Second, what quality of respect, and hence what degree of equality, can we realistically expect under a regime of neutral toleration? As long as advocates for LGBT rights ask simply for protection from discrimination in areas such as employment, housing, and most public accommodations, they seem to have significant support. But as soon as advocates demand full recognition of their families and children (for example, the right to civil marriage, the right to equal benefits, and the right to adopt children), the same legislative champions who were ready to vote for a gay civil rights employment/housing/some public accommodations bill are often nowhere to be found. It seems that once a law appears to connote approval of homosexuality—in an explicit manner, rather than *sotto voce*—most supporters become uneasy. They perceive that their constituents are not yet ready for them to vote for a law that presumes a moral equivalence between homosexuality and heterosexuality.

Finally, if we limit our arguments for equality to the moral value of neutral toleration, it will be harder for us to deal honestly with opponents of LGBT right who have moral objections to homosexuality. Once one acknowledges that some moral assessments necessarily underlie legislative enactments that provide equality for LGBT people, it is easier to understand how those who believe that homosexuality, or acting on one's homosexual orientation, is morally wrong might feel burdened in some way by such legislative enactments. As I describe more fully below in my discussion of Proposition 8, government should not alleviate those burdens in a way that would undermine the effectiveness of equality legislation for LGBT people. But a more open engagement with the moral assessments underlying such legislation would allow us to have a more honest and respectful conversation with individuals who have different substantive moral views.

None of these limitations, however, seemed serious enough to me to justify a change in course during most of the lifetime that I have been advocating for LGBT equality. I authored several articles between 1996 and 2004 noting the limitations of moral bracketing and calling for an internal (and essentially, academic) conversation about the substantive moral claims that might underlie the assertion of "gay is good." I did not, however, see any compelling need for a significant shift in the political or public strategy undertaken by advocates towards advancing LGBT equality. The turning point, for me, was in 2004.

Social conservatives have often asserted that “moral values” gave George W. Bush his second term as President. They point to the fact that exit polling indicated that voters ranked “moral values” as one of their foremost concerns at the ballot box in November 2004. Twenty-two percent of Americans said that, in deciding who ought to lead the United States, “moral values” mattered more to them than:

- Education (4 percent)
- Taxes (5 percent)
- Health Care (8 percent)
- Iraq (15 percent)
- Terrorism (19 percent)
- Economy and Jobs (20 percent)

Eighty percent of those respondents who said they chose their President based on moral values were Bush supporters.²¹

Were supporters of George W. Bush really more moral than supporters of John Kerry? What exactly was *meant* by moral values? How did people filling out those exit polls *know* what was meant? As more than one analyst has pointed out, not even the respondents themselves knew the answers to these questions. More than 44 percent of respondents answering the exit polls thought moral values meant specific issues like abortion and gay marriage. Others thought it referred to the candidates’ personal qualities or religious affiliations.²² But what the poll’s use of the term “moral values” did was prohibit respondents from identifying the Iraq war, or health care, or jobs as *moral* categories. The poll itself contrived which issues were moral issues and which were not.

As it turned out, more sophisticated election analyses that took place in the months after the election indicated that opposition to “gay marriage” or abortion were not as important to voters in 2004 as conservatives liked to claim.²³ But to a certain extent, the damage had been done. The reality is that social conservatives have been incredibly successful with promoting *their* moral values (as moral values) in the public discourse. This success stems from the ability, specifically of the Religious Right, to promote its agenda on multiple levels.²⁴

First, “moral values” has become a popularly understood code word for an entire set of conservative issues and beliefs, even identities and affiliations. Those who believe in moral values, or who vote “on their moral values,” are presumed to agree about a number of social policies, religious beliefs, and political agendas. The term is used like a fraternity handshake to connote much more than its literal, dictionary meaning. And because the popular press has swallowed and regurgitated “moral values” according to the conception offered by its creators, we now have a popularly accepted understanding

of what it means to “act in the public sphere upon one’s moral values.” By accepting this singular meaning of moral values, countless other meanings have been inherently excluded, as Babst’s critique of heteronormativity in this volume suggests.

Second, the Religious Right has used the moral values messaging to galvanize the public. There has been a deliberate and comprehensive campaign by the Religious Right to create the terms “family values” and “moral values” as a simple, innocuous-sounding signal to voters—to include voters in the fraternity handshake without necessarily including them, or needing to include them, in the fraternity itself.

Third, the Religious Right’s moral values messaging capitalizes, in a deliberate and brilliant fashion, on liberal fears of using morality-based language in political discourse. Conservative strategists know very well that liberals and progressives believe strongly in the separation of church and state and hence are often uncomfortable with the language of morality—so often conflated with religion—in politics. Some liberals and progressives make very clear that they stand for *values*, but still feel discomfort identifying their beliefs as *moral values*.

To me, it seems incredibly unfortunate to have one group—with such conservative positions on sexuality and gender no less—be permitted to get away with a monopoly on such a useful term as “moral values.” After 2004, it seemed particularly essential to me to envision a strategy for taking that term back.

The campaign of Barack Obama for President in 2008 might ultimately turn out to be a turning point in terms of taking back the term “values.” In *The Audacity of Hope: Thoughts on Reclaiming the American Dream*, in a chapter titled and devoted to Values, Obama notes how conservatives used the polling data on the ambiguous “moral values” term. But his response to their use is a clarion call to action based directly on values:

I think Democrats are wrong to run away from a debate about values. . . . It is the language of values that people use to map their world. It is what can inspire them to take action, and move them beyond their isolation. The postelection polls may have been poorly composed, but the broader question of shared values—the standards and principles that the majority of Americans deem important in their lives, and in the life of the country—should be the heart of our politics, the cornerstone of a meaningful debate about budgets and projects, regulations and policies.²⁵

I agree with Obama. And my inclination is to go for the whole package. The terms “values” and “moral values” are essentially interchangeable. They both refer to our vision of the good. They both refer to normative beliefs, assumptions, and presumptions about what is right and what is wrong. They

both have relevance to “budgets and projects, regulations and policies.” And many of them will impact issues of sexuality, sexual orientation, and gender. Thus, we need a meaningful debate in this country about what “moral values” means in the context of LGBT equality. The chapters in this book offer a basic grounding for this debate, cutting across a range of scholarly disciplines. But we also need a blueprint for applying that grounding in a practical manner to the political sphere. In the following section, therefore, I lay out the premises and discursive moves of what I call the Moral Values Project, an enterprise I launched in 2005 to provide resources and a base for moral advocacy to achieve equality in the arenas of sexuality, sexual orientation, and gender.²⁶

THE PREMISES OF THE MORAL VALUES PROJECT

Most of the discrimination that gay people experience in American society today derives from the assumption that gay is *bad*—or, at least, is *not as good as* straight. People (including public leaders) do not always say this openly and explicitly. But when one pushes the logic behind any denial of full equality to LGBT people, “morality” is always and perhaps necessarily the ultimate rationale.

Sometimes a discriminatory public policy or private action is based upon the belief that homosexuality or bisexuality—the sexual *orientation* itself—is not as good as heterosexuality. Other times, the public policy is based on the belief that even if an individual’s sexual orientation may have been predetermined by God, nature, and/or nurture—and is therefore not itself a source of moral blame—it is bad (or “not as good”) to *act* on a homosexual orientation as it is to act on a heterosexual orientation.

In contrast, the Moral Values Project holds these truths to be self-evident:

- ☐ sexual orientation is a *morally neutral* characteristic; and
- ☐ it is *morally good* to express one’s gay sexual orientation by engaging in homosexual sex and being out as a gay person.

The Moral Values Project is then based on the following five premises:

Premise One: An individual’s sexual orientation is a morally neutral characteristic and acting in a manner consistent with one’s sexual orientation is a morally good act.

Sexual orientation, in and of itself, is a morally neutral characteristic.

The source of our sexual orientation—be it God, our genes, our childhood experiences, our ideological choices, or something else we haven't even discovered yet—does not matter. It does not matter because sexual orientation *itself* does not matter from a moral perspective, any more than it matters whether we have blue eyes or brown eyes, black skin or white skin.

Society, of course, can decide to make some things matter more than others. Thus, the color of our skin, or who excites us sexually, can be—and has been—*made* to matter more than the color of our eyes. But as a logical and inherent matter, sexual orientation, skin color, and eye color are all morally neutral characteristics.

By contrast, the choice to act consistently or inconsistently with one's sexual orientation is a morally laden act. The Moral Values Project believes that an individual who acts *consistently* with his or her sexual orientation acts in a *morally good* manner. A person who acts in that fashion will be able to feel happiness (including sexual pleasure) more authentically and will be more likely to live a life of honesty and integrity. By contrast, a person who acts inconsistently with his or her sexual orientation is more likely to experience unhappiness (including sexual deprivation and dissatisfaction) and is more likely not to have integrity in his or her life. A corollary of such choices is that the person who becomes the spouse of a person who is acting inconsistently with his/her sexual orientation is also more likely to experience unhappiness in his/her life.

Premise Two: We must force the conversation—in personal, political, and public media settings—that an individual's sexual orientation is a morally neutral characteristic and that an individual who acts consistently with his/her orientation is acting in a morally good manner.

There are many people in American society who feel that homosexuality is just “not as good” as heterosexuality. Many of these people think that even if homosexuality itself is not a terrible thing, it would be better if people did not act upon their homosexual or bisexual orientations. Some people “know” why they hold such beliefs. Many others do not—they cannot articulate *why* being gay or having homosexual sex is not as good as being straight or having heterosexual sex. But whatever category a person may fall into, we have no hope of convincing her or him of the moral neutrality of sexual orientation, and/or of the moral goodness of acting consistently with one's orientation, if we do not engage in a conversation about those beliefs in the first place.

The second premise of the Moral Values Project, therefore, is that we must—in a consistent and perhaps annoying fashion—engage anyone who believes being gay, or acting on one's gay orientation, is morally problematic

to explain to us *why* he or she believes that to be true. For those who use religion to explain the immorality of homosexuality, we must be able to deploy the teachings of religions that believe otherwise. For those who rely on a particular view of natural law, we must be able to explain the logical consequences of applying natural law to other areas of sexuality. (For example, it would require prohibiting all birth control and heterosexual oral sex as well.) For those who simply have a measure of disgust, we need to learn how to diplomatically uncover and then treat that visceral response.

Unfortunately, there are not many accessible scripts out there right now, for anyone—from an ordinary person talking to his family to a policy-maker talking to her colleagues—to explain why sexual orientation is a morally neutral trait and why acting consistently with one's sexual orientation is a morally good act. One of the goals of the Moral Values Project, therefore, is to formulate and broadcast such scripts in a manner that will meet a range of audiences.

Premise Three: An effort to achieve full sexual and gender equality in this country will benefit if the LGBT movement offers a vision of substantive moral goods that our society should advance.

The current political discourse for LGBT rights draws mainly on two compelling values: fairness and equality. We should not abandon this powerful discourse. But neither should we shy away from articulating *additional* substantive goods that members of our society also believe in, goods whose elaboration would benefit the struggle for full gender and sexual equality once we “connect the dots” for people.

To be specific, we believe a good society embodies, at a minimum, the following *four moral understandings*:

- ☐ It is good for people to feel safe.
- ☐ It is good for people to be happy.
- ☐ It is good for people to give and receive care.
- ☐ It is good for people to live a life of integrity.

The work of Robin West has been a particular influence on my understanding of the moral goods of safety and care. In books such as *Caring for Justice* (1999) and *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (2005), West has eloquently set forth the arguments for why government has an obligation to affirmatively support the ability of individuals to give and receive care and to feel safe. The moral understandings that underlie the Moral Values Project also find their

resonance in Urvashi Vaid's statement in her book, *Virtual Equality*: "What principles define gay and lesbian morality? I see them as a commitment to honesty, demonstrated by the experience of coming out; a commitment to community, or a love that surpasses the definition of family and relationship we inherited from the heterosexual norm; and a commitment to joy, expressed in our affirmation of pleasure, both sexual and nonsexual."

Premise Four: Our government has the obligation, through its public policies, to create societal frameworks that advance a set of moral goods.

Our government has more than simply a negative responsibility towards us—that is, a responsibility not to interfere without good reason in our personal lives. It also has a positive responsibility towards us. Hence, government is not doing its job if it fails to ensure that its people, including its LGBT people, have the societal frameworks in which to be safe, happy, able to care for others and to be cared for, and live a life of integrity. Obviously, government cannot guarantee that we will always be safe, happy, find someone to care for, and who will care for us, and be able to live a life of integrity. But government can help create the *social frameworks* in which our *capacity* to feel safe, happy, cared for, and authentic is either supported or diminished. As Carlos Ball notes in his chapter in this book, this is a legitimate role that we can and should expect government to undertake.²⁷

So how are the four substantive moral goods listed above faring in today's society for LGBT people? Not too well!

Safety: LGBT people know what it is like *not* to feel safe—whether we are walking down the street holding hands with our partner or being open about our partner, our family life, or our gender identity at the workplace.

It is a fact of life that when a person exhibits outward signs of being gay or is perceived as being gay, there is at least some risk that physical harm will be visited upon that person in return. Whether we envision an overtly butch lesbian, two men holding hands, or lesbians discussing their sexuality with the potential of being overheard, there is a risk that someone will "retaliate" against them physically.

And safety is not just physical. LGBT people lack the security of knowing that they will not be fired and lose their livelihoods simply because they are gay or transgender. They don't have the security of knowing that they won't be evicted from their apartments—thrown out of their homes—simply because their landlord may morally disapprove of homosexuality. And they don't have the security of knowing that their sexual orientation or transgender status won't be used against them in the receipt of public or private goods and services.

Happiness: While many LGBT people today are very happy, it is not because the government has made that easy.

Our current societal frameworks are not designed to help ensure that LGBT people will experience happiness. Happiness may mean being in a formally recognized relationship that one can share and celebrate with others. Or it might be as simple as being able to put a picture of one's lover on one's desk at work, just as one's straight colleagues do.

And happiness includes sexual pleasure. Gay people have had to articulate more explicitly than most—if only to ourselves—that sexual pleasure is often central to happiness and essential to becoming a fully actualized person. For some individuals, this is because they have forced themselves into abstinence or into having sex with people of the opposite gender. For others, it is simply the experience of feeling compelled to pursue sexual pleasure (and love and romance and other attendant things), even in the face of heavy resistance from the mainstream.

Care: Gay people know what it feels like *not* to be able to protect the ones we care for (and who care for us) in our communities.

Connections with others are key to our sense of self. For many of us, our connections are made within romantic and sexual relationships, and often include having children with these partners. We want to know that we can take care of our children just like straight parents take care of theirs, and we want to know that we can take care of our partners and that they can take care of us. We want this during our lifetime (when, for example, we want to be able to take time off from work to take our partner to the doctor) and we want this after our death (when, for example, we want our partner to be treated fairly by the Social Security system.)

Integrity: Gay people know what it feels like *not* to have integrity—to feel that we are hiding who we are and not being true to our full selves.

Kenji Yoshino discusses this experience in terms of “covering,” a term he borrows from Ervin Goffman.²⁸ By “covering,” Yoshino refers to an increasingly prevalent norm in society and antidiscrimination law, which tells gay people that is acceptable to be gay as a matter of fact, but that it is unacceptable for gay people to act out that identity—to show same-sex affection, to discuss their sexuality in any significant way, to engage in behaviors that are perceived as “gay.” As Yoshino argues, this denial of integrity, this severing of the self, can exact significant psychic damage on gay people and their relationships, and is ultimately stifling and harmful to society as a whole, particularly in a society in which we all, gay or straight, have some attribute that society pressures us to downplay in order to fit into the mainstream.

Premise Five: We as a society share these four moral understandings regardless of the source of the understanding (religious, spiritual, or secular) that any member of society might draw upon.

Some people may not initially identify these four beliefs as statements of *moral* understanding, perhaps because they do not consider themselves religious. Others might quickly view them as moral convictions because they are accustomed to understanding their religious beliefs as moral beliefs.

It is a central premise of the Moral Values Project, however, that morality does not derive from religious beliefs alone. A concomitant belief is that if our moral convictions happen to derive from religious beliefs, that fact neither detracts from nor enhances the power of such convictions.

The first necessary discursive move to be advanced by the Moral Values Project, therefore, is to change the public discourse so that morality (including morality in sexual matters) is understood as deriving equally and validly from secular, spiritual (but not affiliated with any particular religious denomination), *or* religious commitments and beliefs. Each of these sources should be understood as a legitimate and important basis for the creation of moral understandings.

Some religious people believe so strongly in the revealed truth of their beliefs that it is difficult for them to credit nonreligious beliefs as carrying equal weight and validity. Sometimes religious people simply believe this intuitively; at other times, they actually claim that the certitude provided by their religious beliefs provides greater intellectual support for their commitments.

There is no need to challenge religious people on the certitude of their beliefs. One of the (sometimes positive, sometimes negative) consequences of revealed truth is a sense of certitude. What does matter for political theory purposes, however, is that religious, secular, and spiritual beliefs should all be treated with *equal* respect and dignity in the public domain.

What this means, as a practical matter, is a commitment to the pluralism of various sources of "truth." Religious sources of moral values should be treated no better and no worse than secular sources or spiritual sources. A commitment to the First Amendment prescription of the separation of church and state necessarily precludes government from establishing and enforcing a religious theocracy. But it does not require a banishing of religious beliefs as a legitimate source of shared moral values in the public arena.²⁹ Conversely, the fact that a moral value is derived from a religious belief should not shield that moral value from contestation in the public domain.

The second discursive move is to explicate how religious, secular, and spiritual beliefs are often and ought to be *progressive* beliefs. The key discurs-

sive challenge here is to challenge the public perception that religious beliefs in the area of morality (read; “sexual morality”) are by and large conservative and regressive. One way to do that is to highlight, in the public media, the diversity of religious beliefs about sexuality.

There are a growing number of religious denominations that believe that an individual who acts consistently with his or her given orientation is acting consistently with the precepts of that religion.³⁰ And there are many gay people who consider themselves religious.³¹ The existence of religious denominations that support gay rights have figured prominently in amicus briefs submitted to the Supreme Court when it hears a gay rights case and in letters to Congress when it takes up a piece of gay-related legislation.

The challenge, of course, is to highlight the existence of these denominations and individuals whenever the media addresses the issue of gay rights. As Rabbi Sharon Kleinbaum, the Rabbi of Congregation Bet Simchat Torah in New York City, points out, it is both absurd and annoying to watch the typical talking-heads debate on television that pits someone like Reverend Jerry Falwell against someone like ACLU President Nadine Strossen. It is absurd because if we want to persuade individuals who are currently persuaded by Reverend Falwell, we need to offer them a gay rights advocate whose job is to “talk God.”³² And there are certainly many more clergy today who are willing to speak out on behalf of gay rights than ever before. It is annoying because it reinforces in the mind of the public that the “religious view” is “antigay,” while the “civil rights view” is “pro-gay.”

As unlikely a spokesperson as former Senator John Danforth captures the view I believe is essential with regard to the public perception of religious views on gender and sexual morality:

In recent years, conservative Christians have presented themselves as representing the one authentic Christian perspective on politics. With due respect for our conservative friends, equally devout Christians come to very different conclusions. It is important for those of us who are sometimes called moderates to make the case that we, too, have strongly held Christian convictions, that we speak from the depths of our beliefs, and that our approach to politics is at least as faithful as that of those who are more conservative.³³

I think it unlikely that the moderate Christian perspective espoused by Danforth would be consistent with the *progressive* Christian perspective that I would like to see highlighted in the media on LGBT issues. But I agree with Danforth that we must contest the public space currently accorded by the media to the “religious” viewpoint.

Rabbi Kleinbaum has a proposal for contesting that space that is somewhat drastic, but could be very effective. Whenever a media outlet has chosen a

religious person to represent an antigay viewpoint, any advocate contacted to represent the pro-gay viewpoint should demand that a *religious* person be asked to present the pro-gay viewpoint. If the media outlet insists that it wants a lawyer (for example, because it is covering a marriage case brought by that lawyer or others), the advocate should require that the person presenting the antigay viewpoint should also then be a lawyer. Tit for tat. If the media outlet wants the issue to be religion, we can talk religion. If the outlet wants the issue to be law, we can talk law. But let's not let the *media* determine that the pro-gay side will talk law and the antigay side will talk religion.

Of course, as noted above, the ultimate discursive end of the Moral Values Project would be for the media to recognize that they must invite more than *religious* spokespeople (on either side of the issue) if they wish to address *moral* values in government. The true mark of success of the Moral Values Project will be when media outlets realize that to adequately cover the "moral values" front, they need *both* religious and secular people on *both* sides of a gay rights issue talking about morality.

LESSONS FROM PROPOSITION 8³⁴

A robust Moral Values Project would facilitate substantive conversations about the positive moral value of acting on one's sexual orientation, as well as the positive moral goods of safety, happiness, caregiving, and integrity, everywhere from workplaces to radio shows to legislatures. Such conversations could, in turn, help shift the public's moral assessments of LGBT people in a manner that would advance true equality for LGBT people.

But conversations of this kind might also enlighten LGBT people and their allies why some people who believe homosexuality is immoral (either because of their religious or secular beliefs) experience themselves as "under siege" when society begins to extend equal protection to its LGBT citizens. As the passage of Proposition 8 in California in November 2008 made very clear, such fears can be exploited in a crass manner to deny gay couples access to equality. Hence, it behooves us to unpack those fears and figure out an appropriate response.

In May 2008, the California Supreme Court ruled that the state constitution required that gay couples be permitted access to civil marriage in California. The court reasoned that the state constitution's establishment of a fundamental right to marry (under the state's privacy and due process clauses) applied to two people of the same sex who wish to marry, and concluded that to receive equal protection under the law—also guaranteed by the state constitution—such couples had to receive the designation of "marriage" rather than

the separate classification of “domestic partnership,” already available in California for gay couples.³⁵

But in November 2008, California voters passed Proposition 8, amending their California state constitution to block the access of gay couples to state civil marriage. The amendment added a new section 7.5 to Article 1 of the California state constitution with the following words: “Only marriage between a man and a woman is valid or recognized in California.” Section 7 of Article I of the California constitution still proudly proclaims that no person may be deprived of liberty without due process of law and that no person may be denied the equal protection of the laws; section 1 of that article also still provides Californians with an “inalienable right” of privacy. But those sections can no longer be used as they were by the California Supreme Court, to provide gay couples with the liberty and privacy rights of equal access to civil marriage.³⁶

What was particularly striking about the campaign to enact Proposition 8 was the extent to which proponents went out of their way to claim that the new provision would not take rights away from gay couples. In a Frequently Asked Questions document, for example, they raise the question, “Will Proposition 8 take away any rights for gay and lesbian domestic partners?” only to reply: “No. Proposition 8 is about preserving marriage; it is not an attack on the gay lifestyle. Proposition 8 does not take any rights away from gays and lesbians in domestic partnerships. Under California law, ‘domestic partners shall have the same rights, protections, and benefits’ as married spouses. There are no exceptions. Proposition 8 will not change this.”³⁷

But if the point of Proposition 8 was not to take rights away from same-sex couples, then what was its purpose? One argument advanced by its supporters was that Proposition 8 would simply restore the definition of marriage to what “human history has always understood it to be.” But a secondary prominent argument for Proposition 8 was that providing access to marriage for gay couples would *reduce* the rights available to *others*. Supporters of Proposition 8 claimed, for example, that marriage recognition for gay couples in California would make life harder for parents in California who wanted to shield their young children from learning about homosexuals. From this vantage point, an essential selling point of Proposition 8 was that it would *protect* people from the excesses of extending rights to gay couples.

This “harm to others” argument was played out in two contexts: a range of religious entities could lose their tax-exempt status if they refused to perform marriages for same-sex couples or if they treated same-sex couples differently than they treated opposite-sex couples; and parents, particularly religious parents, would have no recourse when the public schools started teaching young students that homosexuality was morally acceptable.

The main legal case that Proposition 8 supporters used (and manipulated) in the education context was *Parker v. Hurley*, a case decided by a federal court of appeals in Massachusetts in January 2008.³⁸ Two sets of parents brought the case, David and Tonia Parker and Rob and Robin Wirthlin. The Parker's son Jacob had brought home from his public school kindergarten a Diversity Book Bag that included the book *Who's in a Family?* The book had pictures of different families, including interracial families, a family without children, a family with two moms, and another with two dads. In its final page, the book answered the question, "who's in a family?" with "the people who love you the most!" The Wirthlin's son, Joey, had come home from his public school second grade, talking about a picture book his teacher had read out loud that day, *King and King*. It's about a prince who is ordered by his mother to get married but who keeps rejecting the princesses he meets. Finally, he finds his true love—another prince!

The Parkers and Wirthlins were not happy. They did not ask the school to change the curriculum. But they did ask for a special accommodation, namely that no teacher or adult be permitted to expose children to materials or discussion about sexual orientation or same-sex unions without first notifying the parents and then giving parents the opportunity to pull their children out of such discussions. The school refused. Massachusetts state law explicitly gives parents prior notice and the right to "opt out" with regard to curriculum that involves human sexuality issues. But, as the school explained to the parents, these materials did not deal with human sexuality.

The parents sued, claiming their federal constitutional rights to raise their children as they wished and to practice their religion were being violated. The parents lost. The court found it difficult to perceive a real burden on the parents in light of the fact that the parents could continue to teach their children at home that same-sex marriages were immoral. And, as the court noted, while the federal constitution protects parents' rights to send their children to private schools, rather than public schools, it did not give parents the right to direct *how* a public school will teach their children.

In early October 2008, the parents' legal case came to an end when the Supreme Court chose not to hear their appeal. But their starring role as voices of doom for the families of America was just beginning.

The Family Research Council produced a video in September 2008, featuring the Parkers' story. In the video, the Parker parents described the book their son had brought home in the Diversity Book Bag as a book "about homosexuality and homosexual relations" and, as proof, opened the page of the picture book to the one showing a child with his two dads. The following month, Rob and Robin Wirthlin became a ubiquitous presence on the California TV scene. The supporters of Proposition 8 released

a thirty-second ad that was shown innumerable times on television before the election. In the ad, a pretty young woman tells us that, contrary to what we may have heard, "Prop 8 has *everything* to do with schools." She then shows us a clip of an interview with Rob and Robin Wirthlin, who explain how "after Massachusetts legalized same-sex marriage," their son heard from the school how boys can marry other boys. "He's only in second grade!" exclaims Robin. Rob then explains that they tried to stop the school from teaching about gay marriage, but the court ruled they had no right to stop that or to pull their son out of class.

What does the right of gay couples in California to access civil marriage have to do with Robin's ability to teach her son Joey that gay marriage is wrong? *Nothing*. What does a change in society's views generally about how gay people should be treated in society, including with regard to marriage, have to do with Joey learning something about gay people in public school that his mother might not agree with? *Everything*.

It is critical that advocates for LGBT equality understand how the law operates in this area. It is not helpful to civil discourse that supporters of Proposition 8 blew their concerns out of proportion. But it still behooves those of us who seek to enshrine equality for LGBT people into the law to understand how the law might operate to place burdens on those who are out of step with changing social mores. It is only by understanding such impacts that we can even begin to consider what the appropriate accommodations, if any, might be.

Once society determines that discrimination on the basis of some category (race, religion, sexual orientation) is wrong, we expect our society to convey that norm in various ways. One important vehicle for transmitting our societal values to our children, including values of nondiscrimination, is the education our children receive in the public schools, funded with our tax dollars.

Indeed, in cases as early as 1925 and as recently as 1972, the Supreme Court has recognized the important role that public schools play in transmitting values and hence has protected the constitutional rights of parents to *shield* their children from exposure to values with which they do not agree by permitting them to educate their children outside of the public school system.³⁹ This was a right my Orthodox Jewish parents took full advantage of, sending me to ultra-religious Jewish schools throughout my elementary and high school years. But if parents choose to send their children to public schools, our system does not permit them to see the curriculum ahead of time and to remove their children from those aspects of the curriculum with which they disagree. One significant exception has been in the area of sex education. Many states, including Massachusetts, have made the policy choice that they will allow parents more specific

control and discretion over that area and will often provide parents with prior notice of a sex education curriculum and the opportunity to "opt" their children out of such classes.

As our society changes its views about gay people and gay couples, therefore, new norms will arise that will appropriately be reflected in our schools. Diversity programs in public and private schools across the country, including programs that teach respect for gay people, have arisen, not as a result of the recognition of civil marriage (or even civil unions) for gay couples in these locations. Rather, they have been the natural outcome of a new and long overdue norm of nondiscrimination on the basis of sexual orientation that is beginning to take hold in our society.

The key legal point here is that it is not the legalization of same-sex *marriage* that is the root of the tension for parents like the Wirthlins. Those opposing Proposition 8 consistently argued that the legality of marriage for same-sex couples would not change anything in California schools with regard to curriculum, and they were correct in that regard. Law professors put out extensive legal statements to that effect and *The L.A. Times* published a sophisticated editorial making those same legal points.

But the audience targeted by the "Yes on 8" campaign was apparently not convinced. That is due partly, I believe, to the fact that gay rights advocates have not forthrightly addressed the natural tensions that have arisen as our social norms have begun to shift and thus have not grappled with how to address those tensions.

The same limitation exists with regard to the second main argument used by Prop. 8 supporters: that churches would be required to perform marriages for same-sex couples or lose their nonprofit tax status. This argument truly stretches the bounds of existing legal doctrine. But again, we need to understand how the basis of the fear operates in this area.

In the 1970s, the Internal Revenue Service revoked the tax-exempt status of Bob Jones University on the grounds that the school banned interracial dating among its students and hence did not serve a "charitable" purpose as required by law. In 1983, the Supreme Court upheld the IRS's position, despite the argument from Bob Jones University that its rule against interracial dating stemmed from a belief that the Bible prohibited such mixing of the races and, as a religious institution, Bob Jones felt compelled to comply with that understanding of the Bible.⁴⁰ (Bob Jones finally lifted the ban on interracial dating in 2000.)

No religious organization, other than Bob Jones University, has ever had its tax-exempt status revoked because of discriminatory rules that it applied on the basis of race or any other category. However, many state property tax exemptions provided to religious and other non-profit organizations are limited

to property that is open to everyone in the public—and such exemptions have been revoked if the property is not, in fact, open to all.

For example, the Ocean Grove Camp Meeting Association of New Jersey, a Methodist organization, consistently described some boardwalk property it owned as open for public use. On that basis, it had sought and received federal, state, and local funds for maintenance of the property and it had received a property tax exemption from the state. The Ocean Grove association had a tradition of renting out its pavilion on the boardwalk property for weddings and other events that had no religious component.

But when a lesbian couple sought to rent the boardwalk pavilion for its civil union ceremony, the Methodist Ocean Grove association refused on the grounds that doing so would be contrary to its religious beliefs. The couple filed a complaint with the New Jersey Division on Civil Rights, citing a state law that prohibited public accommodations from discriminating on the basis on sexual orientation. The division ruled in the couple's favor. In addition, the state's Department of Environmental Protection revoked the portion of the association's property tax exemption that applied solely to the pavilion, since the tax exemption had been based on the premise that the property was available to the general public.⁴¹

When the legitimate liberty interests of gay people to live openly and honestly in society are recognized by society, as they need to be, such protections may sometimes come into conflict with the religious beliefs of individuals and organizations. We need to address these conflicts in an open and honest manner. It is the fair thing to do while we are asking our fellow citizens to thoughtfully consider and rectify the inequality that LGBT people have been subjected to in our society.

I have set forth elsewhere my preliminary thoughts on how to address such conflicts.⁴² As a general matter, I believe that once a religious person or institution has entered the stream of commerce by operating an enterprise such as a doctor's office, hospital, bookstore, hotel, treatment center, and so on, the enterprise must be expected to adhere to a norm of nondiscrimination on the basis of sexual orientation and gender identity. This is essential so that any individual who happens upon the enterprise will not be surprised by a denial of service and/or by a directive to go down the street to a different provider.

But there are enterprises engaged in by belief communities (almost always religious belief communities) that deserve special solicitude, even if they otherwise operate in the general stream of commerce. These include schools, day care centers, summer camps and tours, that are sometimes for-profit and sometimes not-for-profit, but all of which are designed to inculcate values in the next generation.

If such an enterprise presents itself clearly and explicitly as designed to inculcate a set of beliefs in those who come in contact with the enterprise; if the enterprise clearly sets forth its belief that homosexuality, or acting on one's homosexuality, is morally wrong; and if the enterprise denies employment and services equally to individuals who are gay and to individuals who are heterosexual but who fail to profess the beliefs of the enterprise (i.e., that homosexuality, or acting on one's homosexuality, is morally wrong)—then I believe we are dealing with an enterprise that may need to continue excluding LGBT people from service and employment if it is to maintain its distinctive identity.

Obviously, LGBT people would be harmed if such enterprises are excluded from the purview of an antidiscrimination law. But in weighing the interests between the groups, I believe the harm to the enterprise in having the inculcation of values to its members significantly hampered (as I believe it would be if it were forced to comply with such a law) outweighs the harm to the excluded LGBT members.

I also think we need to consider the difficulties that arise with regard to *leadership* positions in enterprises that are more broadly represented in commerce. Many religious institutions operate the gamut of social services in the community, such as hospitals, gyms, adoption agencies, and drug treatment centers. These enterprises are open and marketed to the general public and often receive governmental funds. It seems quite appropriate to require that the enterprises' services be delivered without regard to sexual orientation and that most employment positions in these enterprises be available without regard to sexual orientation.

But the balance of interests, it seems to me, shifts with regard to the *leadership* positions in such enterprises. Particularly for religiously-affiliated institutions, I believe it is important that people in leadership positions be able to articulate the beliefs and values of the enterprise. If the identity and practice of an openly gay person would stand in direct contradiction to those beliefs and values, it seems to me that the enterprise would suffer a significant harm. Thus, in this limited circumstance, a legislature might legitimately conclude that the harm to the enterprise will be greater than the harm to the particular individuals excluded from such positions and provide a narrow exemption from a nondiscrimination mandate in employment.

These issues are not easy. But precisely because they are not easy, they deserve and demand our focused attention. While it may seem counterintuitive, I believe the best way to bring us to the point of full equality for LGBT people is to address head-on the tensions that arise when public schools teach tolerance and when public facilities owned by religious entities are asked to host commitment ceremonies for same-sex couples. Whatever we think the

answers should be in any particular case, we will benefit more if we are in control of the answers and the message than if we pretend the tension is not real and legitimate.

A CALL TO MORAL ACTION IN POLITICS

Ultimately, the Moral Values Project is about formulating and embodying a strategy to advance a new moral agenda for this country.

People in society like to believe they are good. They like to go to sleep at night thinking that they are “good people”—or “good Americans” or “good Christians” or whatever they identify as. The Moral Values Project believes there is an important practical advantage in helping the many people who are not gripped by the Religious Right’s current hold on morality to articulate why they, too, are “good” and “moral”—why they, too, act, vote, speak, and think *morally* when they support civil marriage for same-sex couples, when they believe in comprehensive sexual education, when they think Medicaid should pay for hormones for transgender people, and when they believe inter-sex infants should not be subject to cosmetic genital surgery.

The Moral Values Project wants to engage an alternative moral language, allowing more Americans to seize moral credibility. In doing so, we want to affirm the importance of moral values to the majority of the American public today. And we want to demonstrate that LGBT people care about moral values.

Finally, we want to call to task those who do *not* believe in the type of public policies we describe above. Like a modern-day prophet Isaiah, we want to call the people to understand how *they are falling short* when they support certain public policies over others. We want to play out in rich detail how the government currently *fails* to support the ability of LGBT people to feel safe, to feel happiness and pleasure, to care for others, and to be cared for, and to live a life of honesty and integrity—and how such failure ultimately lies at the feet of the American public. We don’t want those people to go to sleep at night deluded into believing that they are “good people” (or “good Americans” or “good Christians” for that matter) if they have not supported public policies that advance the four moral understandings articulated by the Moral Values Project.

The goal of the Moral Values Project, is therefore twofold: it is rhetorical and intellectual. As a rhetorical matter, we seek to provide language for talking about the moral issues that surround gender and sexuality in society today. We hope that the language and discourse we create will be usable by religious, secular, and spiritual people. As an intellectual matter, we seek to make the case that we can engage in such moral discourse without losing the pluralistic underpinnings that have been so vital in advancing LGBT equality so far.

Government cannot guarantee us safety, happiness, care or integrity. But government can make it easier or harder for members of society to achieve these goods. A moral agenda should name these moral goods for what they are, and then highlight how government is failing to create the societal frameworks that would enable gay people to partake of these moral goods in a manner equivalent to that enjoyed by straight people. This agenda can then act as a mirror facing the average American, forcing each one of us to recognize that the "moral values" guiding our political decisions today fail our most basic moral convictions. And then, like a modern-day Isaiah, we can call the people to do better.

NOTES

1. Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521 (1989) (hereinafter "Moral Argument"). This law review article was modified and subsequently published as "Moral Argument and Liberal Toleration," in *New Communitarian Thinking: Persons, Virtues, Institutions, and Communities*, Amitai Etzioni, ed. (Charlottesville and London: University of Virginia Press, 1995). Sandel expanded on these themes in *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: The Belknap Press of Harvard University Press, 1996.) I am not asserting that no political philosopher made these arguments prior to Sandel's 1989 article. But Sandel's article is the one that made an impact on me, and it remains, from my perspective, one of the clearest articulations of the limitations in traditional liberal philosophy, as described by Carlos Ball in this volume.
2. R. Claire Snyder-Hall, *Marriage Equality and the Morality of Liberalism: The California Decision*. This approach is most widely associated with John Rawls and Ronald Dworkin. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 173-211; Ronald Dworkin, *Taking Rights Seriously* 90-100 (1977).
3. Carlos Ball, *Against Neutrality in the Legal Recognition of Intimate Relationships*. Carlos Ball's fullest explication of this approach is in his excellent book. Carlos A. Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* (New York: Routledge, 2003). I first made this argument in Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237 (1996).
4. Sandel, *Moral Argument*, *supra* n. 1, at 521.
5. *Id.*
6. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).
7. Sandel, *Moral Argument*, *supra* n. 1, at 535 (quoting *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd* 478 U.S. 186 (1986) (footnotes omitted).
8. 394 U.S. 557 (1969).
9. 381 U.S. 479 (1965).
10. See Feldblum, *Moral Conflict & Liberty: Gay Rights and Religion*, 72 *Brooklyn L. Rev.* 61 (2006) (describing Justice Blackmun's reaction to the mail he received from gay people to his dissent in *Hardwick*). As Linda Greenhouse convincingly argues,

Justice Blackmun's passion for his dissent in *Hardwick* may have been due in part to his commitment to protecting the constitutional right of privacy for intimate decisions that he announced in *Roe v. Wade*. See Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York: Times Books, 2005).

11. Sandel, Moral Argument, *supra* n. 1, at 536.

12. *Id.* at 536–37.

13. *Id.* at 537.

14. *Id.* at 538.

15. See Chai R. Feldblum, Sexual Orientation, Morality, and the Law: Devlin Revisited, 57 *U. Pitt. L. Rev.* 237, 308–10 (1996) (describing testimony on the Employment Non-Discrimination Act). Moral bracketing of this kind has dominated the strategic approach for developing support for the federal gay civil rights bill, starting with the first bill offered by Congresswoman Bella Abzug in the 1970s and extending to the latest bills introduced. See Chai R. Feldblum, The Federal Gay Civil Rights Bill: From Bella to ENDA in U. Vaid, J. D'Emilio & W. Turner eds., *Creating Change: Sexuality, Public Policy, and Civil Rights*, (New York: St. Martin's Press 2000) (chronicling moral bracketing strategy in developing support for gay rights civil rights bills. I did a focused deconstruction of another hearing on ENDA, in which a Democratic member of the House committee taking testimony posed the substantive moral question in a dramatic fashion. See Chai R. Feldblum, The Moral Rhetoric of Legislation, 72 *N.Y.U. L. Rev.* 992 (1997). The same moral bracketing in political discourse dominates the rhetoric of those opposing bills to prohibit marriage equality for same-sex couples. See Chai R. Feldblum, Gay is Good: The Case for Marriage Equality and More, 17 *Yale J. L. & Feminism* 139, 140 (2005) (deconstructing moral bracketing in the debate on the Defense of Marriage Act (DOMA) and the federal marriage amendment). For analysis of equality and neutrality as regards religion and sexual orientation, see the discussions in the Gill and Marcossion contributions to this volume.

16. Interview by Michael Boucai with Matt Coles, Director, ACLU Gay & Lesbian Rights and AIDS Project, New York City (Oct. 24, 2005).

17. Interview by Michael Boucai with James Esseks, Litigation Director, ACLU Gay & Lesbian Rights and AIDS Project, New York City (Oct. 24, 2005). ENDA, the Employment Non-Discrimination Act, prohibits discrimination on the basis of sexual orientation (and gender identity, in some formulations of the bill) in private employment.

18. See Karlyn Bowman & Adam Foster, Attitudes About Homosexuality and Gay Marriage, American Enterprise Institute, p. 4. In 2007, 83 percent of liberals, 50 percent of moderates, and 23 percent of conservatives considered homosexual relations to be morally acceptable. Available at www.aei.org/publications/pubID.14882,filter.all/pub_detail.asp (last visited August, 26, 2008).

19. *Id.* at 11.

20. EDK Associates, *Values Based Research Needs to Promote GLBT Rights: Opinion Leader Interviews and Public Opinion Experts* (October 2001) at 12.

21. See www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html (visited March 1, 2009).

22. See <http://people-press.org/reports/display.php3?ReportID=233> (visited March 1, 2009).

23. See Kenneth Sherrill, *Same-Sex Marriage, Civil Unions, and the 2004 Presidential Election 2*, available at www.thetaskforce.org/downloads/MarriageCUSherrill2004.pdf.

24. For an in-depth analysis of how the term “family values” originated and gained currency among conservatives just before the onset of the Reagan Revolution, how it provided an attractive and sufficiently vague (“broad”) slogan around which to rally—and ultimately associate—a wide range of disparate claims, see Alyssa Rayman-Read, *From Pulpit to Politics: How “Family Values” Led Evangelicals out of Crisis into Coalition* (2004), available at www.moralvaluesproject.org. Rayman-Read uses the term “Religious Right” and I adopt that for these subsequent paragraphs that draw significantly on Rayman-Read’s analysis.

25. Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (New York: Three Rivers Press 2006), p. 52–53.

26. www.moralvaluesproject.org.

27. For an explication of the political theory on government and capabilities, see Martha Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2000) pp. 75–83.

28. Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2006).

29. For the legal rendition of this argument, see Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 Wm. & Mary L. Rev. 663, 672 (2001).

30. See generally John C. Green, *Antigay: Varieties of Opposition to Gay Rights*, in *The Politics of Gay Rights* 121, 123 (eds. Craig A. Rimmerman, Kenneth D. Wald, & Clyde Wilcox, 2000) (“some of the strongest advocates for the gay community are found among the theological liberals in all [religious] groups.”)

31. A majority of gay people surveyed in a 2001 poll indicated that religion is important in their lives. Less than one-fifth said it was not important at all. Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation* at 34 (2001). See also EDK Associates, *Values Based Research Needs to Promote GLBT Rights: Opinion Leader Interviews and Public Opinion Experts* at 16 (“Gays and lesbians are as likely as heterosexuals to report frequent church attendance and devotion to faith.”); Sean Cahill, *Same-Sex Marriage in the United States: Focus on the Facts* at 377 (2004) (“Many [gays] are deeply religious or spiritual. . . . Eighty-five percent of 2645 African-American gay people surveyed in summer 2000 reported a religious affiliation. Only 15 percent indicated they were atheist/agnostic or skipped the question.” It is interesting to note, however, that gay people are significantly more likely than the general population to profess no religious faith whatsoever; whereas approximately 15 percent of gay and bisexual people say they are atheist, agnostic, or had no religion, the figure is approximately 6 percent for the general population. Kaiser Family Foundation at 34.

32. Interview by Michael Boucai with Sharon Kleinbaum, Rabbi, Congregation Beth Simchat Torah, Washington, D.C. (Nov. 2, 2005). See also Interview by Michael Boucai with Sylvia Rhue, National Black Justice Coalition, Director of Religious

Affairs and Constituency Development, Washington, D.C. (Oct. 18, 2005) ("The appropriate messengers of religious messages are religious people.").

33. John C. Danforth, *Onward Moderate Christian Soldiers*, *New York Times*, June 17, 2005.

34. This Section is excerpted from *The Selling of Proposition 8*, which first appeared in the *Harvard Gay & Lesbian Review*, Jan–Feb. 2009.

35. *In Re Marriage Cases*, 183 P.3d 384 (California 2008). In October 2008, the Connecticut Supreme Court similarly ruled that the state constitution required that gay couples be permitted access to civil marriage in Connecticut. Relying solely on the equal protection guarantee provided by the state constitution, the court concluded that gay couples had to receive the designation of "marriage" rather than the separate categorization of "civil unions," already available in Connecticut for gay couples. *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

36. Given the sweeping nature of the amendment made by Proposition 8, a number of groups have challenged the validity of Proposition 8 on the grounds that it was a revision of the state constitution, not an amendment, and hence was required to have undergone additional procedural steps before being put to the voters.

37. www.protectmarriage.com/ (last visited March 1, 2009).

38. *Parker v. Hurley*, 514 F.3d 87 (1st Circuit 2008).

39. *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary*, 45 S.Ct. 571 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

40. *Bob Jones v. U.S.*, 461 U.S. 574 (1983).

41. *Bernstein v. Ocean Grove Camp Meeting Association*, State of New Jersey, Office of the Attorney General, Department of Law and Public Safety, Division on Civil Rights, Docket No. PN34XB-03008.

42. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 *Brooklyn L. Rev.* 61 (2007).
