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The Moral Values Project: Deploying Moral Discourse For Gay Equality

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I. EXECUTIVE SUMMARY: WHY A MORAL VALUES PROJECT?[1]

The language of "moral values" dominates contemporary political debates. As currently constructed, this language offers little room for those of us who believe in full sexual and gender equality for women, for people who are lesbian, gay or bisexual, and for transgender and intersex people. Indeed, it offers little room for anyone whose moral values do not fit into the Religious Right's narrowly contrived meaning of morality.

The authors of this paper believe in full sexual and gender equality. We understand these goals as a *moral agenda*. And we believe a Moral Values Project can help to bring about the agenda of sexual and gender equality. This Project would bring new meanings to the language of morality. It would demand moral legitimacy for a diverse range of political aims. And it would help progressives find and raise their moral voices.

The Moral Values Project does not seek to displace our existing political framework, with its rhetorical focus on concepts like non-discrimination, equality, and fairness. Rather, it would offer a moral vocabulary as a "friendly amendment" – an incredibly important one – to our traditional language of non-discrimination, fairness, and equality.[2]

This paper articulates why and how LGBT communities should deploy, as an additional quiver in their bow, a moral discourse to create social change. Our hope is that the needs identified and the strategies suggested here will invite thoughtful response and creative collaboration and support. In particular, we hope that this effort will be viewed by movement leaders as the friendly amendment that it is – one designed to deepen our ideological commitments, broaden our political base, and expand our rhetorical reach.

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[1] This paper draws significantly on Michael Boucai's longer companion piece, *Gay is Good: Moral Politics and the Meanings of Gay Experience* (2005), available in Appendix A. That paper was written on contract to the National Gay & Lesbian Task Force during fall 2005, pursuant to a Ford Foundation grant to the Task Force, and was advised and supervised by Professor Chai Feldblum during that time period. This paper, also written under contract to the Task Force pursuant to the Ford Foundation grant, was drafted in early 2006 and benefited from the research and writing assistance of Alyssa Rayman-Read and Amy Simmerman, research assistants to Professor Feldblum. Many of the ideas for this paper were developed from March 2004 through March 2005, based on conversations between Chai Feldblum, Rabbi Sharon Kleinbaum, Urvashi Vaid, Michael Boucai and Nan Hunter. One of the catalysts for this project was the Ford Foundation Convening on GLBT Issues and American Religious Traditions, held April 12-13 2004, organized by Urvashi Vaid, Constance Buchanan, and Sarah Costa from the Ford Foundation, and facilitated by Deborah Johnson. Chai Feldblum would like to thank Nan Hunter, Rabbi Maggie Wenig, Heather Sawyer, and Katie Corrigan for helpful comments on this paper.

[2] We borrow the phrase "friendly amendment" from Professor Robin West's proposed "friendly amendment to liberalism." See Robin West, *Universalism, Liberal Theory, & the Problem of Gay Marriage*, 25 Fla. St. U. L. Rev. 705 (1998).

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The audience for the Moral Values Project itself is very different from the audience for this paper. Our imagined readers for this paper, and for the meeting that will be held to elicit responses to this paper, are individuals who already believe that sexual and gender equality are important goals for our society. They also already believe that our country is failing in its attainment of these goals and they are themselves actively involved in trying to foster sexual and/or gender equality through various legal, political, educational, and artistic means.

The audience for the Moral Values Project, by contrast, consists of people who are neither completely comfortable with homosexuality nor rabidly opposed to some rights for gay people. They are the people who, in response to poll questions, say that homosexuality is immoral but that gay people should not be fired from their jobs, or that civil unions but not marriage should be available to same-sex couples. They are the people who are living with some cognitive dissonance right now in their beliefs about homosexuality and gay people, and who need a little push to realize that *full equality* for LGBT people is a *moral imperative*.

WHY DEPLOY A MORAL RHETORIC?

Sexual orientation in the United States today *is* a moral issue.

Most of the discrimination that gay people experience in American society today derives from an 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, a 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.

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.

This executive summary sets forth five basic premises – some theoretical, some political – that underlie the strategic framework of the Moral Values Project. The paper that follows expands on these premises and provides some of the intellectual thinking behind each premise.

First Premise: Homosexuality is Morally Neutral – *And* Gay is Morally Good

> *The first premise of the Moral Values Project is that an individual's sexual orientation is a morally neutral characteristic and that 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.[3]

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. As noted below, the Moral Values Project believes that experiencing happiness (including sexual pleasure) and living a life of integrity are each moral goods that society should support.

Second Premise: Pursuing a Conversation About Morality and Gay People is Politically Smart

> *The second premise of the Moral Values Project is that 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 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. Whatever category a person falls into, we have no hope of convincing her of the moral *neutrality* of sexual orientation, and of the

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[3] Society, of course, can *decide* to make some things matter more than others. Thus, the color of our skin, or who excites us sexually, is *made* to matter more than the color of our eyes.

moral *goodness* of acting consistently with one's orientation, if we do not engage in a conversation about those beliefs.

Thus one of the premises of the Moral Values Project is that it is *politically smart* to turn the tables, in any conversation, so that we consistently and annoyingly force anyone who believes that being gay, or acting on one's gay orientation, is *morally problematic* to explain *why* he or she believes this to be true. Against 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 to them the logical consequences of believing in such natural law in the area of sexuality. For those who simply have a measure of disgust, we need to learn how to diplomatically uncover and treat that visceral response.

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 is to formulate and broadcast arguments that clearly articulate and explain those views. Having done so, we must teach those arguments to the existing champions of our cause, for they, too, need to be able to engage in this type of conversation. This will not be easy for many of our champions who appreciate the cover that the "moral bracketing" of liberal discourse permits them. (See more on moral bracketing below.) But first we need to convince our champions that they do not ultimately serve us well if they keep letting our opponents "off the hook" by not challenging them on the assumption that being gay, or acting on a gay orientation, is a moral failing.

Third Premise: Offering a Vision of Substantive Moral Obligations Is a Helpful Addition to the Struggle for Sexual & Gender Equality

The third premise of the Moral Values Project is that 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 could benefit the struggle for full gender and sexual equality once we "connect the dots."

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.*

We do not spend much time in this paper debating the *truth* of these premises. We think most people agree that it is a good thing for people in society to feel safe, to experience happiness, to receive and give care, and to live a life of integrity. What we do offer is some explication of each statement, particularly as it relates to the moral case for LGBT equality. And we also suggest that gay people have something important and unique to share with society in explaining the importance of these values. Being gay has given many of us particular insight into the meaning of safety, of happiness and sexual pleasure, of caring and relationships of care, and of integrity.

Fourth Premise: Morality is Not Synonymous with Religion

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

Thus a fourth premise of the Moral Values Project is that we as a society share these four statements of moral understanding regardless of the source from which each member draws them – be it religion or other forms of spirituality, or a wholly secular framework.

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

Fifth Premise: It is Legitimate for Government to Legislate Based on Moral Understandings

The fifth premise of the Moral Values Project is that we should expect our government, through its public policies, to bring about a good society based on moral understandings.

It is a more complex endeavor to justify why the state should be involved in advancing these four statements of moral understanding. One of the objectives of this paper, and the Moral Values Project in general, is to explain why, as a matter of democratic governance, it is legitimate to expect and desire government to fashion policies based upon the four moral understandings stated above. Moreover, we suggest that it is not only possible but necessary for government, when legislating on the basis of morality, to embrace the pluralism so strongly associated with liberalism and so vital to a well-functioning democracy.

A New Moral Agenda

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," etc. 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 intersex 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 in particular 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 gay and transgender 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 be able to go to sleep at night deluded into believing they are still "good people" (or "good Americans" or "good Christians" for that matter) if they do not support the type of public policies that align with the four moral understandings we set forth in this paper.

The goal of this paper, and this 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 unaffiliated/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.

II. MORAL POLITICS: SHOULD WE GO THERE?

A. The Religious Right's Use of "Moral Values": The Current Occupants of the Space

Conservatives – especially the Religious Right – like to believe that "moral values" are what gave George W. Bush a second term as President. After all, exit polling indicated that voters ranked "moral values" as their foremost concern 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 matters more than:

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

Eighty percent of those respondents who said they chose their President based on moral values were Bush supporters.[5]

Were Bush supporters really more moral than Kerry supporters? 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% 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.[6] 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.

The Religious Right has been incredibly successful with its moral values agenda. Its success stems from that movement's ability to promote its agenda on multiple levels.[7]

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[4] See http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html

[5] Id.

[6] See http://people-press.org/reports/display.php3?ReportID=233

[7] 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) (on file with author). This section of the paper draws significantly on that analysis.

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.[8]

Second, the Religious Right has used the moral values messaging to galvanize the public. As many of us know, 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.[9]

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. Such avoidance simply allows our opponents to claim a powerful vocabulary without the fight it deserves.

It is also not good, by the way, if liberals and progressives – in an effort to reclaim the "moral high ground" – engage in a language of moral values without dealing explicitly with the sexual components of moral values. In angry disbelief at losing the presidential election in 2004 under political and economic circumstances that were patently disastrous, some liberals were easily persuaded that "morality," that realm

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[8] The exit poll data used by media outlets following Election Day 2004 is an excellent example of the way that religious conservatives have co-opted the term "moral values." See Scott Keeter, *Evangelicals and Moral Values in the Election of 2004*. Presented at "A Matter of Faith? Religion and the 2004 Election," Notre Dame University, Dec. 3-5, 2005. Available at: http://72.14.203.104/search?q=cache:j9_uFEJR9tgJ:americandemocracy.nd.edu/conferences/matter_of_f aith/documents/EvangelicalsandMoralValuesin2004NotreDame.pdf+moral+values+exit+polls+44%25+of+ respondents+answering+the+exit+polls+thought+moral+values+meant+specific+issues+like+abortion+an d+&hl=en&gl=us&ct=clnk&cd=2
[9] See Rayman-Read, supra n. 7.

typically associated with privacy and sex, was their Achilles' heel.[10] The contrary analysis of respected political scientists did nothing to shake that perception.[11]

In response to the "moral values" victory in 2004, some liberals and progressives began to call for a renewed reliance on "faith and values" to explain their positions on everything from the war in Iraq to health care. For example, the recently formed Progressive Faith and Values Project within the Center for American Progress notes the following:

> For American Progressives, the election of 2004 was a wake up call. Our failure to communicate our faith and values to our fellow Americans has cost us our voice – at least for the time being – in the American political process. …The time has come for Progressives to reclaim the moral high ground on America's political landscape. This will require fundamental changes in our approach to engaging our fellow Americans in political discourse. Ignoring the central role that Faith and Values plays in American electoral politics has contributed to defeat after defeat for Progressives at the ballot box; only by addressing this problem head-on … will America[ns] allow us to reassume our proper role in the American political process.[12]

Engaging with faith and values is fine from our perspective – as will be explicated by this paper. But it is dangerous to do so if sexual and gender equality is not clearly part and parcel of the set of moral values that progressives are offering.

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[10] Bill Clinton called antigay ballot measures "an overwhelming factor" in his party's failure to win back the White House. *See* Sean Cahill, *The Role of Anti-Gay Family Amendments in the 2004 Election* 19 (on file with authors). About a month after the election, current Democratic Party chairman Howard Dean accused the Republican Party of strategically dividing the country over "guns, God and gays." *See* Jim VandeHei, *Dean Crafts Own Southern Strategy,* WASH. POST, Dec. 8, 2003, p. A6.

[11] Political Scientist Ken Sherrill convincingly refutes "the uncritically accepted … common wisdom" that "the issue of same-sex marriage cost the election to the Democratic Party." Kenneth Sherrill, *Same-Sex Marriage, Civil Unions, and the 2004 Presidential Election* 2, *available at* www.thetaskforce.org/downloads/ MarriageCUSherrill2004.pdf. Sean Cahill summarizes Sherrill's and others' research and concludes that while "anti-gay politics played a central role in the 2004 election," it was probably not the decisive factor on Election Day. Sean Cahill, *The Role of Anti-Gay Family Amendments in the 2004 Election* (on file with authors). Indeed, a May 2004 Gallup poll asked voters to indicate whether and how their decision at the ballot box would be affected by a candidate's position on same-sex marriage; although 35% of respondents said it was not a major issue, 16% insisted that the candidate share their view and 46% called it "one of many important factors." See American Enterprise Institute, *Attitudes about Homosexuality* (updated May 20, 2005), *available at* http://www.aei.org/publications/pubID.14882,filter./pub_detail.asp.

[12] See http://www.thecaliforniacenter.org/documents/vc_reporter-4.21.05.html.

B. Moral Bracketing: Liberals' Principled Retreat from Moral Politics

What liberals often offer as an alternative to morality-based or morality-inflected politics is a practice called "moral bracketing." To engage in moral bracketing is to ask voters, policy-makers, judges, and other political actors to set aside their moral views on the political or legal question before them and try to decide, as "neutrally" as possible, what is best for a society in which people subscribe to many different moral systems. The essence of moral bracketing is that it should not matter if we do not like someone (or if we do not like something that someone is doing), as long as that person and/or his behavior does not hurt anyone else.

This is not an approach to politics that is devoid of 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 that respects these values, individuals living in a pluralist society are understood to inevitably hold divergent normative and moral beliefs. Thus, the role of law and government 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 to affirmatively advance one moral, normative view of "the good" over others.[13]

Moral bracketing has a long and celebrated history in the gay rights political movement. As I have chronicled, moral bracketing was a key 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 bill introduced in 2004.[14] Moral bracketing continues to be the most widely used mechanism in advancing gay rights. It allows the public to not particularly like gay people, but nonetheless believe that gay people should share some rights equally with straights.[15]

Indeed, I resorted to moral bracketing in my Congressional testimony during the effort to enact the Employment Nondiscrimination Act (ENDA):

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[13] John Rawls, POLITICAL LIBERALISM 173-211 (1971); Ronald Dworkin, TAKING RIGHTS SERIOUSLY 90-100 (1977); Bruce A. Ackerman, SOCIAL JUSTICE IN THE LIBERAL STATE 349-78 (1980).
[14] Chai R. Feldblum, *The Federal Gay Civil Rights Bill: From Bella to ENDA* in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS, ed. U. Vaid, J. D'Emilio & W. Turner (2000).
[15] See Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996) (deconstructing the moral bracketing used in equal protection gay rights litigation); Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992, 1007 (1997) (deconstructing moral bracketing done by Members of Congress supporting the Employment Non-Discrimination Act); *Gay Rights*, *in* THE REHNQUIST COURT, JUDICIAL ACTIVISM ON THE RIGHT 129 (Herman Schwartz ed., 2002) (deconstructing moral bracketing used by the Supreme Court in deciding constitutional gay rights cases); 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). *See also* Carlos Ball, THE MORALITY OF GAY RIGHTS: AN EXPLORATION OF POLITICAL PHILOSOPHY (2003) (extensive analysis of moral bracketing in liberal theory generally and with regard to gay rights specifically).

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.)[16]

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."[17] 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'."[18]

Coles and Esseks are correct that moral bracketing is very much in play when a gay civil rights law is being considered. The polling information makes this starkly apparent. Polls indicate that many Americans believe homosexuality is immoral. In 2002, the most recent year in which Gallup asked the question in a nationwide survey, a majority (55%) of Americans believed that sexual relations between two adults of the same sex are "always wrong."[19] Only 33% of Americans were willing to state unequivocally that gay sex is not wrong.[20] In Gallup's most recent poll on "homosexual behavior," taken in May 2004, 54% of respondents called such behavior "morally wrong," while only 42% called it "morally acceptable."[21] (It probably goes without saying that "morally good" wasn't and never has been a choice in these polls.)

And yet, since 1996, sixteen polls by five different public opinion monitors also find that more than 80% of Americans believe "homosexuals should have equal rights in terms of job opportunities."[22] 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 like employment discrimination. As one poll analyst observes: "People have learned they need to be more tolerant of gays and lesbians.

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[16] See Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237, 308-310 (1996) (noting and then deconstructing the moral bracketing used in Feldblum's testimony on the Employment Non-Discrimination Act)

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

[18] Interview by Michael Boucai with James Esseks, Litigation Director, ACLU Gay & Lesbian Rights and AIDS Project, New York City (Oct. 24, 2005).

[19] American Enterprise Institute Studies in Public Opinion, *Attitudes About Homosexuality and Gay Marriage*, 2005 supra n.11. This figure is somewhat heartening in light of the fact that 73% of respondents felt this way just two decades earlier. Id. at 2.

[20] Id. at 2.

[21] Id. at 4.

[22] Id at 11. The AEI document, by our count, includes information from over 260 different polls, ranging from 1972 to 2005. See Appendix B for the AEI document.

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.'"[23]

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

Given the value of moral bracketing (particularly in legal discourse and particularly as an interim strategy), the Moral Values Project does not believe that the gay rights movement should abandon this traditional discourse entirely. But we believe this approach has two inherent limitations.

First, while many individuals who vote for a gay civil rights bill claim 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 make the *prior* moral assessment that acting on one's homosexual orientation is not *so* morally problematic as to justify discrimination against such individuals in the public domain. We do not have laws protecting those who engage in domestic violence or pedophilia from employment, housing or public accommodation discrimination, precisely because society (as reflected in its government's public policy) has determined that those actions *are* morally problematic and thus may legitimately be used by private actors as grounds for discrimination. While one can perhaps claim, with a straight face, that voting for a gay rights bill does not connote moral "approval" of homosexuality, it is certainly not possible to claim that such a vote connotes *no* moral assessment at all.[24]

Second, as soon as an advocate for gay rights moves away from claiming protection from discrimination on the basis of sexual orientation in such areas as employment, housing and most public accommodations and moves to the demand for the full recognition of family 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 may have been ready to vote for a gay civil rights employment/housing/some public accommodations bill are nowhere to be found. The reason is clear: 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.[25]

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[23] EDK Associates, *Values Based Research Needs to Promote GLBT Rights: Opinion Leader Interviews and Public Opinion Experts* (October 2001) at 12. See also Feldblum, *From Bella to ENDA*, at xx (quoting George Will).

[24] See Feldblum, *Devlin Revisited*, 57 U. PITT. L. REV. 237. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. at 992; Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation and Transgender*, 54 Maine Law Rev. 159 (2003)

[25] See *The Limitations of Liberal Neutrality Arguments in Favor of Same-Sex Marriage*, LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 55

C. What Movement Leaders Say about Moral Rhetoric and LGBT Politics

Because moral bracketing has serious limitations, we believe the movement needs an *additional* strategic plan that allows for direct engagement with morality. As described in Section (D) below, the pluralism that moral bracketing supports reappears in our proposal for a moral discourse strategy. But it does so through an explicit commitment to pluralism within moral discourse itself, not through moral bracketing *per se*.

We expected that a commitment to the time-honored traditions of liberal politics would entail resistance among many movement advocates to even just supplementing our rights-based agenda and equality-based rhetoric with a more frankly morality-based agenda. It was this assumption that led us to pursue interviews with an array of progressive movement leaders working in various fields, at various levels of government, and in various parts of the country.

From September 2005 through November 2005, Michael Boucai, on contract with the Task Force, interviewed fifteen individuals to elicit their views on a Moral Values Project. The list of interviewees was developed in conjunction with Sean Cahill and Rea Carey from the Task Force, who helped identify a diverse range of progressive perspectives within and/or on LGBT politics and values.[26] Some interviews were conducted by phone, but most took place in person and lasted about an hour.

The following individuals were interviewed:[27]

Michael Adams, Lambda Legal
Sergio Bendixen, Bendixen & Associates (Miami Polling Firm)
Mandy Carter, Southerners on New Ground

(Hart Publishing 2002); Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 Yale Journal of Law and Feminism 139 (2005); Carlos Ball, The Morality of Gay Rights.
There is also a third limitation to moral bracketing. Once one acknowledges that moral assessments necessarily underlie legislative enactments to prohibit discrimination based on sexual orientation in employment, housing and public accommodation, and more clearly underlie legislative enactments to confer equal access for gay people to civil marriage and adoption/foster care rights, it is easier to understand how those who believe homosexuality, or acting on one's homosexual orientation, is morally wrong might feel that their liberty is being burdened by these legislative enactments. It is not that government should alleviate those burdens, given that doing so would seriously undermine the effectiveness of the legislative enactments. Nevertheless, a more open engagement with the moral assessments that underlie granting equality to LGBT people would allow us to have a more honest and respectful conversation about the impact of the passage of gay rights laws. See *Rectifying the Tilt*, supra n. 24 for a brief statement of this conflict; see Chai R. Feldblum, *Moral Conflict: (Some) Religions and Marriage Equality*, chapter in Beckett Foundation book on Same-Sex Marriage (2006) for a fuller explication of this topic.

[26] Efforts were made to reach Hector Vargas, Frank Kameny, and Mary Bonauto, but were unsuccessful.
[27] In addition, Linda Bush and Deborah Johnson interviewed Chai Feldblum on behalf of a project funded by Urvashi Vaid for the Arcus Foundation. Chai took the opportunity to pick the brains of Linda and Deborah on the topic of moral values and sexuality in a "reverse-interview" technique.

Matt Coles, ACLU Lesbian & Gay Rights and AIDS Project
James Esseks, ACLU Lesbian & Gay Rights and AIDS Project
David Fleischer, National Gay and Lesbian Task Force
Andrea Hildebran, Equality Federation
Nan Hunter, Law Professor, Brooklyn Law School
Mara Keisling, Executive Director, National Center for Transgender Equality
(interviewed by Chai Feldblum)
Kate Kendall (phone interview), National Center for Lesbian Rights
Rabbi Sharon Kleinbaum, Congregation Beth Simchat Torah
Lisa Mottet, National Gay and Lesbian Task Force
Suzanne Pharr, Author
Sylvia Rhue, National Black Justice Coalition
Heather Sawyer (interviewed by Chai Feldblum), formerly of Lambda Legal
Urvashi Vaid, Arcus Foundation

A significant number of movement leaders believed that a morality-based platform *could* work, or at least that it would be worth finding out. Kate Kendall at the National Center for Lesbian Rights said a more explicit engagement with morality was "definitely a good idea."[28] When asked whether such an engagement was (1) necessary, (2) legitimate, and (3) viable, Sylvia Rhue at the National Black Justice Coalition abruptly answered "yes to 1 and 2; now let's get to number 3."[29] When asked if it would be a good idea to start making moral claims in the ACLU's public relations work, Coles asked, "What makes you think we're not doing that now?"[30]

But the interviews also clearly manifested that there are two very distinct ways in which morality can be used in political discourse. One way is to illuminate the moral values that underlie liberal pluralism. In this discourse, antigay discrimination is cast as immoral because it negates the liberal values of equality and fairness.

Task Force Executive Director Matt Foreman has been doing an excellent job of doing this over the past year. As Foreman recently said: "Rather than reframing the debate away from moral values, we must embrace them … [and] state unambiguously that antigay discrimination in any form is immoral."[31] Indeed, the Task Force has been a leader in this transposition from neutrality-based to morality-based argumentation for more than a decade. In her speech at the 1993 march on Washington, Foreman's

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[28] Phone Interview by Michael Boucai with Kate Kendall, Executive Director, National Center for Lesbian Rights (Oct. 6, 2005).

[29] Rhue went on to say that our movement's "fatal flaw" has been "ceding the moral high ground to our opponents." Interview by Michael Boucai with Sylvia Rhue, National Black Justice Coalition, Director of Religious Affairs and Constituency Development, Washington, D.C. (Oct.18, 2005)

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

[31] Matt Foreman, *Discrimination is Immoral. Enough Said.*, *available at* http://www.advocate.com/exclusive_detail_ektid16737.asp.

predecessor Urvashi Vaid declared, "The supremacists who lead the anti-gay crusade are wrong *morally*. They are wrong because justice is moral, and prejudice is evil."[32]

What Foreman and Vaid were correcting in these statements is the failure of liberal advocates – gay advocates included –to make their moral premises explicit.[33] When liberals talk about their belief in equality and fairness, they do not usually cast these beliefs in *moral* terms, although of course they are moral: they are about the explicitly non-judgmental moral values that liberal pluralism exalts. As Vaid writes, "justice and equality … [are] moral commitments which are implicit in our movement [and] need to be made explicit as our movement pursues genuine equality."[34]

None of the interviewees had major reservations about this type of moral rhetoric. In addition, a number of interviewees noted that they often pushed the envelope more than the traditional liberal "neutral" approach. For example, Heather Sawyer, a lawyer for eight years in Lambda Legal's Midwest office, noted that when she talked to the public or the media, she would challenge the audience as to what made the love they experienced with someone of the opposite sex any less valuable than the love someone might experience with a person of the same sex.[35] This also sounds like what Andrea Hildebran meant when she explained: "Morality plays a big part in the work I do – with legislators, with voters."[36]

A number of the interviewees noted that the movement has been increasingly forced to engage in morality talk as it pushes for state of recognition gay relationships and families. Although advocates rarely say outright that gay relationships are morally equivalent to straight ones, that idea is implicit in their rhetoric. For example, the slogan "Love Makes a Family," defines family by way of a moral value ("love"), one that is manifest in gay families no less than straight ones. Such tacit moral comparisons are similarly at work in our legal strategy; ACLU attorney James Esseks points out that when he and his colleagues present courts with statistics relating to same-sex

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[32] Urvashi Vaid, *Speech at the March on Washington* (April 25 1993) *in* SPEAKING FOR OUR LIVES: HISTORIC SPEECHES AND RHETORIC FOR GAY AND LESBIAN RIGHTS 639 (64)(ed. Robert B. Ridinger 2004).

[33] STEPHEN HART, CULTURAL DILEMMAS OF PROGRESSIVE POLITICS: STYLES OF ENGAGEMENT AMONG GRASSROOTS ACTIVISTS (2001) does an excellent job of laying out this tendency on the part of liberals engaging in politics.

[34] See *Virtual Equality* at 380. To some extent, these moral principles are so deeply ingrained in the liberal political consciousness that their own proponents fail to understand them as moral. That's why John Dewey concludes an essay defending his faith in the liberal-democratic tenets of equality, nondiscrimination and autonomy with: "if what I have said is charged with being a set of moral commonplaces, my only reply is that that is just the point in saying them." John Dewey, *Creative Democracy: The Task Before Us*, *in* HATRED, BIGOTRY, AND PREJUDICE: DEFINITIONS, CAUSES, AND SOLUTIONS at 21. Or, as Selma Sevenhuijsen has observed: "The most influential political ethics of the second wave of feminism is the liberal ethics of equality, justice and autonomy. These values have become so self-evident in the normative framework of modern feminism that they are often no longer recognized as part of an ethics at all." SELMA SEVENHUIJSEN, CITIZENSHIP AND THE ETHICS OF CARE: FEMINIST CONSIDERATIONS ON JUSTICE, MORALITY, AND POLITICS, at 37-38.

[35] Conversation between Heather Sawyer and Chai Feldblum, February 2006.

[36] Phone Interview by Michael Boucai with Andrea Hildebran, Equality Federation Co-Chair, Sept. 30, 2005.

parenting, the idea they are trying to convey is that "gay people are *just as good*" – at parenting – "as straights."[37]

It is fair to say that we do not know what the interviewees would think of the Moral Values Project, since the enterprise was so clearly in its infancy when we began the interviews and started this paper. But the interviews do highlight three ways in which the Moral Values Project seeks to push the current conversation in a slightly different direction, albeit not necessarily such a radically different direction than has already been taken.

First, the Moral Values Project offers a clear explication of the moral assumptions underlying our push for equality. Echoing Heather Sawyer's challenge – "what makes our love worse?" – we want to be even more explicit about our belief that acting consistently with one's sexual orientation is a morally good act, with no need for any intermediate step of moral bracketing. Second, we want to argue that government has a unique role in advancing a particular *substantive* vision of the good – that is, a society in which people are safe, happy, can give and receive care, and live lives of integrity. Third, we want to explore how gender and sexuality can be starting points for unique and important perspectives on morality.

At the time of the interviews, we were articulating the values that government should pursue, and which the LGBT movement represents: pleasure, community, and authenticity. These values were inspired by Urvashi Vaid's nomination, in her book *Virtual Equality*, of joy, community, and honesty as paramount gay values.[38] Boucai's companion piece to this paper incorporates interviewees' specific reactions to this triumvirate into its discussion of each of these values. Overall, the movement leaders Boucai interviewed were positive about these starting points for a movement morality. Despite understandable trepidation about the delicacy of frank discussion of sexual pleasure, only one interviewee believed we should (continue to) avoid such a conversation. It was also widely agreed that the value of "community" provided, on one hand, a useful alternative vocabulary for talking about our relationships of care and, on the other, a useful source for the production, inculcation, and exposition of gay moral values. And authenticity (despite quibbling about what to call it) was considered by most interviewees an important way to broach in public debate what remains, for many gay people, a significant obstacle: the closet. Perhaps, most importantly, was the universal embrace of any set of substantive values at all – i.e., enthusiasm for a substantive moral agenda for the movement.

D. The Pluralist Underpinnings of a Progressive Moral Politics

When we began this paper, we started with this question: can we call for the LGBT movement to deploy substantive moral values in political discourse without

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[37] Interview by Michael Boucai with James Esseks, Litigation Director, ACLU Gay & Lesbian Rights and AIDS Project, New York City (Oct. 24, 2005).
[38] Id. at 380.

running the risk of lapsing into regressive sexual politics, getting caught in impossible political debates or, worst of all, justifying a religious theocracy?

Our instinct was that the answer to this question was "yes."[39] And working on this paper has only reinforced that belief. But that is because we distinguish between universalizing moral vision, characterized by an open-ended and debatable conception of utopia, and moralism, characterized by a rigidly fixed conception of unassailable moral truths.[40]

We understand that "morality" often brings to mind rules, codes, lists of do's and don'ts – instructions to an individual that often derive from external sources, most often from God or religious doctrine (i.e., "do this or you're bad/sinful").[41] And we accept that some moral philosophers believe morality necessarily requires the existence of a coherent, all-encompassing teleology that will never permit any challenge, any change, and any individualistic perspectives on "the truth."[42]

But we do not accept that morality has to mean that. We accept that morality necessarily depends on some version of "truth." For example, our morality is based on the "self-evident truths" we set forth in the beginning of this paper: sexual orientation is morally neutral and acting consistently with one's sexual orientation is morally good. Indeed, we believe the *passion* that derives from holding certain self-evident truths (self-evident to oneself and, hopefully self-evident to others) is precisely what underlies the *passion* of a "galvanizing moral vision."[43]

But law professor Susan Williams captures well our vision of the interplay between a vision based on moral beliefs and the openness and vulnerability that a commitment to pluralism demands:

> The feminist approach suggests that in order to reach across our differences to construct a shared reality on which policy choices can be based, we must be willing to have our values challenged and we must be actively engaged in exploring the frameworks of those who are different. In other words, the responsibility here includes a powerful dose of vulnerability and an openness to challenge. Most fundamentally, we have a responsibility to listen to, perhaps

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[39] That instinct was based on our engagement with the work of thinkers like Robin West, Martha Nussbaum, Mary Becker, and Carlos Ball, all of whom have presented arguments for a government's engagement with morality in a manner that advances progressive outcomes.

[40] For a more extensive treatment of these issues, see Boucai's companion paper, Appendix A, at pages 13-22.

[41] Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from Bowers to Lawrence*, text at fns 247-249.

[42] For that reason, some moral philosophers might contest that the term "morality" even describes what we are advocating here. See, e.g., ALASDAIR MACINTYRE, AFTER VIRTUE (1981) (bemoaning the lack of morality in today's society precisely because of the fluidity that has become part of the term).

[43] See WENDY BROWN, POLITICS OUT OF HISTORY (2001), at 22 (recommending that we look to men like Mahatma Gandhi and Martin Luther King for insight into "the difference between a galvanizing moral vision and a reproachful moralizing sensibility").

even to seek out, moral perspectives that differ from our own and to engage with them in a spirit of openness that leaves us vulnerable to their challenge.[44]

Morality (to us) is about having a moral vision. But it is not about *not* listening to others who might have a different vision of self-evident truths. Morality and pluralism can coexist. Pluralism, to us, means being willing to engage in a *conversation* about why we hold some truths to be self evident and others do not.

So what comprises a "galvanizing moral vision," that ingredient which historian Wendy Brown locates at the center of a defensible moral politics? As Boucai puts it:

> If we take Gandhi and King as our guides, a galvanizing moral vision is one that captures the public imagination through an appeal to a better future for everyone, a more livable society for all. As King said in his famous speech before the Lincoln Memorial, the goal is to make our oppressors realize, not only that they should heed the "legitimate discontent" of a suffering minority, but that "their destiny is tied up with our destiny and their freedom is inextricably bound to our freedom."[45] Provoking that recognition requires ideological fearlessness and rhetorical boldness. Gandhi and King did not equivocate. People understood what they stood for. They encouraged, inspired, and cultivated what King, in the same breath as he exalted "soul force" over "physical force," called a "marvelous new militancy."[46]

> As King understood so well, to have a galvanizing moral vision is to *have a dream*. And it is our hope and belief that *we as a movement* have a dream. We have a dream that pleasure will not be a holiday luxury, a euphemism for frivolity, or a marker of material privilege, but will be, in its sensual and intellectual and spiritual modes, a realized entitlement for anyone who seeks it. We have a dream that community will not be a thing but a *practice*, one that is carried out and socially supported at every level of an individual's interpersonal life – as a neighbor, employee, sister, mother, lover, Christian, citizen, or whatever nurturing and loving roles she performs in relation to others. And we have a dream that individual authenticity, the pursuit of being true to a self that is one's own to define and discover and explore, will be a virtue inculcated and celebrated by and through our many overlapping communities of choice, of birth, and of necessity.

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[44] Susan H. Williams, *Religion, Politics, and Feminist Epistemology: A Comment on the Uses and Abuses of Morality in Public Discourse*, 77 IND. L.J. 267, 272 (2002).
[45] Martin Luther King, Speech, *I Have a Dream*, Aug. 28, 1963, *reprinted in* CROSSING THE DANGER WATER: THREE HUNDRED YEARS OF AFRICAN-AMERICAN WRITING 647, 648 (ed. Deirdre Mullane, 1993).
[46] Id. at 647-48.

This is a dream that, though derived from our queer experience, is not tethered to any particular identity. A galvanizing moral vision, as Brown writes, is not identity-based; rather, the solidarity it produces is "rooted in *shared beliefs*." It "seeks to unite people under the auspices of [an] *understanding*."[47] This point cannot be overstated. *There is no moral vision without moral beliefs.* Although the gay movement must try to sketch its vision broadly enough to represent the most prevalent and profound themes of gay ethical experience, the beliefs our movement shares with the world need not be shared – indeed cannot be shared – by every gay person.[48]

The question, of course, is whether one can articulate a galvanizing moral vision, seek to encode that vision in law and policy, *and* still maintain a commitment to pluralism in the political conversation about what the moral vision should be, and hence, what the law and policy should be.[49] Our belief that this is possible might well be a statement of faith (secular faith, that is), but it underlies our belief that liberalism and morality are not mutually exclusive.

E. Identifying the Dangers of Using Morality in the Area of Sexuality

We must not embark on a Moral Values Project that advances sexual and gender equality without clearly identifying the potential dangers of such a project. Professor Nan Hunter has been a leading proponent of such caution. She has said that she is "very nervous" about the approach advocated by the Moral Values Project. Hunter advises us to be "very, very careful" in pursuing this enterprise.

Hunter does not object to challenging the morality espoused by the Religious Right. Indeed, over fifteen years ago, Hunter lamented the very same right-wing moral monopoly so commonly recognized today.[50] It is worth quoting Hunter at some length, given how her 1992 "call to arms" resonates with the goals of the Moral Values Project:

Lastly, lesbian and gay rights advocates must recast the terms of the debate as to the state's interest in morality--an interest that has been found sufficient to justify both gender neutral and same-sex only sodomy statutes, as well as the military's anti-gay personnel policy. In each of these opinions, the court interpreted "morality" to mean the suppression of homosexuality, a goal accepted

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[47] WENDY BROWN, POLITICS OUT OF HISTORY 26, 38 (2001) (emphases added).
[48] Boucai, Appendix A, pages 17-19.
[49] For example, we read Wendy Brown as being somewhat skeptical of that possibility, despite her belief that a galvanizing moral vision is important for society. As Brown observes: "A richly configured political or intellectual morality bears an openly contestable character insofar as it must be willing to give an account of itself and be tested against other accounts of the good. *And it cannot encode itself as law, or in law, without losing its philosophical and spiritual depths*—precisely the evisceration that has befallen both liberal and socialist moral doctrine when codified as absolute truth." WENDY BROWN, POLITICS OUT OF HISTORY (2001) 37 (emphasis added).
[50] Hunter, Life after Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531 (1992).

as a public good. So long as discouragement of homosexuality is treated as a legitimate state interest, resolving such disputes as the immutability debate is likely to be pointless. Even if a predisposition to homoeroticism is substantially inborn, the government still can determine to seek a cure, or justify laws that impose a social cost on its expression as a means to diminish its public visibility, if not its private manifestations.

Whatever the merits of the argument that the government should not be permitted to enforce a public morality because of principles of limited government, it is likely to be largely unavailable to litigators--at least in the federal courts--in the immediate post-*Hardwick* era. In addition to arguing that "morality" is impermissibly subjective, lesbian and gay rights advocates must reinvoke the positive moral dimension of equality, a principle that helped inspire the movement for racial civil rights. In 1963, Robert Bork, then a law professor, argued against enactment of a federal civil rights statute on the grounds that the moral view it embodied--that segregation was wrong--should not be enforced by the power of the state. In the *Dronenburg* decision, two decades later, Judge Bork ridiculed the argument made by the gay plaintiff that law was not and should not be based on morality. Whatever change of heart Judge Bork may have had as to the role of government, *it is also true that during the interval the rhetoric of morality adopted by those seeking change was appropriated by those defending the status quo. Perhaps the biggest challenge lesbian and gay rights advocates face is the need to shift that rhetoric once again*."[51]

As is evident from this quotation, Hunter would rather that government *not* be permitted to "enforce a public morality."[52] But, apart from that fact, Hunter's particular concern with the Moral Value Project's approach is that invoking morality in American debates about *sexuality* – as opposed to issues such as poverty or health care, for instance – almost automatically triggers the conflation of morality with religion and conservatism. She does not argue that it is impossible for morality in sexual matters to be understood in secular terms, but that achieving such a result will mean an incredibly steep, uphill battle.[53] For these reasons, Hunter worries that the enterprise being undertaken by the Moral Values Project is "enormously difficult, dicey and dangerous."[54]

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[51] Id. at 552-553 (footnotes omitted) (emphasis added).

[52] While the Supreme Court's opinion in *Bowers v. Hardwick* made this argument "largely unavailable to litigators" at the time, the Court's reversal of *Hardwick* in *Lawrence v. Texas* makes it somewhat possible to now argue that government has no role in enforcing a "public morality." One can argue, as a legal matter, how definitively the Supreme Court rejected the use of "public morality" for purposes of justifying any governmental action. Some commentators have argued that the Court soundly rejected the use of public morality, *see, e.g.,* Suzanne Goldberg, Morals-Based Justifications for Lawmaking: Before and After *Lawrence v. Texas*, 88 Minn. L. Rev. 1233 (2004), but the authors of this paper – like many courts, it seems – are more skeptical. In any event, what's most important for present purposes is whether it is a good or bad thing for us to expect our government to enact public policies based on a shared understanding of public morality.

[53] Conversation between Hunter and Feldblum, 3/5/06.

[54] Id.

A final word on religion: Some of our interviewees, such as Nan Hunter, argued that if we really want to achieve progressive social goals, especially equality on sexual and gender issues, a better use of the LGBT movement's resources would be to try to make American society less religious overall. Feldblum and Boucai ultimately reached a détente on this point. We disagree between ourselves as to the desirability of a less religious society. But we have agreed – for purposes of this paper – that such a position is not necessarily helpful for the movement as a practical matter (at least for the short-term) and moreover, that an unfriendly or skeptical stance toward religion is not logically necessary to our work here. In addition, both of us are confident that either a secular or a religious framework is capable of generating moral beliefs politically favorable to gay people.

III. The Moral Values Project

A. The Discursive Moves

The situation Nan Hunter identifies as desperate *for* change and despairingly difficult *to* change is, essentially, a discursive and rhetorical hegemony that might be schematized by the equation:

morality (in sexual matters) = religious = conservative

By contrast, the equation the Moral Values Project postulates is:

morality (including in sexual matters) = secular *or* spiritual *or* religious = progressive

A belief that it is possible to make this equation work in this country is, without doubt, a necessary premise of the Moral Values Project. The more skeptical one is about the viability of this discursive change, the more skeptical one will be of the Project's utility.

i. Morality = Secular, Spiritual or Religious

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

The *equal validity* of each of these sources is one of the Project's key premises. Some religious people believe so strongly in the revealed truth of their beliefs that it is difficult for them to credit non-religious beliefs as carrying equal weight and validity. Sometimes religious people simply believe this intuitively; at other times, they make the

claim – similar to the one made by MacIntyre – that the certitude provided by their religious beliefs actually provides greater intellectual support for their commitments.[55]

We see no particular need to challenge religious people on the certitude of their beliefs. It is definitely true that one of the (sometimes positive, sometimes negative) consequences of revealed truth is a sense of certitude. What does matter to us is that religious, secular and spiritual beliefs be treated with the *same* respect and dignity. We are talking here simply about equality. We do not believe the religious sources of moral values should be treated better or worse than the secular sources or the spiritual sources.

What this means, as a practical matter, is a commitment to pluralism. Engagement in the public domain requires a commitment to the pluralism of various sources of "truth." Religious people should not be treated worse or better than non-religious people in the public domain. While a commitment to the First Amendment prescription of the separation of church and state should preclude government from establishing and enforcing a religious theocracy, it should not require a banishing of religious beliefs as a legitimate source of shared moral values.[56] 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.

ii. Secular, Spiritual or Religious Sexual Morality = Progressive

The second move is to explicate how religious, secular and spiritual beliefs are often and ought to be *progressive* beliefs. The key discursive 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.[57] And there are many gay people who consider themselves religious.[58] The existence of religious denominations that support gay rights

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[55] See, e.g., Michael Perry, Towards a Theory of Human Rights: Religion, Law, Courts (2006).

[56] For the legal rendition of this argument, see Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause* at 672.

[57] 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.")

[58] 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. … 85% of 2645 African-American gay people surveyed in summer 2000 reported a

figured prominently in amicus briefs submitted to the Supreme Court when it hears a gay rights case or when Congress takes up a piece of gay-related legislation. Some gay rights groups have long supported and coordinated progressive religious denominations, groups and individuals. For example, Urvashi Vaid launched the Task Force's National Religious Leadership Roundtable in 1998 and the Roundtable has become an increasingly vocal presence for progressive religious denominations and views.[59] In July 2005, the Human Rights Campaign launched a Religion and Faith Program that highlights religious organizations that are progressive on gay issues and brings together progressive religious individuals and organizations.[60]

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 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."[61] And there are certainly many more clergy today who are willing to speak out on behalf of gay rights than ever before.[62] It is annoying because it reinforces in the mind of the public that the "religious view" is "anti-gay," while the "civil rights view" is "pro-gay."

As unlikely a spokesperson as former Senator John Danforth captures the view we 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

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religious affiliation. Only 15% indicated they were theist/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% of gay and bisexual people say they are atheist, agnostic, or had no religion, the figure is approximately 6% for the general population. Kaiser Family Foundation at 34.

[59] http://www.thetaskforce.org/ourprojects/nrlr/index.cfm.

[60] http://www.hrc.org/Template.cfm?Section=Religion4&Template=/TaggedPage/TaggedPageDisplay.cfm &TPLID=23&ContentID=22019. See also: http://www.commondreams.org/news2005/0224-12.htm.

[61] 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.")

[62] Mandy Carter, for example, insists we must counter the image of the "Religious Right" with an image of the "Religious Left." Carter referenced the excellent work and support that is coming from many black clergy and the necessity of bringing that work to larger audiences; she noted the film "All God's Children" as a good example of the faith-related intra-community outreach being done within the African-American community. Phone Interview by Michael Boucai with Mandy Carter, Sept. 28, 2005.

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.[63]

We do not presume that the moderate Christian perspective espoused by Danforth is consistent with the *progressive* Christian perspective we would like to see highlighted in the media on LGBT issues. But we agree with Danforth that we must contest the public space currently accorded by the media to the "religious" viewpoint as the Religious Right viewpoint.

Rabbi Kleinbaum has a proposal for contesting that space that is somewhat drastic, but that we believe is appropriate. Whenever a media outlet has chosen a religious person to represent an anti-gay 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 anti-gay 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 anti-gay side will talk religion.

Of course, as noted above, the ultimate discursive end of the Moral Values Project is 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.

B.   A Government's Moral Duty to Its Citizens

> 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.

> Urvashi Vaid, Virtual Equality (1996) at 380.

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.

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[63] John C. Danforth, *Onward Moderate Christian Soldiers*, NY Times, June 17, 2005.

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The Moral Values Project equally rests on the belief that 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.[64]

Our argument is that the government is falling down on its job when it fails to ensure that LGBTI people are provided the societal frameworks in which they can be safe, happy, care for others and be cared for, and live a life of integrity. Obviously, government cannot guarantee that we will be safe, that we will be happy, that we will find someone to care for us, and that we will live a life of integrity. (Wouldn't that be nice?) 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.[65]

We also believe that gay people have a particular perspective on these statements of moral understanding. Obviously, not all gay people have had identical experiences in their lives, given the range we represent in race, ethnicity, gender, religion and class. And yet, many of us have experienced what it feels like to live in a society that proactively debilitates and undermines our capacity to enjoy these four moral goods.[66]

Let us examine the way each of these moral goods is currently undermined:

Safety: Gay 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 and our family life at our workplace.

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[64] The work of Robin West has been a particular influence on my understanding of the moral goods of safety and care. See ROBIN L. WEST, CARING FOR JUSTICE, (1999); ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW (2005) (describing the need for government to affirmatively support the ability of individuals to give and receive care and to feel safe).

[65] The argument that government has a responsibility to ensure that its citizens are provided with certain capabilities has been developed most fully by Martha Nussbaum and Amrtya Sen. See MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 75-83 (2000); Amartya Sen, *Rights as Goals*, *in* EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE 16 (Stephen Guest & Alan Milne eds., 1985). Various legal scholars, including Robin West, Linda McLain, Mary Becker and Carlos Ball, have built on this argument.

[66] We decided in fall 2005 to identify the substantive moral goods that society should advance as: *pleasure*, *community*, and *authenticity*. These values were inspired by Urvashi Vaid's quote that begins this section, in which she nominates *joy*, *community*, and *honesty* as paramount gay values. Boucai's paper expands in significant detail on the three values we began with, and explains why we slightly modified the values Vaid had chosen. See Boucai, Appendix A at 52-76. As we moved further in our research (and as Feldblum began putting her stamp more on the product), we moved to the four statements of moral understanding currently in this paper.

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 just 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: As our self-chosen appellation proclaims, "gay" people craft ingenious ways of attaining happiness despite society's strictures against us. But society certainly is not set up to help us achieve happiness. Happiness may mean being in a relationship that you can share and celebrate with others and have formally recognized. Or it can be as simple as putting a picture of your lover on your desk at work, just like your straight colleagues. Happiness might come from the job or education you didn't pursue because of the paralysis of the closet or social ostracism. Happiness may be derived from the jokes, friends, or dates you didn't make for fear of being "too gay."

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 to becoming a fully actualized person. For some individuals, this is because we have sometimes forced ourselves into abstinence or 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 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 we want to know we can take time off from work to take our partner to the doctor) and we want this after death (when we want our partner treated fairly in the pension system and by Social Security.)

Straight people also have something to learn from gay people, who have developed innovative ways to build support systems and navigate life. Some of us have

created official NSDP relationships (non-sexual domestic partners), while others have set up unofficial networks of care.

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.

Professor Kenji Yoshino discusses this experience in terms of "covering," a term he borrows from Ervin Goffman.[67] By "covering," Yoshino refers to an increasingly prevalent norm in society and anti-discrimination 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 physic 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.

Like Yoshino, Michael Boucai is interested in the gay contribution to the concept of "authenticity." He believes that the metaphor of the closet, rather than that of "covering," provides – perhaps ironically – the best vocabulary for universalizing the lesson in integrity to be drawn from gay experience. While Boucai does perceive the experience and transgression of the closet as the central gay narrative, he agrees with authors who have argued that "coming out is a process of becoming, a lifelong learning of how to become and of inventing the meaning of being a lesbian or gay man in this historical moment."[68] Thus he argues that the greatest moral claim of the gay movement lies in its politicization of a thoroughly Existential notion of authenticity, He suggests that, more than any other issue that politicizes the traditionally personal, "the closet and its transgression make vivid the *political* significance of the question of self-definition in an inevitably social world. … When the metaphor of the closet is made real in the practice of coming out, the epistemological problem of identity … becomes concretized as a political problem of the first order."[69]

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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 that names these moral goods for what they are, and then highlights 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, can act as a mirror facing the average American, forcing each one of us

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[67] Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights (2006).
[68] Mark Blasius, *An Ethos of Lesbian and Gay Existence*, *in* SEXUAL IDENTITIES, QUEER POLITICS 143, 157 (Mark Blasius, ed. 2001).
[69] See Boucai, Appendix A, at 81.

to recognize that the "moral values" guiding political decisions today fail our most basic moral convictions.

And then, like a modern-day Isaiah, we can call the people to do better.