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# Moral Conflict and Liberty: Gay Rights and Religion

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# Moral Conflict and Liberty: Gay Rights and Religion

*Chai R. Feldblum*<sup>†</sup>

## I. INTRODUCTION

Imagine that you and your same-sex male partner got married last year in Massachusetts and are now planning a delayed honeymoon in Tennessee. You search the Web and find a lovely guesthouse in your price range. Nothing about the guesthouse's description on the Web site makes you think you will not be welcome there. You make reservations through the Web site.

The two of you arrive at the guesthouse, sporting your wedding rings and calling each other "honey." The owner of the guesthouse asks if you are gay. You answer that you are and explain that this is your delayed honeymoon. The owner is very gracious and courteous, but explains that you cannot stay in his guesthouse unless you agree to sleep in separate rooms and also agree not to engage in any sexual activity during your stay. He explains that his religion requires that he "love the sinner, but hate the sin." For this reason, you are welcome to stay at his guesthouse, but only if you do not use his facilities to carry out sinful activities.

The owner also gives you a list of guesthouses in town that do allow gay couples to stay in the same room. And, he

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<sup>†</sup> Professor of Law, Georgetown University Law Center. A version of this paper was first delivered at Brooklyn Law School as part of the Symposium on Justice Blackmun and Judicial Biography in September 2005. A subsequent version of the paper was presented during a meeting hosted by the Becket Fund in December 2005. The Becket Fund meeting was expressly designed to consider the impact that legal recognition of civil marriage for same-sex couples might have on religious people. *See* Scholars' Conference on Same-Sex Marriage and Religious Liberty, <http://www.becketfund.org/index.php/article/494.html> (last visited Sept. 27, 2006). Preparing a paper for that meeting both gave me an opportunity, and forced me, to engage with an issue that I had considered only briefly in previous scholarship. I benefited greatly from questions and comments in both venues. This article appears in this law review and, with some revisions, it will appear in a book of the various papers delivered at the Becket Fund meeting. I am indebted to the research assistance of Amy Simmerman and Alyssa Rayman-Read.

quickly assures you, he has checked and there is no law that prohibits him from treating you in this way.

Let us assume that all the other guesthouses are full, so you decide to stay at the original guesthouse, under the owner's rules. No one can claim that the guesthouse's rules prohibit you from "being gay." Your identity as a gay person does not disappear simply because you have not been able to engage in the conduct of having sex with your same-sex partner over one weekend. But it would be foolish to imagine that one's identity as a gay person would have any real meaning if one was consistently precluded from having sex with one's same-sex partner. This identity—this identity liberty, as I hope to explain below—is necessarily curtailed by the *absence* of a law that prohibits public accommodations from discriminating against you on the basis of sexual orientation.

Now imagine that you and your opposite-sex wife have decided to open a Christian bed and breakfast. You view your guesthouse as a haven for God-fearing, evangelical Christians. You do not advertise generally on the Web, only on Christian sites. You make it very clear in all your advertisements that you run a Christian business and that you will not rent rooms to cohabiting, homosexual couples (married or not) or to cohabiting, heterosexual couples who are not married. One day you are sued because your state has a law prohibiting discrimination based on marital status and sexual orientation. The court rules that the law places no burden on your religious beliefs because your religion does not require you to operate a guesthouse. You are ordered to change your guesthouse's rules.

No one can claim that the court order prohibits you from "being religious." The court has explained that you may continue to hold whatever beliefs you want about sexual practices. You simply may not impose your beliefs on others. However, you feel it is foolish to imagine that your beliefs and identity as a religious person can be disaggregated from your conduct. Your religious belief—your belief liberty interest, as I hope to explain below—is necessarily curtailed by the *existence* of a law that prohibits you from discriminating on the basis of sexual orientation or marital status.

We tend not to think of these conflict situations in the language of conflicting liberties, and certainly not in the language of liberties that have something in common, even as they conflict. Those who advocate for laws prohibiting discrimination on the basis of sexual orientation tend to talk

simply about “equality.” Those who seek to stop such laws from coming into existence, or who seek religious exemptions from these laws, tend to talk about “morality” and/or “religious freedom.” These groups tend to talk *past* each other, rather than *with* each other.

My goal in this piece is to surface some of the commonalities between religious belief liberty and sexual orientation identity liberty and to offer some public policy suggestions for what to do when these liberties conflict. I first want to make transparent the conflict that I believe exists between laws intended to protect the liberty of lesbian, gay, bisexual and transgender (“LGBT”) people so that they may live lives of dignity and integrity and the religious beliefs of some individuals whose conduct is regulated by such laws. I believe those who advocate for LGBT equality have downplayed the impact of such laws on some people’s religious beliefs and, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.

Second, I want to suggest that the best framework for dealing with the conflict between some people’s religious beliefs and LGBT people’s identity liberty is to analyze religious people’s claims as belief liberty interests under the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than as free exercise claims under the First Amendment. There were important historical reasons for including the First Amendment in our Constitution, with its dual Free Exercise and Establishment Clauses.<sup>1</sup> But the First Amendment need not be understood as the sole source of protection for religious people when the claims they raise also implicate the type of liberty interests that can legitimately be considered under the Due Process Clauses of our Constitution.<sup>2</sup>

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<sup>1</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-14 (1947) (discussing these historical reasons, including the early Americans’ desire to escape the “bondage” of European laws that compelled citizens to attend and support government-favored religions, and the colonial governments’ practice of taxing citizens to pay for, among other things, ministers’ salaries and the construction of churches).

<sup>2</sup> As a practical matter, of course, current constitutional doctrine would provide minimal protection to any individual who experienced a civil rights law as burdening his or her religious beliefs or practices. Under the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), a neutral law that burdens religious beliefs will be sustained as long as it is rationally related to a legitimate governmental purpose. But the catalyst for my argument is not the strategic one of offering religious people a “second bite at the apple” post-*Smith*. Rather, as I hope to make clear in this article, I believe it is simply more *appropriate* to analyze religious

My argument in this article is that intellectual coherence and ethical integrity demand that we acknowledge that civil rights laws can burden an individual's belief liberty interest when the conduct demanded by these laws burdens an individual's core beliefs, whether these beliefs are religiously based or secularly based. Acknowledging such a liberty interest will not necessarily result in the invalidation of the law or the granting of an exemption for the religious individual. Rather, as I hope to demonstrate below, Justice Souter's concurrence in *Washington v. Glucksberg*<sup>3</sup> offers us a useful approach for engaging in the required substantive due process analysis, in a manner that provides us with a means of seriously considering the liberty interest at stake without necessarily invalidating the law burdening that interest.

Finally, I offer my own assessment of how these conflicts might be resolved in our democratic system. I have no illusions that either LGBT rights advocates or religious freedom advocates will decide I have offered the correct resolution. But my primary goal in this piece is simply to argue that this conflict needs to be *acknowledged* in a *respectful* manner by *both* sides, and then *addressed* through the legislative processes of our democratic system. Whether my particular resolution is ultimately accepted feels less important to me than helping to foster a fruitful conversation about possible resolutions.<sup>4</sup>

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belief claims as liberty claims, and not to elevate religious beliefs over other deeply held beliefs derived from sources other than religion.

<sup>3</sup> 521 U.S. 702, 752-89 (1997) (Souter, J., concurring).

<sup>4</sup> Among the law review articles and notes that have been written on this issue (all from the perspective of free exercise claims), some have suggested a balancing of interests, while others have focused on justifying either the religious interest or the non-discrimination perspective. Surprisingly to me, I found a limited number of articles on the subject overall. See, e.g., Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 438, 444 (1994) (arguing that anti-discrimination legislation based on sexual orientation is not a compelling interest like gender or race because homosexuality is still "morally controversial" and government should not legislate a particular view of sexual morality); Marie A. Failing, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U. L. REV. 383, 425-28 (2001) (proposing a remedies approach under which a landlord would be held liable for discrimination based on religious beliefs, but under which damages would be limited, so as to recognize and honor the landlord's religious beliefs, discourage frivolous claims challenging those religious beliefs, and strike a balance between the parties' "consciences"); Harlan Loeb & David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. REV. 27, 49 (2001) (suggesting individual religious-based exemptions that could be overridden by a state's compelling interest in limited circumstances); Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29

## II. A JUSTICE BLACKMUN STORY

### A. *We Love You Anyway / We Love You*

When I delivered this paper as a talk during the symposium on the judicial biography of Justice Harry A. Blackmun, I titled it: *We Love You Anyway / We Love You: Justice Blackmun, Gay Rights and Religion*. The phrase “We love you anyway / We love you” came from Justice Blackmun’s response to me when I informed him I was a lesbian. As I explain below, the difference in meaning between those two responses can help illuminate the conflict that arises between some people’s religious liberty and LGBT people’s full liberty rights.

But to begin in the spirit of judicial biography, I want to consider Justice Blackmun’s dissent in *Bowers v. Hardwick*<sup>5</sup> and, in particular, his reaction to the responses he received to that dissent. In her book *Becoming Justice Blackmun*, Linda Greenhouse eloquently documents how the public response to *Roe v. Wade*<sup>6</sup> impacted Justice Blackmun’s views on women’s rights.<sup>7</sup> I believe the responses the Justice received to his dissent in *Hardwick* had a similar impact on his subsequent views on gay rights.

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RUTGERS L.J. 487, 549-52 (1998) (suggesting proposals for a modification or replacement of the compelling state interest test in free exercise cases that have the hallmarks of voluntary commercial activity and third party harm); Maureen E. Markey, *The Price of Landlord’s “Free” Exercise of Religion: Tenant’s Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699, 702-03 (1995) (arguing against individual religious-based exemptions from civil rights laws because allowing free exercise claims to trump civil rights laws could be the death knell for civil rights); Stephanie Hammond Knutson, Note, *The Religious Landlord and the Conflict Between Free Exercise Rights and Housing Discrimination Laws—Which Interest Prevails?*, 47 HASTINGS L.J. 1669, 1726-31 (1996) (noting difficulty in weighing civil rights interests and religious interests and proposing a religious exemption for small landlords); Alvin C. Lin, Note, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 748-51 (2001) (arguing against individual religious-based exemptions from civil rights laws because they inject a troubling “morality” inquiry into civil rights laws that are not based on morality concerns); Shelley K. Wessels, Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1231 (1989) (urging protection for religious groups when the group looks “inward” to itself as a religious community, but not when the group “turns outwards” in providing services to others in the community).

<sup>5</sup> 478 U.S. 186, 199-214 (1986) (Blackmun, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

<sup>6</sup> 410 U.S. 113 (1973).

<sup>7</sup> LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 207-27 (2005).

In *Hardwick*, a 5-4 decision written by Justice Byron White, the Court ruled that the federal constitutional right of privacy did not prohibit the State of Georgia from criminalizing the sexual act of sodomy.<sup>8</sup> This decision was a huge blow to gay rights advocates across the country. In a folder containing Justice Blackmun's materials on the *Hardwick* case, he saved copies of several articles from the *New York Times* and the *Washington Post*, with headlines like "Friend and Foe See Homosexual Defeat" and "Sodomy Ruling's Implications Extend Far Beyond Bedroom."<sup>9</sup>

The *Hardwick* case was argued on March 31, 1986. From about mid-May on, I awaited the decision with tension and anticipation. At the time, I was clerking for Judge Frank M. Coffin, who sat on the First Circuit Court of Appeals and whose chambers were in Portland, Maine. I was scheduled to begin my clerkship with Justice Harry A. Blackmun in July 1986. So, starting in mid-May, I would call the Supreme Court's public number every Monday morning to find out if the *Hardwick* decision had been handed down—to find out whether it would be a huge step forward or backward for gay rights and to find out how my soon-to-be new boss had voted in the case.

I remember clearly when I heard the news of the decision. Like so many others, I was upset and distraught by

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<sup>8</sup> 478 U.S. at 189. As Justice White described the case:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.

*Id.* at 190.

<sup>9</sup> Larry Rohter, *Friend and Foe See Homosexual Defeat*, N.Y. TIMES, July 1, 1986, at A19 ("It's a major disaster from our point of view," said Thomas Stoddard, executive director of the Lambda Legal Defense and Education Fund, a leading homosexual advocacy group. "For the gay rights movement, this is our Dred Scott case," he said referring to the 1857 Supreme Court ruling upholding slavery in which blacks were held not to be citizens."); Ruth Marcus, *Sodomy Ruling's Implications Extend Far Beyond Bedroom*, WASH. POST, July 2, 1986, at A1 ("The court's decision 'will not doom every gay-rights case in every context in the future,' said Nan Hunter of the American Civil Liberties Union. But, she said, 'the preservation of the sodomy laws provides an excuse for the courts to invoke when we have successfully proved that there is no nexus between homosexuality and job performance, or between homosexuality and parenting ability . . . . Even though there is little criminal prosecution, the sodomy laws are invoked frequently.'" (alteration in original)).

the outcome. But I was elated that the Justice I was to work for had dissented. And not only had he dissented, but as I read the opinion a few days later, he had authored what I viewed as a ringing endorsement of equality and protection for gay people. I was off to work for my champion!

I began work at the Supreme Court in July 1986. Although I had self-identified as a bisexual for the previous six years (and had been open about my sexual orientation with Judge Coffin and my co-clerks in that chambers), I held off saying anything about my sexual orientation for the first few weeks. And as July and August progressed, I became even more reticent.

My hesitation had everything to do with my observation of the way Justice Blackmun reacted to the reactions to his dissent.

The Justice's dissent in *Hardwick* had included several eloquent and thoughtful statements about gay people. For example:

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.<sup>10</sup>

Reading an affirming statement such as this, in a Supreme Court opinion no less, was an incredible experience for many gay people. In reaction, gay men and lesbians across the country poured out their gratitude, and often their stories, in letters to the Justice. Justice Blackmun read every piece of mail he received and he responded to a fair percentage of that mail. He also reported on many of these letters during his daily breakfasts with us, his four new clerks.

Watching Justice Blackmun respond to these letters was a fascinating, and yet sobering, experience for me. I realized that while the Justice had put his name on eloquent statements about gay people that had warmed my heart (and the hearts of so many others), he had not necessarily experienced those same statements on an emotional plane. For

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<sup>10</sup> *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting) (citations omitted).



that reason, the stark (and sometimes heart-wrenching) emotion that came through these letters sometimes, I think, simply bemused the Justice.

Ultimately, I believe the honesty and intense emotion of these letters opened Justice Blackmun's eyes to the daily injustices faced by gay people across the country and radicalized him in a way that simply thinking about the legal question of the scope of privacy for sodomy could not. But Justice Blackmun's initial reaction to the deluge of letters was mostly to marvel at how many gay people there seemed to be out there. He was even more amazed when he found out that he actually knew some of them. I vividly remember one breakfast at which Justice Blackmun reported receiving a letter the previous day from the son of a close friend. In the letter, the young man told him he was gay and went on at length to explain how personally important Justice Blackmun's dissent in *Hardwick* had been for him. Although the Justice was clearly moved by this letter, he was also clearly astonished that this "lovely young man" was "a homosexual." Indeed, he confided in us, he wasn't sure the young man's *father* knew yet that his son was a homosexual.

Listening to Justice Blackmun during those first few months made me decide to closet my own sexual orientation. It was not that I feared overt discrimination by the Justice. I did not. But I did fear and shrink from his overt *discomfort*. It was clear to me that the Justice was not comfortable with "homosexuals" (as he called them), despite his strong support for their right of privacy. And, indeed, as I would come to see when I taught Justice Blackmun's *Hardwick* dissent in my Sexual Orientation and the Law class several years later, some of that discomfort is evident in the opinion itself.<sup>11</sup>

So I chose the comfort and ease of the closet, as so many of us who do not otherwise defy gender stereotypes are able to do. I did not feel particularly good about it, but I also did not feel that I needed to "educate" my Justice any further by coming out.<sup>12</sup>

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<sup>11</sup> See *infra* notes 16-20 and accompanying text.

<sup>12</sup> The irony of my closeting myself was, nevertheless, apparent to me each time Justice Blackmun told us how astonishing it was that Justice Powell had confided in him the previous term that he (Justice Powell) had "never met a homosexual." Justice Blackmun found this statement to be particularly bizarre because he had heard from his own clerks that one of Justice Powell's clerks the previous year was gay. I think Justice Blackmun often wondered whether Justice Powell would have joined Justice Blackmun's opinion (turning it from a dissent into a majority) had he realized

In 1991, four years following my clerkship, I finally told Justice Blackmun that I was a lesbian. I was nervous about doing so, remembering the Justice's discomfort with homosexuality. I believe the Justice's residual discomfort with homosexuals was still there when I told him. Yet his reaction was telling and moving—encapsulating the nugget of resistance to full equality for gay people that continues to exist in our country, while still suggesting future possibilities for real equality.

Here was my exchange with the Justice (as best as I can remember it fifteen years later):

Chai: "Mr. Justice, I have something important to tell you. I want to let you know that I've finally met someone and I'm really happy and I'm *really* in love and we're living together and . . . she's a woman."

Short pause.

Justice Blackmun: "Well, Chai . . . you know we want you to be happy . . . and we care about you . . . and we love you anyway."

Half beat of silence; Chai looks at the Justice.

Justice Blackmun: "You know, we love you."

I believe there is a world of difference and a depth of meaning between "We love you anyway" and "We love you." Let me explicate that difference by considering three possible views that one might hold about gay people and gay sex. Each of these views, I believe, holds sway in some segment of our society today.

### B. *Three Views of Gay Sex*

One possible view of gay sex is that it is morally harmful (and/or sinful) to the individual and to the community. Therefore, it must be discouraged to the greatest extent possible in order to advance the moral health of these individuals and of the communities in which they reside. The second view is that gay sexual activity is not good, but it is not inherently harmful; it is more akin to an unfortunate, abnormal health condition that one does not wish for oneself (or for one's children or law clerks), but it is not a harmful

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that he *did* know a "lovely young man" who was a homosexual. As has since been reported, that clerk anguished about whether to come out to Justice Powell, but ultimately chose not to. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521-22 (1994).

element that must be actively purged from society. The third view is that gay sexual activity has the same moral valence as heterosexual activity and gay people are basically similar to straight people.

The first view of gay sex is the one underlying Justice White's majority decision in *Hardwick* and Justice Burger's concurrence in that case. It is this view that best explains the (in)famous sentence in Justice White's opinion: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent."<sup>13</sup>

This simple, conclusory statement that homosexual sex has *nothing* to do with marriage and family, while heterosexual sex presumably has something or a great deal to do with such matters, will come as a great surprise to the many gay couples who feel their sexual activity cements their personal intimacy and perhaps their marital relationships. But Justice White's conclusory statement is valid if one assumes that homosexual sex is immoral, wrong, harmful and sinful, and hence necessarily antithetical to such moral goods as marriage and family.

Indeed, this assumption is also what gives logical force to Justice White's statement that if the Court were to accept *Hardwick's* argument, "[I]t would be difficult, *except by fiat*, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home."<sup>14</sup>

Why would a court need to resort to "fiat" to find a distinction between homosexual conduct and incest, and not similarly have been required over the years to have resorted to "fiat" to find a distinction between heterosexual conduct and incest? Only if homosexual sex is as harmful and immoral as incest and other sexual crimes and thus logically offers no coherent manner of providing a distinction. According to the first view of gay sex, this is indeed the case. Under that view, the *only* way a court can possibly distinguish between the harm of homosexual conduct and the harm of these other sexual crimes is "by fiat."

A second possible view of gay sex is that while it is not good, it is also not inherently harmful. A person holding this

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<sup>13</sup> *Hardwick*, 478 U.S. at 191.

<sup>14</sup> *Id.* at 195-96 (emphasis added).

view might believe that a desire for gay sex is abnormal and that being gay is not a preferred sexual orientation (he/she would certainly not want his/her *own* child to be gay). But, nevertheless, this person might believe that gay sexual activity is not inherently harmful to the individual and is not a moral stain on society; it is simply an “unfortunate condition” with which some people are born. Someone with this view might believe that individuals who are born with this unfortunate or aberrant condition should be tolerated by society and not penalized for their sexual orientation. At the same time, a person with such a view would be quite comfortable with societal rules that demonstrate a *preference* for the more normal and natural condition of heterosexual orientation—for example, a societal rule that restricts civil marriage benefits to heterosexual couples without extending similar societal affirmation to gay couples.

Although it is hard to know for sure, my instinct is that this second view reflects Justice Blackmun’s beliefs in 1991. I think this is the view that is captured by the phrase: “We love you anyway.” What I heard in that phrase was: “We are really sorry you have been afflicted with this condition; we are so glad to see that you are dealing with it so well, and we love you despite this condition.”<sup>15</sup>

I think one can also discern aspects of this view in selected statements in Justice Blackmun’s *Hardwick* dissent. For example, shortly following the eloquent statement about personal intimacy that I quoted above, Justice Blackmun goes on to observe the following:

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: “There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong.’ *A way of life that is odd or even erratic but*

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<sup>15</sup> It was also interesting to me that Justice Blackmun used the phrase “we” in his response. That was so striking that I remember it these many years later. I think Justice Blackmun might have explained the use of “we” as intending to encompass himself, Dottie (his wife), Wanda and Wannett (the two secretaries), i.e., the “family” of the Blackmun Chambers. But I think it was also a use of a term that was intentionally distancing, and less personal, than “*I feel / I think.*” It is also, as Alyssa Rayman-Read points out, a term that placed me as the “other,” and all the normal heterosexuals as the “we.”

*interferes with no rights or interests of others is not to be condemned because it is different.*" *Wisconsin v. Yoder*, 406 U.S. 205, 223-224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.<sup>16</sup>

And although the paragraph ends there, one has the sense that the author is saying to himself, "Even if that intimate association is sort of 'odd or even erratic,' or maybe just a bit unfortunate—like a bad medical condition." The type of condition that might make you love your law clerk "anyway."

A third possible view of gay sex is that it has the same moral valence as heterosexual sex. Both types of sex are equally normal (or equally bizarre, as sex often is); both types of sex partake of the same moral value when used to enhance personal intimacy or to bring pleasure in a consensual relationship; and both types of sex are morally bad when used to subjugate or harm one of the parties.

Consistent with this view (and depending on one's view of the role of government), one can easily believe that government has a role, for example, in creating a civil marriage structure to support heterosexual and homosexual activity designed to further personal intimacy and perhaps to include the raising of children. Under this view, it would certainly be irrational for the government to exclude couples that use gay sex to create the same personal intimacy structure for which other couples use heterosexual sex.<sup>17</sup>

As Michael Sandel pointed out in an early article analyzing *Hardwick* and *Roe v. Wade*, if Justice Blackmun had believed that homosexual and heterosexual sex were morally equivalent, his dissent could have been written quite differently.<sup>18</sup> That is, instead of basing Michael Hardwick's right to engage in homosexual sodomy on the line of privacy

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<sup>16</sup> *Hardwick*, 478 U.S. at 205-06 (Blackmun, J., dissenting) (emphasis added) (citation omitted).

<sup>17</sup> Even under this view, it is not clear why government should be supporting *only* couples who are using *sexual* intimacy to cement their personal intimacy, as opposed to relationships that use other forms of connections to cement similar, socially useful bonds. See generally Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005) [hereinafter Feldblum, *Gay Is Good*] (making the case for societal support of non-sexual domestic partners).

<sup>18</sup> Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 534 (1989).

cases that protected one's "right to be let alone,"<sup>19</sup> Justice Blackmun could have rested his analysis directly on the line of cases affirming an individual's privacy right to enjoy intimate relationships within families and among those rearing children.<sup>20</sup> That is, following Justice White's statement that he could perceive no connection between "family, marriage, or procreation on the one hand and homosexual activity on the other,"<sup>21</sup> Justice Blackmun could have responded: "Of course there is a connection. Homosexual activity and heterosexual activity are equivalent—and both are used to facilitate important moral goods such as family and marriage."

But I do not think Justice Blackmun, in 1986, would have been comfortable making such a claim of moral equivalency between heterosexual and homosexual sex. Nor do I believe he accepted such an equivalency in 1991, leading to this reaction when finding out I was a lesbian: "We love you anyway."

I think Justice Blackmun stretched himself to perceive the contours of the third view of gay sex (and, by extension, gay people) in his amended statement of "We love you." My guess is that he truly felt: "It must be terrible to have this horrible condition, Chai, but we love you anyway." But he must have quickly gathered that I did not experience that reaction as positive. I think he suddenly realized that *I* did not think I had a horrible condition and so I was not asking for tolerance or sympathy. I was actually asking him to be *happy* for me because I had finally found someone I loved. I was asking to be treated in the same way he would have treated any other clerk who had just said to him, "I am so happy. I have found the person I want to marry!"

I think that realization is what prompted Justice Blackmun to say "We love you," and to take away the "anyway." I do not think he was as happy for me as he would have been had I said, "I'm getting married to a man." But he did discern that *I* was happy and that *I* did not experience

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<sup>19</sup> In the first paragraph of his dissent, Justice Blackmun announces that "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" *Hardwick*, 478 U.S. at 199 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

<sup>20</sup> Sandel, *supra* note 18, at 533-38. See also Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 331-34 (1996) [hereinafter Feldblum, *Sexual Orientation*] (discussing Sandel's insights and making the case for the moral equivalency of gay and heterosexual sex).

<sup>21</sup> *Hardwick*, 478 U.S. at 191.

myself as afflicted with an unfortunate social, physical or mental condition. And so he stretched himself to acknowledge that fact.

These alternative views of gay sex and gay people can be directly correlated with a range of governmental policies. The first view is the one that criminalizes homosexual sodomy and removes children from parents who are gay.<sup>22</sup> The second view is what permits legislators to vote for a bill that prohibits discrimination in employment on the basis of sexual orientation and to vote (on the same day) for a bill that prohibits the federal government from recognizing state civil marriages between same-sex couples.<sup>23</sup> The third view is what would ensure complete and total equality for gay people, without apologetics or qualifications.

But even the second view (which is probably the predominant view in this country today)<sup>24</sup> poses challenges to those individuals who adhere to the first view of gay sex. There is a significant difference between a belief that a characteristic is morally problematic and is best expunged or repressed and a belief that a characteristic is unfortunate but should be tolerated by society to some minimal extent. While,

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<sup>22</sup> For example, in 1885, Oscar Wilde was imprisoned under Section 11 of the 1885 Criminal Law Amendment Act for his relationship with the Marquess of Queensbury. Judith Fingard, Book Review, 43 AM. J. LEGAL HIST. 83, 83 (1999) (reviewing MICHAEL S. FOLDY, *THE TRIALS OF OSCAR WILDE: DEVIANCE, MORALITY, AND LATE-VICTORIAN SOCIETY* (1997)). The court sentenced Wilde to two years of hard labor for “gross indecency” and “extensive corruption of the most hideous kind.” *Id.* See, e.g., *Ex Parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring) (supporting denial of child custody to lesbian mother and stating that “Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s God upon which this Nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.”); *Roe v. Roe*, 324 S.E.2d 691, 692, 694 (Va. 1985) (denying child custody and visitation rights to gay father because he shares a “bed and bedroom” with his male lover and stating that “[t]he father’s continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law”).

<sup>23</sup> See Feldblum, *Gay Is Good*, *supra* note 17, at 145-50 (describing Senate debate and analysis on the 49-50 vote in favor of the Employment Non-Discrimination Act and the 85-14 vote in favor of the Defense of Marriage Act in 1996). See also Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992, 996 (1997) [hereinafter Feldblum, *Moral Rhetoric*] (describing consistent efforts to justify a vote for ENDA as simply a vote for “equality” with no implications for moral views of homosexuality).

<sup>24</sup> See *infra* notes 42-48 and accompanying text.

obviously, there is even more of a significant difference between the first view of gay sex and the third view, even governmental policies premised on the second view can cause conflict for those who adhere to the first view.

My guess is that Justice Blackmun continued to evolve in his views about gay people, particularly as he worked with clerks who were openly gay during their entire tenure with the Justice. I doubt he ever became a full adherent of the third view of gay sex (“Gay sex is morally equivalent to straight sex”), but I think he might have been inching towards that resolution.

And as I write this article, I wonder how Justice Blackmun would have addressed and resolved the conflict I explore in this piece. Based on my experience working with him and my knowledge of him as a human being, I feel the Justice would have seen and acknowledged the conflict and not brushed it under the rug. As to whether he would have resolved the conflict in the manner I recommend in this piece, we will never know; some things are simply unfinished sagas.

### III. IMPACT ON BELIEF LIBERTY WHEN PROTECTING LGBT LIBERTY

#### A. *Postulating an Age of LGBT Liberty*

In 2006, the most pressing question for LGBT people probably is not, “How can we be sure that we adequately consider and take into account the beliefs of those who believe we are immoral and sinful?” At the moment, it seems that people who hold that point of view are prevailing in any number of states, at the direct expense of LGBT people’s liberty. Over the past decade, forty-one states have passed statutory Defense of Marriage Acts, defining marriage as solely between a man and a woman.<sup>25</sup> Twenty states have amended their constitutions to restrict marriage in a similar fashion, and eight more states had constitutional amendments on their 2006 ballots to do the same.<sup>26</sup> In thirty-three states, a person can be fired from a job, thrown out of his or her apartment or

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<sup>25</sup> Nat’l Conference of State Legislatures, Same Sex Marriage, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited Sept. 27, 2006).

<sup>26</sup> *Id.* Seven out of those eight ballot initiatives passed in November 2006. See Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at P16.



refused service in a restaurant simply because he or she is gay, lesbian or bisexual.<sup>27</sup>

Given the current state of affairs, I do not disagree that the primary focus and energy of the LGBT movement must be directed at resisting efforts to deny LGBT people liberty and fighting for legislation and judicial outcomes that will allow LGBT people to live lives of honesty and safety in today's society. Indeed, I have spent a fair portion of the last twenty years of my professional life engaged in that precise struggle and I expect to do more of the same in the future.<sup>28</sup>

But I also believe it is only a matter of time before the world around us changes significantly. In some number of years (I do not know how many), I believe a majority of jurisdictions in this country will have modified their laws so that LGBT people will have full equality in our society, including access to civil marriage or civil unions that carry the same legal effect as civil marriage. Or perhaps federal statutory changes, together with federal constitutional decisions, may result in LGBT people achieving full liberty across all states. At the very least, I believe it is worth postulating this outcome and considering now, rather than later, the impact that the achievement of such liberty might have on employers, landlords and others whose moral values (derived from religious sources or secular sources) teach them

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<sup>27</sup> Nat'l Gay & Lesbian Task Force, State Nondiscrimination Laws in the U.S., <http://thetaskforce.org/downloads/nondiscriminationmap.pdf> (last visited Sept. 27, 2006).

<sup>28</sup> From 1988 to 1990, I was a staff attorney with the ACLU AIDS Project and the ACLU Lesbian & Gay Rights Project. In 1993, I was the Legal Director of the Campaign for Military Service, an enterprise to help lift the ban on the service of gay people in the military. From 1993 to 1998, I worked as a consultant to the Human Rights Campaign, a political organization dedicated to advancing gay rights. In that capacity, I wrote innumerable drafts of a federal bill to establish non-discrimination in employment on the basis of sexual orientation and negotiated with groups to bring them on to support the bill. From 1999 to 2006, I was an advisor and consultant to the National Gay & Lesbian Task Force, another political organization dedicated to advancing lesbian, gay, bisexual and transgender equality. I have written amicus briefs on behalf of civil rights organizations, religious organizations, and gay rights organizations in constitutional cases seeking to establish equality for gay people, including the Supreme Courts cases of *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), and in several lower court cases challenging the military's ban on gay servicemembers. Since 2002, I have run a Web site designed to help law schools respond to the presence of military recruiters that discriminate against openly gay law students. See *SolomonResponse.org*, <http://www.solomonresponse.org> (last visited Sept. 27, 2006). And in 2005, I began the Moral Values Project, <http://www.moralvaluesproject.org> (last visited Sept. 27, 2006), an enterprise dedicated to bringing a progressive moral voice to issues of sexuality, sexual orientation, and gender in the public arena.

to hold the first view of gay sex—that is, that same-sex sexual conduct is sinful for the individual and harmful to society.

Why do I believe an era of full LGBT liberty is simply a matter of time? A large part, I am sure, is due to my being an optimist who believes that simple truth and justice usually win out in the long run and that truth and justice demand full liberty for LGBT people.

But my conviction also comes from observing changes in our society over the past twenty years and from reading opinion polls. The polling numbers indicate that an increasing number of people in this country simply do not believe homosexual orientation and conduct are as “big a deal” as they once were. These individuals may not particularly *like* homosexuality, nor do they believe that homosexuality is morally equivalent to heterosexuality. But they do not seem as agitated about homosexuality as they have been in past decades.

No poll that I have seen asks the question directly: “Do you think homosexuality is a big deal?” But a reduced anxiety about homosexuality is the overall gestalt that emerges upon reviewing the myriad polls that have asked members of the American public about their views on homosexuality over the past thirty years. Karlyn Bowman, a resident scholar at the American Enterprise Institute (“AEI”) who specializes in polling data, has done a Herculean task of reviewing and compiling information from over 200 polls, conducted from 1972 to 2006, that have asked questions about the American public’s attitudes towards homosexuality.<sup>29</sup> Bowman’s report is both illuminating and intriguing.

Bowman begins her report with a section called *Acceptance* and notes the following:

In 1973, when the National Opinion Research Center at the University of Chicago [“NORC”] first asked people about sexual relations between two adults of the same sex, 73 percent described

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<sup>29</sup> See KARLYN BOWMAN & ADAM FOSTER, AMER. ENTER. INST., ATTITUDES ABOUT HOMOSEXUALITY AND GAY MARRIAGE, [http://www.aei.org/publications/filter.all.pubID.14882/pub\\_detail.asp](http://www.aei.org/publications/filter.all.pubID.14882/pub_detail.asp) (last visited Sept. 27, 2006). I do not purport to be an expert in polling data nor do I assert that every survey I cite in the following paragraphs and footnotes is necessarily free from methodological errors. My sole assertion is that I believe Bowman’s compilation indicates a trend towards the public caring *less* about homosexuality as a morally problematic issue. That trend is sufficient to make me think it is at least probable that civil rights laws protecting the liberty of LGBT people might be enacted over the coming decades and that the passage of such laws might then burden the liberty of those who believe that homosexuality is morally problematic.

them as “always wrong” and another 7 percent as “almost always wrong.” When the organization last asked the question in 2004, 58 percent called them always wrong and 5 percent almost always wrong. NORC interviewers have asked the same question about extramarital sexual relations over the period, and they find no liberalization in attitudes.<sup>30</sup>

The Roper Center at the University of Connecticut, together with AEI, did a subgroup analysis of the NORC cohort data. Their analysis showed that in the age cohort of 30-44, there was an even more significant reduction in the percentage of respondents who believed homosexual relations were “always wrong.” In 1973, 74% of respondents in that age cohort believed homosexual sexual relations were “always wrong.”<sup>31</sup> In 2002, only 48% of respondents in that age cohort answered that homosexual sexual relations were “always wrong”—a reduction of 26%.<sup>32</sup>

Bowman’s compilation also indicates that an enduring half of the American public continues to believe that homosexuality is not morally acceptable, although that number appears to decrease slightly if respondents are asked about “homosexual relationships” or homosexuality as an “acceptable alternative lifestyle,” rather than about “homosexual behavior.”<sup>33</sup> The number of people who say they personally

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<sup>30</sup> *Id.* at 2. The NORC survey found that 70% of respondents in 1973 thought that a married person having sex outside of his or her marriage was “always wrong.” *Id.* at 47. That number stayed consistently in the 70% range every year the survey was conducted until 2004, when 80% of respondents thought extramarital sex was “always wrong.” *Id.* at 47-48.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* The subgroup analysis also looked at sex, race, education, church attendance, region, party, ideology and family income. *Id.* The significant changes among younger people are apparent in other surveys as well. In a University of California at Los Angeles Cooperative Institutional Research Program survey of college freshman, 47% of respondents in 1976 answered that “[i]t is important to have laws prohibiting homosexual relationships.” *Id.* at 6. By 2005, that number had decreased to 25%. *Id.*

<sup>33</sup> For example, a February 2006 survey by Princeton Survey Research Associates (“PSRA”)/Pew Research Center found that 50% of respondents believe that “homosexual behavior” is “wrong,” and a May 2006 Gallup poll found that 51% of respondents believe that “homosexual behavior” is “morally wrong.” *Id.* at 4. A *Los Angeles Times* survey in 2000 found that 51% of respondents believed that “sexual relations between adults of the same gender” is “always wrong.” *Id.* By contrast, a February 2004 Harris/CNN/*Time* poll found that only 38% of respondents considered “homosexual relationships” to be “not acceptable,” while 49% considered them acceptable for others but not themselves, and 11% considered them acceptable both for others and for themselves. *Id.* at 5. A May 2006 Gallup poll found that 54% of respondents felt that “homosexuality should be considered an acceptable alternative lifestyle,” while 41% felt it should not. *Id.* at 6. And the percentage of people who believe that “homosexuality is a way of life that should be discouraged by society” has

know a gay person, however, or who say they have become more accepting of gays and lesbians over the past few years, has increased significantly over the past fifteen years.<sup>34</sup>

Of particular note is the number of people who seem to have discovered gay people in their own families. In a 1992 Princeton Survey Research Associates (“PSRA”)/*Newsweek* poll, 9% of respondents said that someone in their family was gay or lesbian, while 90% reported that there was no one in their family who was gay or lesbian.<sup>35</sup> In 2000, 23% of respondents said that someone in their family was gay or lesbian, while only 75% reported there was no one in their family who was gay or lesbian.<sup>36</sup> Given that the number of gay people probably did not increase 14% between 1992 and 2000, one must presume that more gay people told their families about their sexual orientation during that time period.<sup>37</sup>

Perhaps because of the greater familiarity that members of the American public are beginning to have with gay people (including their own family members), purging homosexuality from our society does not appear to be a huge priority for a significant segment of our public. What is particularly interesting about Bowman’s polling compilation is the number of people who do not think homosexuality is a moral issue at all,<sup>38</sup> and the significant percentage who do not

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remained below 50% (ranging from 41% to 45%) in responses to a PSRA/Pew Research Center survey in 1999, 2000, 2003 and 2004. *Id.* at 8.

<sup>34</sup> In a PSRA/*Newsweek* poll in 1985, only 22% of respondents said they had a “friend or close acquaintance” who was gay or lesbian. *Id.* at 16. In a 2000 PSRA/*Newsweek* poll, 56% of respondents said they had a “friend or close acquaintance” who was gay or lesbian. *Id.* In a July 2003 Gallup poll, 32% of respondents indicated they had “become more accepting of gays and lesbians” over the past few years, 59% said their attitudes had not changed, and 8% said they had become less accepting. *Id.* at 10.

<sup>35</sup> BOWMAN & FOSTER, *supra* note 29, at 16.

<sup>36</sup> *Id.*

<sup>37</sup> Along the lines of increasing knowledge about gay family members, I have always appreciated Professor Nan Hunter’s idea of a “Thanksgiving Family Coming Out Day.” Every Thanksgiving, every family with a gay member should tell another family about the gay family member. If all families with a known gay member would adopt this tradition, my guess is that almost every person in America would end up knowing (or knowing of) one gay person within some number of years.

<sup>38</sup> For example, in a February 2006 survey by PSRA/Pew Research Center, 33% of respondents stated that “homosexual behavior” was “not a moral issue,” while 12% called such behavior “acceptable.” BOWMAN & FOSTER, *supra* note 29, at 4. In the May 2006 Gallup question, in which respondents were given only the options of “homosexual behavior” being “morally wrong” or “morally acceptable,” 44% of respondents said it was morally acceptable. *Id.* It seems likely to me that the Pew data are more consistent with a significant segment of the public’s view—i.e., that homosexuality is not something to be agitated about (the second view of gay sex), but is also not something they would call “morally acceptable” (the third view of gay sex).

think it would matter that much if there was greater acceptance of gay people in society. For example, in a 2003 PSRA/Pew Research Center survey, respondents were asked the following question: “Do you think more acceptance of gays and lesbians would be a good thing or a bad thing for the country—or that it would not make much difference either way?”<sup>39</sup> Only 31% of respondents said that more acceptance of gay people would be bad for the country.<sup>40</sup> Twenty-three percent thought it would be good for the country and 42% felt it would not make much difference.<sup>41</sup>

To me, these various polls taken together indicate that there is a significant number of people (but substantially *less* than a strong majority of people) in this country who believe that homosexuality is morally problematic and that society must therefore do what it can to discourage, disapprove of and reduce the incidence of homosexual behavior. These are the individuals whom I would consider to hold the first view of gay sex I describe above. There is also a much smaller group of people who believe that homosexuality is as morally acceptable as heterosexuality. These are the individuals whom I would consider to hold the third view of gay sex I describe above.

And, finally, there is a significant group of people in the middle. These people adhere to the second view of gay sex and therefore hold conflicting views about public policy and homosexuality. They do not feel homosexuality is morally equivalent to heterosexuality and so they are not interested in conferring civil marriage on gay couples.<sup>42</sup> But they also do not believe it would be terribly harmful for society if gay couples were acknowledged and permitted to have equal rights.<sup>43</sup>

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<sup>39</sup> *Id.* at 7.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* A 2004 Harris/CNN/*Time* poll reflects similar indifference. In that poll, respondents were asked whether they would be more or less likely to vote for a candidate who favored legalizing gay marriage, or whether it would make no difference. *Id.* at 15. Forty-eight percent of respondents said they would be less likely to vote for such a candidate, 10% said they would be more likely to vote for such a candidate, and 39% said it would make no difference to them. *Id.*

<sup>42</sup> *Id.* at 21-24 (noting various polls showing consistent 50% to 65% disapproval of marriage for same-sex couples when respondents are given the opportunity to note solely their approval or disapproval of marriage for same-sex couples).

<sup>43</sup> For example, in a 2003 Gallup/CNN/*USA Today* poll, respondents were asked whether “allowing two people of the same sex to legally marry will change our society for the better, will it have no effect, or will it change our society for the worse?” Forty-eight percent thought it would change our society for the worse, 10% thought it

Thus, when given the choice between marriage or civil unions for same-sex couples, and no legal recognition for same-sex couples at all, support for “no legal recognition” never goes above 50% and, in most cases, hovers between 35% and 40%.<sup>44</sup> Conversely, when one combines the small public support for gay marriage with the more substantial support for civil unions, there is consistently a majority of support for some legal recognition of gay couples.<sup>45</sup>

What this means to me is that the second view of gay sex holds significant sway in our society today. As I note above, I presume most parents today would prefer their child not be gay. But if their child was gay, these parents may no longer believe they must desperately seek out professional “help” for the child. The large number of well-adjusted, happy and successful gay people living openly and honestly in today’s society reinforces the medical profession’s current judgment that there is nothing psychologically wrong with being gay.<sup>46</sup>

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would change our society for the better, and 40% thought it would have no effect on our society. *Id.* at 25.

<sup>44</sup> BOWMAN & FOSTER, *supra* note 29, at 27-28 (reviewing one poll from 2000, and fifteen polls from 2004, that gave respondents the option between marriage, civil unions, and no legal recognition for same-sex couples).

<sup>45</sup> *Id.* What is particularly fascinating is that people *report* more moral disapproval of homosexuality among the American public than the polls indicate there actually *is*. A 2001 Gallup poll asked, “What is your impression of how most Americans feel about homosexual behavior—do most Americans think it is acceptable or not acceptable?” Seventy-four percent responded that most Americans believe homosexual behavior is not acceptable, while 21% responded that most Americans believe homosexual behavior is acceptable. *Id.* at 7. In fact, a May 2001 Gallup poll found that 40% of respondents considered “homosexual behavior” to be “morally acceptable,” while 53% found it to be “morally wrong.” *Id.* at 4. And in the NORC survey of 2002, 55% said homosexual behavior was “always wrong” and 5% said it was “almost always” wrong; 33% said it was “not wrong” and 7% said it was “only sometimes” wrong. *Id.* at 2.

<sup>46</sup> *See, e.g.*, Amer. Psychiatric Ass’n, Gay Lesbian and Bisexual Issues, <http://healthyminds.org/glbissues.cfm> (last visited Sept. 27, 2006) (quoting a 1992 American Psychiatric Association (“APA”) statement: “Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, the [APA] calls on all international health organizations and individual psychiatrists in other countries, to urge the repeal in their own country of legislation that penalized homosexual acts by consenting adults in private. And further the APA calls on these organizations and individuals to do all that is possible to decrease the stigma related to homosexuality wherever and whenever it may occur.”); Amer. Psychological Ass’n, Being Gay Is Just as Healthy as Being Straight, <http://www.psychologymatters.org/hooker.html> (last visited Sept. 27, 2006); Child Welfare League of America, LGBTQ Youth Issues: About the Program, <http://www.cwla.org/programs/culture/glbqtqabout.htm> (last visited Sept. 27, 2006) (noting the Child Welfare League of America’s “full support for all young people, regardless of sexual orientation”); Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults, <http://www.cwla.org/programs/culture/glbqtqposition.htm> (last visited Sept. 27, 2006)

And more and more people are beginning to accept that individuals do not “choose” homosexuality; they are simply emotionally and physically happier with an individual of the same sex.<sup>47</sup> It is also possible that the horror value of discovering one’s child is gay has subsided. Although the majority of parents today may not want their child to be gay, they are probably less horrified to find out their child is gay than they would be if they discovered their child was having sex with his or her sibling, having sex with a child or having sex in public.

And, at bottom, these parents do not want their children discriminated against “just because they are gay.” Parents may not like the fact that their child is gay, but they also do not want American society to penalize their child unduly for that fact.<sup>48</sup>

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(“The Child Welfare League of America . . . affirms that lesbian, gay, and bisexual parents are as well suited to raise children as their heterosexual counterparts.”).

<sup>47</sup> See, e.g., BOWMAN & FOSTER, *supra* note 29, at 19 (surveying relevant polls and concluding that “[o]ne of the most dramatic changes in attitudes about homosexuality appears to be about its cause. More people than in the past say that people are born homosexual or that it is an orientation that they cannot change. In a Gallup question from 1977, 12% said homosexuality was something a person was born with; in 2003, 38% gave that response.”).

<sup>48</sup> What many of these people and their friends do, with regard to public policies, is engage in “moral bracketing.” Moral bracketing, a basic component of liberal political theory, allows people to say both that homosexuality is wrong *and* that antigay discrimination is wrong. Under this liberal view, as long as gay people do not harm anyone else, the State should be tolerant of them. See Feldblum, *Gay Is Good*, *supra* note 17 at 147-50 (describing moral bracketing). The advantages and disadvantages of moral bracketing have intrigued me for over a decade. See generally Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149 (John D’Emilio et al. eds., 2000) [hereinafter Feldblum, *Federal Gay Rights*]; Chai R. Feldblum, *The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 55 (Robert Wintemute & Mads Andnæs eds., 2001); Feldblum, *Moral Rhetoric*, *supra* note 23; Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998); Feldblum, *Sexual Orientation*, *supra* note 20. My personal belief is that we will be able to achieve full liberty for LGBT people only if we directly engage in a moral discourse about sexuality, sexual orientation, and gender in the public domain. The Moral Values Project, an enterprise I began working on in 2005, is designed to reach people who believe homosexuality is immoral but who also believe gay people should not be discriminated against. One goal of the Moral Values Project is to move people from the “I love you anyway” stance to the “I love you” stance—that is, from the second view of gay sex I describe above to the third view of gay sex. For purposes of this article, however, I am postulating a trend towards more legal protection and equality for LGBT people, whether it is achieved through a continuation of moral bracketing (as some people believe it can be) or through a new engagement with moral discourse (as I believe is necessary).

For purposes of this article, therefore, I would like to postulate that the coming decades will see a rise in legislation and judicial opinions favoring full liberty for LGBT people. Assuming that is the case, how should the LGBT movement think about the fact that granting liberty to gay people might put a burden on people holding the first view of gay sex—people who feel that if they rent an apartment to a gay couple, allow a gay couple to eat at their restaurant or provide health benefits to a same-sex spouse, it is tantamount to aiding and abetting sinful or immoral behavior?

*B. Impact of LGBT Liberty on Belief Liberty*

To consider the question I pose above as relevant at all, one has to believe that a civil rights law that protects the liberty of LGBT people by prohibiting discrimination based on sexual orientation or gender identity (or by conferring civil union or marriage status on same-sex couples) places a burden on the liberty of some people regulated by the law. This is not self-evident. Many people believe these laws merely regulate the “conduct” of such individuals and have little or no impact on such individuals’ beliefs, identities or practices.

The liberty I believe such laws might, in certain circumstances, burden is what I call “belief liberty.”<sup>49</sup> What I mean by “burden” is that the law requires an individual to engage in conduct that requires him or her to act in a manner inconsistent with his or her deepest held beliefs. From a liberty perspective, whether these beliefs stem from a religious source or from a secular source is irrelevant. What is common among these belief systems, and what should be relevant for the liberty analysis, is that these beliefs form a core aspect of the individual’s sense of self and purpose in the world.

Certainly, in America today, religious people of certain denominations are likely to be disproportionately burdened by laws that regulate their conduct with regard to gay people. For example, current polling data shows that, while the majority of Americans (58%) say marriage for same-sex couples should not be permitted, a much larger 85% of self-identified conservative Republicans and evangelical, white Protestants say that gay

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<sup>49</sup> I explain what I mean by “belief liberty,” as well as what I consider “identity liberty” and “bodily liberty” *infra* Part B.2.a.



marriage should be illegal.<sup>50</sup> But we miss the mark, I think, if we analyze this burden solely as a burden on religious liberty, writ narrow, rather than as a burden on belief liberty, writ large. Obviously, as I note in the introduction to this article, the Supreme Court's decision in *Employment Division v. Smith*<sup>51</sup> limits the reach of the Free Exercise Clause as a practical matter. But, as a theoretical matter, I believe it is more appropriate to analyze these belief claims as liberty claims and not to elevate religious beliefs over other deeply held beliefs derived from non-religious sources. From the perspective of a person holding a particular belief, the intensity of that belief may be as strong regardless of whether it derives from a religious or a non-religious source.

Fully recognizing the existence of this type of burden requires two steps. First, we must consider what moral values are inherent in civil rights laws and whether these values might conflict with the deeply held beliefs of some individuals who are regulated by the law. Second, we must consider whether forcing someone to *act* (or not to act) in a certain way can burden a liberty interest that should be protected under the Due Process Clause.

### 1. The Moral Values in Civil Rights Laws

A major strand of liberal political theory postulates that “morality”—in the sense of a moral, normative view of “the good”—is not the proper object of governmental action. According to this view, individuals living in a pluralist society will inevitably hold divergent normative and moral beliefs, and the role of law and government is to adequately safeguard the rights necessary for each individual to pursue his or her own normative view of “the good life”—not to affirmatively advance one moral view of “the good” over others.<sup>52</sup>

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<sup>50</sup> Gary Langer, *Most Oppose Gay Marriage; Fewer Back an Amendment*, ABC NEWS, June 5, 2006, <http://abcnews.go.com/US/Politics/story?id=2041689&page=1>.

<sup>51</sup> 494 U.S. 872, 879 (1990) (holding that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’” (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

<sup>52</sup> See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 349-78 (1980); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 90-100 (1977); JOHN RAWLS, *The Priority of Right and Ideas of the Good*, in *POLITICAL LIBERALISM* 173, 173-211 (1996). See generally Feldblum, *Gay Is Good*, *supra* note 17, at 143-50 (describing liberal

In a recent short comment on why government should not be involved in recognizing any marriages (for either same-sex couples or opposite-sex couples), Tamara Metz nicely captures this viewpoint. Metz posits that the goal of marriage as an institution is to have a couple's relationship supported by an ethical authority outside the couple itself. And the "liberal state," argues Metz, is "ill suited to serve as an ethical authority."<sup>53</sup> Why? As Metz explains: "Ideally, the liberal state is relatively distant, more legal than moral, and more neutral than not among competing worldviews so as to protect individual freedom and diversity."<sup>54</sup>

I do not disagree that a liberal state must have, as its highest priority, the protection of pluralist ways of living among its citizens, subject to such ways of living not harming others in society. My argument is simply that when government decides, through the enactment of its laws, that a certain way of life does *not* harm those living that life and does *not* harm others exposed to such individuals, the government is necessarily staking out a position of moral *neutrality* with regard to that way of living. And that position of moral neutrality may stand in stark contrast to those who believe that the particular way of living at issue is morally laden and problematic.

I have both documented and personally watched as supporters of a gay civil rights bill have gone to great lengths to argue that they are not taking a position on the morality of homosexuality or bisexuality by supporting such a law.<sup>55</sup> I agree that supporting such a law does not necessarily convey a message that "gay is good." But it is disingenuous to say that voting for a law of this kind conveys no message about morality at all. 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

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neutrality approach); Feldblum, *Sexual Orientation*, *supra* note 20, at 245-46 (same). Carlos Ball has written extensively on liberal neutrality in the context of gay rights. See CARLOS BALL, *THE MORALITY OF GAY RIGHTS* (2002).

<sup>53</sup> Tamara Metz, *Why We Should Disestablish Marriage*, in MARY LYNDON SHANLEY, *JUST MARRIAGE* 99, 101 (Joshua Cohen & Deborah Chasman eds., 2004).

<sup>54</sup> *Id.* at 102.

<sup>55</sup> See, e.g., Feldblum, *Federal Gay Rights*, *supra* note 48 (documenting moral bracketing throughout introduction of recurring gay rights bills); Feldblum, *Moral Rhetoric*, *supra* note 23, at 996-1004 (deconstructing moral bracketing done by various Members of Congress during a hearing on ENDA).

to justify private parties discriminating against such individuals in the public domain. To return to the three possible views of gay sex, supporting a law that prohibits discrimination based on sexual orientation requires that the supporter hold, at a minimum, the second view of gay sex—even though it does not require that the supporter hold the third view.

For example, we do not have laws today that protect those who engage in pedophilia or domestic violence from employment, housing or public accommodation discrimination. We do not ask about these groups of individuals: “Well, but can they type? Can they do the job?” I do not believe the lack of such laws is due solely to the lack of an adequate “pedophile lobby” or “domestic violence abuser lobby.” Rather, I believe society (as reflected in its government’s public policy) has determined that actions of this kind hurt others and are thus morally problematic. For that reason, a private actor who uses the fact that an individual has engaged in these actions as grounds for exclusion is not viewed as engaging in unjustified discrimination.

This analysis works equally well to explain and describe the status quo in which LGBT people currently remain vulnerable to private and public discrimination. When the government *fails* to pass a law prohibiting non-discrimination on the basis of sexual orientation, in the face of documentation that such discrimination occurs on a regular basis, or *fails* to allow same-sex couples access to civil marriage when the practical need for that access has been documented for scores of families, the government is similarly taking a position on a moral question. The State has decided that a homosexual or bisexual orientation is not morally neutral, but rather may legitimately be viewed by some as morally problematic. It is precisely that determination which permits legislators to continue denying full liberty to those who act on their homosexual or bisexual orientations and who are open and honest about their actions.

In these cases, the issue is often framed as a question of “equality.” That is certainly true. The existence of civil rights laws, as well as the absence of such laws, will determine how much equality LGBT people enjoy in our society. But let us be clear: the fact that this is a question of equality should not obscure the fact that this is *also* a question of morality. And that is because moral beliefs necessarily underlie the

assessment of whether such equality is *justifiably* granted or denied.

Once we acknowledge these moral assessments, it becomes easier to understand that a civil rights law prohibiting discrimination based on sexual orientation might be shocking for some members of society. For those who believe that a homosexual or bisexual orientation is not morally neutral, and that an individual who acts on his or her homosexual orientation acts in a sinful or harmful manner (to himself or herself and to others), it is problematic when the government passes a law that gives such individuals equal access to all societal institutions. Such a law rests on a moral assessment of homosexuality and bisexuality that is radically different from their own. Such a law presumes the moral neutrality of homosexuality and bisexuality, while those who oppose the law believe homosexuality and bisexuality are morally problematic.

Conversely, for those who believe that any sexual orientation, including a homosexual or bisexual orientation, is morally neutral, and that an individual who acts on his or her homosexual or bisexual orientation acts in an honest and good manner, it is problematic when the government *fails* to pass laws providing equality to such individuals. The failure to pass such a law rests on a moral assessment of homosexuality and bisexuality that is radically different from their own. Such failure presumes homosexuality and bisexuality are morally problematic, while those who desire the law believe homosexuality and bisexuality are morally neutral.

Given this reality, we are in a zero-sum game: a gain for one side necessarily entails a corresponding loss for the other side.

This is why then-Professor (now Judge) Michael McConnell is correct to observe that disputes surrounding sexual orientation “feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality.”<sup>56</sup> McConnell believes that the debate over sexual orientation is best approached by the government extending respect to both of these positions, without taking sides on either position.

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<sup>56</sup> See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 43-44 (2000).

Thus, using an analogy to the respect people seek from government for their religious beliefs, he urges the following:

The starting point would be to extend respect to both sides in the conflict of opinion, to treat both the view that homosexuality is a healthy and normal manifestation of human sexuality and the view that homosexuality is unnatural and immoral as conscientious positions, worthy of respect, much as we treat both atheism and faith as worthy of respect. In using the term “respect,” I do not mean agreement. Rather, I mean the civil toleration we extend to fellow citizens and fellow human beings even when we disagree with their views. We should recognize that the “Civil Magistrate” is no more “competent a Judge” of the “Truth” about human sexuality than about religion.<sup>57</sup>

But what McConnell fails to appreciate in his analysis is the zero-sum nature of the game. That is, he fails to recognize that the government is *necessarily* taking a stance on the moral question every time it *fails* to affirmatively ensure that gay people can live openly, safely and honestly in society.

Note, for example, how McConnell characterizes possible governmental actions (and inactions) under his recommended approach:

Under this approach, the state should not impose a penalty on practices associated with or compelled by any of the various views of homosexuality, and should refrain from using its power to favor, promote, or advance one position over the other. The difference between a “gay rights” position and a “First Amendment” approach is that the former adopts as its governing principle the idea that homosexuality is normal, natural, and morally unobjectionable, *while the latter takes the view that the moral issue is not for the government to decide*. Thus, the government would not punish sexual acts by consenting gay individuals, nor would it use sexual orientation as a basis for classification or discrimination, without powerful reasons, not grounded in moral objections, for taking such action. On the other hand, the *government* would not attempt to *project this posture of moral neutrality onto the private sphere*, but would allow private forces in the culture to determine the ultimate social response.<sup>58</sup>

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<sup>57</sup> *Id.* at 44.

<sup>58</sup> *Id.* (emphasis added). As McConnell concludes:

Such an approach would produce many of the same advantages for this cultural conflict that the First Amendment produces for religious conflict. This approach would provide the basis for civic peace on an issue where the nation is dangerously divided, it would provide maximum respect for individual conscience, it would depoliticize an issue that many of us believe is private and not political in character, and it would help to restore the public-private distinction.

It seems apparent from McConnell's writing (although, for some reason, he fails to state so explicitly) that the "gay rights" position is one that calls for government intervention in the private sector through laws that make discrimination on the basis of sexual orientation illegal or that make civil marriage available to same-sex couples. I gather that is what McConnell is referring to by the government "project[ing] this posture of moral neutrality onto the private sphere."<sup>59</sup>

But if that is the case, McConnell is simply wrong to assume that a government's failure to pass such laws rests on the view "that the moral issue is not for the government to decide." The government *is* taking a position on the moral question when it fails to extend access to civil marriage to same-sex couples. It is precisely because some people hold the view that homosexuality is immoral that gay people have been *denied* equal protection under the law up until this point. Government has not simply been sitting on the sidelines of these moral questions during all the time it has failed to pass laws protecting the liberty of LGBT people. Government has quite clearly been taking a side—and it has not been taking the side that helps gay people.

McConnell correctly diagnoses the opposing moral viewpoints, but his proposed solution is no more satisfying than the solutions proposed by gay rights leaders who characterize gay civil rights laws as simple "neutral" prescriptions of equality that have no impact on a person's religious or moral beliefs. Both McConnell and these gay rights leaders are trying to deal with the conflict by simply wishing it away. That is neither possible nor intellectually honest.

## 2. The Burden on Liberty

Passage of a law based on a moral assessment different from one's own can certainly make an individual feel alienated from his or her government and fellow citizens. But that is a far cry from accepting that such a law burdens one's liberty in a way that might require further justification by the State. I might disagree with my government's foreign policy or economic policy and think on some days that I would be happier living in some other country. But without something

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*Id.* at 44-45.

<sup>59</sup> *Id.* at 44.

more, it is hard to argue that my liberty—even something as broad as my “belief liberty”—has been burdened.

The “something more,” from my perspective, is a legal requirement that an individual *act*, or *refrain from acting*, in a manner that the individual can credibly claim undermines his or her core beliefs and sense of self. Without such a trigger, a claim that one’s liberty has been burdened cannot legitimately be maintained. Explicating this point requires a discussion of both belief liberty and the interaction between conduct and belief.

### *a. Three Forms of Liberty*

It is way past time to get over the *Lochner* era’s<sup>60</sup> baggage and embrace the full scope of our Due Process Clause’s liberty interest. Numerous scholars over the past thirty years have produced compelling and thoughtful analyses of the liberty interest embodied in the Fifth and Fourteenth Amendments.<sup>61</sup> My goal in this section is more limited. I want to focus on Justice David Souter’s comprehensive and historically far-reaching concurrence in *Washington v. Glucksberg*<sup>62</sup> and suggest that we apply the lessons of that concurrence to thinking about belief liberty more generally.

In his *Glucksberg* concurrence, Justice Souter is clear that he believes the *Lochner* line of cases was incorrectly decided. But that is not because a person’s “right to choose a calling” is not an essential “element of liberty.”<sup>63</sup> Rather, it is because the Court’s decisions in the *Lochner* line of cases “harbored the spirit of *Dred Scott* in their absolutist

<sup>60</sup> The era was named after the substantive due process case of *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>61</sup> For just a small sample, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491 (2002); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 4 (2003); Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) [hereinafter Tribe, *Lawrence*]; Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 (1992).

<sup>62</sup> *Washington v. Glucksberg*, 521 U.S. 702, 752-89 (1997) (Souter, J., concurring).

<sup>63</sup> *Id.* at 759 (noting that the standard of reasonableness or arbitrariness under the Due Process Clause is “fairly traceable to Justice Bradley’s dissent in the *Slaughter-House Cases*, in which he said that a person’s right to choose a calling was an element of liberty . . . and declared that the liberty and property protected by due process are not truly recognized if such rights may be ‘arbitrarily assailed’” (citation omitted)).

implementation of the standard they espoused.”<sup>64</sup> In other words, it is not that living and working where one wills is not an essential part of liberty. But the government must have the ability to regulate that liberty in a reasonable manner in order to carry out its important interests.<sup>65</sup> The Court’s failure in the *Lochner* line of cases was its failure to properly judge and apply the government’s important interest in protecting the social and economic welfare of its citizens. It was not a failure in judging the importance of work as an element of liberty.<sup>66</sup>

Justice Souter’s main priority in his *Glucksberg* concurrence, however, is not to revive the importance of contract as a liberty interest. His main objective is to attack the Court’s approach, over the past fifty years, of focusing almost exclusively on whether a proclaimed liberty interest is a “fundamental right,” and then almost invariably invalidating any legislation burdening such a right. To Justice Souter, this approach not only represents a wrong turn from earlier substantive due process jurisprudence, but it also elides the key point that liberty interests naturally fall across a spectrum. Thus, many interests can be “liberty” interests and still be *justifiably* burdened by the government because of the needs of society.<sup>67</sup>

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<sup>64</sup> *Id.* at 761. Justice Souter begins his historical overview by reminding us that one of the first instances in which the Court applied the Due Process Clause was “the case that the [Fourteenth] Amendment would in due course overturn, *Dred Scott v. Sandford*.” *Id.* at 758 (citation omitted).

<sup>65</sup> In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Court said that Fourteenth Amendment liberty includes

the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

*Id.* at 589. Justice Souter’s observation of *Allgeyer* is the following: “Although this principle was unobjectionable, what followed for a season was, in the realm of economic legislation, the echo of *Dred Scott*.” *Glucksberg*, 521 U.S. at 760 (Souter, J., concurring).

<sup>66</sup> While the ability to pursue one’s calling can fall within the identity liberty I describe below, one must admit that the Court’s assessment that one needs perfect economic freedom in doing so (including the freedom to agree to wretched work conditions), *see, e.g.*, *Lochner v. New York*, 198 U.S. 45, 59-61 (1905), was yet another failing of reasoning in many of the *Lochner*-era cases.

<sup>67</sup> Scholars have correctly pointed out that the opinion authored by Justices O’Connor, Kennedy and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), focused on a similar liberty spectrum. *See, e.g.*, Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2002-2003 CATO SUP. CT. REV. 21, 33 (2003). Barnett notes that the discussion of the liberty right in



Justice Souter finds guidance for this approach in Justice Harlan's dissent from dismissal on jurisdictional grounds in *Poe v. Ullman*:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.<sup>68</sup>

For Justice Souter, the type of interests that would require particularly careful scrutiny would presumably be those described in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, an opinion written jointly by Justices O'Connor, Kennedy and Souter:

These matters [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>69</sup>

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*Casey* is commonly attributed to Justice Kennedy. *Id.* Assuming that is true, there are two Justices on the current court, Justices Kennedy and Souter, who appear to be deeply invested in a flexible liberty analysis. See Post, *supra* note 61, at 85-96 (noting flexibility in the early evolution of modern substantive due process and describing the rigidity articulated by the *Glucksberg* majority).

<sup>68</sup> *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted). Justice Souter begins his substantive analysis in his *Glucksberg* concurrence as follows:

My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. That understanding begins with a concept of "ordered liberty," comprising a continuum of rights to be free from "arbitrary impositions and purposeless restraints."

*Glucksberg*, 521 U.S. at 765 (Souter, J., concurring) (citations omitted) (quoting *Poe*, 367 U.S. at 543, 549).

<sup>69</sup> *Casey*, 505 U.S. at 851.

Drawing from a historical overview of substantive due process cases and Justice Harlan's dissent in *Poe*, Justice Souter articulates two basic guidelines for courts engaging in a substantive due process analysis. First, a court "is bound to confine the values that it recognizes to those truly deserving constitutional stature"<sup>70</sup>—an approach that enables a court to avoid engaging in piercing scrutiny of every conceivable burden on liberty that may arise across the spectrum.<sup>71</sup> Second, a court may not intervene "merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review."<sup>72</sup> As Justice Souter articulates the standard,

It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right.<sup>73</sup>

In an interesting (strategic?) move, Justice Souter never directly repudiates the strict scrutiny standard requiring that governmental restrictions on fundamental rights be narrowly tailored to fit a compelling government interest. Indeed, he repeats that standard in various citations in his concurrence.<sup>74</sup>

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<sup>70</sup> *Glucksberg*, 521 U.S. at 767 (Souter, J., concurring).

<sup>71</sup> As Justice Souter put it:

Justice Harlan thus recognized just what the Court today assumes, that by insisting on a threshold requirement that the interest (or, as the Court puts it, the right) be fundamental before anything more than rational basis justification is required, the Court ensures that not every case will require the "complex balancing" that heightened scrutiny entails.

*Id.* at 767 n.9.

<sup>72</sup> *Id.* at 768.

<sup>73</sup> *Id.* In a footnote to this sentence, Justice Souter observed,

Our cases have used various terms to refer to fundamental liberty interests, and at times we have also called such an interest a "right" even before balancing it against the government's interest. Precision in terminology, however, favors reserving the label "right" for instances in which the individual's liberty interest actually trumps the government's countervailing interests; only then does the individual have anything legally enforceable as against the state's attempt at regulation.

*Id.* at 768 n.10 (citations omitted).

<sup>74</sup> Justice Souter wrote:

The claims of arbitrariness that mark almost all instances of unenumerated substantive rights are those resting on "certain interests requir[ing] particularly careful scrutiny of the state needs asserted to justify their abridgment[.]" [c]f. *Skinner v. Oklahoma [ex rel. Williamson]*, 316 U.S. 535

But his emphasis that a court must consider whether a “legislation’s justifying principle, critically valued” is “*commensurate* with the individual interest”<sup>75</sup> appears clearly designed to argue that a court has flexibility in its substantive due process analysis. That is, in order to be true to what Justice Souter sees as the spirit and design of the constitutional protection of liberty, while at the same time ensuring that government is able to regulate effectively in a complex world, he calls for an almost dialectical valuation of the government’s interest against the particular liberty interest at stake.<sup>76</sup>

Of course, Justice Souter’s opinion in *Glucksberg* was a concurrence, and Justice Rehnquist’s majority opinion offers a very different view of substantive due process. Under the majority approach in *Glucksberg*, there are a limited number of “fundamental rights” that can be clearly named and found, based on objective, historical facts, to be rooted in our nation’s tradition.<sup>77</sup> With regard to legislative burdens on this very limited set of “fundamental rights,” courts will apply strict

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(1942)]; *Bolling v. Sharpe*, [347 U.S. 497 (1954)], [Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)]; that is, interests in liberty sufficiently important to be judged “fundamental,” *id.*, at 548; see also *id.*, at 541 (citing *Corfield v. Coryell*, 4 Wash. C. C. 371, 380 (CC ED Pa. 1825)). In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted. *Poe, supra*, at 548 (Harlan, J., dissenting) (an “enactment involv[ing] . . . a most fundamental aspect of ‘liberty’ . . . [is] subjec[t] to ‘strict scrutiny’”) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S., at 541); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (reaffirming that due process “forbids the government to infringe certain ‘fundamental’ liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest”).

*Id.* at 766-67 (alterations in original) (footnote omitted).

<sup>75</sup> *Id.* at 768 (emphasis added).

<sup>76</sup> As Justice Souter put it:

*Skinner*, that is, added decisions regarding procreation to the list of liberties recognized in *Meyer* and *Pierce* and loosely suggested, as a gloss on their standard of arbitrariness, a judicial obligation to scrutinize any impingement on such an important interest with heightened care. In so doing, it suggested a point that Justice Harlan would develop, that the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual.

*Glucksberg*, 521 U.S. at 762 (Souter, J., concurring) (citing *Poe*, 367 U.S. at 543). See also *id.* at 767 (stating that a court is “to assess the relative ‘weights’ or dignities of the contending interests”).

<sup>77</sup> See *id.* at 719-28 (majority opinion).

scrutiny (not dialectical balancing) and will almost invariably invalidate the legislative burden.<sup>78</sup>

But the Supreme Court's deployment of a liberty analysis to invalidate Texas' sodomy law in *Lawrence v. Texas*<sup>79</sup> opened the door to a revival of Justice Souter's more capacious understanding of substantive due process. Professor Robert Post observes that Justice Kennedy's "extravagant and passionate" opinion in *Lawrence* "simply shatters, with all the heartfelt urgency of deep conviction, the paralyzing carapace in which *Glucksberg* had sought to encase substantive due process."<sup>80</sup> And Professor Larry Tribe notes that the "*Glucksberg* gambit" to "collapse claims of liberty into the unidimensional and binary business of determining which personal activities belong to the historically venerated catalogue of privileged acts and which do not" could well have succeeded, had future cases followed its trajectory.<sup>81</sup> Instead, as Tribe notes, even the briefest examination of the *Lawrence* opinion makes plain that the Court steadfastly resisted a "reductionist procedure" that reduces the liberty interest to "flattened-out collections of private acts."<sup>82</sup>

Indeed, the Supreme Court's opinion in *Lawrence* triggered a revival of writing on liberty, some of it from people who had been writing and thinking about liberty for a long time. In a sweeping and eloquent article, Professor Larry Tribe revives his theory that the "essence of freedom" is "the self-governing experience of making, expressing, and renewing one's commitments, all the way from one's choices with respect to intimate relationships to one's choices as a participating member of a self-governing polity."<sup>83</sup> Tribe's theory is premised on an "understanding of self-government and relational rights as defining the core of liberty," and on the "recognition of coercion, and of using others as mere means to the

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<sup>78</sup> *Id.* For fascinating and excellent analyses of the development of substantive due process, and the effort by the *Glucksberg* majority to radically change the trajectory of that development, see Post, *supra* note 61, at 86-96 and Tribe, *Lawrence*, *supra* note 61, at 1921-25.

<sup>79</sup> 539 U.S. 558 (2003).

<sup>80</sup> Post, *supra* note 61, at 96.

<sup>81</sup> Tribe, *Lawrence*, *supra* note 61, at 1924-25.

<sup>82</sup> *Id.* at 1931-32.

<sup>83</sup> *Id.* at 1941.

maximization of one's own ends, as setting the limit to liberty's reach."<sup>84</sup>

Professor Robert Post, who explored pre-New Deal substantive due process in several articles,<sup>85</sup> argues that the "[t]hemes of respect and stigma . . . at the moral center of the *Lawrence* opinion" offer an entirely new dimension to substantive due process analysis.<sup>86</sup> Post speculates that this new approach may result in courts using the power of the Due Process Clause to "prohibit[] the state from stigmatizing or demeaning the private lives of persons."<sup>87</sup> And Professor Randy Barnett argues that the *Lawrence* opinion finally breaks the post-New Deal presumption of constitutionality for any government regulation other than that of a "fundamental right," and substitutes a "presumption of liberty," which requires some justification by the government for any restriction it places on liberty.<sup>88</sup>

Professor Nan Hunter was one of the first scholars to explicitly connect the Court's analysis in *Lawrence* with Justice Souter's concurrence in *Glucksberg*, and to suggest that *Lawrence* may "mark[] the beginning of a substantive due process jurisprudence that examines negative liberty limits on state power before, or instead of, articulating a specific standard of review."<sup>89</sup> In her analysis, Hunter does not speculate on whether she thinks this is a positive development for liberty jurisprudence; she is agnostic on that question. I have noted elsewhere that I believe Hunter is correct with

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<sup>84</sup> *Id.* at 1943. Tribe describes how, in a series of articles written in the 1970s, he

sketched a theory of why human relationships beyond the purely instrumental—and the expressive dimensions and mutual commitments they entail—are indispensable to the process of transmitting and transmuting values in an intergenerational, cross-social progression that keeps faith with a starting set of basic democratic undertakings while remaining open to evolution in the direction of greater empathy, inclusion, and respect.

*Id.* at 1940-41.

<sup>85</sup> See Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489 (1998); Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513 (2002).

<sup>86</sup> Post, *supra* note 61, at 97-98.

<sup>87</sup> *Id.* at 98.

<sup>88</sup> Barnett, *supra* note 67, at 35-36 (citation omitted). Barnett carefully distinguishes between "liberty," which he defines as "the properly defined exercise of freedom" which "is and always has been constrained by the rights of others" and "license," which is not limited by the rights of others and is therefore not a right at all. *Id.* at 37.

<sup>89</sup> Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1117 (2004).

regard to her prediction of how the Court may proceed with substantive due process analyses in the future.<sup>90</sup> But my point here is to argue that Justice Souter's approach is also the appropriate one for the Court to adopt.

I recognize that some might view Justice Souter's approach as a death knell for important fundamental rights, while others may view it simply as a necessary correction to earlier substantive due process jurisprudence. But on its merits, Justice Souter's approach seems to me to properly reflect the reality of our complex society while staying consistent with the plain meaning of the Fifth and Fourteenth Amendments. Governmental laws constantly burden liberty, and to decide that only ones that cross a magic line called "fundamental rights" should ever gain redress seems rigid and inappropriate. Justice Souter's approach permits courts to recognize realistically and honestly the myriad ways in which laws might burden the liberty interests of those subject to the laws, while not necessarily invalidating the laws.

In 2002, Professor Rebecca Brown offered a comprehensive and sophisticated analysis of the liberty interest embodied in the Fifth and Fourteenth Amendments, complete with a vigorous defense of the courts' responsibility to protect such liberty, an explanation of how such judicial review is consistent with, not destructive of, democracy and a framework for considering liberty claims.<sup>91</sup> In explaining why protecting liberty interests is as important a constitutional goal as protecting equality interests, Brown observed:

[I]n a world of increasingly diverse personal and moral values, supporting very different notions of the good life, the communion of interests between representatives and represented can degrade even when laws nominally operate evenhandedly. For example, laws that provide that "no one may [blank]" can exploit difference as effectively as a classification, when the blank is an activity that "we," the

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<sup>90</sup> Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115, 120 (2006) [hereinafter Feldblum, *Right to Define*] (describing liberty analysis in *Lawrence*). See also Chai Feldblum, Professor, Georgetown Univ. Law Ctr., Comments at *From Griswold to Lawrence and Beyond: The Battle over Personal Privacy and the New Supreme Court* (Mar. 2, 2006) (transcript available at <http://pewforum.org/events/index.php?EventID=95>).

<sup>91</sup> See Rebecca Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491 (2002).

political ins, have no wish to do, but that “they,” the outs, claim a profound need to do in pursuit of personal fulfillment.<sup>92</sup>

Brown uses laws prohibiting sodomy or assisted suicide as principal examples of the need to question a legislature’s reasons for burdening liberty.<sup>93</sup> But the same framework that Brown proffers to scrutinize such prohibitions should apply as well to a legislature’s prohibition of discriminatory conduct that might adversely impact a regulated person’s liberty. The fact that we might need to be concerned in the coming decades with the potential liberty burdens imposed by a sexual orientation anti-discrimination law or a marriage equality law (rather than with the liberty burdens posed by a criminal sodomy law or a law that excludes same-sex couples from civil marriage) simply reflects the reality that moral values are beginning to shift in this country—as I believe they should.

Finally, in thinking about the type of liberties that rise to the level of requiring more searching government justification, I believe it is helpful to group the spectrum of liberty interests into three broad categories: bodily liberty, identity liberty and belief liberty. There is nothing magical about these categories, and I do not contend they are the only ones that make sense. But I believe this three-part categorization is an intellectually coherent manner in which to think about the spectrum of liberty interests that the Supreme Court has protected over the decades.<sup>94</sup>

Bodily liberty is the easiest one to describe: the State should not invade the integrity of our bodies without a good

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<sup>92</sup> *Id.* at 1498.

<sup>93</sup> *Id.* at 1545-49.

<sup>94</sup> This categorization also permits us to think more logically about whether such liberties are inherently and solely negative liberties that prohibit the government from restraining some action on our parts, or whether they are also inherently positive liberties that require some affirmative action on the part of the government to allow for their full expression. Obviously, the Supreme Court, for the moment, has come down clearly on the side that the liberty protected by the substantive Due Process Clause is solely a negative liberty. *See, e.g.*, *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989). But in many circumstances, the only way to achieve real liberty for some individuals will be for the government to take affirmative steps to bring about that liberty—even if such steps might then interfere with the liberty of others. *See, e.g.*, ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* 6-7 (2003) (describing the need for government to affirmatively support the ability of individuals to give and receive care and to feel safe); Feldblum, *Right to Define*, *supra* note 90, at 127-39 (noting affirmative steps government should take to protect the liberty of intersex and transgender people); West, *supra* note 61, *passim* (describing affirmative steps to be taken by government to ensure the liberty of women).

reason for doing so.<sup>95</sup> Protecting members of the public from contagious diseases is a good reason to force someone to have his body invaded through a vaccination; fighting drug crime is not a good enough reason to force someone to vomit by pumping an emetic solution through a tube into his stomach.<sup>96</sup>

Identity liberty is the term I would use to describe the liberty that the *Casey* plurality sought to capture in its “mystery of human life” description, a description repeated by Justice Kennedy in the *Lawrence* majority:

These matters [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>97</sup>

Despite Justice Scalia’s scoffing at this description as meaningless for purposes of law,<sup>98</sup> I think it accurately captures a set of liberty interests that go to the core of a person’s identity. This may be a person’s identity as a parent (including the decisions whether to have a child and how to raise the child), a person’s identity as a spouse or a lover (deciding what form of sexual intimacy one wishes to engage in), a person’s racial, ethnic, or religious identity or a person’s gender identity. As I have previously observed:

Not that many personal decisions rise to the level of “defin[ing] one’s own concept of existence, of meaning, of the universe, and of the

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<sup>95</sup> See, e.g., *Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>96</sup> Compare *Jacobson*, 197 U.S. at 26-27 (holding compulsory vaccination within police powers), with *Rochin*, 342 U.S. at 172-74 (holding unconstitutional the forcible administration of emetic solution to induce vomiting in course of drug investigation).

<sup>97</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). See also *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (relying on and quoting *Casey* when finding unconstitutional laws criminalizing consensual homosexual sex).

<sup>98</sup> See *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (“And if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage (‘At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life’): That ‘casts some doubt’ upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one’s ‘right to define’ certain concepts; and if the passage calls into question the government’s power to regulate *actions based on* one’s self-defined ‘concept of existence, etc.’ it is the passage that ate the rule of law.”).



mystery of human life.” We should not let the lofty rhetoric mislead us to the conclusion that these words can mean everything and anything. They do not. The examples provided by the *Lawrence* majority give meaning to the type of personal decisions at play here—the choice to marry, the choice to have a child (or not have a child), the choice to have sexual intimacy with a partner, the choice to raise a child in a certain fashion. These are not small decisions. These are those big decisions in life that go to the core, essential aspects of our selves.<sup>99</sup>

Moreover, while the phrasing of the “mystery of human life” sentence reflects a twenty-first century language of human self-awareness, a similar sentiment regarding the importance of self-identity seems to underlie one of the Court’s earliest descriptions of the liberty interest, in *Meyer v. Nebraska*:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and *generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*<sup>100</sup>

What was recognized at common law as essential to the “orderly pursuit of happiness by free men”<sup>101</sup> is no doubt different from what would be recognized as such today. But the underlying objective of the standard is the same—identifying an area of core identity liberty for which the government needs a good reason if it is going to infringe on such identity.

Finally, I use the category belief liberty to refer to one’s liberty to possess deeply held personal beliefs without coercion or penalty by the State. Belief liberty presumably could be subsumed under identity liberty, since our beliefs are very often constitutive of our identities. But I believe it is worth identifying this type of liberty separately because it is so often conflated with First Amendment rights to free speech, free expression and free exercise of religion. That conflation is

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<sup>99</sup> Feldblum, *Right to Define*, *supra* note 90, at 139. Larry Tribe’s project on liberty, with its focus on self-government and relational rights, captures incredibly well what I call identity liberty. Tribe, *Lawrence*, *supra* note 61, at 1941-44.

<sup>100</sup> 262 U.S. 390, 399 (1923) (emphasis added).

<sup>101</sup> *Id.*

understandable; most cases dealing with “beliefs” naturally arise under the First Amendment. But is it necessary that such beliefs be protected *solely* under the First Amendment? Certainly, the ability to believe what one will seems “essential to the orderly pursuit of happiness by free men [and women].”<sup>102</sup>

The First Amendment right to free speech necessarily protects any speech, no matter how trivial. The First Amendment right to free exercise necessarily protects (within the limits of current Supreme Court doctrine) any religious belief, no matter how trivial. By contrast, I believe it is appropriate that the belief liberty protected under the Due Process Clause be limited to those beliefs that occupy a position of significant importance to the individual. Even if those beliefs are not so constitutive of the person’s identity as to be protected under “identity liberty,” the “mystery of human life” description of identity liberty can offer us guidance regarding what type of beliefs demand more searching scrutiny when a burden on such beliefs is alleged.

Obviously, we all have many beliefs. If the government had to justify every burden on every belief caused by every law, it would presumably have little time to do anything else. But, certainly, we are capable of placing these beliefs in some sort of hierarchy. For example, I believe that heterosexuality and homosexuality are morally neutral characteristics (similar to having red hair or brown hair), and I believe that acting consistently with one’s sexual orientation is a morally good act. I also believe that flowers are necessary to happiness and that *Star Trek* is a great contribution to our culture. But I would rank my beliefs regarding sexuality as much more significant to my sense of self than my beliefs regarding flowers or *Star Trek*. Thus, in order for belief liberty to be situated at a point in the spectrum that requires greater government justification for infringement, such beliefs must constitute an important core aspect of the individual.<sup>103</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> As Justice Souter was at pains to argue in his concurrence, “the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual.” *Washington v. Glucksberg*, 521 U.S. 702, 762 (1997) (Souter, J., concurring) (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). See also *id.* at 767 (“[A] court [is] to assess the relative ‘weights’ or dignities of the contending interests . . .”). There is no reason to presume that this same analysis could not be applied to the relative weights

Analyzing belief liberty under the Due Process Clause (and not simply under the First Amendment) serves an additional useful purpose. An individual's deeply held beliefs may derive from religious sources, from purely secular sources or from spiritual sources that are not traditionally viewed as religious. If these beliefs are an integral part of the person's sense of self, my argument is that they constitute belief liberty. The particular source of the individual's beliefs is not the barometer of their importance for due process purposes. For belief liberty, the source of the beliefs (be it faith in God, belief in spiritual energy or a conviction of the rational five senses) has no relevance. A belief derived from a religious faith should be accorded no *more* weight—and no *less* weight—than a belief derived from a non-religious source.

As the Supreme Court reflected on a somewhat related question in 1944:

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.<sup>104</sup>

*b. Burdening Belief by Regulating Conduct*

To understand the burden that an LGBT equality law might place on some people's belief liberty, one must start by acknowledging that a State necessarily takes a position of moral neutrality on sexual orientation when it passes such a law. For that reason, the logical underpinning of such a law will be at odds with the belief systems of some individuals who are subject to the law.

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of beliefs. Thus, although Justice Souter makes no claim regarding belief liberty in his concurrence, I believe my approach is consonant with his analysis.

<sup>104</sup> Prince v. Massachusetts, 321 U.S. 158, 164-65 (1944) (citations omitted). In *Prince*, the appellant was seeking a higher degree of protection for her religious beliefs than would have been accorded secular beliefs under the First Amendment. See *id.* at 164.

But, obviously, such a law does not require individuals subject to the law to *change* their beliefs. An employer who is required to hire a gay person or a hotel owner who is required to rent to a gay couple may continue to believe whatever he or she wishes about the immorality or sinfulness of homosexuality. To grasp the full impact of such laws, therefore, it is necessary to explicate and acknowledge the logical intertwining that many people (including religious people) experience between their conduct and their beliefs such that compliance with a neutral civil rights law may burden their belief liberty.

Obviously, in a complex society, conduct must be regulated in a way that belief need not be. That is a truism. From the Supreme Court's ringing protection of belief in *West Virginia v. Barnette*<sup>105</sup> to its consistent refrain that religious beliefs will be protected in a manner that religious conduct will not be,<sup>106</sup> the logical distinction between conduct and belief has been clear.

But it does not follow from that truism that conduct should always be viewed as completely apart and distinct from belief. Certainly, courts have recognized that particular conduct may be used to communicate an expressive belief.<sup>107</sup> Why should it be so difficult to accept that engaging in certain conduct (or being precluded from engaging in certain conduct) will undermine an individual's strongly held beliefs?

Indeed, I would argue that gay people—of all individuals—should recognize the injustice of forcing a person to disaggregate belief or identity from practice. For years, gay people have been told by some entities that they should separate their status from their conduct. In the religious arena, this is framed as “loving the sinner, but hating the sin.”

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<sup>105</sup> 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”).

<sup>106</sup> The Supreme Court has often observed that while there is an absolute right to hold religious beliefs, *see, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 214, 219 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), religiously grounded conduct is not absolutely protected, *see, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 699 (1986); *Yoder*, 406 U.S. at 220; *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

<sup>107</sup> *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (stating that flag burning as a political statement constitutes expressive conduct); *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (stating that the display of a flag bearing a peace symbol is constitutionally protected expressive conduct); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (recognizing that symbolic conduct is constitutionally protected).

That is, gay people have been told that their *status* as individuals with homosexual orientation is not inherently sinful—but that if they *act* in a way consistent with that orientation, then they are engaging in sin.

In the legal arena, this approach to a gay person's identity and being has been framed as the "status/conduct" distinction. Particularly as a means of dealing with the holding in *Hardwick*, some legal advocates have argued that their clients should not be discriminated against for the *status* of being gay, although they have deliberately failed to claim equal non-discrimination rights for their clients' rights to engage in gay *conduct*.<sup>108</sup> From the moment I became aware of this legal approach, I have detested it and argued against it.<sup>109</sup> It seemed to me the height of disingenuousness, absurdity and indeed disrespect, to tell someone it is permissible to "be" gay, but not permissible to engage in gay sex. What do they think being gay *means*?

I have the same reaction to those who blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious *means*? Of course, at some basic level, religion is about a set of beliefs. But for many religious people across many religious denominations (Catholic, Protestant, Jewish and Muslim—to note just the ones I have some personal understanding of), the day-to-day *practice* of one's religion is an essential way of bringing meaning to such beliefs. And while religious beliefs on homosexuality may seem the most familiar to us, there may be people with strongly held secular beliefs who feel just as strongly on the issue.

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<sup>108</sup> See Feldblum, *Sexual Orientation*, *supra* note 20, at 290-96 (detailing cases in which the "status-conduct" distinction has been used). As I noted in that article:

Instead of countering the ramifications of *Hardwick* by decoupling sodomy and homosexual conduct, many gay rights attorneys have implicitly accepted the equivalence between homosexual conduct and homosexual sodomy and have instead sought to decouple homosexual *orientation* from homosexual *conduct*. This approach has produced victories in court for a few individual gay and lesbian plaintiffs, but at a cost to equal protection for gay people generally, and at a potential cost to the development of a more effective paradigm for equal rights for gay people.

*Id.* at 290.

<sup>109</sup> See *id.* at 290-96; Chai Feldblum, *Based on a Moral Vision: The Majority in Romer v. Evans Could—and Should—Have Engaged the Dissent Directly on the Role of Popular Morality in Making Laws*, LEGAL TIMES, July 29, 1996, at S31; Chai R. Feldblum, *Keep the Sex in Same-Sex Marriage*, 4 HARV. GAY & LESBIAN REV. 23 (1997).

Given this perspective, it makes sense to me that three born-again Christians who run a chain of sports and health clubs would feel that “[t]heir fundamentalist religious convictions require them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives,” and hence mandate them to hire only employees who conform to their views about proper sexual behavior.<sup>110</sup> It also makes sense to me that these same owners would feel their religion compels them to have these employees “talk[] to homosexuals about their religious views and sexual preference and [tell] them homosexuality [is] wrong.”<sup>111</sup> And I can well understand the elderly Christian woman who believes “God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.”<sup>112</sup>

Whether such conduct should legitimately be permitted in a workplace or a public accommodation is a separate question. But at this stage of the analysis, we should be concerned solely with whether a burden on belief liberty *exists*, not whether the burden is justified. The relevant question at this stage is how a court or a legislature should respond to an allegation that engaging in certain conduct, in compliance with a neutral law, burdens an individual’s beliefs that constitute a core aspect of that individual’s sense of self.

My argument is that we should err on the side of accepting the person’s allegation for purposes of deciding whether a burden on liberty *exists*. (Again, this is different from the subsequent step of deciding whether the burden on liberty is ultimately *justified*.) In erring on the side of the person making the allegation, there must of course be some basis to the person’s claim that will situate the belief liberty interest on the upper end of the liberty spectrum. That is, the person must demonstrate that he or she holds a particular belief that is core to his or her sense of self and must make a credible claim that engaging in certain conduct would be inconsistent with that belief. But beyond that, I do not believe

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<sup>110</sup> McClure v. Sports & Health Club, 370 N.W.2d 844, 846 (Minn. 1985) (en banc).

<sup>111</sup> Blanding v. Sports & Health Club, 373 N.W.2d 784, 787 (Minn. Ct. App. 1985), *aff’d*, 389 N.W.2d 206 (Minn. 1986).

<sup>112</sup> Smith v. Fair Employment & Hous. Comm’n, 913 P.2d 909, 912 (Cal. 1996).

the government acts appropriately when it second-guesses the individual and concludes, for example, “Really, this isn’t such a burden on your belief.”

Many judges have been unsympathetic to religious individuals’ claims that a neutral law burdens their religious beliefs. As I describe below, sometimes judges wrap the justification for the burden into the analysis of whether a burden exists in the first place. Sometimes judges creatively construe a law so as to result in the absence of a burden and sometimes judges simply dismiss the religious person’s allegation that a burden exists.

For example, in *Smith v. Fair Employment & Housing Commission*, the Supreme Court of California considered whether a housing law that prohibited discrimination based on marital status imposed a “significant burden” on a religious landlady who did not wish to rent to an unmarried, heterosexual couple.<sup>113</sup> The court concluded that no such significant burden existed because the landlady could invest her capital in an enterprise other than housing.<sup>114</sup> The court also noted that the landlady’s religious beliefs did not “require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples.”<sup>115</sup> In light of that fact, the court concluded: “No religious exercise is burdened if she follows the alternative course of placing her capital in another investment.”<sup>116</sup>

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<sup>113</sup> *Id.* at 918-19. As I note in the text, the woman in this case was afraid she would not see her husband in the hereafter if she rented to the unmarried couple. *See supra* note 112. The court used the formulation of a “significant burden” because it was applying the standard set forth in the Religious Freedom Restoration Act. *Smith*, 913 P.2d at 919.

<sup>114</sup> *Id.* at 926. The court was contrasting the burden on a religious person who lost his or her job because of a refusal to work on the Sabbath and who then sought unemployment compensation:

[T]he degree of compulsion involved is markedly greater in the unemployment-compensation cases than in the case before us. In the former instance, one can avoid the conflict between the law and one’s beliefs about the Sabbath only by quitting work and foregoing compensation. To do so, however, is not a realistic solution for someone who lives on the wages earned through personal labor. In contrast, one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments.

*Id.*

<sup>115</sup> *Id.* at 926.

<sup>116</sup> *Id.*

A similar analysis was advanced by a dissenting judge in *Donahue v. Fair Employment & Housing Commission*,<sup>117</sup> a state court ruling in California that also concerned a religious couple who did not wish to rent to unmarried, cohabiting heterosexual couples. In concluding that the burden on the couple's religious conduct was slight, the dissenting judge first observed that the couple "d[id] not contend that refusing to rent to unmarried cohabitants is a central tenet of their religious belief," nor did they "contend that the burden imposed by the statute prohibits them from practicing their religion."<sup>118</sup> Rather, the couple's only contention, observed the dissenting judge, was that "if they are compelled to rent to unmarried cohabitants, they would be—in effect—aiders and abettors in the commission of sin by others in violation of their own religious beliefs."<sup>119</sup>

The dissenting judge was unsympathetic to this concern. As the judge concluded:

The Donahues are the owners of a five-unit apartment building which they rent to members of the general public. They are engaged in secular commercial conduct performed for profit. There are no religious motivations for their conduct. The statute does not require the Donahues to aid and abet "sinners," it merely requires them "to act in a nondiscriminatory manner toward all prospective [tenants]. A legal compulsion . . . to refrain from discriminating against [prospective tenants] on the basis of [marital status] can hardly be characterized as an endorsement" or the aiding or abetting of sin.<sup>120</sup>

In the case involving born-again Christians who owned and operated a chain of sports and health clubs in Minneapolis, a Minnesota court found no burden on the owners' religious beliefs by offering a creative interpretation of the State's gay civil rights law. The court observed that "based on his understanding of the Bible, Owens [the owner of the clubs] (the

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<sup>117</sup> 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991). For subsequent appellate history of this case, see *infra* note 120.

<sup>118</sup> *Donahue*, 2 Cal. Rptr. 2d at 49 (Grignon, J., dissenting).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting *Pines v. Tomson*, 160 Cal. App. 3d 370, 389 (Cal. Ct. App. 1984)) (alterations in original) (citations omitted). The *Donahue* majority found a burden on the couple's free exercise of religion, as prohibited by the state constitution, and that the State did not have a sufficiently compelling interest in prohibiting marital status discrimination to override that exercise of religion. *Id.* at 46 (majority opinion). The opinion in *Donahue* was superseded by an order granting review, 825 P.2d 766 (Cal. 1992); the review was then dismissed and the case remanded, 859 P.2d 671 (Cal. 1993). The case of *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909, 912 (Cal. 1996), discussed *supra* notes 112-17 and accompanying text, was decided three years after *Donahue* was remanded.



other principals agree with him) clearly is opposed to homosexual *acts*.”<sup>121</sup> For example, quoting from the trial transcript, the court noted that Owens had emphasized that, with regard to homosexuals, he has “a love, a heartfelt love for them, but not for the activity. The same way I would have a heartfelt love for anybody; but as God says in his word, we can hate the sin but we love the sinner.”<sup>122</sup>

But, the court observed, the Minneapolis ordinance prohibited discrimination “based on affectional preference, not acts.”<sup>123</sup> Thus, the court concluded: “From [Owens’] words it would be difficult to conclude that his Christianity supports discrimination based on preference rather than acts. Thus, the Minneapolis ordinance as applied in this case does not impose a burden upon Owens’ free exercise of religion.”<sup>124</sup>

In other words, because the State’s civil rights law prohibited discrimination solely on gay “status,” and not on gay “conduct,” the obligation on the owners not to discriminate on the basis of “affectional preference” could logically have no impact on their belief that homosexual conduct was immoral. In fact, the State’s law seemed perfectly matched to the owners’ beliefs in loving the sinner, but hating the sin.

Of course, the fact that most of the gay men frequenting the sports and health club were presumably also having gay sex at some point was ignored by the court. Thus, the court’s analysis, while offering an ironic twist on the status-conduct distinction, seems as riddled with illogic as when the distinction is applied in gay rights cases.

Some of the more sophisticated judicial analyses of the possible burden that civil rights laws place on religious beliefs are represented in the various opinions issued in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*.<sup>125</sup> This case concerned the refusal of Georgetown University, a Jesuit school, to recognize gay student groups that had organized at the University and the Law School.<sup>126</sup> The university administration permitted the gay student

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<sup>121</sup> *Blanding v. Sports & Health Club*, 373 N.W.2d 784, 791 (Minn. Ct. App. 1985), *aff’d*, 389 N.W.2d 206 (Minn. 1986).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> 536 A.2d 1 (D.C. 1987).

<sup>126</sup> *Id.* at 8-14.

groups to exist and to use various school facilities.<sup>127</sup> However, the administration drew the line at “endorsing” the student groups. If it allowed the groups to use the Georgetown name, receive university funds and have access to subsidized office space, telephone service, office supplies and equipment, the administration felt it would be connoting its endorsement of the groups.<sup>128</sup> As the administration explained:

This situation involves a controversial matter of faith and the moral teachings of the Catholic Church. “Official” subsidy and support of a gay student organization would be interpreted by many as *endorsement of the positions taken by the gay movement on a full range of issues*. While the University supports and cherishes the individual lives and rights of its students it will not subsidize this cause. *Such an endorsement would be inappropriate for a Catholic University.*<sup>129</sup>

Judge Pryor’s concurrence provides a good example of a judge simply not accepting the allegations of a religious person (or, in this case, a religious institution):

I do not understand Georgetown to argue that discrimination against any persons or groups is a tenet of its faith. Rather, it claims that providing the disputed facilities and services to the gay student organizations infringes the University’s religious interest in embracing a particular doctrine of sexual ethics. Therefore, to require the University to make available its facilities and services in an even-handed manner works, at most, an *indirect* infringement of its religious interest. For just as enforcement of the prohibition against discrimination on the basis of political affiliation does not signify endorsement of any particular political party, enforcement of the Human Rights Act’s ban on discrimination on the basis of sexual orientation does not signify endorsement by the government or by the covered entity of any particular doctrine of sexual ethics.<sup>130</sup>

In contrast to Judge Pryor’s concurrence, the plurality opinion in the *Georgetown* case parsed the situation somewhat differently—acknowledging that D.C.’s law did place some burden on the University, but nevertheless refusing to accept fully the University’s allegations with regard to that burden. The plurality first interpreted the D.C. Human Rights Act (which prohibited discrimination based on sexual orientation)

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<sup>127</sup> See *id.* at 10.

<sup>128</sup> *Id.* at 11-12.

<sup>129</sup> *Id.* (quoting Memorandum from Dean W. Schuerman, Georgetown Univ., to the Student Government, Georgetown Univ. (Feb. 6, 1979) (emphasis added by the Court)).

<sup>130</sup> *Id.* at 45 (Pryor, J., concurring) (footnote omitted).

as not requiring that any covered entity, including Georgetown University, endorse a gay group.<sup>131</sup> The plurality concluded: “[T]he Human Rights Act does not require one private actor to ‘endorse’ the ideas or conduct of another.”<sup>132</sup>

Instead, the plurality focused on the “mere” conduct required by the law:

While the Human Rights Act does not seek to compel uniformity in philosophical *attitudes* by force of law, it does require equal *treatment*. Equality of treatment in educational institutions is concretely measured by nondiscriminatory provision of access to “facilities and services.” . . . Georgetown’s refusal to provide tangible benefits without regard to sexual orientation violated the Human Rights Act. To that extent only, we consider the merits of Georgetown’s free exercise defense.<sup>133</sup>

Thus, the plurality held that the D.C. law required that the University simply engage in the conduct of providing funds, facilities and services in an even-handed manner to the gay student groups. The plurality then simply asserted that providing such funds, facilities and services did not translate into an endorsement of the groups’ beliefs on sexual ethics, despite the University’s clear statement that it viewed precisely such actions as connoting endorsement.<sup>134</sup>

A classic mark of judges who downplay the burden on religious people who are forced to engage in certain conduct is an unwillingness to err on the side of accepting the allegation that conduct can impair belief. For those of us who believe that government should err on the side of accepting such allegations (whether the allegation is that engaging in certain conduct will impair a person’s religiously based belief or secularly based belief), the Court’s decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (“FAIR”)*<sup>135</sup> was particularly troubling.

The core argument of the law schools and law faculty in *Rumsfeld v. FAIR* was that forcing the schools to act in a

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<sup>131</sup> *Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d at 16 (plurality opinion).

<sup>132</sup> *Id.* at 17.

<sup>133</sup> *Id.* at 5 (quoting D.C. CODE § 1-2520 (1987)).

<sup>134</sup> The plurality, unlike Judge Pryor, then accepted that there was a burden on the school in forcing the University to provide tangible benefits to the student groups (albeit a less minor burden than an forced endorsement would have been), and that the burden was outweighed by the State’s compelling interest in prohibiting discrimination based on sexual orientation. *Id.* at 38.

<sup>135</sup> \_\_\_ U.S. \_\_\_, 126 S. Ct. 1297 (2006).

certain way burdened their freedom of speech and freedom of expressive association.<sup>136</sup> The cavalier manner in which the Court treated FAIR's allegations does not bode well for future claims made by those who feel their religious or secular beliefs are being burdened when they are forced to comply with neutral civil rights laws.<sup>137</sup>

In *FAIR*, the law schools and law faculty claimed that the government burdened their freedom of speech and their freedom of expressive association<sup>138</sup> by requiring that they treat military recruiters better than other recruiters who discriminate based on sexual orientation.<sup>139</sup> The schools and faculty argued that while military recruitment was a compelling government interest, forcing the schools to treat military recruiters similarly to other recruiters (with no symbolic or logistical differences to convey the schools'

<sup>136</sup> *Id.* at \_\_\_, 126 S. Ct. at 1303.

<sup>137</sup> Indeed, it was precisely the fear that people who wished to discriminate on the basis of sexual orientation or gender or race would use the argument that complying with a civil rights law burdened their freedom of expression that made so many gay rights and civil rights advocates welcome the result in the *FAIR* decision. See, e.g., Brief of Prof. William Alford et al. as Amici Curiae Supporting Respondents at 21-22, *FAIR*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1297 (No. 04-1152), available at <http://www.law.georgetown.edu/solomon/documents/FAIRamicusHarvard.pdf> (urging the Court to decide the case on statutory rather than constitutional grounds, to avoid providing constitutional shelter to those seeking to evade anti-discrimination laws); Jack Balkin, *All's FAIR in Law and War*, BALKINIZATION, Mar. 15, 2006, <http://balkin.blogspot.com/2006/03/all-s-fair-in-law-and-war.html> (discussing the problems the law schools' possible success in *FAIR* would pose for the enforceability of anti-discrimination laws); Dale Carpenter, *Balkin on Solomon*, THE VOLOKH CONSPIRACY, Mar. 15, 2006, <http://www.volokh.com/posts/1142448786.shtml> (same). As I explain further *infra*, I believe the result in *FAIR* was both wrong and unfortunate. Moreover, I do not believe a contrary result would have given *carte blanche* to those who wish to discriminate on the basis of sexual orientation, gender, race, or any other ground. It would, however, have ensured that the burdens that neutral civil rights laws place on those who disagree with the premises of such laws would have been made more transparent, would have been accorded some recognition, and would have been justified in the legal process.

<sup>138</sup> See Brief for the Respondents at 16-33, *FAIR*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1297 (No. 04-1152).

<sup>139</sup> As a general matter, law firms and law organizations that do not attest to the fact that they do not discriminate on the basis of sex, race, religion, national origin, disability, or sexual orientation are not provided assistance by law schools in the recruitment process. See Assoc. of Am. Law Sch., Executive Comm. Regulations, Reg. 6-3.1, [http://www.aals.org/about\\_handbook\\_regulations.php#6](http://www.aals.org/about_handbook_regulations.php#6) (last visited Oct. 4, 2006) (requiring, in order to enforce the Association of American Law Schools' ("AALS") anti-discrimination by-laws, employers who recruit at law schools to provide written assurance that they do not discriminate on any of the grounds prohibited in AALS' by-laws); see also Brief of Nat'l Ass'n for Law Placement et al. as Amici Curiae Supporting Respondents at 2, 5, *FAIR*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1297 (No. 04-1152), available at <http://www.law.georgetown.edu/solomon/documents/FAIRamicusNALP.pdf> (discussing same policy).

disapproval of the military's recruitment policy) was not narrowly tailored to fit the compelling government interest of military recruitment.<sup>140</sup>

What exactly was the burden about which the schools and faculty were complaining? Obviously, the government was not requiring that the law schools pronounce their support for the statutory policy of "Don't Ask, Don't Tell," which set the parameters of military recruitment and which prohibited the recruitment of openly gay law students as JAG Corps officers. No such speech was being coerced. Nor was the government prohibiting schools from loudly expressing their belief that appropriate legal recruitment would place no weight on the sexual orientation of law students. To the extent that a school viewed itself as creating an expressive community based on such a view of justice, the government was not standing in its way.

The "only" thing the government was requiring from the law schools was a simple act of *conduct*: it was requiring that schools *treat* military recruiters *equally* to all other recruiters, even though the law schools viewed the military recruiters as advancing, and possibly embodying, an unjust and perhaps immoral position. Where was the burden in requiring such conduct?<sup>141</sup>

As with some religious people's claims that the act of complying with a neutral civil rights law burdens their religious beliefs, the answer lies in the inherent entangling between conduct and practice *in some situations*.

In most situations, of course, conduct is not intended to convey expression. For that reason, one does not ordinarily feel

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<sup>140</sup> Brief for the Respondents, *supra* note 138, at 18, 44-48.

<sup>141</sup> As the Supreme Court put it: "The Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *FAIR*, \_\_\_ U.S. at \_\_\_, 126 S. Ct. at 1307. Although the manner in which the government obtained compliance from the law schools was via the threat of withholding funds, the Supreme Court concluded that the government could have demanded such compliance directly without violating the Federal Constitution. *Id.* For that reason, it was irrelevant that the government used the method of conditioning conduct on the receipt of spending. *Id.* ("This case does not require us to determine when a condition placed on university funding goes beyond the 'reasonable' choice offered in *Grove City* [*College v. Bell*] and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." (citation omitted)).

that a requirement to engage in certain conduct (or not to engage in certain conduct) necessarily undermines one's identity or beliefs. We engage in innumerable acts throughout the day. We might get on the subway in the morning, buy a newspaper, order lunch, give an exam or take an exam, fix a car, buy stock or feed a baby. We rarely experience ourselves as expressing a belief system when we engage in these forms of conduct. Beliefs may underlie our actions (for example, public transportation is good; newspapers should be supported; babies should be cared for); but it is rare that we experience our conduct (or our lack of engaging in certain conduct) as inherently intertwined with our beliefs and identities.

But that is not always the case. Sometimes being forced to engage in certain conduct—or being precluded from engaging in certain conduct—*will* impinge on our beliefs or identities. This is not an overly difficult situation to perceive. It is certainly not beyond the sophistication of a legislature or a court to ascertain. It requires that an individual articulate a particular belief or identity, and then articulate how being forced to engage in an act (or how being prohibited from engaging in an act) will interfere with, or will undermine, that belief or identity.

This is precisely the situation that the law schools and law faculty faced in *FAIR*. The schools and faculty experienced the “mere” conduct of assisting military recruiters as undermining their expressive beliefs. The members of FAIR held two expressive beliefs: first, that law students should be hired without regard to their sexual orientation, and second, that aiding and abetting any recruiter who took sexual orientation into account in hiring was unjust. Thus, a mandate by the government that the schools assist military recruiters who did not hire openly gay law students was experienced by the schools as burdening that second belief. Because the belief itself related to *conduct* (i.e., it is unjust to aid and abet a discriminatory recruiter), the mandate to engage in certain conduct (i.e., treat military recruiters the same as other recruiters) necessarily burdened that belief.

The Supreme Court got around this difficulty by simply refusing to accept that the government's requirement that the law schools engage in certain conduct burdened their expressive beliefs—much as some judges simply refuse to accept that a requirement to engage in certain conduct burdens the religious beliefs of an individual or an institution. The Court first recast the schools' argument as a concern that

assisting military recruiters would mean that students would get confused and would not be able to differentiate the military recruiters' message from the schools' message. To that contrived concern, the Court wryly responded: "We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school."<sup>142</sup>

The schools' *actual* concern—that simply engaging in the conduct of hosting the military recruiters undermines the schools' expressive belief in non-discrimination—was simply dismissed by the Court in a conclusory manner:

To comply with the [Solomon Amendment], law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school "to accept members it does not desire."<sup>143</sup>

Thus, the Court asserted that the conduct of associating with military recruiters who are not members of the school did not undermine the law schools' expressive beliefs. The fact that the law schools experienced the association as causing precisely that result was simply ignored by the Court and dismissed.

Religious employers who do not want to provide health benefits to same-sex couples and religious schools who do not want to provide funding for gay rights groups might view themselves as far removed from law schools that do not wish to assist military recruiters who discriminate against gay law students. But the parallels between the two groups are stark: In each case, an individual or an institution experiences the coerced conduct (the "equality mandate") as burdening its beliefs. And in each case, the individual or institution runs the risk that the State and the courts will simply dismiss its experience of burden as not real.

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<sup>142</sup> *Id.* at \_\_\_, 126 S. Ct. at 1310 (citations omitted).

<sup>143</sup> *Id.* at \_\_\_, 126 S. Ct. at 1312 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)) (internal quotation marks omitted).

C. *Justifying the Burden on Belief Liberty*

It may be cold comfort to those with strongly held beliefs regarding the immorality and sinfulness of homosexuality that I argue that the burden on their belief liberty should be acknowledged. After all, as I note in the beginning of this article and as I hope to make clear in this section, I believe it will rarely be the case that a court should use the Due Process Clause to insert an exemption to an LGBT equality law in order to accommodate the belief liberty of those who are regulated by the law.<sup>144</sup>

As Justice Souter contended in his *Glucksberg* concurrence, a court should not intervene “merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review.”<sup>145</sup> Rather, “[i]t is only when the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.”<sup>146</sup>

Under this approach, I find it difficult to envision any circumstance in which a court could legitimately conclude that a legislature that has passed a LGBT equality law, with no exceptions for individual religious people based on belief liberty, has acted arbitrarily or pointlessly. If the “justifying principle” of the legislation is to protect the liberty of LGBT people to live freely and safely in all parts of society, it is perfectly reasonable for a legislature not to provide any exemption that will cordon off a significant segment of society from the anti-discrimination prohibition. This may not be the result a particular judge might have reached were she in the legislature, but it is certainly a “reasonable resolution of contending values” for a legislature to have reached.

Nevertheless, I believe explicating the burden that such civil rights laws may place on some individuals’ belief liberty is still worthwhile. While a court should not be permitted to re-strike a balance between competing liberties when the balance already struck by the legislature is reasonable, that does not

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<sup>144</sup> To the extent that any equality law regulated belief directly, it should be held invalid under the First Amendment. To the extent that forced compliance with an equality mandate burdened an individual’s belief liberty, my argument in this section is that such a burden is likely to be justified.

<sup>145</sup> *Washington v. Glucksberg*, 521 U.S. 712, 768 (1997) (Souter, J., concurring).

<sup>146</sup> *Id.*



mean the *legislature* should not choose to place certain exemptions in the law at the outset. The utility in acknowledging the burdens on belief liberty that might arise from the application of civil rights laws is that advocates of such laws might see their way to deciding that the legislature should protect belief liberty in a limited set of circumstances. Indeed, the best outcome would be for such decisions to be made in a negotiated setting with those whose beliefs will be adversely impacted by the law.

It probably seems dangerous to advocates of LGBT equality to acknowledge that a civil rights law might burden the liberty of those who are regulated by the law. This is because laws prohibiting discrimination based on sexual orientation that have been held to burden a constitutionally protected right have not fared well in Supreme Court jurisprudence thus far.<sup>147</sup> The Supreme Court's opinion in *Boy Scouts of America v. Dale*,<sup>148</sup> creating an exemption for the Boy Scouts of America to New Jersey's law prohibiting discrimination based on sexual orientation, is the classic example.

In *Dale*, the Court spent the bulk of its opinion explaining why it agreed with the Boy Scouts that forcing the organization to retain James Dale as an assistant scoutmaster, after Dale had acknowledged he was gay, would "significantly burden"<sup>149</sup> the Boy Scouts' desire "to not promote homosexual conduct as a legitimate form of behavior."<sup>150</sup>

As can be deduced from what I have written thus far, I have only a small quarrel with the Court's analysis in that regard. It seems eminently reasonable to me that a group that wishes to convey the message that homosexual behavior is immoral, wrong and unacceptable would not want one of its leaders to be a happy, well-adjusted and ordinary-seeming gay person. My small quarrel with the Court's analysis is that the Boy Scouts failed to consistently and clearly convey such a

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<sup>147</sup> Indeed, I believe it is precisely because this argument has so consistently failed that proponents of LGBT equality believe they must retreat to the position of denying the existence of any burden on a possible constitutional right to begin with. However, the same optimism that fuels my belief that the legal landscape will ultimately change for LGBT people also makes me believe that courts will begin to accept the compelling interest that government has in ensuring that LGBT people can live lives of honesty and safety.

<sup>148</sup> 530 U.S. 640 (2000).

<sup>149</sup> *Id.* at 659.

<sup>150</sup> *Id.* at 653 (internal quotation marks omitted).

message about homosexuality to its members. I have no difficulty accepting an organization's statement of its beliefs and then deferring to that organization's allegation that engaging in certain conduct will undermine those beliefs. Nevertheless, it does seem to me that the organization must clearly *state* its beliefs and then conform its actions to those beliefs in a logical fashion. The Boy Scouts' position was problematic on both fronts: first, the organization's public membership documents did not clearly state that homosexuality was inconsistent with the Boy Scouts' oath, and second, the organization did not consistently remove *heterosexual* scoutmasters who publicly stated that homosexuality was acceptable.<sup>151</sup>

But the fatal flaw in the Court's *Dale* opinion, from my perspective, is its failure to truly examine whether the burden on the Boy Scouts was *justified*. This would have required, first, a careful analysis of the State's interest in prohibiting discrimination based on sexual orientation in order to determine the importance of that interest. Next, it would have required an analysis of whether refusing to include an exemption in the law for entities whose expressive association beliefs would thereby be burdened was "so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied."<sup>152</sup>

If that analysis had been done, and if the Court had taken seriously the adverse impact on the identity liberty of gay people when a government fails to protect them from private discrimination, I believe the Court would have appropriately determined that a group as large and as broad-based as the Boy Scouts should not have been granted an exemption from the state law.

But the Court's analysis in *Dale* regarding whether New Jersey's interests in protecting gay people justified its burdening of the Boy Scouts' expressive association rights was neither thorough nor thoughtful. The Court's "analysis" consisted of the following three sentences:

We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public

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<sup>151</sup> On the importance of the latter point, see Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1611-13 (2001).

<sup>152</sup> *Glucksberg*, 521 U.S. at 768 (Souter, J., concurring).

accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. *That being the case*, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.<sup>153</sup>

*"That being the case?"* The very lack of analysis in the Court's opinion—the simple reliance on these conclusory words—was a slap in the face of gay people.<sup>154</sup>

The plurality in the *Georgetown* case did a better job of analyzing the compelling interest a government might have in prohibiting discrimination on the basis of sexual orientation. After delving extensively into the literature regarding sexual orientation, as well as exploring the legislative history of the D.C. Council's ordinance, the plurality noted the following:

The Council determined that a person's sexual orientation, like a person's race and sex, for example, tells nothing of value about his or her attitudes, characteristics, abilities or limitations. It is a false measure of individual worth, one unfair and oppressive to the person concerned, one harmful to others because discrimination inflicts a grave and recurring injury upon society as a whole. To put an end to this evil, the Council outlawed sexual orientation discrimination in employment, in real estate transactions, in public accommodations, in educational institutions, and elsewhere. Such comprehensive measures were necessary to ensure that "[e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District, and to have an equal opportunity to participate in all aspects of life . . . ."<sup>155</sup>

The plurality also invoked the majestic sweep of the federal constitutional liberty interest in underscoring the importance of a State interest in prohibiting discrimination based on sexual orientation:

The compelling interests, therefore, that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her

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<sup>153</sup> *Boy Scouts of Am.*, 530 U.S. at 659 (emphasis added).

<sup>154</sup> For additional cases finding that a civil rights law may not be applied in a manner that burdens the religious beliefs of an individual or organization because of the lack of a compelling state interest, see *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 716 (9th Cir. 1999), *vacated*, 220 F.3d 1134 (9th Cir. 2000) (no compelling government interest in protecting unmarried, cohabiting heterosexual couples); *Walker v. First Orthodox Presbyterian Church of San Francisco*, No. 760-028, 1980 WL 4657, at \*1 (Cal. Super. Ct. Apr. 3, 1980) (interest of city of San Francisco in its gay rights ordinance was not compelling).

<sup>155</sup> *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 32 (1987) (citations omitted) (alterations in original).

potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.<sup>156</sup>

Ensuring that LGBT people can live honestly and safely in all aspects of their social lives requires that society set a baseline of non-discrimination on the grounds of sexual orientation and gender identity. If individual business owners, service providers and employers could easily exempt themselves from such laws by making credible claims that their belief liberty is burdened by the law, LGBT people would remain constantly vulnerable to surprise discrimination. If I am denied a job, an apartment, a room at a hotel, a table at a restaurant or a procedure by a doctor because I am a lesbian, that is a deep, intense and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me in the same way.<sup>157</sup>

Thus, for all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude unmarried, straight couples and all gay couples, this is a point where I believe the “zero-sum” nature of the game inevitably comes into play. And, in making the decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people. Once individuals choose to enter the stream of economic commerce by opening commercial establishments, I believe it is legitimate to require that they play by certain rules.<sup>158</sup> If the

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<sup>156</sup> *Id.* at 37.

<sup>157</sup> As the court observed in *Smith v. Fair Employment Housing Commission*, “[T]o permit Smith to discriminate would sacrifice the rights of her prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics.” 913 P.2d 909, 925 (Cal. 1996). *Cf.* *Heart of Atlanta Motel, Inc. v. United States* 379 U.S. 241, 250 (1964) (“the fundamental object of [federal civil rights legislation] was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’” (quoting S. REP. NO. 872, at 16-17 (1964))).

<sup>158</sup> A number of writers have made the argument that entering the stream of commerce should legitimately subject an enterprise to civil rights laws. *See, e.g.*, Mark Hager, *Freedom of Solidarity: Why the Boy Scout Case Was Rightly (But Wrongly) Decided*, 35 CONN L. REV. 129, 157 (2002) (contending that “[o]rganizations engaged in commerce should not be cloaked with fundamental or First Amendment freedom to exclude members on any bases they see fit”); Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487,

government tolerated the private exclusionary policies of such individuals in the commercial sector, such toleration would necessarily come at the cost of gay people's sense of belonging and safety in society. Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect LGBT people.<sup>159</sup>

But that is not to say that we should not acknowledge that this zero-sum game *has* resulted in a burden on some individuals' belief liberty and that we not be forced to articulate why such a burden is appropriate. A government's reasons for burdening liberty should be, as Professor Rebecca Brown argues, "accessible to all in a meaningful sense."<sup>160</sup> Brown defines these as reasons that "have some public and secular component to them and [do] not rest entirely on personal moral belief systems not universally shared."<sup>161</sup> While I am not sure I would use Brown's formulation of a "personal moral belief system[] not universally shared," I do believe that the reasons given by the State must "reflect the public good."<sup>162</sup> And ensuring that members of the public who have a morally neutral characteristic are able to live without fear or vulnerability of discrimination based on that characteristic certainly seems to be a reason that reflects the public good.

The question remains, however, whether there are limited situations in which a *legislature* should choose to protect the belief liberty of individuals or institutions over the

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549-52 (1998) (suggesting that the government need not show a compelling state interest test for anti-discrimination laws in free exercise cases in which religious people have engaged in voluntary commercial activity); Wessels, *supra* note 4, at 1231 (urging protection for religious groups from civil rights laws when the group looks "inward" to itself as a religious community, but not when the group "turns outwards" in providing services to others in the community).

<sup>159</sup> For cases finding that the government interest in prohibiting racial discrimination was sufficiently compelling to justify a burden on religious beliefs, see *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Newman v. Piggie Park Enters.*, 256 F. Supp. 941 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968).

<sup>160</sup> Brown, *supra* note 61, at 1547.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* Brown draws significantly on the work of political theorists to argue that "[a] major contribution of deliberative democracy theory to constitutional theory is its insight that a commitment to equality of all citizens gives rise to an obligation to justify laws with reasons that are accessible to all." *Id.* at 1548 (citing LAWRENCE C. BECKER, *RECIPROCITY* 73-144 (1986); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 55-59, 65, 84-85 & 377 n.43 (1996)).

interest in protecting the safety and dignity of LGBT people. I believe there are two situations that are worth exploring.

As a general matter, once a religious person or institution enters the stream of commerce by operating an enterprise such as a doctor's office, hospital, bookstore, hotel, treatment center and so on, I believe the enterprise must adhere to a norm of non-discrimination on the basis of sexual orientation and gender identity. This is essential so that an individual who happens upon the enterprise is not surprised by a denial of service and/or a directive to go down the street to a different provider. While I was initially drawn to the idea of providing an exemption to those enterprises that advertise solely in very limited milieus (such as the bed and breakfast that advertises only on Christian Web sites), I became wary of such an approach as a practical matter. The touchstone needs to be, I believe, whether LGBT people would be made vulnerable in too many locations across society. An "advertising exception" seemed potentially subject to significant abuse.

Nevertheless, I believe there might be a more limited exception that would be justified. There are enterprises that are engaged in by belief communities (almost always religious belief communities) that are specifically designed to inculcate values in the next generation. These may include schools, day care centers, summer camps and tours. These enterprises are sometimes for-profit and sometimes not-for-profit. They are within the general stream of commerce, together with many other schools, day care centers, summer camps and tours.

I believe a subset of these enterprises present a compelling case for the legislature to provide an exemption in a law mandating non-discrimination based on sexual orientation. The criteria for an exemption should be as follows: the enterprise must present itself clearly and explicitly as designed to inculcate a set of beliefs; the beliefs of the enterprise must be clearly set forth as being inconsistent with a belief that homosexuality is morally neutral and the enterprise must seek to enroll only individuals who wish to be inculcated with such beliefs.

The dignity of LGBT individuals would still be harmed by excluding such enterprises from the purview of an anti-discrimination law. But in weighing the interests between the groups, I believe the harm to the enterprise in having its inculcation of values to its members significantly hampered (as

I believe it would be if it was forced to comply with such a law) outweighs the harm to the excluded LGBT members.

I am more hesitant regarding the second limited circumstance, but I offer it for analysis and criticism.<sup>163</sup> I believe there may be a legitimate exemption that should be provided 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 will stand in direct contradiction to those beliefs and values, it seems to me that the enterprise suffers a significant harm. Thus, in this limited circumstance, a legislature may perhaps 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 non-discrimination mandate in employment.

#### IV. CONCLUSION

In his response to my article, Andy Koppelman correctly observes that my suggestions are radical.<sup>164</sup> Calling for judicial and legislative acknowledgment of a "belief liberty" that encompasses *any* sincerely held core belief can indeed be

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<sup>163</sup> My thoughts in this area are shaped by the thirteen years that I represented Catholic Charities USA (from 1993 through 2006) in the federal legislative arena as Director of the Federal Legislation Clinic at Georgetown University Law Center.

<sup>164</sup> See Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

viewed as a radical departure from the more traditional focus on just religiously based beliefs.<sup>165</sup>

As I hope my analysis has made clear, however, such an acknowledgement need not bring the mechanisms of our complex society to a screeching halt. For a court to invalidate a law based on its burdening of belief liberty, the court must first find that the legislature could not have legitimately enacted the law as a “reasonable resolution of contending values.”<sup>166</sup> By contrast, a legislature is permitted greater latitude and greater responsibility to consider and weigh these contending values when it enacts legislation in the first place—exactly as it should be in a democratic process.

My primary argument is that we gain something as a society if we acknowledge that a law requiring individuals to act in a certain way might burden some individuals’ belief liberty. Such an acknowledgement is necessary if we wish to be respectful of the whole person. Protecting one group’s identity liberty may, at times, require that we burden others’ belief liberty. This is an inherent and irreconcilable reality of our complex society. But I would rather live in a society where we acknowledge that conflict openly, and where we engage in an honest dialogue about what accommodations might be possible given that reality, than to live in a society where we pretend the conflict does not exist in the first place.

But in dealing with this conflict, I believe it is essential that we not privilege moral beliefs that are religiously based over other sincerely held core, moral beliefs. Laws passed pursuant to public policies may burden the belief liberty of those who adhere to either religious or secular beliefs. What seems of paramount importance to me is that we respect these core beliefs and do the best we can in this imperfect world of ours to protect both identity liberty and belief liberty to the greatest extent possible.

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<sup>165</sup> As Koppelman observes, however, some members of the Supreme Court have, at times, been quite expansive with what they consider to be a “religiously based” belief. See *Welsh v. United States*, 398 U.S. 333, 340 (1970).

<sup>166</sup> *Glucksberg*, 521 U.S. at 768 (Souter, J., concurring).