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You Can't Hurry Love

WHY ANTIDISCRIMINATION PROTECTIONS FOR GAY PEOPLE SHOULD HAVE RELIGIOUS EXEMPTIONS

Andrew Koppelman[†]

Should those who have religious objections to employing gay people or renting them housing be allowed to discriminate? There has been a lot of talk lately about a possible conflict between gay rights and religious liberty.¹ Must there be such a conflict?

Chai Feldblum's article admirably delineates the high moral stakes on both sides.² As she lucidly shows, many courts and commentators have gotten undeserved comfort by occluding one horn of the dilemma, and thus making the accommodation problem seem easier than it is. By showing the similarities between the felt situation of both sides, Feldblum has shown keener perception than most courts that have addressed the problem.

I propose two friendly amendments to Feldblum's analysis.

First, although Feldblum is correct to stress the burden that antidiscrimination laws can place on religious persons who object to facilitating homosexual conduct, she is mistaken in her legal analysis of this burden. Under present law, the burden does not have constitutional status. Courts are obligated, under the law of some states, to weigh that burden

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¹ See, e.g., Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-sex Marriage and Religious Liberty*, WKLY. STANDARD, May 15, 2006, at 20; Douglas W. Kmiec, *If Gays Marry, Churches Could Suffer*, CHI. TRIB., May 26, 2006, at 27; Judy Peres, *Same-sex Marriage Foes Say Religious Liberty at Risk; Others Call Fears Greatly Exaggerated*, CHI. TRIB., June 5, 2006; Peter Steinfeld, *Beliefs: Advocates on Both Sides of the Same-sex Marriage Issue See a Potential Clash with Religious Liberty*, N.Y. TIMES, June 10, 2006, at A11.

² See generally Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61 (2006).

against the purposes of an antidiscrimination law. But that obligation is not grounded in her novel concept of “belief liberty.” Rather, it rests on a specific obligation to accommodate religion. Feldblum is evidently uncomfortable with the decision of so many legislatures and courts to single out religion for special treatment. But her broader concept of “belief liberty” is an invitation to chaos, because it would create a presumptive right to disobey any law you dislike intensely.

Second, when she finally performs the actual weighing of interests at the end of her article, she is surprisingly conclusory. She argues that religious claims to exemption from antidiscrimination laws should almost always be rejected, because any act of discrimination is “a deep, intense and tangible hurt” that the state has a compelling interest in preventing.³ She loses sight, however, of comparable intangible burdens felt by conservative Christians. A more precise account of the balance suggests that religious objectors should usually be accommodated.

Part I of this Comment considers the constitutional significance of the burden that antidiscrimination laws impose on religious objectors. Part II explains why religious exemptions are a sensible way to address America’s cultural division over the moral status of homosexuality. Part III examines Harry Blackmun’s ambivalent attitudes toward homosexuality, which are described so well by Feldblum, and shows why his somewhat equivocal defense of gay rights was politically and even normatively appealing because it was responsive to that division. Part IV takes up the problem of coexistence within a culture in which citizens have such dramatically differing views of sexual ethics. It concludes that Feldblum’s aspiration to create a world in which gay people need never fear insult is not an aspiration that law should try to enforce, because enforcement would require silencing conservative Christians who, like gay people, should be able to say what they believe, however distressing that may be to their fellow citizens.

³ *Id.* at 119.

I. THE NATURE AND SIGNIFICANCE OF THE BURDEN

Proposing an elaboration of Justice Souter's concurrence in *Washington v. Glucksberg*,⁴ Feldblum argues that there should be a presumptive immunity, under substantive due process, from having to engage in conduct "(or being precluded from engaging in certain conduct) [when such compulsion] will undermine an individual's strongly held beliefs."⁵ When an individual alleges that obeying a given law will "burden[] an individual's beliefs that constitute a core aspect of that individual's sense of self,"⁶ the courts "should err on the side of accepting the person's allegation."⁷ Although all of the claims in the cases she discusses were based on religious belief, Feldblum is not inclined to single out religion for special treatment. She indicates that she would extend accommodation "whether these beliefs are religiously based or secularly based."⁸

The rule proposed by Feldblum—nowhere stated by Souter—is breathtakingly broad. It is often the case that persons who disobey laws disagree with those laws, and sometimes they feel those disagreements intensely. Consider John Rapanos, who was so unhappy with environmental regulations that prevented him from filling in his wetlands that he ultimately defied the law, went to prison, and litigated his fines all the way to the Supreme Court.⁹ Was the state constitutionally required to accommodate him, solely on the basis of how strongly he felt about it? There is a virtually infinite universe of possible exemption claims here. Under Feldblum's test, the entire population of Southern white racists in 1964, who had strong identity-based objections to civil rights laws, would have had a presumptive claim to accommodation. Unsurprisingly, courts have never adopted a broad exemption rule of the kind that Feldblum contemplates.

She evidently is driven to this extreme position by pressure from two sides, her sympathy with some religious accommodations and her discomfort with the law's singling out

⁴ *Id.* at 101 & n.102 (citing *Washington v. Glucksberg*, 521 U.S. 702, 762 (1997) (Souter, J., concurring)).

⁵ *Id.* at 103.

⁶ *Id.* at 105.

⁷ *Id.*

⁸ Feldblum, *supra* note 2, at 64; *see also id.* at 84.

⁹ *Rapanos v. United States*, 126 S. Ct. 2208, 2214-15 (2006).

of religion. In this she is not alone. She is only the latest of a long series of efforts to salvage religious accommodation under some description of what is being accommodated that is broader than “religion,” because it seems unfair to single out religion for special treatment.

Her basic approach appears to be to accommodate objections to a law when they are felt with particular intensity by the objector. The classic statement of this position is Justice Harlan’s concurrence in *Welsh v. United States*, which involved a draftee who petitioned for conscientious objector status and who conscientiously objected to participation in any war, but who stated that he did not believe in God and that his beliefs were not religious.¹⁰ A four-judge plurality in the Supreme Court concluded that Welsh’s beliefs were “religious” as that term was defined in the pertinent statute.¹¹ What was necessary was “that this opposition to war stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.”¹² Justice Harlan, concurring in the result, thought that the Court’s removal of the statute’s theistic requirement was “a remarkable feat of judicial surgery” that was inconsistent with the clear intentions of Congress.¹³ But he joined the result, because he thought, as the Court of Appeals had thought in *Seeger*,¹⁴ that the law impermissibly discriminated on the basis of religion.¹⁵ If Congress was going to create exemptions, Harlan thought, it was constitutionally required to show “equal regard for men of nonreligious conscience.”¹⁶ “The common denominator must be the intensity of moral conviction with which a belief is held.”¹⁷ A dissenting judge in the Court of Appeals below had come to the same conclusion, noting that Welsh was “willing to go to jail rather than do violence to his beliefs, which is more than

¹⁰ *Welsh v. United States*, 398 U.S. 333, 335-37 (1970).

¹¹ *Id.* at 343-44.

¹² *Id.* at 340.

¹³ *Id.* at 351 (Harlan, J., concurring).

¹⁴ *United States v. Seeger*, 326 F.2d 846, 852-53 (2d Cir. 1964), *aff’d*, 380 U.S. 163 (1965).

¹⁵ *Welsh*, 398 U.S. at 362 (Harlan, J., concurring).

¹⁶ *Id.* at 360 n.12.

¹⁷ *Id.* at 358; *see also id.* at 366 (speculating that the policy of granting exemptions is based on “the assumption that beliefs emanating from a religious source are probably held with great intensity”).

can be said for many who profess a belief in a Supreme Being.”¹⁸

The problem with the focus on intensity is that it is both overinclusive and underinclusive. It is overinclusive because the fact that I am experiencing some intense desire, without more, does not state a claim that other people are obligated to honor. It is underinclusive because some religious claims are not based on core aspects of a person’s sense of self. The interpretation of the free exercise clause that now prevails does not require the state to accommodate religion,¹⁹ but it permits such accommodation, and the federal government and numerous states have accepted the invitation with laws that mandate religious accommodation whenever this does not conflict with a compelling state interest.²⁰ When religion is accommodated, it is accommodated whether or not the objector’s core sense of self is implicated.²¹ Whether Feldblum likes it or not, the law presently singles out religion for special treatment.²²

The potentially breathtaking scope of Feldblum’s proposed rule is apparent when one considers her critique of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (“FAIR”), the case in which the Court rejected the First Amendment claims of law schools that wanted to exclude military recruiters.²³ The schools were doing this because the military’s ban on openly gay personnel violated the schools’ nondiscrimination policies.²⁴ Feldblum argues that the schools (which, incidentally, are not natural persons; it is not apparent how an institution can have a core sense of self) thought “that law students should be hired without regard to their sexual orientation” and that “aiding and abetting any recruiter who

¹⁸ *Welsh v. United States*, 404 F.2d 1078, 1092 (9th Cir. 1968) (Hamley, J., dissenting), *rev’d*, 398 U.S. 333 (1970).

¹⁹ See *Employment Division v. Smith*, 494 U.S. 872, 888 (1990).

²⁰ For a survey, see Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 210-12 & nn.368-73 (2004).

²¹ I argue this at greater length in *Conscience, Volitional Necessity, and Religious Exemptions* (2006) (unpublished manuscript, on file with author).

²² For an argument that this is not as unfair as Feldblum appears to think, see Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571.

²³ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (“FAIR”), 126 S. Ct. 1297, 1307 (2006).

²⁴ *Id.* at 1302.

took sexual orientation into account in hiring was unjust.”²⁵ This, Feldblum thinks, made out a powerful claim: “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.”²⁶

Feldblum thinks that the Court simply refused to accept that the required admission of military recruiters burdened the law schools’ expressive beliefs. But the Court’s opinion took no view about whether the schools’ beliefs were burdened. The Court just did not care about that. It did not suggest that an objector to a law ever stated a claim by showing that obedience burdened his beliefs.

Consider the implications of the opposite view. Federal regulations now require cars to have airbags.²⁷ These regulations were adopted despite the resistance of automobile manufacturers.²⁸ When new cars conspicuously have airbags, this is reasonably understood as sending a message that (1) airbags are necessary to make cars safe, and (2) their inclusion is cost-justified—both propositions from which the manufacturer may dissent. Depending on how strongly the manufacturer feels about the matter (and let’s assume a sole proprietor, to avoid the problem of corporations having beliefs), does the manufacturer not have a powerful argument that his expressive beliefs are being burdened?²⁹

The intense preferences of persons are, of course, relevant to policymaking. One ought to accommodate them if possible. But they do not rise to the level of constitutional claims.

One advantage to singling out religion as a basis for exemptions is that religious claims are, in their nature, available only to those claimants who have a specifically religious basis for objecting to obeying a law. It is a matter of

²⁵ Feldblum, *supra* note 2, at 113.

²⁶ *Id.*

²⁷ 49 U.S.C. § 30127 (2000); 49 C.F.R. § 571.208 (2005).

²⁸ See *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983).

²⁹ Feldblum’s proposal, and more generally the constitutional claim of the law schools in *FAIR*, is thus open to the same objections I have made against a broad freedom of expressive liberty. See Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 *CARDOZO L. REV.* 1819 (2002); see also ANDREW KOPPELMAN AND TOBIAS BARRINGTON WOLFF, *THE BOY SCOUTS, GAY RIGHTS, AND FREEDOM OF ASSOCIATION* (forthcoming 2007).

record that such claims have not arrived in an unmanageable flood.³⁰ This does not resolve the question of what to do with those claims. They will be more or less persuasive in a vast array of possible situations.³¹ But at least they will be unusual and idiosyncratic, and that fact alone may be relevant to the weighing of the accommodation claim. It is, in fact, relevant to the specific question of religious exemptions from discrimination laws.

II. SHOULD THERE BE RELIGIOUS EXEMPTIONS FROM ANTIDISCRIMINATION PROTECTION OF GAY PEOPLE?

In order to decide whether religious objectors ought to be excused from compliance with a law protecting gay people from discrimination, we need to consider why there are such laws in the first place.

The general rule, in employment decisions, is that of employment at will. An employer normally has the privilege of refusing to hire, or of firing, employees for any reason or no reason. He need not justify these actions to any official. Antidiscrimination laws, such as the Civil Rights Act of 1964, are exceptions to this general rule. So long as an employer does not engage in the enumerated types of discrimination, she has the privilege of being as arbitrary as she likes in her hiring. I can, for example, absolutely refuse to hire anyone whose eyebrows are not at least three inches long.

It is important to understand the reasons for the rule of employment at will, so that we can understand what we are doing when we depart from that rule. One traditional justification is rights-based: people have a right, it is sometimes said, to do what they like with their private

³⁰ See Amy Adamczyk, John Wybraniec, & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CHURCH & ST. 237, 250 tbl.1 (2004). In the nine and one-quarter years before *Employment Division v. Smith*, 494 U.S. 872 (1990), held that there is no right to religious exemptions from laws of general applicability, there were 310 free exercise claims reported, with a success rate of 39.5%. *Id.* In the next three and one-half years, the number of filed claims plunged to thirty-eight, and the success rate dropped to 28.4%. *Id.* Under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, which temporarily restored the “compelling interest” test (until the Supreme Court struck it down in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997)), success rates rose to 45.2% and the number of filed claims in that three-year period rose to 114, perhaps in response to the strong legislative signal that courts should take religious impact very seriously. *Id.* Even at its peak, this is hardly an overwhelming volume of claims.

³¹ See generally 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006).

property.³² The bankruptcy of this justification became clear during the debate over the Civil Rights Act of 1964, which then-presidential candidate Barry Goldwater opposed on libertarian grounds.³³ The Civil Rights Act is not an invasion of our precious liberties. On the contrary, it diminishes the amount of oppression in the world. The idea of private property is not as sacrosanct as it once was, because the uses of that property can have public effects that are legitimate objects of legislative concern. Even Goldwater eventually abandoned the libertarian argument and supported antidiscrimination protection for gay people.³⁴

The more persuasive justification for the rule of employment at will is efficiency-based. It would be a terrible burden on the economy for government officials to have to approve every firing, much more every refusal to hire, that takes place in the private sector. Moreover, there is little reason to think that most types of arbitrary refusal to hire are likely to have much effect on anyone's opportunities. Although I may refuse to hire anyone whose eyebrows are less than three inches long, other employers will compete for the services of the short-eyebrowed, and so will bid their wages up to pretty much the same level that they would have been if I had been willing to hire them. And the market will also punish me for my foolishly discriminatory hiring practices, since competent short-eyebrowed workers will go to work for my competitors. My tendency to discriminate means that I am turning away better workers and hiring worse ones. The overall tendency is for people like me to be driven out of the market.

Considerations of this sort led Richard Epstein to argue that the Civil Rights Act ought to be repealed, because it interfered with freedom of contract for no good reason.³⁵ In a free market, he argued, we can expect that blacks' wages (for instance) will be as high as they can be.³⁶ Epstein did not

³² For arguments of this sort, see AYN RAND, *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM* 126-34 (1964); Michael Levin, *Negative Liberty*, 2 *SOC. PHIL. & POL'Y* 84, 98-100 (1984).

³³ See RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* 363-64 (2001); see also *id.* at 462 (quoting Goldwater speech, co-authored by William Rehnquist, declaring that "the freedom to associate means the same thing as the freedom not to associate").

³⁴ See Barry M. Goldwater, *The Gay Ban: Just Plain Un-American*, *WASH. POST*, June 10, 1993, at A23.

³⁵ See generally RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

³⁶ *Id.* at 28-58.

persuade many people. The point most commonly made by his critics was that he had left culture out of his model. Some groups are subject to *pervasive* discrimination. At least when the Civil Rights Act was enacted, his critics argued, racism was sufficiently pervasive to withstand the egalitarian tendencies of a well-functioning free market.³⁷ Antidiscrimination law can have a powerful effect on economic opportunity. We know that black wages, for instance, went up dramatically after the act was passed. In 1964, the median income of nonwhite males was 57% of median white male income.³⁸ By 1985, that ratio had risen to 66%.³⁹ The proportion of black men working as professionals or managers relative to whites rose from 32% to 64%.⁴⁰ And the most dramatic progress came in the first ten years after the Act.

Epstein does not succeed in showing that antidiscrimination law should not exist, but he does show why the burden is on those who want antidiscrimination law to be extended to new classes, and what it is that they need to show. Anyone who wants to extend antidiscrimination protection to a new class needs to show that the class is subject to discrimination that is so pervasive that markets will not solve the problem.

This is not hard to show in the case of lesbians and gay men. The intensity with which gay people have been despised in American culture is well documented,⁴¹ and good scholarship, some of it by Feldblum herself, has now dispelled Antonin Scalia's ignorant claim that all gays "have high

³⁷ See Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219, 1242-43 (1992) (book review); Symposium, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, 31 SAN DIEGO L. REV. 1 (1994); see also John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1415-19 (1986) (similarly responding to neoclassical economic attacks on antidiscrimination law). Even those of us who are unpersuaded by Epstein's claims about racism are indebted to his analysis, because the task of responding to him has starkly revealed what kind of showing is necessary to make out a prima facie case for intervention in an allegedly discriminatory market.

³⁸ James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 281 (1990).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 60-63 (2006) [hereinafter KOPPELMAN, *SAME SEX, DIFFERENT STATES*]; ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 21-25 (2002) [hereinafter KOPPELMAN, *THE GAY RIGHTS QUESTION*].

disposable income.”⁴² There is plenty of reason to think that antigay discrimination is pervasive enough, and has a sufficiently severe effect on the economic opportunities of gay people, to warrant protection.

A lot of legislatures have been persuaded by these arguments. In twenty-two states as well as the District of Columbia and many municipalities, discrimination against gay people is prohibited.⁴³ If these statutes are enforced, then in those jurisdictions, overt discrimination against gays will become like discrimination against the long-eyebrowed: if it happens once in a while, it will not make any economic difference. The preconditions for Epstein’s economic defense of a right to discriminate are not always present—that is why his general argument against antidiscrimination law is wrong—but they will be present here.

And there is every reason to think that religious exemptions will not often be sought. Antigay discrimination is now sufficiently stigmatized that a business that openly discriminates is likely to pay an economic price for doing so. When religious exemptions are available, they are an affirmative defense against the enforcement of the law. The defendant charged with discrimination carries the burden of pleading, the burden of producing evidence showing that the exemption is applicable, and the burden of persuasion. An antidiscrimination law with a religious exemption is nothing at all like a regime with no such law.⁴⁴ The difficulties should not be exaggerated; conspicuously religious discriminators are so likely to prevail in their defenses that they are unlikely to be sued in the first place. But there are unlikely to be huge

⁴² *Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting). See M.V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 128-132 (2001); *Employment Non-Discrimination Act of 1997: Hearing of the Committee on Labor and Human Resources on S. 869 to Prohibit Employment Discrimination on the Basis of Sexual Orientation*, 105th Cong. 46-49 (1998) (statement of Chai R. Feldblum, Associate Professor of Law, Georgetown University Law Center).

⁴³ See Lambda Legal, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, <http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=217> (last visited October 4, 2006).

⁴⁴ This was emphasized in an amicus brief by the Christian Legal Society in *Romer v. Evans*, which argued that this burden on the religious constituted a compelling reason to abolish all antidiscrimination protection for gay people. Brief for Christian Legal Society as Amici Curiae Supporting Petitioners, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008428. This argument proves far too much. It would argue for the abolition of all laws to which some religious persons have objections (which probably means, all laws).

numbers of them, at least in most parts of most jurisdictions that protect gay people from discrimination.

This is perhaps why Feldblum ignores the economic rationale for antidiscrimination protection. Her concern about antigay discrimination is not, ultimately, economic. It is more precisely dignitary.

Ensuring that LGBT people can live lives of honesty and safety 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.⁴⁵

There is something odd about this passage. The parallels between the burden on gay people and the burden on Christians, so nicely drawn at the beginning of the article, have entirely disappeared. What about the right of conservative Christians to “live lives of honesty?” If they are “constantly vulnerable” to forced association with gay people, will this not be “a deep, intense and tangible hurt” to them?

The great attraction of regulation-plus-exemptions is that it lowers the stakes and makes possible a legislative compromise that does not threaten the deepest interests on either side. Feldblum even acknowledges this; she is willing to consider exemptions as part of a legislative compromise “in a negotiated setting with those whose beliefs will be adversely impacted by the law.”⁴⁶ But put that way, it appears simply as a tactical concession, with no principled underpinning. The case for exemptions is stronger than that.

The burden of complying with antidiscrimination rules has become one of the premier concerns of conservative Christians, who tend to understand their opposition to gay rights to be defensive in nature. They have been collecting

⁴⁵ Feldblum, *supra* note 2, at 119.

⁴⁶ *Id.* at 116.

horror stories which, they argue, show that gay rights are a threat to religious liberty.⁴⁷ Reasonable gay rights proponents should take these concerns seriously and seek to accommodate them where this is possible—not just because it is politically sensible (though it is), but because it is the right thing to do.

Feldblum claims that gay people are hurt by even one instance of discrimination. They are entitled never to have that happen to them, ever. But this is not precisely an argument. It is an assertion. Just why should this right be construed in this way, rather than more modestly?

Feldblum here does not seem quite to have the courage of her convictions, because she silently puts her thumb on the nondiscrimination side of the scales. Just how is the ability of gay people “to live lives of honesty and safety”⁴⁸ jeopardized by the occasional discriminator? There has, of course, been ubiquitous violence against gays and the law needs to suppress that,⁴⁹ but the discriminator proposes to exclude gay people, not beat them up. In the story with which her paper begins, a guesthouse owner unfairly surprises a gay wedded couple by forbidding them to sleep together.⁵⁰ But, of course, discrimination is one thing and unfair surprise is another.⁵¹ The unfair surprise is a cheat. It has nothing to do with the discrimination question.

Feldblum’s position becomes even more puzzling when she concedes that she *can* tolerate discrimination in a very

⁴⁷ See, e.g., JANET L. FOLGER, *THE CRIMINALIZATION OF CHRISTIANITY* (2005); ALAN SEARS & CRAIG OSTEN, *THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY* (2003); Robert H. Knight, *The Corporate Curtain: How Companies Are Using Views on Homosexuality to Punish their Christian Employees*, Concerned Women for America, Jan. 20, 2006, <http://www.cwfa.org/articledisplay.asp?id=9808&department=CFI&categoryid=papers>; Douglas W. Kmiec, *Same-Sex Marriage and the Coming Anti-Discrimination Campaigns Against Religion*, Mar. 8, 2006, <http://www.becketfund.org/files/3edbb.pdf>.

⁴⁸ Feldblum, *supra* note 2, at 76.

⁴⁹ See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1462-70 (1992).

⁵⁰ Feldblum, *supra* note 2, at 61-62.

⁵¹ In her hypothetical, Feldblum states that the gay couple made a reservation. It is an interesting question whether the guesthouse owner is liable for breach of contract. Courts normally fill in unspecified contract terms by reference to ordinary usage and reasonable expectations. In a state where there is an antidiscrimination statute, from which the owner claims a religious exemption, the burden is likely to be on the owner to tell those making reservations that, unlike almost all other hoteliers in the state, he deviates from the ordinary usage and custom. See E. ALLAN FARNSWORTH, *CONTRACTS* § 7.13, at 483-86 (3d ed. 1999). An owner who waits to state his objections until after travelers have arrived is not likely to get much sympathy from the courts, even if the law allows a religious exemption. Thanks to Richard Speidel for helpful discussion of this example.

narrow set of cases: “enterprises that are engaged in by communities of faith (almost always religious communities) that are specifically designed to inculcate values in the next generation” and that “seek to enroll only individuals who wish to be inculcated with such beliefs.”⁵² Gay people (with the important exception of adolescents in conservative Christian families) are unlikely ever to encounter such enterprises. Apparently, antigay beliefs, and actions based on those beliefs, are acceptable so long as they remain deeply closeted.

What Feldblum really wants is full social acceptance for gay people. She wants them to be free from a certain kind of insult. There can be discriminatory entities out there, but she does not want to hear about them. In the hypothetical with which she begins, her wedded couple would be unjustly injured even if the guesthouse’s web homepage clearly indicated that it turns away unmarried and gay couples.

Now, it is possible to bring that about in the long run. Social change can sometimes be as complete as that. My father told me about getting beaten up on the way to school because he was Jewish. The last time I was so much as subjected to an anti-Semitic remark was decades ago.

But that is not the state of contemporary American society with respect to homosexuality. Many Americans continue to hold the second of the three views Feldblum describes, that gay sexuality is not good, but not intrinsically evil either. Their reaction to homosexuality is not the “we love you” that she eventually elicited from Justice Blackmun. It is “we love you anyway.” Though Feldblum does not disaggregate further, this second view comes in different varieties. Some people regard homosexuality as a kind of handicap, morally neutral but unfortunate inasmuch as it makes it impossible to create children through ordinary (and relatively inexpensive!) biological processes.⁵³ Others regard it as a moral failing, but a venial one. And of course all of these views frequently coexist in the same people, in an incoherent bricolage. Justice Blackmun’s ambivalence, which Feldblum describes so tellingly, is not atypical.

⁵² Feldblum, *supra* note 2, at 121.

⁵³ Those who think so include some gay people. See, e.g., Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 269-70 (1995). On the other hand, for many, the ability to have sex without worrying about pregnancy is a positive good.

For just that reason, however, Blackmun's ambivalent response may have been just what was needed in Blackmun's time.

III. THE VIRTUES OF JUSTICE BLACKMUN'S AMBIVALENCE

As Feldblum emphasizes, Blackmun's dissent in *Bowers v. Hardwick* says "there may be many 'right' ways of conducting [intimate sexual] relationships."⁵⁴ But Blackmun puts "right" in scare quotes (and says "may be" not "are"), and so ends up being agnostic as between the love you/love you anyway positions.⁵⁵ Feldblum in effect proposes to take off the scare quotes, as Blackmun himself did (or at least tried to do) in their conversation.

She has argued elsewhere that we ought to reject liberal neutrality and make our moral judgments about homosexual conduct clear on their face.⁵⁶ The basis of gay rights should not be "we love you anyway"; it should be "we love you." Others have criticized the kind of approach Blackmun makes in *Hardwick* on similar grounds. Thus, for example, Michael Sandel objects that "the toleration [Blackmun's dissent] defended was wholly independent of the value or importance of the thing being tolerated."⁵⁷

But there is reason to leave the law ambiguous on certain issues. The law must sometimes reckon with the

⁵⁴ *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting), quoted in Feldblum, *supra* note 2, at 67.

⁵⁵ The scare quotes are, of course, borrowed from Burger's *Yoder* opinion, which Blackmun quotes. *Hardwick*, 478 U.S. at 206 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972)). But Burger does not really mean to be agnostic. It's clear that he loves the Amish and wishes that more Americans were like them: hardworking, abstemious, and deferential to authority.

⁵⁶ See generally Chai R. Feldblum, *The Federal Gay Civil Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149 (John D'Emilio, William B. Turner & Urvashi Vaid eds., 2000); Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 *YALE J.L. & FEMINISM* 139 (2005); Chai R. Feldblum, *The Limitations of Liberal Neutrality Arguments in Favor of Same-Sex Marriage*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 55 (Robert Wintemute & Mads Andenæs eds., 2001); Chai R. Feldblum, Response, *The Moral Rhetoric of Legislation*, 72 *N.Y.U. L. REV.* 992 (1997); Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 *TEMP. POL. & CIV. RTS. L. REV.* 485 (1998); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 *U. PITT. L. REV.* 237 (1996).

⁵⁷ MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 106 (1996). Sandel is here critiquing the vision of toleration set forth in *Stanley v. Georgia*, 394 U.S. 557 (1969), but he argues that precisely the same vision animates Blackmun's dissent in *Hardwick*. See *id.* at 103-108.

problem posed by John Rawls: “[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”⁵⁸ Rawls thinks that the answer has to be an idea of public reason that can be the basis for an overlapping consensus. As the poll data that Feldblum cites indicates, homosexuality is one of those issues about which we are likely to remain profoundly divided for some time to come.

Two bits of data suggest the wisdom of the kind of bracketing of moral issues that Blackmun’s dissent undertook. A Gallup poll conducted a few days after *Hardwick* came down found that, by 57% to 34%, Americans thought states should not “have the right to prohibit particular sexual practices conducted in private between consenting adult homosexuals.”⁵⁹ On the other hand, in 1986, more than 70% of Americans thought that homosexual sex was always wrong (The number remains a bit above 50%).⁶⁰

Blackmun’s take in *Hardwick* is theoretically messy for all the reasons rehearsed most prominently by Robert Bork. In a well-known article published in 1971, Bork objects that the Court’s choice of the level at which to define the right to privacy was necessarily arbitrary. *Griswold v. Connecticut*⁶¹ certainly did not adopt the very broad principle that “government may not interfere with any acts done in private,” but it is hard to explain why the principle should be defined narrowly, as “government may not prohibit the use of contraceptives by married couples.”⁶²

Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? . . .

To put the matter another way, if a neutral judge must demonstrate why principle *X* applies to cases *A* and *B* but not to case *C* . . . , he must, by the same token, also explain why the principle is defined as

⁵⁸ JOHN RAWLS, *POLITICAL LIBERALISM* 4 (rev. paperback ed. 1996).

⁵⁹ JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 332 (2001).

⁶⁰ MORRIS P. FIORINA ET AL., *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA* 85 (2005).

⁶¹ 381 U.S. 479 (1965).

⁶² Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 7 (1971).

X rather than *X minus*, which would cover *A* but not cases *B* and *C*, or as *X plus*, which would cover all cases, *A*, *B*, and *C*.⁶³

Thus, Bork argues, there is no principled way to distinguish the economic liberty at issue in *Lochner* from the sexual liberty at issue in *Griswold*.⁶⁴ In each case, those whose conduct is restricted by the law would prefer to be unburdened by the restriction, while the majority has a different preference.

Bork's critique is theoretically powerful. No particular privacy interest is derivable from first principles, because those principles do not entail any particular public/private line.⁶⁵ The vagueness of the privacy right opens the door for arbitrary and idiosyncratic line-drawing, such as Blackmun's strange fixation on the rights of doctors in *Roe v. Wade*.⁶⁶

And Blackmun does not really answer Bork, either in *Roe* or in *Hardwick*.⁶⁷ His defense of decisional privacy does not satisfactorily distinguish abortion and fornication. His idea of spatial privacy, based on the *Stanley v. Georgia* principle protecting private possession of obscenity,⁶⁸ does not explain why illegal drugs and prostitution are not likewise protected. All Blackmun has to go on is an intuition that noncommercial, consensual sexual conduct in the home should be outside the state's power.

Happily for Blackmun, though, that intuition is very widely shared. The virtue of the intuition is that it abstracts away from the evaluative question, where many people's views are much less friendly to gay people. Its vice is precisely the same. Sandel complains that "the analogy with *Stanley* tolerates homosexuality at the price of demeaning it; it puts homosexual intimacy on a par with obscenity—a base thing that should nonetheless be tolerated so long as it takes place in private."⁶⁹ But it is precisely this neutrality that made it possible for Blackmun's reasoning to have such broad appeal.

⁶³ *Id.*

⁶⁴ *Id.* at 11-12 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Lochner v. New York*, 198 U.S. 45 (1905)).

⁶⁵ See KOPPELMAN, *THE GAY RIGHTS QUESTION*, *supra* note 41, at 35-52.

⁶⁶ 410 U.S. 113, 125-27 (1973).

⁶⁷ He did better in his later abortion opinions, where he placed less weight on the substantive due process argument and placed more emphasis on women's equality. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 222-27* (2005).

⁶⁸ *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

⁶⁹ SANDEL, *supra* note 57, at 107.

Feldblum is skeptical of neutrality. But neutrality takes many forms. The political ideal of neutrality toward conceptions of the good is unsustainable at the extremely abstract level proposed by some liberal theorists: the state cannot really be neutral toward all controversial conceptions of the good. Neutrality is nonetheless a valuable political ideal. One of the many ways that government can go wrong is to take a position on some question that it would, all things considered, be better for it to abstain from deciding. The classic example is the question of which (if any) religion is true. The idea of neutrality holds that government ought to avoid this pathology. There is probably an infinite number of ways in which the field of abstinence might be specified, and so there is a lush profusion of possible neutralities. With any particular issue, the question is whether government ought to be neutral with respect to *that* question.⁷⁰

With the “we love you/we love you anyway” problem, there is some value in the Court not taking sides, because it has no special expertise in deciding the intrinsic value or lack thereof of homosexual relationships. This is not a question of law at all. It is not the job of a court to tell the rest of us what to value. Imagine a court deciding whether the extinction of endangered species is really something that should bother us.⁷¹

What courts can and should do is enforce the Equal Protection Clause. Blackmun did not reach the Equal Protection issue in *Hardwick*, but, as Linda Greenhouse shows, his understanding of privacy, at least with respect to the core issue (for him) of abortion, became increasingly inflected with equality concerns.⁷² Blackmun was no longer on the Court when it decided *Romer v. Evans*,⁷³ but it follows his lead in avoiding any resolution of moral questions.

The question after *Romer* that a court must decide in any particular case of antigay discrimination is whether a law reflects a bare desire to harm an unpopular group. This is Ely’s notion of prejudice. As John Hart Ely pointed out long ago, “a sincerely held moral objection to the act” of homosexual

⁷⁰ The argument of this paragraph is developed in detail in Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. OF POL. 633 (2004).

⁷¹ But for an argument that the Court is coming dangerously close to doing this, see Andrew Koppelman and David Dana, *Clean Water is Symbol of the Power of the People*, S.F. CHRON., July 23, 2006, at E-3.

⁷² See GREENHOUSE, *supra* note 67.

⁷³ 517 U.S. 620 (1996).

sex is not *per se* the same thing as “a simple desire to injure the parties involved.”⁷⁴ *Romer* asks whether any particular law reflects a bare desire to harm an unpopular group.⁷⁵

Lawrence v. Texas takes no position on the morality of homosexual conduct when it holds that gay people “are entitled to respect for their private lives.”⁷⁶ This is just *Stanley* again. What modern doctrine asks courts to do is to try to decide which is doing the work in any particular statute that burdens gay people. It does not deem moral objections illegitimate. It simply holds that, if a state singles out gays for unprecedentedly harsh treatment, the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval.⁷⁷

The *Romer/Lawrence* approach shares the virtue of Blackmun’s *Hardwick* dissent in that it abstracts away from the precise questions that Feldblum would like the courts to take a stand on. So it avoids the messiness of substantive due process, but it preserves the value of abstraction that Blackmun wanted to pursue. That is a virtue. Blackmun is to be praised for doing the precise thing that troubles Feldblum.

IV. INTENDED TO BE HURTFUL

Let us return to the question of religious exemptions. How should that question be resolved if the state is not going to take sides on the moral value of homosexuality?

It is possible for gay people and conservative Christians to live together, each following their own deepest allegiances. But the coexistence that this entails will necessarily be painful for both. The only way to achieve comfort for either would be to make the other disappear or pretend to disappear. Because that is not appropriate, there is no good way to prevent the kind of hurt that Feldblum wants to prevent.

There will be times when it is indeed necessary to silence one of the parties to this dispute: when there is a

⁷⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 256 n.92 (1980).

⁷⁵ See 517 U.S. at 634-35 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973))).

⁷⁶ *Lawrence v. Texas*, 539 U.S. 558, 578 (2004).

⁷⁷ This interpretation of *Lawrence* is elaborated and defended in Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171 (2004). For a state Supreme Court decision adopting a similar reading of *Lawrence*, see *Kansas v. Limon*, 122 P.3d 22 (Kan. 2005).

likelihood that the speech will involve an abuse of power,⁷⁸ or when there is an unusually vulnerable audience.⁷⁹ But when neither of these is present, the law, and more generally those wielding power in our society, should try to contain the tension between the two views, rather than trying to silence either.

The difficulty of achieving such coexistence is starkly presented in *Peterson v. Hewlett-Packard Co.*, in which the Ninth Circuit Court of Appeals upheld the dismissal of a claim of religious discrimination.⁸⁰

Richard Peterson had been an employee of Hewlett-Packard's office in Boise, Idaho for more than twenty years when his dispute with his employer arose.⁸¹ The company, as part of a workplace diversity campaign, began displaying "diversity posters" that included supportive descriptions of the company's gay workers.⁸² Peterson, who described himself as a "devout Christian," thought that he had a duty "to expose evil when confronted with sin."⁸³ He responded to the posters by placing biblical verses on an overhead bin in his work cubicle, in type large enough to be visible to passersby, which included coworkers and customers.⁸⁴ Among these was the following passage from Leviticus 20:13: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them."⁸⁵

Hewlett-Packard had an anti-harassment policy that prohibited "[a]ny comments or conduct relating to a person's . . . sexual orientation . . . that fail to respect the dignity and feeling [sic] of the individual."⁸⁶ Peterson's supervisor removed the materials from his cubicle, and in the next several days he attended a series of meetings with

⁷⁸ See, e.g., *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (denying religious discrimination claim of conservative Christian supervisor fired after harassing and intimidating openly gay subordinate).

⁷⁹ See, e.g., *Harper v. Poway Unified School Dist.*, 445 F.3d 1166 (9th Cir. 2006), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006) (student barred from wearing T-shirt saying "homosexuality is shameful"). But see Eugene Volokh, *Sorry, Your Viewpoint is Excluded from First Amendment Protection*, Apr. 20, 2006, <http://volokh.com/posts/1145577196.shtml>.

⁸⁰ *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

⁸¹ *Id.* at 601.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 601-02.

⁸⁵ *Id.* (quoting *Leviticus* 20:13).

⁸⁶ *Peterson*, 358 F.3d at 602.

managers.⁸⁷ The Biblical passages, he explained, were “intended to be hurtful. And the reason [they were] intended to be hurtful is you cannot have correction unless people are faced with truth.”⁸⁸ He expressed his hope that gay co-workers who read the passages “would repent (change their actions) and experience the joys of being saved.”⁸⁹

Peterson refused to take down his Bible verses unless Hewlett-Packard took down its posters.⁹⁰ Hewlett-Packard gave him time off with pay to reconsider his position, but when he returned to work, he posted the verses again and refused to remove them.⁹¹ He was fired for insubordination.⁹² His suit for religious discrimination was rejected on summary judgment in federal district court.⁹³ The Ninth Circuit affirmed.⁹⁴

As a legal matter, the courts certainly got it right: Peterson was not subjected to discrimination on the basis of religion, and Hewlett-Packard had the right to fire him. And yet, I wonder whether firing him was the most appropriate course of action for Hewlett-Packard. In light of its diversity campaign, Peterson was obviously an outlier, someone whose views did not represent those of the company. Judge Reinhardt, writing for the Ninth Circuit, placed considerable weight on “Peterson’s intention that his postings be ‘hurtful,’”⁹⁵ and concluded that an employer need not “permit an employee to post messages intended to demean and harass his co-workers.”⁹⁶

Circuit Judge Reinhardt’s view is far too conclusory. He presumes that it is never appropriate, in civil society, for someone to say things that he knows to be hurtful to others.⁹⁷ But this conclusion is morally and politically loaded. It

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 604.

⁹⁰ *Id.* at 602.

⁹¹ *Id.*

⁹² *Peterson*, 358 F.3d at 602.

⁹³ *Id.*

⁹⁴ *Id.* at 608.

⁹⁵ *Id.* at 604 n.3.

⁹⁶ *Id.* at 607.

⁹⁷ And on this basis, he suggests that Hewlett-Packard may have had an obligation, under the law of workplace harassment, to silence Peterson. This surely goes too far. Harassment law, thus broadly construed, would run afoul of the First Amendment. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 248-55 (1996).

presumes that none of us need to hear things that will hurt us.⁹⁸

Reinhart's argument draws its power from the analogy with racism: people should not be subjected to ideologies that demean them.⁹⁹ In the same way that racism has no legitimate place in the public sphere, one might think that heterosexism should be eradicated.¹⁰⁰ There is a powerful case to be made for the eradication of racism, to the extent that this can be done consistently with free speech guarantees¹⁰¹—and of course such guarantees do not apply in the workplace. The First Amendment does not protect you from being fired for your opinions. But the gay rights issue is different. The racism analogy has some power; much of the antigay animus that exists in the United States is just like racism, in the virulence of the rage it bespeaks and the hatred that it directs toward those who are its objects. Not all antigay views, however, deny the personhood and equal citizenship of gay people.¹⁰² Certainly Peterson's views did not do that. There is a serious discussion to be had here about sexuality and morality. Peterson's views do not place him beyond the pale of civilized discussion.

It is a disputed question whether the specific hurtful things that Peterson had to say were sound enough to be worth hearing. It is a question about which the state properly ought to be agnostic. Our society's most basic moral traditions are deeply divided about the proper answer to that question. We need to keep talking about it. The conversation is not always a pleasant experience. And it is fragile. It will shut down if either side uses its power to coerce the other to shut up. Gay people have been for a long time, and sometimes still are, subjected to just this kind of silencing.

⁹⁸ On the value of the moral distress caused by exposure to strange and hateful ideas, see Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 61 (Lee C. Bollinger & Geoffrey R. Stone, eds., 2002); Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 *POL. STUD.* 310 (1987).

⁹⁹ He presses the analogy in his majority opinion in *Harper*, 445 F.3d at 1181.

¹⁰⁰ I made this claim in *Antidiscrimination Law and Social Equality*, *supra* note 97, but I now think that I did not adequately deal with the complication that I am describing here.

¹⁰¹ This case is made at length in *Antidiscrimination Law and Social Equality*, *supra* note 97.

¹⁰² See KOPPELMAN, *THE GAY RIGHTS QUESTION*, *supra* note 41, at 17-19; KOPPELMAN, *SAME SEX, DIFFERENT STATES*, *supra* note 41, at 53-68.

Hewlett-Packard had enormous leverage over Peterson. It is not a light thing to fire someone from a job he has held for 20 years. This is the kind of sanction that is likely to drive dissenters into the closet. And, as gay people know so well, the closet is not a healthy place to be.

CONCLUSION

Feldblum is correct that we should directly engage in moral argumentation about the gay rights question. There is a correct answer to the question of how gay relationships ought to be valued, and she and I agree about what that answer is.¹⁰³ But our conclusion should not be imposed on everyone else by the courts. Slower and more cumbersome processes are needed. You can't hurry love.¹⁰⁴

¹⁰³ See KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 41, at 79-93; Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5 (2004); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

¹⁰⁴ See THE SUPREMES, *You Can't Hurry Love*, on SUPREMES A' GO-GO (Motown Records 1966).