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Should the Government Recognize Same-Sex Marriage? Session One: Social, Cultural, and Philosophical Issues

Authors

Gregory Dell, Dwight Duncan, Hannah Garber-Paul, Martha Nussbaum, Vincent Samar, and Arnold Wolf

SHOULD THE GOVERNMENT RECOGNIZE SAME-SEX MARRIAGE?

SESSION ONE:

REV. GREGORY DELL, DWIGHT DUNCAN, HANNAH GARBER-PAUL,
MARTHA NUSSBAUM, VINCENT SAMAR, RABBI ARNOLD WOLF

SESSION TWO:

TERESA STANTON COLLETT, DAVID ORGON COOLIDGE, GEORGE
DENT, ANDREW KOPPELMAN, MARK STRASSER, CASS SUNSTEIN

SESSION ONE:

SOCIAL, CULTURAL, AND PHILOSOPHICAL ISSUES

JAMES MADIGAN: Our question today [October 22, 1999] is whether America should recognize same-sex marriage. We have two sets of panelists who will address this question. Joining us in this first session are Reverend Gregory Dell and Rabbi Arnold Wolf, so we have a nice representation from the clergy; I think it is important to have a religious perspective on this issue rather than one dominated by law. Dwight Duncan joins us from Southern New England School of Law. Dwight's got a connection to a case that actually has a Chicago connection, which makes our symposium today quite timely. Two Chicago alumni are on either side of the table in the Vermont same-sex marriage case. Dwight Duncan has worked on amicus briefs on that particular case. Vince Samar, is a professor of Philosophy at Loyola, and an adjunct professor of Law at Chicago-Kent, works in Law and Philosophy, and is a good friend. I thank him for coming on scant notice and vague emails; he was always willing to accommodate us, and I appreciate that. Hannah Garber-Paul is from the city of Chicago, a friend of Professor Nussbaum and Rabbi Wolf, a member of "First Breath" which many of you may have heard of in Chicago, a very well received theatrical production concerning the lives of gay and lesbian youth. Our own professor, Martha Nussbaum, the Ernst Freund Professor of Law and Ethics in the Law School, the Divinity School and the Department of Philosophy here at the University of Chicago has graciously agreed to help us by moderating. So we welcome them all, and we welcome you.

MARTHA NUSSBAUM: Okay. This is what we'll do. Each speaker will speak for no more than ten minutes. Then if speakers want to ask questions to one of the other speakers, we'll have an opportunity for that to take place, but then we will turn things over to questions from the floor. Reverend Dell will go first, then Arnold Wolf, Hannah Garber-Paul, Vince Samar, Dwight Duncan, and I will speak last. So, Reverend Dell.

REVEREND GREGORY DELL: Thank you. My hope is to speak considerably shorter than ten minutes, but preachers always say things like that and never make it. I guess that the briefest thing I could say is "yes" in answer to the question: "Should America recognize same-sex marriage?" I am a United Methodist pastor, currently suspended by my denomination following a church trial, for conducting a service of holy union for two members of the congregation I serve. In fact, it was the thirty-third such service I've conducted over the last eighteen years. But until 1996, the United Methodist Church did not have an explicit rule about conducting such services. We recognize, those of us who conduct such services, and have done so in the United Methodist Church from the outset, that technically, we were not performing weddings.

There is a very peculiar relationship in the United States between clergy and the government. Peculiar in a lot of ways. But not the least of which is at the point of wedding, at the point of creating a legal marriage, clergy become agents of the state. Some clergy take that with great seriousness, to the point that if in fact the state has any criteria for affirming this kind of relationship between a couple, that the clergy feel themselves bound by that. I belong to another group of clergy. Although I have acted as an agent of the state for weddings for heterosexual couples for twenty-nine or thirty years, I have also done what the state would call, if not illegal, then certainly not recognized, services of wedding for couples who, for a variety of reasons chose not to get a marriage license, but wanted an affirmation of their relationship.

Now, I say that by way of background because I want to say just very briefly, about same-gendered relationships, that I cannot think of a single reason why such services and such relationships should not receive the same protections, the same possibilities, the same measure of accountability that relationships between men and women experience in the institution of wedding. Arguments notwithstanding about the purpose of the state's involvement in wedding is because of its desire to protect children, understanding that, it's certainly been my experience that gay and lesbian couples are no less likely to have responsibility for the care of children than are heterosexual couples, and, conversely, heterosexual couples are no more expected, under at least some circumstances, to automatically begin producing babies any more than gay and lesbian couples.

For me, it is a matter of economic, political, civil and religious justice. My tradition, my understanding of that tradition begins with an affirmation of the goodness of creation. And the goodness of creation means that all identities are in fact to be valued. That what we do with those identities needs care, support, understanding, and at points, discipline, for the best expression of those. My favorite example was, I'm a great chocolate lover. And I learned a long time ago that five malted milk balls are joy and bliss. Six is sin. Just by virtue of what it does to me, by having six. So in that same sense, I respond to understandings about what might guide our human behavior in relationship and in the broader society.

Well, I do want to limit my remarks to those, at this point. My hope is to be able to engage in the discussion that will follow. I do need to be out of this building by about 3:15. So if you see me leave, it's not because I'm mad, although I may be. But that's not the reason I would leave.

NUSSBAUM: Thank you very much. Now Arnold Wolf.

RABBI ARNOLD WOLF: Well, if you hear two preachers speak less than their allotted time, it will be a first in the history of the world. I want to use my few minutes to explain, as I understand it, the situation of Jewish law on this subject.

First, about homosexuality itself. The prohibition against homosexuality, which is perfectly clear in the Bible and in rabbinic writings, applies to homosexual behavior by a heterosexual male, which is presumed to have idolatrous consequences and which is forbidden, and that is all that is forbidden as such, in the classic documents.

Now, a little bit about what a rabbi is and is authorized to do. This will demonstrate to you my ambivalence on this subject and on others. But, I think it's an accurate description. Rabbis are not clergy. Judaism has no clergy. Rabbis are experts in Jewish law and tradition who are privileged to teach it. And sometimes to judge it. But never in the sense of a sacramental act of a clergy person.

How do you get married, if you get married Jewishly? The bride and groom marry each other. And the function of the rabbi, if any, is to make sure that they have it right. The ceremony of Jewish marriage is about six or eight ways of getting married, so that you have to be a great expert in order to go through the ceremony and not be married. You would have to know how to invalidate each element of that. For example, the document, or the exchange usually given of something of value, or the statements, which are promises, and so on.

Now what happens, if two people get married as Jews in a wedding that is not permissible in Jewish law? Or let's say, recognized in Jewish law. For

example, if a mother presumed to marry a son, that marriage never happened. No matter what they go through. It is null, it is void, it is simply not there. More complicated is the case of an inter-marriage. Which, in principle, is also impermissible, but after the fact has certain consequences. For example, if a mother especially, but in later Judaism, the father or the mother happens to be Jewish, the child will be Jewish.

Now the case of same-sex marriage is something like that. Which is to say, probably, two people of the same-sex being married, according to Jewish law are not married. That's where I come in, or out, as the case may be, because there's nothing, in my opinion, that I can do about that. That I am free to do about that. I get no pleasure out of that, I can hope for change, but it seems to me, given the framework in which Jewish marriage resides, that is a long and hard and possibly improper way to go.

It may be that such people should be married outside of the situation within Jewish law. In American law, I have no problem. Not only no problem, I think same-sex couples should have every right that every other couple has, as long as I am not constrained to act against my authorization or against my conscience and participate in it. That's ambivalent, and a little bit mealy-mouthed, for which I apologize, but it's accurate as to where I stand. In other words, you guys do it. Just leave me out.

NUSSBAUM: Thank you. Now, Hannah Garber-Paul.

HANNAH GARBER-PAUL: Before I get started, I would like to thank Professor Nussbaum and Jim Madigan for inviting me to speak. It's a really great honor, and I appreciate it a lot. I'm a little bit nervous, if you can't tell. Sorry.

When we consider the justifications of same-sex marriages, or marriage in general, we really have to think about what it means within our society to be married. What role marriage plays in our society, and what it truly means to be married. In my opinion, marriage is an affirmation of a relationship that is already there. It doesn't make the love happen; it doesn't create loving families; it doesn't create suitable parents. It simply affirms what was already there. And, by letting two people marry, we say as a community and as a society that we have faith in the couple. It says that we believe that they are capable, and that we believe in the relationship that they have, and that we believe that they can form a loving and nurturing environment for themselves and for their children.

Within our society recently, we have begun to view people who are gay as being capable of having these loving and nurturing relationships. We're moving off of the traditional view that people who are gay are inherently wrong or evil or deviant. We've also begun to question what a true family is. We're moving away from the traditional view that a family is always going to be a

mother and a father and children. We now accept the fact that there are going to be inter-marriage relationships. We accept inter-racial relationships. We're creating more equal families, where the wife is no longer the property of the husband. We believe that it's alright for families not to have children necessarily, or not to produce their own children and be seen as still true marriages.

Because of that, because we are now moving away from a marriage that's based on procreation, it seems logical to me, that since gay people are capable of having the same form of relationship as a heterosexual couple, that we should also allow them to have the same affirmation and support from our community. Conversely, in our refusal to permit gay people equality within this institution, we are in fact saying that we believe that they are second-class citizens. We are saying that because of how they love, we are going to treat them unequally, and that we are not going to accept them as full members into our community.

As a young woman within our society, I am urged constantly to have within my life the goal of getting married—to form a committed and loving relationship. Our society maintains that the need to seek out and create this loving family of my own is one of the highest goals I can achieve along the way to becoming a true equal member, an adult member of our community.

However, I am told that if I find that relationship with a member of my own gender, regardless of how loving and how committed we are, that within our society we will not be valued equally. We will not be allowed to share a mortgage, or job benefits. If we separate, strangers can take our children. If one of us is in the hospital, the other one may not be able to see them. How can we maintain a loving and supportive and stable family if our society is going to attack the essence of our humanity? They are denying us the ability to maintain a family. They are denying us support. They are denying that we are true equal members of humanity. And it's not because of any rational judgment on our individual ability to love, or to nurture. It's simply because people that we choose, that we love and that we want to spend the rest of our life with happen to have the same gender as we do.

NUSSBAUM: Thank you very much, Hannah. Now, Vince Samar.

VINCENT SAMAR: Let me first express my very heartfelt appreciation to the University of Chicago Law School Roundtable for inviting me to participate on so distinguished a panel discussing the very important civil rights topic of same-sex marriage. The members of the Roundtable have shown great discernment in recognizing that the question of what to do about same-sex marriage is certainly one of the cutting-edge civil rights issues of the new

millennium. To me, the issue is both very clear and very difficult.¹ Very difficult because, at present, there is no clear societal consensus on the political morality of same-sex marriage. Very clear because the best theory of politics—the one that protects basic human dignity—requires that same-sex marriage be made available to all persons on the same basis as opposite-sex marriage. Permit me to explain why this is the case, and let me begin by saying why marriage in general is (and ought to be) a fundamental human right.

I begin by noting that the institution of marriage is formed as a reflection of the partners' mutual love. Alan Gewirth has said that it is entered into for purposes that enhance the partners' general abilities of agency (that is, their individual freedom and well-being) as evidenced by its ability to enhance their "deeply intimate union and extensive mutual concern and support for each other."² Martha Nussbaum has added that "emotionally and morally, being able to enter a legally recognized form of marriage means [having the] opportunity to declare publicly an intent to live in commitment and partnership," to seek public recognition as a union, and to engage in the expressive act of "declaring a commitment in the presence of others."³

As such, marriage contributes to individual human capacity-fulfillment by making each partner the best that he or she can be with respect to human relationships. It also contributes to individual self-worth and dignity by allowing the partners to be both the locus and source of the purposes that each wants to fulfill. The attribution of dignity is as true for gay and lesbian couples as for straight couples. For it is supervenient on the natural fact that each partner is a voluntary, purposive agent who can reflect and evaluate the various ends that constitute a fulfilled life for himself and his partner. And it is also supervenient on a system of ethics or morality (I do not distinguish these here) that would advance self-fulfillment.

Now any system of morality has to presume that the persons it addresses are capable of following its prescriptions. That is to say, it has to presume the actors to be both voluntary and purposive, to be agents. This is a simple result of Kant's dictum "ought implies can." What is interesting is that out of these two elements of voluntariness and purposiveness, Gewirth is able to derive (from within the internal conative standpoint of the agent) rights to freedom and well-being respectively.⁴ These rights, in turn, especially the right to freedom, justifies the subprinciple that every person has the right to enter into

1. For a discussion of the relationship between easy, hard and very hard cases, see Vincent J. Samar, *Justifying Judgment: Practicing Law and Philosophy* (Kansas 1998).

2. Alan Gewirth, *Self-Fulfillment* 143 (Princeton 1998).

3. Martha Nussbaum, *Sex and Social Justice* 201 (Oxford 1999).

4. Alan Gewirth, *Reason and Morality* (Chicago 1998).

such voluntary associations as would enhance his or her individual human capacity-fulfillment. And, under this subprinciple, one finds a justification for the particularist purpose of forming families with special purposes, including the purpose of affording preferential concern for one's spouse. Thus, the universalist moral principle of human rights justifies the creation of marriage contracts under the subprinciple that permits voluntary associations to be established.

The formulation of marriage contracts is an idealization of this particularist preferential concern. It becomes problematic only when it is laid down with baggage related to a history of sexism inherent in our culture. But this does not mean marriage itself need be so laden. For presumably one can enter into a relationship of mutual love that recognizes each partner as equally capable of giving and receiving nurturing and support as well as control and direction over the benefits of their spouse. Indeed, gay men and lesbians *having been* raised as males and females respectively may be in the best position to work out the requirements of this mutuality since they would likely be carrying less role-playing baggage than their heterosexual counterparts.

When two men or two women enter into a relationship reflecting their mutual love, that relationship has the greatest chance of enhancing each of their individual capacities to become the best that he or she can be with respect to human relationships. It also serves as a positive role model for the society where relationships are not always so mutual. This is particularly true when the parties to the relationship have had to fight for this right, as gay men and lesbians are now doing all over the country.

But it is also true that a double standard results when marriage is legally allowed only to opposite-sex partners but not to same-sex partners. As Nussbaum notes, the denial of the opportunity to marry, "reinforces stereotypes that lesbians and gay men are rootless, antisocial and incapable of sustaining permanent relationships thus contributing further to their marginalization and isolation."⁵ When marriage is denied to gays and lesbians but not others, the result is a justifiably deep resentment against this double standard by all who might benefit from it. The basis of this resentment resides in the normative reality that the partners' equal rights to freedom and well-being are being violated.

Now, it is true that universalist morality also sets the conditions for denying the creation of certain voluntary associations. But the only time a person can be denied the right to enter into a voluntary association (in our case of marriage) is if their entering into such a contract would violate the equal

5. Nussbaum, *Sex and Social Justice* at 202 (cited in note 3).

rights to freedom and well-being of others. This simply is not the case with same-sex marriage. No comparable rights of others are violated by the institution being made available to same-sex couples. To the contrary, as Eskridge has pointed out, it seems quite telling of whose rights are being denied that “heterosexual pedophiles, transvestites, transsexuals, sadists, masochists, sodomites, and hermaphrodites” can get marriage licenses in every state but gay people cannot.⁶ If this were all I had to say, it would, at least, lead to the conclusion that it is morally permissible for the state to recognize same-sex marriage for gays and lesbians. But I am after larger game. I want to make the argument that the state should be morally required to make same-sex marriage available to all on the same basis that it makes opposite-sex marriage available.

The basis for this stronger claim is that same-sex marriage is a positive good to the individuals who participate in it and to the society that makes it available. I have already said how it is a positive good to the individuals who participate in it by enhancing their individual human capacity-fulfillment. So now let me focus on how it is a positive good to the society. Here the important point is that same-sex marriage extends human autonomy by way of giving individuals further control over their own lives. Since one justification for democratic government, under universal morality, is its ability to promote individual autonomy, autonomy must be one of the ends of such governments. This follows from the fact that democratic government, like all government, places restrictions on individual autonomy. For these restrictions to be justified as a matter of universal morality, it must be the case that government restricts freedom only when necessary to insure the equal rights of all. Anything more would be an unjustifiable usurpation of individual freedom.

In the case of marriage, human autonomy is manifested by the ease of legal, social and economic arrangements that attend marriage and which grant to the parties greater freedom to interact both with each other and with the society at large. We must not lose sight of the fact that marriage, in the sense that I am considering it, is a social/legal institution that has a long history of goods associated with it. These goods, which in *Baehr v Lewin*,⁷ the Hawaii Supreme Court identified, include:

- (1) a variety of income tax advantages, including deductions, credits, rates, exemptions, and estimates; (2) public assistance from and exemptions relating to the Department of Human Services; (3) control, division, acquisition, and disposition of

6. William N. Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* 12 (Free Press 1996).

7. 852 P2d 44 (Hawaii 1993).

community property; (4) rights relating to dower, curtesy, and inheritance; (5) rights to notice, protection, benefits, and inheritance; (6) award of child custody and support payments in divorce proceedings; (7) the right of spousal support; (8) the right to enter into premarital agreements; (9) the right to change of name; (10) the right to file a non-support action; (11) post-divorce rights relating to support and property division; (12) the benefit of the spousal privilege and confidential marital communications right; (13) the benefit of the exemption of real property from attachment or execution; and (14) the right to bring a wrongful death action.

To not allow these goods to be available to same-sex partners on the same basis that they are made available to opposite-sex partners, would substantially limit the partners' individual autonomy. Even to make these goods available only by an expensive and complicated process of separate legal transactions, including the making of wills, contracts, powers of attorney, etc., with many different parties, would damage individual human autonomy. It would discriminate against poorer gays and lesbians, and it would send the message that all gay and lesbian relationships were of less worth since they do not qualify for the far easier way in which these goods are normally distributed. This sub-classing of one group to another in no way fulfills the state's moral obligation to provide maximal autonomy for all of its members equally. To the contrary, it undercuts that goal as to require that same-sex marriage be allowed as a reasonable and legitimate method for fostering the autonomy of the state's gay and lesbian members.

In this short talk, I have tried to make the argument that same-sex marriage is not merely permissible in a society that recognizes opposite-sex marriage, but that its availability is morally obligatory. This is a result of the fact that same-sex marriage contributes to human capacity-fulfillment in the sense of making the partners the best they can be with respect to human relationships and contributes to maximal human autonomy. It also means that, as a society, we should be less concerned about trying to decide *whether* to permit same-sex marriage and more about *how* to make it available. I hope I have made a slight contribution toward that goal.

NUSSBAUM: Thank you very much, Vince. Now Dwight Duncan.

DWIGHT DUNCAN: I guess I'm going to take a somewhat different tack here. I plan to critique certain social science arguments made repeatedly by those in favor of the legal recognition of same-sex marriage, namely that, 1) same-sex marriage was a historical commonplace in other times and cultures, and 2) that children of homosexual parents develop just as well as children raised by their mother and father. Both claims are in play in the Vermont same-sex marriage case, *Baker v Vermont*, pending before that state supreme court. I responded to both arguments in an amicus brief filed on behalf of New

Journey, et al.⁸ In that case, plaintiff-appellants argued in their brief that “recently published historical materials demonstrate that marriages, or marriage-like relationships have been recognized and supported between people of the same gender throughout human history.”⁹ Two works, a law review article and a book chapter, are cited in support of this claim,¹⁰ both by William Eskridge, Jr., who is currently a law professor at Yale. Actually, the book chapter is simply a re-working of the law review article, which in turn had its origins in the same-sex marriage case brought in the District of Columbia, wherein Professor Eskridge was counsel.¹¹

These cannot be refuted here in detail, but a law review article (this is my show and tell portion), a law review article I co-authored does so in a detailed manner.¹² One example illustrates Eskridge’s historical method: the case of the Emperor Nero.¹³ Eskridge calls the same-sex marriages of the Roman Emperors Nero and Elagabalus the best-documented historical instances of the phenomenon: “The marriages of emperors such as Nero stand as examples of publicly celebrated same-sex marriages in imperial Rome.”¹⁴ Perhaps it is instructive to quote in full the primary sources cited by Eskridge, and I’ll quote them in full to get the full context and flavor of how these imperial liaisons were viewed in pagan antiquity, how far they were from being “recognized and supported,” as appellants’ brief claims. Suetonius in his “Lives of the Twelve Caesars” deals with Nero’s same-sex marriages in a section dealing with his “shameful and criminal deeds.” “Little by little, however, as his vices grew stronger, he dropped jesting and secrecy. And with no attempt to disguise, openly broke out into worse crime. Besides abusing free-born boys and seducing married women, he debauched the vestal virgin Rubria. The freed woman Acte he all but made his lawful wife, after bribing some ex-consuls to perjure themselves by swearing that she was of royal birth. He castrated the boy Sporus and actually tried to make a woman of him. He married him with all

8. Brief of Amici Curiae New Journey, the Massachusetts Family Institute, Inc., the National Association for the Research and Therapy of Homosexuality, Inc., Family Research Council, Parents and Friends of Ex-Gays, Mark E. Williams, Rev. Dr. Andrew H. Selle, and Rev. Dr. Craig Bensen, *Baker v Vermont*, 744 A2d 864 (Vt 1999) (No 98-032), filed by J. Paul Giuliani and Dwight G. Duncan.

9. Brief for Appellants at 49 n 44, *Baker v Vermont*, 744 A2d 864 (Vt 1999) (No 98-032).

10. Eskridge, *The Case for Same-Sex Marriage* at ch 2 (cited in note 6); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va L Rev 1419 (1993).

11. See Brief for Appellants, *Dean v District of Columbia*, 653 A2d 307 (DC App 1995) (No 92 Civ 737).

12. Peter Lubin and Dwight Duncan, *Follow the Footnote, Or, the Advocate as Historian of Same-Sex Marriage*, 47 Cath U L Rev 1271 (1998).

13. The discussion of Nero here follows closely the argument in Lubin and Duncan, 47 Cath U L Rev at 1313-19 (cited in note 12).

14. Eskridge, *The Case for Same-Sex Marriage* at 23 (cited in note 6).

the usual ceremonies, including a dowry and a bridal veil, took him to his house attended by a great throng and treated him as his wife. And the witty jest that someone made is still current: that it would have been well for the world if Nero's father Domitius had had that kind of wife. This Sporus, decked out with the finery of the empresses and riding in a litter, he took with him to the assizes and marts of Greece, and later at Rome, through the Street of the Images, fondly kissing him from time to time. That he even desired illicit relations with his own mother, and was kept from it by her enemies, who feared that such a relationship might give the reckless and insolent woman too great influence, was notorious, especially after he added to his concubines a courtesan who was said to look very like Agrippina. Even before that, so they say, whenever he rode in the litter with his mother, he had incestuous relations with her, which were betrayed by the stains on his clothing. He so prostituted his own chastity that after defiling almost every part of his body, he at last devised a kind of game, in which, covered with the skin of some wild animal, he was let loose from a cage and attacked the private parts of men and women who were bound to stakes, and when he had sated his mad lust, was dispatched by his freed man Doryphorus. For he was even married to this man in the same way that he himself had married Sporus, going so far as to imitate the cries of lamentations of a maiden being deflowered."¹⁵ Thus, Suetonius.

Needless to say, using such a monstrous figure as a poster boy for same-sex marriage is ludicrous. As the leading commentator on Suetonius's "Life of Nero" states: "Mention of specific elements of a normal marriage ceremony is certainly intended by Suetonius to heighten the outrageousness of Neronian libido in general, and the present episode in particular."¹⁶ The commentary also indicates that "It appears probable . . . that Suetonius has confused Doryphorus and Pythagoras," who was correctly identified in the account of Tacitus. And Tacitus wrote, "Nero, who polluted himself by every lawful or lawless indulgence, had not omitted a single abomination which could heighten his depravity, till a few days afterwards he stooped to marry himself to one of that filthy herd by name Pythagoras, with all the forms of regular wedlock. The bridal veil was put over the emperor; people saw the witnesses of the ceremony, the wedding dower, the couch and the nuptial torches; everything, in a word, was plainly visible, which, even when a woman weds, darkness hides."¹⁷ So Tacitus was as disapproving as Suetonius. He continues: "A disaster followed," and goes on to describe the burning of Rome.

15. Suetonius, *Lives of the Twelve Caesars* 258-59 (Modern Library 1931) (Joseph Gavorse, trans).

16. K.R. Bradley, *Suetonius' Life of Nero: An Historical Commentary* 161-62 (Latomus 1978).

17. *The Complete Works of Tacitus* 376 (Modern Library 1942) (Moses Hadas, ed) (Alfred John Church and William Jackson Brodribb, trans).

Do these historians think that Nero's same-sex weddings were "commonplace"? Indeed, all the classical pagan sources on the same-sex weddings of both Nero and Elagabalus, far from expressing recognition and support, express outrage and repugnance. Lampridius, for example, introduces his "Life of Elagabalus" by saying, "I should never have put it in writing, hoping that it might not be known that he was emperor of the Romans. Were it not that before him this same imperial office had a Caligula, a Nero and a Vitellius." And he then goes on to record that these emperors "were murdered, dragged through the streets, officially called tyrants, and no man wishes to mention even their names."¹⁸ No one, that is, except Eskridge.

Anyway, there's plenty more where that came from in my law review article if you're perverse enough to want to continue.¹⁹

As to the second argument, the homosexual plaintiff-appellants in the Vermont case, and their amici Vermont Psychiatric Association, et al. also argue that "the children of gay or lesbian, or same-sex parents are as happy, healthy and well adjusted as their counterparts with heterosexual or different sex partners."²⁰ Appellants quote an American Psychiatric Association study, which claims that "not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents."²¹ Amici Vermont Coalition for Lesbian and Gay Rights claim that "studies on this subject had unanimously concluded [that] children being raised by gay and lesbian parents experienced developmental outcomes substantially similar to those of children raised by heterosexual parents."²² These claims are false.

Even some of the studies cited by appellants and their amici, and provided to the Vermont Supreme Court in a massive social science appendix to the amicus brief of Vermont Psychiatric Association, belie the claim that there is no significant difference between homosexual and heterosexual parenting. The research has many limitations and flaws that do not permit the generalizations that appellants would have the court draw. The studies were largely designed to influence the courts,²³ with small sample sizes, inadequate control groups, non-

18. 2 *The Scriptores Historiae Augustae* 105 (W Heinemann 1924) (David Magie, trans).

19. See especially, Lubin and Duncan, 47 *Cath U L Rev* at 1312-21 (cited in note 12).

20. Amicus Brief of Vermont Psychiatric Association, et al at 24 & n 55, *Baker v Vermont*, 744 A2d 864 (Vt 1999) (No 98-032).

21. Brief for Appellants at 36 (cited in note 9).

22. Amicus Brief of Vermont Coalition, et al at 11 n 10, *Baker v Vermont*, 744 A2d 864 (Vt 1999) (No 98-032).

23. For example, Charlotte Patterson, co-author of a number of articles appended to Amicus Vermont Psychiatric Association's brief, is quite open about her desire to influence courts: "[T]he research findings can be brought to the attention of the courts in the form of amicus briefs. . . . Uncontroverted scientific evidence may not influence the courts as much as some social scientists would like, because the social,

random participation and consequent response bias. These significant limitations cast significant doubt on the findings of such studies.

In 1993, Belcastro, et al. reviewed the published database studies on homosexual parenting and evaluated each according to accepted scientific standards.²⁴ Their “most impressive finding was that all of the studies lacked external validity.”²⁵ The conclusion that there are no significant differences in children reared by lesbian mothers versus heterosexual mothers is not supported by the published research database.²⁶ Indeed, other recognized authorities conclude that “conducting research in the gay community is fraught with methodological problems.”²⁷ Now, suffice it to say that the methodological problems of all these homosexual parenting studies are such that the most that can be established from them is that the hypothesis of equivalent results with mother/father parenting merits the Scottish verdict “not-proven.”

Obviously, this is a complex scientific issue. Belcastro, et al., Professor Lynn Wardle of Brigham Young University,²⁸ Doctor George Rekers of the University of South Carolina, and a forthcoming methodological critique of homosexual parenting studies by Robert Lerner and Althea K. Nagai demonstrate the weaknesses of all these studies. My own amicus brief in the Vermont case thoroughly reviews the eighty studies submitted by the appellants’ amici and finds them essentially flawed²⁹ because of defects in research design. Many studies do not include a heterosexual parenting control group. Or they compare lesbian couples to single mothers. Thus, no comparison is possible with mother/father parenting. Another defect is that they use defective sampling techniques. These studies use small sample sizes

moral, and religious values of judges and legislators often hold sway over all other considerations. . . . Because lawyers often have little or no training in the area, they often fail to appreciate the value of social scientific evidence, believing instead in the superiority of moral and philosophical reasoning.” Charlotte Patterson and R. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 (3) *J Social Issues* 29, 45 (1996).

24. Philip A. Belcastro, et al, *A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children’s Sexual and Social Functioning*, 20 (1/2) *J Divorce & Remarriage* 105 (1993).

25. External validation is defined as “validation of a measure by correlating it with an appropriate external criterion as, for example, validating an aptitude test by establishing high positive correlation with school grades.” *Dictionary of Behavioral Science* 133 (Academic Press 1973) (Benjamin B. Wolman, ed).

26. Belcastro, *A Review of Data Based Studies* at 105-06 (cited in note 24).

27. L. Koepke, J. Hare, and P.B. Moran, *Relationship Quality in a Sample of Lesbian Couples with Children and Child-Free Lesbian Couples*, 41 *Family Relations* 224, 225 (1992).

28. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U Ill L Rev 833 (1997).

29. This passage is drawn virtually verbatim from the amicus brief’s section on parenting studies, which was originally drafted by Dr. George A. Rekers and Dr. Mark D. Kilgus of the University of South Carolina School of Medicine.

that are not random. Thus, no generalization is possible. And the studies analyze data and interpret their findings erroneously.

Let me give you one egregious example, if I can find it. In their study of children from homosexual and heterosexual mother-headed households, Green, et al., stated in the abstract of their article, “no significant differences were found between the two types of households for boys and few significant differences for girls.”³⁰ But this flatly contradicts the results reported in the body of the article. In the amicus brief of Vermont Psychiatric Association to the court, the inaccurate abstract is repeated: “no difference between 56 children of lesbian mothers and matched group of 48 children of heterosexual mothers with respect to gender identity. No difference between sons in two samples with respect to gender role behaviors. Daughters of lesbian mothers demonstrated less adherence to traditionally sex-typed standards, though are still similar to many other same-age girls.”³¹ With regard to statistically significant differences between the two types of households for boys, however, the body of the article states: “Thirty-two percent of lesbians’ sons wanted to play at both sexes’ activities equally, as opposed to only ten percent of heterosexuals’ sons.”³² “Younger boys who had been living in a house without a man for a longer period of time were more likely to mention a woman as a person they would like to be like when grown.”³³ “More children of lesbian mothers showed a ‘considerable’ interest in play-acting and role-taking than did children of heterosexual mothers.”³⁴ “Sons of heterosexual mothers were more likely to have experienced more than one period of separation from father, whereas sons of lesbian mothers typically had experienced a single separation.”³⁵ “For the two boys’ groups, seventy-three percent of heterosexual mothers encouraged truck play, compared to only thirty percent of lesbian mothers.”³⁶ “For the first year of life, the majority of lesbian mothers reported having spent fewer daytime hours holding or touching their infant sons than did heterosexual mothers.”³⁷ Furthermore, the article reported many statistically significant differences between the daughters from the two types of households, including: the daughters of homosexual mothers had significantly more cross-dressing, more rough-and-tumble play, more playing with trucks, more play

30. Richard Green, et al, *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 *Archives Sexual Behavior* 167, 168 (1986).

31. Brief of Vermont Psychiatric Association, et al at 35 n 93 (cited in note 20).

32. Green, *Lesbian Mothers and Their Children* at 178 (cited in note 30).

33. *Id* at 178-79.

34. *Id* at 177.

35. *Id* at 174.

36. *Id* at 179.

37. *Id* at 174.

with guns, more play with boys' activities, greater preference for both masculine and feminine activity, and greater preference for taking masculine adult roles than the daughters of heterosexual mothers. And "girls whose mothers were active in lesbian or feminist organizations were significantly likely to express an interest in traditionally masculine occupations. Fifty percent of heterosexual mothers reported holding their daughters seven hours or more per day in the first year, whereas only seventeen percent of lesbian mothers reported holding their daughters this many hours."³⁸ This impressive list of developmentally important differences is hardly just a few differences, as the authors' abstract misleadingly states.

To conclude, I would say that these studies do not provide a reliable basis for a radical change in public policy such as the advocates of same-sex marriage intend. There are other arguments for recognition of so-called same-sex marriage that do not purport to be based on history and social science. I would suggest that we proceed to those arguments without the encumbrance of an advocate's tendentious reading of history or result-oriented sociological and psychological studies. As one of my clients observed, "one of the beautiful things about a democracy is that social scientists can ruin a generation, and then come back twenty years later with our objective measures to validate what common sense should have told us."³⁹ Thank you.

NUSSBAUM: Thank you very much. Now, I'll be the last speaker.

Marriage has three aspects: the religious, the emotional, and the civic. The three are in principle quite separate from one another, and here I'm only going to address the third one. So I'm going to take the question posed in our title as the question, "Should American law give legal and institutional recognition to same-sex marriage?" Now, in a sense, the minute one poses the question in that way, there seems to be but one reply that someone who supports the equality and dignity of lesbian and gay citizens can give. If the only alternative to same-sex marriage is the persistence of marriage as we know it, together with the denial of marriage rights as they are now denied to same-sex couples, then there's a powerful case to be made for opening those rights to same-sex couples—and I think Hannah and Vince in different ways have made that case—because marriage is a bundle of important civic privileges, not to have which does define the status of same-sex couples as inferior. On the other hand, what I will argue here is that the whole question should be taken up in a more reflective way, not taking for granted the civic salience of marriage, as we know it, with its large bundle of highly diverse privileges. I favor a thorough

38. Id.

39. Dr. Joseph Nicolosi, quoted in Don Feder, *Gay Parenting at the Barricades*, Boston Herald 21 (Sept 27, 1993).

rethinking of the whole question of marriage as a civic status and experiments with disaggregating its component parts. Many of these experiments are currently being tried in European nations, and a similar more experimental approach has long been advocated by many feminists who don't think that marriage has such a sterling record that it should be immune from rethinking. Other thoughtful writers on the topic have joined them in calling for a more experimental approach, including such perhaps unlikely allies as Judge Richard Posner and radical gay activist Michael Warner.

What is marriage as a civic institution? As Richard Posner notes in *Sex and Reason*, "marriage is a status rich in entitlements."⁴⁰ And I was going to read out the list from *Baehr v Lewin*⁴¹ that the Supreme Court of Hawaii put together, but since Vince has read it already, I won't read that long list of fourteen civic items. But I want to add this list is far from complete. To get even close, we need to add the right of next of kin in hospital visitations, decisions about medical treatment and burial, immigration advantages, and many other discounts and privileges available to married couples on a more local basis. Now this is a very large bundle of privileges. Obviously, it's better to have them, than not to have them. And to be denied them on the basis of one's sexual orientation seems to me to be a major form of social inequality and hierarchy. But the question is why should there be this large bundling in the first place? Many European nations recognize forms of contractual cohabitation that confer many of the advantages of marriage, particularly with regard to tax and inheritance. Even in the U.S., we recognize common law unions as conferring many of the rights of marriage, particularly to post-divorce maintenance or palimony. France has recently taken the most innovative step yet, by making available civic solidarity pacts to people who have lived together for a certain period of time and who contract to enter that status, which confers privileges in areas including property, inheritance, and medical care. The remarkable feature of the French arrangement is that it permits groups not defined by a sexual or emotional bond to so register under certain conditions; they may be relatives or even long-term intimate friends.

Feminist scholars have long expressed some skepticism about marriage, because that institution has a rather bad history where women's equality is concerned. Maybe it can change, maybe it is changing, and maybe the entry into it of same-sex couples would be an agent in that change, but this is by no means obvious. When women were chattels, there were very strong reasons for bundling all those entitlements together under the umbrella of marriage. The

40. Richard A. Posner, *Sex and Reason* (Harvard 1992).

41. *Baehr*, 852 P2d 44.

institution, so conceived, served to cement men's control over women and their own legitimate children. Equally obviously, it helped to define other social groupings as inferior: single women, divorced women, groups of friends living together, in fact every way in which women live without putting themselves under male control. That definition of other female statuses as inferior, was part of the point of bundling so many privileges together under the rubric of marriage. Similarly, anyone who chose to have and raise children not in the traditional, patriarchal family would lose out. And again, this was a big part of the point of that institution. If we don't have the goal of cementing male domination over women and children anymore, as both Posner and Warner also observe, there's no very clear reason why all of these privileges should in fact be bundled together. Some seem specific to households rather than to romantic couples. Others may be more closely linked to close intimate ties, but again it's not clear why these ties would have to be thought of as marriages. Some nations already extend immigration advantages to unmarried couples, Australia, for example. Even in the U.S., until 1996, it was possible to win special immigration consideration for intimate partners. The abrupt change that ensued caused many painful separations as people who loved one another were deported. Child custody, similarly, could be linked to relations of care for which evidence could be given rather than to marriage. India gives federal government support to the formation of women's collectives, groups that promote women's education, employment, and self-esteem. But also, they promote a communal approach to child-rearing and the care of young children. These women typically remain married in fact. But the privileges of being in a woman's collective, or a *songham*, are often greater than those attached to marriage.

Gay and lesbian couples, like many modern couples, are experimenting on how to combine the features of coupling that used to be all grouped together under the rubric of marriage. Consider this description from lesbian feminist Claudia Card,

My partner of the past decade is not a domestic partner. She and I have formed some kind of fairly common social unit, which so far as I know remains nameless. Along with such namelessness, goes a certain invisibility. We do not share a domicile; she has her house, I have mine. Nor do we form an economic unit; she pays her bills, I pay mine. Although we have fun together, our relationship is not based simply on fun. We share the sorts of mundane details of daily living that Richard Moore finds constitutive of marriage, often in her house, often in mine. We know a whole lot about each other's lives that the neighbors and our other friends will never know. In times of trouble, we are each other's first line of defense. And in times of need, we are each other's main support. Still, we are not married. Nor do we yearn to marry. Yet if

marrying became an option it would legitimate behavior otherwise illegitimate and make available to us social securities that will no doubt become even more important to us as we age. We, and many others like us, might be pushed into marriage. Marrying under such conditions is not a totally free choice.⁴²

I think that is true of many heterosexual couples, too, that there is a subtle coercion to enter that status even though it might not be the most sensible choice for the individual people. And I might add, if Card and her partner married, then everyone would expect them to live in the same house. If they didn't, then people would think that was very weird or that they were not getting along well and so on. So an arrangement that suits them well, and suits many other people, would have to be given up perhaps in favor of some more conventional norm.

John Stuart Mill, in *On Liberty*, described the many ways in which the tyranny of public opinion prevents people from carrying out possible, fruitful so-called experiments in living. Mill's call for a less dictatorial type of public culture has recently been taken up, not only by feminists such as Claudia Card, but also by Judge Posner, who explicitly took Mill as his starting point, in calling for a more experimental approach to marriage and the statuses it embodies. And it has been taken up by Michael Warner, who holds in his new book, *The Trouble with Normal*, in a very Millian way that a "politics of shame" often makes people follow the social majority, even when there are no very good reasons to do so. The rush to endorse marriage on the part of many gays and lesbians is, Warner argues, an unfortunate result of the social pressure marriage brings to bear on us all, simply by being there as the defined, privileged status.

Warner makes three arguments against taking marriage rights as a major goal for the movement for lesbian and gay rights. His first argument is tactical; working for marriage rights is a deflection of valuable resources and energy away from causes that are both more urgent and more immediately possible, he thinks—for example, aids prevention and education, and general nondiscrimination laws in housing and employment. Indeed, there's no reason to think that the marriage struggle is winnable in this country any time soon. So it may well be that a lot of money and time is being simply wasted. Warner also makes two deeper and more controversial arguments, closely connected. The first is that by pushing for marriage rights unthinkingly, we validate the social status quo, when we should really be thinking hard about what living arrangements we want to support with what forms of state action. The second

⁴² Quoted in Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Free Press 1999).

argument is that the status of marriage as it exists in American society is inherently discriminatory and hierarchical, setting up some couples as worthy, and thus defining others ipso facto, as less worthy. The two arguments are closely linked because Warner believes that a more reflective and experimental approach to the bundle of political privileges currently associated with marriage would be likely to lead to at least some disaggregation and that disaggregation would produce a less hierarchical social state of affairs. I have suggested that there are many reasons to accept both of those arguments, and to seek therefore, a situation in which the various privileges and statuses now associated with marriage will be disaggregated. This state of affairs would indeed, as Warner argues, remove stigma from single people and in general conduce to a society in which people would be simply less likely to stigmatize one another around issues of sexual lifestyle. It will also encourage experiments in living, at least some of which might prove fruitful. Given the sorry record marriage has had as an allegedly protective home—but really a home that has protected many things both good and bad, including battery and rape of women, and including the sexual, physical and emotional abuse of children—I think we need all the experimenting and creativity we can get if we are to have a more flourishing society.

Let me stop and thank all of our panelists very, very warmly for what they have said here. [*applause*]

And now what I think I'll do is moving from this end of the table to the other end, I'll just ask each panelist if he or she would like to make one comment addressing anything that any other panelist has said. And then I'll throw things open to the floor.

DELL: Just maybe a brief response to Dwight's comments, which I found illuminating and amusing. At this point, particularly, I also have a tendency to be rather skeptical about sociological and historical arguments because one always has to examine the one making the argument and the sources they choose to use to support their position. I wonder sometimes for instance if an argument around racism would best be supported by those who supported slavery. But what was most amusing, I think, to me, and informative, was your final comments about some of the actual differences between boys and girls. It occurred to me that there may be a number of women among our number today who are actually going after the male profession of being lawyers, as there have been women now with the audacity to decide to become clergy persons. So some of the distinctions, I wouldn't necessarily argue, I would simply, rather, suggest that they can be evaluated in terms of their benefit to the human family and to the expression of the full potential of an individual. But I

would say just in general that I have appreciated very much the comments of all of the panel members.

DUNCAN: Likewise, I found the discussion very interesting. I think the one point I would like to pursue off the top of my head is the autonomy point that Vince Samar made, and I'm just wondering if the autonomy argument that he articulated would also basically encompass polygamy and incestuous marriage. Would autonomy also lead to those results?

NUSSBAUM: I will let Vince answer when we get to him. I just want to follow on what Greg Dell said. And to say that when you [Duncan] read the list from the psychiatrist, I kept thinking, "Oh good. They don't play with trucks all of the time." *[laughter]*

DUNCAN: Exactly.

NUSSBAUM: I think child psychologists always are subject to what Michael Warner rightly diagnoses as the "tyranny of the normal." They somehow think that a statistical norm is also a moral norm, or a norm of human flourishing, and of course it isn't. Most children are unkind, greedy, and cruel. *[laughter]* And if they see a child who is more reflective or more sensitive than another child they typically try to say, "That child isn't in the group enough, etc." So I'm skeptical of psychologists as are you [Duncan], but I am skeptical I think for different reasons. Because I think they exhibit a lack of normative thinking, but they behave as if they've already done the normative thinking.

SAMAR: I guess I have to respond, but before I do, I have a conscious comment, too, and that is very simply, I like the last part of Mr. Duncan's remarks because I thought they actually exposed why all the more same-sex marriage is necessary. When you come in with less heterosexual role-playing baggage, you don't necessarily confine children, who might have a lot of experiences and a lot of directions to go, to one narrow role model that they have to live up to. A boy doesn't have to necessarily go into the marines, or be a truck driver—perhaps he will, perhaps he won't, perhaps a woman will—but all these things are possible. And the idea that maybe we are upsetting role models, yes, it's probably the case we are, and maybe that's a good thing, because maybe in that autonomy comes.

As for the part about my discussion of autonomy, sure, let's consider polygamy in the right context, not here, this is about same-sex marriage. Let's consider incest in the right context, not here, this is about same-sex marriage. Let's consider those on their merits as to whether they are good or bad. It may turn out that polygamy, as it is usually thought of, as being available to men and not women, is bad for reasons that have to do with domination of women. And that may be a very strong argument for why that restricts autonomy. And there might be problems with incest, or not. But those things can be handled

on a one-by-one basis. We don't need to assume a slippery slope because we allow same-sex marriage, that we necessarily allow all of the rest on the surface.

GARBER-PAUL: Everyone else has had wonderful comments. Very interesting. I was going to comment on Duncan, as well. But everybody else has, and they have all taken exactly what I was going to say. [*laughter*] Again, I just wanted to add how interesting I found it. They helped to break down the stereotypes of what it means to be a girl and what it means to be a boy and to assume that based on your gender you have particular roles to fulfill. I kind of like the idea that they don't have to do that anymore. Definitely a benefit in my mind.

WOLF: I want to pick up on Martha Nussbaum's notion of disaggregation, which I think is crucial, at least to a religious perspective. Religion it seems to me should not endorse society as it stands, or images of society proposed by various constituent groups thereof. For example, some people who are married by American law are not married by Jewish law. The best case I know is the following. An older man, very successful, marries a trophy wife. And shortly after that drops dead. His son then marries the trophy wife, his stepmother. This actually happened. It is permissible in American law; it is not permissible in Jewish law. Something like that applies to abortion. Where it is perfectly clear from Jewish law that a woman has a right to abortion at any time that she claims to need it. But she should not avail herself of that right except when she really needs it. And there are many other such cases, I think including the case of same-sex marriages. I do not think that a religion must endorse or participate in or perform that which the state probably ought to do—it certainly ought to equalize the relationship of gay people with straight people. Therefore, I have a little bit more than a personal stake, in saying it is the state's business to settle this, and the citizenry in the first place. But as for me, I am committed to a system of law and of theology, which forbids me to participate in this process.

NUSSBAUM: Okay, now we will turn things over to questions from the floor. You can address your questions to a specific panelist or throw it to all of us, and we'll see who answers. Yes, Andy [Koppelman].

AUDIENCE: Mr. Duncan probably figures by now that people are going to pile on him, so I apologize for the barrage. The question of how you measure how a child is flourishing—the measures that you cite are controversial. There are things that you might imagine when you started studying same-sex couples you might have found that would certainly trouble some of us who are advocates of same-sex marriage. There are dimensions of well-being that aren't particularly controversial. Are kids doing well in school? Are they dropping out of school? Are they showing psychiatric problems? Are they hurting themselves?

Are they getting into trouble with the law? Is their ability to form relationships impaired? Are higher numbers of girls getting pregnant before the age of fourteen? There are some measurable aspects of well-being that you expect the studies to turn up. And you are right that the studies are in the aggregate flawed, and Belcastro's studies of children who are raised by same-sex couples are flawed. Better studies need to be done. But even the flawed studies do show us something. Isn't it indicative of something that none of these studies have shown any worse outcomes on these unproblematic measures of well-being, so that you have to stretch to controversial things like "Gee the girls are playing with trucks," in order to find any difference at all?

DUNCAN: Well, I was addressing the comparative issue about heterosexual parents versus homosexual parents, so I wasn't going at the issue on some kind of an absolute scale of well-being. One of the many problems with these studies methodologically, is that we don't have longitudinal studies. We don't have studies over time. So for example, you said, numbers of girls under fourteen that get pregnant. We don't have lifespan studies yet on this subject. But it would really take that. One of my points is that basically we do not know what the socio-effects of legalizing same-sex marriage will be in fact. And my view is that since it is a radical change compared to not only what our own tradition has been, but what pretty much the universal consensus of the world has been on this subject, the burden of proof should be on those who are proponents of the change. My point is just the sociological studies that they have produced don't make the case.

NUSSBAUM: Could I just pose a question? Do you think the world as it has been has been happy and good? [*laughter*] Because if you do, then there's reason for wanting to keep it as it is. But Mill's whole point was that we might not have that view.

DUNCAN: Well, obviously the world as it has been has been a mixture. There are some good things and some bad things. There have been improvements over time and there have been things that have deteriorated over time in particular times and places. I don't want to come across as someone who is opposed to any changes whatsoever in society. But here we are talking about an institution that pretty much every society has the same view, that homosexual relationships, whatever their status, are not entitled to be recognized as marriages, among other reasons because of the relationship between marriage and future generations. And however else you consider it, homosexual couples are incapable of procreating as a couple.

SAMAR: I find it interesting that the burden of proof should be placed on those who want to seek same-sex marriage, when you yourself have just said, at least finally said, that it hasn't been all that sweet and dandy with the way

things have been. Why merely preserve a status quo and on that ground alone shift the burden of proof to those who want to change it? There are plenty of people who live as married. I myself have a partner for five and a half years. That person is very special to me. To this day, he is my power of attorney, and I'm his attorney. I live with him as a couple and I would like to have that marriage recognized. I would like to have him not fear bringing me to a Christmas party at his place of employment, which he did at the time. I testified to this when we got the civil rights ordinance, the human rights ordinance passed in the city of Chicago. I don't see any reason to make the burden of proof be on those who want to have self-fulfillment, have human capacity fulfillment. It seems to me when you yourself admit things haven't been so hunky-dory, that the burden of proof is on those who want to keep things the way they are. That's the way I think it should go.

DELL: Let me make a quick response. I do have to leave. I want to just recount an experience I had my first year at Broadway Church when a visiting adult daughter of one our members came and heard me preach a sermon in which I endorsed same-gender services of holy union and marriage. As we left the sanctuary, she said with a very pleasant smile, "Reverend Dell, do you really think that two people of the same gender can commit their lives to each other, understand each other and support one another? Do you really think it is possible for people of the same gender?" I said, "I've been married for almost thirty-one years. I'm not convinced it is possible for people of the opposite gender." *[laughter]*

I think there are real dangers in doing the kind of analysis out of sociological data. For instance, approximately three times as many gay teenagers commit suicide as straight teenagers. Does that mean that being gay in itself suggests some weakness in psychological make up? Or do we need to look more broadly and ask the question, what happens to a young person as they discover that they are gay and lesbian? So I just want us to be cautious about making use of so-called scientific analyses when we are making evaluations of what is fulfilling for people. And at the same time, taking a more—I would say—realistic view, on what these so-called normative patterns, that society has had for at least two thousand years in Western society, have actually produced.

AUDIENCE: I find it interesting that the differences that Professor Duncan mentioned were focusing on playing with trucks. I happen to know many married couples who share a rig and drive together, so I don't see that as being gender-based or sex-based. But we are ignoring the differences in holding infants. There is extensive medical literature, in fact, involving questions about women in prisons being able to nurture their babies. There is extensive medical

literature that shows that tactile contact with infants is extremely important and I find it troubling that you have all those saying there's an eight-times differential in the homosexual mothers holding of children of the opposite sex than you did of the heterosexual mother. As a feminist, Professor Nussbaum, how do you reconcile what at least currently medical science would suggest could have severe detrimental effects?

NUSSBAUM: Well, I haven't read all the studies and I don't know therefore how much holding they suggest is important but what I do know is that cross-cultural studies of child-rearing in India have shown that mothers in India typically don't hold their infants in the same way at all. They tend to carry their infants on their hip while they're doing other tasks and the infant is introduced to a larger network of an extended family and of village group much earlier than the American child. What Stanley Kurtz, who is an expert on Indian child-rearing practices has argued—and I have no view on this because these studies are very few and I don't know them all either—Kurtz just thinks that maybe there is something to be said for that, because we know that the very intense romantic bond between infant and mother may be the source of an idealized set of romantic expectations in later life, as Proust so beautifully demonstrates, and therefore of some unhappiness. Whereas making a child part of a group may be the source of a more realistic set of social expectations. To me that is a hypothesis, I don't know, but we need to look at things not only in the American spectrum. But we need to consider a wide range of child-rearing practices, all of which seem to produce rational adults, before we could be able to say anything at all on that question.

AUDIENCE: I don't know that Professor Samar addressed the question Professor Duncan posed. Because Professor Samar, your argument is based on autonomy, and not of being permitted to do anything unless it violates the rights of others. So I'm curious, if two brothers want to marry, or three brothers want to marry, or if three brothers and a dog want to marry, [*laughter*] how does that violate the rights of others? That's just as good as an autonomy argument.

SAMAR: Let's get rid of the dog, because I'm not sure the dog can consent, as an issue of autonomy.

AUDIENCE (same): Well I disagree with you on that. But it is interesting that your opening objection is that the dog cannot consent. [*laughter*]

SAMAR: Since you raised it on autonomy, and the dog can't consent, that seems to be enough right away to dispense with it on that. Now in terms of the remainder we are back again on the slippery slope ground. You seem to want to say that because we open the door to same-sex marriage, therefore we open the door to all these things. Perhaps what we need to do is, we need to look at each

type of case-situation—maybe we have to look at incest, maybe we have to look at polygamy—and ask on its merits, are there good grounds to allow it or not, or is autonomy ultimately harmed by that. In the case of polygamy, if women are not allowed to marry more than one person, but men are, that may have a further way of detriming women in the sense of domination of women. In the case of incest, there are biological, medical, and health reasons. But there may be other areas where those problems don't hold up, where there is enough distance, or it is not going to lead to children, or something of that sort. Those matters need to be looked at individually on the merits, and I don't think that our discussion of same-sex marriage, because we allow one thing necessarily means we will or will not allow the other. So on that ground, I think that you're in the wrong forum for that issue to be discussed.

WOLF: But it is not just that we're talking about apples and oranges. Your defense of same-sex marriage, will in principle apply in these other cases, unless you can distinguish them in principle, and not simply case by case.

SAMAR: The defense of same-sex marriage that I'm making applies to all areas of autonomy in which you can add to human capacity fulfillment. That much is true, and if those areas did that, it would apply to that. But then the question becomes, are the other forms of arrangements indeed going to contribute to human capacity fulfillment? Part of that is a conceptual question; what do we mean by human capacity fulfillment? But more often, part of it is also an empirical question. So there would be specific relevant information to come in on each of those types of cases that may or may not apply to the other ones. Since part of the empirical part would be to find out information as to the subject of same-sex marriage, we would need to have that information available.

WOLF: So, you would be prepared to await empirical evidence that will justify same-sex marriage, as you are with the others?

SAMAR: In the case of same-sex marriage, as in the case of the any of the other matters that would come up as well, the burden of proof, I have said, is on those who would want to restrict it. If there is empirical evidence, if there is other kinds of evidence out there, that burden of proof then needs to be met by the people in question.

AUDIENCE: I would like to challenge Professor Duncan's notion that legalizing same-sex marriage would represent a radical change, particularly from the standpoint of the subjects that you are talking about. Same-sex couples have always existed and will continue to exist. They have raised children throughout history and will continue to do so. All that recognition would change is the context, the legal context, in which they can do that. I

guess I don't see how that's radical, from the standpoint of the specific social topics that you've mentioned.

DUNCAN: Well, my view is that it radically changes the understanding and definition of marriage, which has classically been understood as the union of a man and a woman. Ancient Roman law had that definition. That wasn't foisted on us by Christianity. That is the consensus definition of the world on that subject. So it represents a radical change. Admittedly, there have always been homosexual relations, but they have been considered separate and distinct from marriage, which was always between a man and a woman. It would be as if we were to say that from henceforth, law firms shall be considered marriages. My point would be, well, then you've changed what marriage is. Even people who are married now are doing something different than they were before because now law firms are sorts of marriages. I guess there's a definitional point here that I think is quite radical.

NUSSBAUM: Let's go back to Rome, because I think there is an issue here. Marriage in Rome was several different things. It was a way of cementing control over women. And we know that even in Augustus' very repressive *Lex Iulia Del Avutelieres*, it was not adultery for the husband to sleep with a slave or a hetaera, or any kind of woman who wasn't somebody else's wife or daughter. It was only a problem if he slept with somebody else's wife or daughter. Whereas for the woman to sleep with anyone else, it was the crime of adultery. So it was a highly asymmetrical institution. I don't suppose you defend those legal asymmetries today. And when we've changed those asymmetries, we've changed what marriage is. On the other hand, in Rome, too, it was also increasingly conceived of as a form of emotional companionship. Susan Treggiari's very fine book on Roman marriage shows that, by contrast to Greece, Roman marriage was a way of expressing love and commitment over a complete life.⁴³ The inscriptions of graves of spouses express this kind of love and loyalty. Now it's that element that presumably your questioner is saying is one that has always been there for same-sex couples. So what would be done is to play up that element and not the other element. So it is not like calling a law firm a marriage.

DUNCAN: Well, one of the other aspects of the classical Roman understanding of marriage was ordered to the procreation and education of children. That's in Justinian's *Institutes*, it's in the *Digest*, right in the opening passages: "the union of the male and female for purposes of procreation and the education of children."

43. Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford 1991).

NUSSBAUM: Yes, but they loved adoption, and there was a tremendous amount of adoption in Rome—often, because there was a high rate of childlessness, who knows why. Marcus Aurelius was an adopted child. So, many of the Roman families that we know about got their children by adoption. They didn't have a moral problem with that.

DUNCAN: Right, but nor do I with adoption.

NUSSBAUM: But then the question is why not? If you think that marriage is inherently ordered towards the procreation of children, then you ought to have a problem with adoption, as I suppose Jewish law under some interpretations has had that problem.

WOLF: [*nods*]

AUDIENCE: I have a question about autonomy again—I'm sorry I don't mean to beat a dead horse. Many advocates of same-sex marriage have used the autonomy-based argument, but many supporters of the gay rights' movement when it comes to anti-discrimination laws, don't seem to be as concerned with individual autonomy when it comes to refusal to deal or the right to exclude. Professor Epstein has often said that he thinks the autonomy principle should include those rights when it comes to anti-discrimination laws. I wonder what you think of those and whether or not that has any implication for your autonomy-based argument on same-sex marriage.

SAMAR: Well if you remember what I said about autonomy, I said that it had to be maximal autonomy. And that meant to maximize the rights of everyone equally, and not that it's maximizing autonomy in the libertarian sense of the term where we are just concerned about overall maximizing autonomy and without concern for distribution. I am concerned about distribution so it's maximal autonomy generally. So in that sense the autonomy does include an equality principle built into it.

AUDIENCE: I don't seem to understand that. Everyone should have the right to exclude, is what the argument is. And many supporters of gay rights anti-discrimination laws reject that. That being the case, how can you rely on individual autonomy in the marriage context.

SAMAR: To exclude whom?

AUDIENCE: Anyone you want, is the principle. Freedom of contract. Anti-discrimination laws impinge on that autonomy right.

SAMAR: In this situation, where you are talking about freedom of contract, people do not have to enter contracts with any other person . . .

AUDIENCE: Does that include the boy scouts in New Jersey?

SAMAR: Let me finish. People do not have to enter into contracts with any other person, if the contracts are strictly for their individual personal benefits. But if the contracts have broader implications, social implications, or create a

part of an arrangement that the state sanctions, then that arrangement has to be available to everyone. Not having it available to everyone, only available to a select group, would be to give a kind of support by the state to the arrangements of individuals, even if those are discriminatory. That would be the state being colluded into being a part of the discrimination itself. That's what I would object to.

AUDIENCE: How far would that extend? Would that extend to a landlord who just has a single apartment and doesn't want to rent out to homosexuals?

SAMAR: Well, as a general rule, the ways the laws have been written, we have usually allowed landlords up to units of five to exclude someone from their apartments. But anything larger than that—and that's just because there's a feeling that there's a kind of close relationship that doesn't exist in a larger more independent kind of arrangement of a larger number units. For that reason, for example, we recognize more of a kind of familial or close relationship. But if you are asking me in general should the landlord do that, I don't think a landlord should use criteria of sexual orientation as a way of exclusion. I think that still would be wrong. But I can see in that case the amount of harms would be minimal, so there's a kind of *de minimis* argument, and given that, it adds to the self-fulfillment of the individual landlord, one could say that it is in a murky area

WOLF: But the chocolates between five or six? [*laughter*]

SAMAR: Only one or two.

NUSSBAUM: In the back.

AUDIENCE: This is for Rabbi Wolf. I have a question about religious leadership. In this type of legislation, it seems that religious leadership is crucial. I know that the Unitarian Universalist Church openly supports same-sex marriage as well as supports legislation legalizing same-sex marriages. I'm wondering how you feel about major religions as a whole as a group supporting this type of legislation, getting involved.

WOLF: I think the Unitarians have a big problem of no boundaries. This is a case where they didn't even think much about it because they don't have to. Their style is to go for all such, I will say, trendy [*laughter*], but all such simply ethical matters. I think what we learned about ethics in this generation, is that ethics must be grounded, that ethics must come from somewhere. It must depend on something; it must be related to a place and to a time and to a tradition. Now I think that's radical. I don't think that is at all conservative. I agree with Professor Nussbaum that the whole question of marriage has to be seriously reconsidered. The problem of heterosexuality is at least as complicated as the problem of homosexuality and it is hardly discussed at all. So I do

believe that from these religious and other traditions, grounded and boundaried, can come a serious critique of contemporary American law.

AUDIENCE: I consider that placing the burden of proof on those who want change is like considering the defendant guilty until proven innocent. And based on this reasoning, how are you going to get any proof of cases that are not tainted by the attitudes of society towards children being raised in the face of such antipathy from the sociological sources. I don't know how in the world you're going to get any atmosphere where you can raise a child for years to come until society is more accepting of these changes.

DUNCAN: Well as a practical matter, given the context, I would be perfectly satisfied if such a question were to be resolved democratically after debate and discussion—as opposed to being decided basically by a handful of elites in the judiciary and then foisted on the rest of society, which is basically the strategy that is being pursued, very vigorously, by advocates of same-sex marriage. They want this change to occur by judicial fiat essentially. The current polls indicate that the American public is opposed to this by a wide majority. I think until those who are interested in this project can convince the general public, I think it is a bad idea.

NUSSBAUM: Let me just comment on that. I think it is very important to remember that we've had some of the same issues around interracial marriage, adoption, and child custody. There's a case—the law students all know, I'm sure—*Palmore v Sidoti*,⁴⁴ where there was a couple who divorced, then the woman remarried to an African-American man, and wanted to get custody of the child of the former marriage. And the argument was used by the lower court that the child would be very unhappy because the child would encounter all of the prejudice that attaches to an interracial family. And the Supreme Court overruled on the grounds that you must not turn private prejudice into a source of public law. We're in danger of doing that in this discussion. I agree with you that it is very hard. I think it is quite extraordinary that these children do as well as they do on all the major uncontroversial indicators of well-being, considering what they face in the society around them.

Hannah, do you want to comment upon that?

GARBER-PAUL: I think you're absolutely right. I find it fascinating that these children are able to survive as well as they do, given the immense pressure by society to conform. My comrades, my cohorts, who are gay and lesbian face enormous pressure to be quiet about that. The suicide rate, which I believe Reverend Dell brought up, gay and lesbian youth are more than three times as likely to commit suicide. And approximately two-thirds of gay and lesbian

44. 466 US 429 (1984).

youth have been clinically depressed at one point or another. Our society is not supportive of people who don't fit the traditional definition of sexuality when they actually deal one on one with those people. And I'm amazed that these children are doing so well right now.

Getting back to that information, those studies. I found it very interesting that they didn't comment on the role of fathers, only on the role of the mothers holding the children. I would be curious to know if the disproportionate amount of the mothers holding the children could have been impacted by the fact that there were two mothers holding the children all of the time rather than a single mother who got all of the nurturing role and the father didn't play much.

DUNCAN: As to that latter point, I honestly don't know. As to the former point as to why they don't talk about the fathers, it is because—it is not by accident—almost all the studies of homosexual parenting deal with the lesbian mothers. I think the reasons for that has to do with the features peculiar to the homosexual male population. Promiscuity is a big factor in that population.

NUSSBAUM: It is difficult for them to get custody of the children. *[laughter]* Let me ask you, who was it who was referred to as the mother, then? Does that happen to be the one of the lesbian couple that is the biological mother? Is that the one they are assuming that she's the one who is holding; that she's the one we should be looking at?

DUNCAN: You've got me. I'd have to . . .

NUSSBAUM: I think that's pretty important because most of the holding studies show that it could be any person. Of course, adoptive mothers hold their children, too.

DUNCAN: I didn't bring up this study. I didn't support this study. It was the study that the proponents brought up. I didn't bring it up.

SAMAR: One also has to be careful about the majoritarian argument that would simply leave everything up to current majority rule. We have several reasons to think about that going back to the Federalist papers where there has always been a concern about the tyranny of the majority and that there might be some limitations. That's why they adopted a whole Bill of Rights. In addition to that, we also have to recognize as Ackerman has pointed out at Yale, that the amount of thinking that people do about legislation is relatively small. It is like whether I should go to the grocery store at night. Versus what they think about in terms of important constitutional changes, this may involve a lot more attentive thought over a longer period of time. If we simply leave thinking to a simple majority in a short period of time, which is not a great amount of thought, important rights could be lost. When you balance that with the fact that autonomy is in part why we justify democracy and the

majority control that it yields and it supports, then we must make sure that in the process of supporting that majority control, we don't underwrite autonomy. We don't take away from that. And that's been an argument that has gone back in terms of argument in the literature of jurisprudence at least ten years.

AUDIENCE: Professor Duncan, could you cite your study on which you base your claim about promiscuity and homosexual males? Was that your own study?

DUNCAN: Let's see. I probably can if you give me a second.

AUDIENCE: Is there a higher quality study than those offered for the Romans and Greeks?

DUNCAN: How about Andrew Sullivan?

AUDIENCE: He's not a sociologist.

DUNCAN: How about the book called, *The Male Couple: How Relationships Develop*, by McWhirter and Andrew Mattison, 1984.⁴⁵ This is a comprehensive study of 156 male couples and was cited by the proponents of same-sex marriages. It observed that, "Of 156 male couples studied, only 7 couples had a totally exclusive sexual relationship..."

AUDIENCE: It is an unreliable sociological study.

AUDIENCE: It is not a random sample.

DUNCAN: Well you asked me for the cite. And I'm giving it to you.

AUDIENCE: Poor faith, professor.

DUNCAN: Well, I've got the cite here.

NUSSBAUM: Let me just mention the Lauman study, which I think is the only statistically pure and reliable study on numbers of sexual partners. Because their funding was cut, they couldn't study enough homosexual couples to have reliable data about that. I think that the conclusion should be we just don't know.

DUNCAN: Well we don't know, but this is what the advocates said. "Only seven couples of one hundred fifty-six had a totally exclusive sexual relationship, and these men have all been together for less than five years. Stated another way, all couples with a relationship lasting more than five years, have incorporated some provision for outside sexual activity in their relationship. That's of every single couple studied . . ."

WOLF: Sounds like my congregation. [laughter]

45. David P. McWhirter and Andrew M. Mattison, *The Male Couple: How Relationships Develop* (Prentice-Hall 1984).

AUDIENCE: I merely wanted to ask whether the word “data” was relevant to heterosexual relationships when we address these kinds of issues. But I couldn’t put it any better than Arnold did. [*laughter*]

WOLF: Careful, or you’ll be a statistic.

AUDIENCE: Yes, but you won’t know which one. [*laughter*] But I do want to point out, first of all, the things that Hannah had said with regard to the inadequacies of the statements regarding for example which mother held which child. And I think until you look at those kinds of details, those kinds of studies don’t have a lot of weight.

The other thing to point out, though, and it’s a corollary to Arnold’s comment, is that all of the children we do have lots of data on with regard to early teenage pregnancy, conduct disorder, trouble with the law, bad school performance, and I could go down the list—in fact, we do know that those preponderances do come from heterosexual families. And so I think that argument is moot.

AUDIENCE: Professors Duncan, Nussbaum, and Samar, does the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution require the legal recognition of same-sex marriage, and if so, under what theory of interpretation?

DUNCAN: Well, I would say no. There are a number of federal court cases making that point. So again, the burden of proof is on the other side.

NUSSBAUM: I think of course the question would be really under what theory, and we’ll hear from Andy Koppelman the relevant considerations. I think the big question would be whether to try to think of homosexuals as a suspect classification for the purposes of the Fourteenth Amendment, which of course is a strategy that has been tried again and again, lots of different places. It has usually failed to get beyond the state courts. Or whether to try to do what Andy Koppelman has very eloquently argued, and that is to think about the denial of this right as a form of sex discrimination. And I think that is a more strategically powerful theory at the present time. It also seems to me to have a lot of depth, because it is true that our fear, loathing, and confused sentiments about same-sex unions are bound up with the history of compulsory heterosexuality and the idea that the binary relationship between a male and female has to have a certain traditional form. So I think that going in that direction will be the most promising direction.

SAMAR: I too will let Koppelman and Strasser comment on this in the second hour, but I would point out that one has to be careful about taking the positivist position here. And that is to simply say that we have some sort of written legal documents, and that those documents are the starting point for all of light and truth and shine. The fact is those documents only have moral