

The University of Chicago Law School Roundtable

Volume 7 | Issue 1

Article 4

1-1-2000

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Recommended Citation

Collett, Teresa Stanton; Coolidge, David Orgon; Dent, George; Koppelman, Andrew; Strasser, Mark; and Sunstein, Cass (2000)
"Should the Government Recognize Same-Sex Marriage? Session Two: Legal, Equitable, and Political Issues," *The University of Chicago Law School Roundtable*: Vol. 7: Iss. 1, Article 4.
Available at: <http://chicagounbound.uchicago.edu/roundtable/vol7/iss1/4>

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Should the Government Recognize Same-Sex Marriage? Session Two: Legal, Equitable, and Political Issues

Authors

Teresa Stanton Collett, David Orgon Coolidge, George Dent, Andrew Koppelman, Mark Strasser, and Cass Sunstein

weight, and therefore any weight at all, if they are supported by a moral theory behind it all—a theory like autonomy or more generally a theory that would come out of human agency, which could not be denied by any rational actor. Such a theory I think would say that you have to afford certain kinds of interpretations and within a range. And then more particular interpretations within that range will still be possible on various needs that a society has, as well as individuals, with relevant statistical and empirical evidence.

NUSSBAUM: Okay I think we are going to need a break, because there's another panel at four.

MADIGAN: Yes, I want to say just a couple of things. The second panel is going to deal primarily with law, so this might be a good transition point.

I also wanted to say in defense of Dwight Duncan—who I am so thankful for, who stood here and took a sociological beating for studies which aren't his—it really demonstrates why interdisciplinary studies, as the Roundtable advocates, are so important. Lawyers on the side for same-sex marriage put these studies forward. Mr. Duncan is pointing out the various problems with them. Maybe if we as lawyers are better able to really dig through these things, we won't make those sort of blunders, and we won't take this sort of blind reliance on “well, same-sex couples will be the same vis-à-vis parenting.” It seems that a much more creative approach would be to say, “we admit that differences may exist, and we're going to try to create a proactive constitutional theory to account for those.” In some ways, Mr. Duncan's role keeps the advocates honest, and I appreciate that.

I also want to thank all of the panelists, especially Hannah, who has had the wherewithal to stand in front of people and really put forward what I think is a challenging point of view. She put forth a perspective that we in the ivory tower don't get, and that's for people not old enough to get into the ivory tower. *[laughter]* I thank you very much. I think you will see in the second panel, that the burden of proof shifts, and that the strong arm may be coming from opponents of same-sex marriage and maybe it will be time to beat up on the other side a little more.

SESSION TWO: LEGAL, EQUITABLE, AND POLITICAL ISSUES

MADIGAN: This panel will focus on legal issues. I'll go down our list of esteemed speakers in alphabetical order.

First, Teresa Stanton Collett from South Texas College of Law, who I found out today, shares a title with me. She was also in charge of Moot Court

back in law school. So she understands the hectic stuff I've been doing lately, so I appreciated her words of comfort.

David Orgon Coolidge from Columbus School of Law and Catholic University of America. I want to say a special thanks to Dave, because he and Professor Nussbaum were the two people who really helped me the most in finding other speakers and offering suggestions and thoughts about structuring the panels. It turned out to be a great help. He has sort of done his part before he even opens his mouth today. He has really done a great service for all of us.

George Dent from Case Western Reserve University School of Law. That happens to be my undergraduate alma mater. I have a good friend who was my teacher there, and I found out today was his student. So I kind of feel a little generational bond with George.

Andrew Koppelman from Northwestern University, who I have just gotten to know through the Law and Philosophy Workshop. I know his work. I actually have friends who are students of his who are also big fans of his work.

Mark Strasser from Capitol University School of Law, who holds the honor of being the first person to tell me "yes," [*laughter*] that he would do this. We had to string him along for details for the longest time.

Our own professor, Cass Sunstein, who has graciously offered to help us by moderating. I appreciate your willingness to do that. So we'll turn it over to the panel.

CASS SUNSTEIN: Thank you all for being here, and thanks to the panelists who come from some place other than Hyde Park. We're going to start with Teresa Stanton Collett.

TERESA STANTON COLLETT: Thank you. I'd like to thank the journal for inviting us and the university for providing the support to have such a forum. When I was telling my colleagues back at South Texas that I would be coming to the University of Chicago to speak on this topic, they all suggested that this topic at this particular point in history more often than not generates a lot of heat and very little light. I think that the first panel illustrated some of that but more importantly illustrated that there is in fact the potential for light here. It is a wonderful opportunity to have the chance to meet and talk with people whose work I've read. In fact, I was telling Professor Koppelman—who it will become apparent fairly quickly that we're on different sides of this particular issue—how much I admired one of his recent books, and in fact, assigned the first chapter of it in one of my classes. So it is a marvelous chance to be with people's whose work is very thoughtful, and hopefully this dialogue will follow suit.

Let me begin by saying that I think that the Roundtable symposium is appropriately entitled, but it makes some assumptions that no one at this

moment yet has really focused on as far as their public remarks. The question that is posed is "Should the Government Recognize Same Sex Marriage?" And embedded in that title is an assumption about the reality of marriage. It is that the state recognizes marriage, rather than creates marriage. And I found it very interesting that Reverend Dell opened with his statement saying that the point of the wedding where the clergy is involved is where there is a creation of a legal relationship. I think that part of the difficulty that Americans are having when we talk about this topic is the competing understandings of what marriage is and how it is created.

So let me begin by laying out my fundamental assumption. Assumption number one is that marriage is not created by the state, but in fact, is merely recognized by the state. It is my operating assumption that marriage is a lived reality that reflects a metaphysical existence, an ontological reality, if you will. And that marriage by its nature has four characteristics. The first is that it is mutually supportive—that individuals who are in a marriage relationship are mutually supportive. Now that's an ill-defined term, as you can imagine, because it can be economic support solely. It can be the commitment of the husband to be the breadwinner and the wife to be the domestic homemaker. It can be the agreement of the husband to provide the place and the wife to provide the labor, as we have seen in some cultures. It can be any number of forms of mutual support. But when you look throughout history, and when you look at the various arrangements that have been called marriage, you see at least some reciprocal support that flows from the two partners.

The second assumption is that it is permanent. Now that assumption clearly is belied by the current experience in America. And many of you can say, in light of the current divorce rate and what some authors have called serial polygamy, "How on earth, Professor, can you suggest that marriage in its ontological reality, in its metaphysical ideal, if you will, could be permanent?" But I will suggest to you that human flourishing occurs when an individual can engage in self-realization and self-giving, with another individual for an extended period of time. Although I will grant you that historically the requirement has not been permanence but merely of extended duration, it must exist beyond the one-night stand in all cultures to be called a marriage—unless of course he dies that night. *[laughter]* There are of course those cases where the very wealthy millionaire has married the trophy wife and then drops dead immediately upon saying, "I do." Those of you who anticipate marrying for money, this should be your ideal.

The third characteristic that I would suggest to you is that it is self-giving. Notice the difference in the characterization of marriage as self-giving rather than self-satisfying, because it is a supposition of mine that human nature is

such that we flourish best not when we seek our own self-satisfaction, but when we seek mutual self-giving

Then the final characteristic that I believe characterizes marriage throughout history and in all cultures is that it calls for procreative potential. Procreative potential. Now that can be challenged certainly in contemporary America today where you could suggest, “But Professor, is it not true that the majority of Americans, who are heterosexual who enter into a marriage relationship use contraception and in fact intentionally thwart the procreative potential within that union?” In response to that, I could give you the statistics from the Gudmacher Institute that were published just this summer, while good intentions are only half done because in fact fifty percent of all pregnancies in America are unintended. I can suggest to you that the pill, which is often suggested to be three percent error rate, when actually measured against user effectiveness, has a twenty percent failure rate. In fact, the desire not to have a procreative union certainly does not define the biological potential of that union. And it is that biological potential that I believe has led to the status recognition of marriage.

In the United States, when we look at the historical existence of marriage, what we find is that marriage was in large part about licensing sexual intercourse. It was about licensing sexual intercourse because that is the only human activity that can give rise to the creation of children—something that people continued to be surprised by, independent of the human experience. Because that potential resulted in the vulnerability of the mother and the creation of new vulnerable human beings, the state has set up a series of rules that govern that relationship—rules that require things like male support for their offspring, rules that require some considered reflection before the dissolution of marriage. And while contemporary marriage laws have altered some of these rules, they have not totally done away with them. The requirement that males support their offspring continues independent of a woman’s right to discharge the ability to have that offspring through termination of pregnancy. And the period of waiting to dissolve the marriage continues in all of the fifty states independent of autonomy-based arguments that might well suggest that marriage should be terminable at will as if it were some sort of leasehold upon each other’s bodies.

Given that, I would suggest that the state’s interest in assuring the protection of women’s economic vulnerability during periods of childbearing and the assurance that vulnerable children are provided for by marriage is a rational and defensible reason for the state’s concerning itself only with heterosexual unions involving sexual intercourse. And for that reason, I believe that same-sex unions—while clearly entitled to some ability of private ordering

so that their will and their autonomy can be made manifest—do not require state sanction, recognition, or protection as a form of marriage.

ANDREW KOPPELMAN: Okay. The question was asked in the last panel whether the Constitution of the United States has anything to say about the same-sex marriage issue. In response to that question, Martha promised that I would answer it. I will try to do that.

There are basically three main arguments that get made, and two of them are so familiar, at least to an audience of law students, that I will just gesture towards them.

One is substantive due process. There are certain important personal decisions not enumerated in the Constitution that are nonetheless protected by the court under the rubric of substantive due process. It is sometimes argued that the right to marry—the right of same-sex couples to marry—is one of those. The problem with this argument is that either you buy it or you don't. There doesn't seem to be much intermediate work for argument to do. Nobody has come up with an argument persuasive to me as to how one discerns what is or is not protected by substantive due process, even if such things exist.

Another is the suspect classification argument—the argument that gay people are a discrete and insular minority, like blacks, who are entitled to protection from legislation that is the product of prejudice. The problem for me with this argument is that the question whether discrimination against gays is prejudice or not goes to the heart of the very moral disagreements that we have been talking about. The law does in fact makes lots of discriminations lots of times, and when those discriminations have an intelligent basis, then they are not the products of prejudice. So what one would like is a constitutional argument that doesn't go through the very substantive disagreements that make us ask, “well, we've reached this impasse about the normative questions, does the Constitution have anything to say about this?” The suspect classification argument takes us right back into the impasse. And it hasn't been much help.

This is to be one of the attractions of the third argument, which is the sex discrimination argument. The basic sex discrimination argument is simple. Any action that singles out homosexuals per se facially classifies on the basis of sex. If a business fires Ricky, or the state prosecutes him because of his sexual activities with Fred, while these actions are not being taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against on the basis of sex. You can run the same argument with marriage, obviously. Lucy is allowed to marry Fred, and Ricky is not allowed to marry Fred; we have a sex-based classification. Sex-based classifications are problematic in the law. The court has held that the parties seeking to uphold a

statute that classifies individuals on the basis of their gender must carry the burden of showing an “exceedingly persuasive justification” for the classification. “The burden of justification is demanding and it rests entirely on the state.” There was a lot of talk about burden of proof in the last panel. I’m not sure how far we get in the argument. But the law gives you precise answers for those questions.

The state can’t justify a sex-based classification on the basis of generalizations that are only statistically accurate, such as the generalization that many heterosexual couples produce children, and same-sex couples tend to be childless. As soon as you start getting into statistics, I think you need generalizations of that sort to make the claim that Teresa was just making about the purpose of the marriage laws as protecting vulnerable women and children. It is just not the case that there are no vulnerable women and children in same-sex relationships, no women or children who are in danger of being abandoned by the more financially prosperous partner or rendered destitute. So if that’s a reason for the law to intervene, that reason obtains for same-sex couples.

Again, quoting the court, “generalizations about the way women are, estimates as to what is appropriate for most women, no longer justifies denying opportunities to women whose talents and capacities lie outside of the average description.” You can’t rely upon overbroad generalizations about different talents and capacities of males and females. So it seems to me the problem for advocates of the status quo in this area is to try and find some way of responding to the sex discrimination argument.

I’ve been wondering all day what to do with my ten minutes. I’ve now decided that one thing I can do is to take on a response to the argument that might be made by someone like, say, Teresa Collett. [*laughter*] One real, exceptionless difference between men and women that could be cited is what Teresa has called the “metaphysical reality of marriage.” And this doctrine holds that marriage is inherently heterosexual, as some writers put it, because only a heterosexual couple can achieve the “two-in-one flesh union that comes from being an organic unit of a procreative kind.” This is a somewhat mysterious doctrine. It is rooted in a certain variety of natural law theory. If the argument were accepted, it would be able to provide two kinds of answers to the sex-discrimination argument

One might say laws that don’t allow same-sex couples to marry classify on the basis of marriage and not on the basis of gender. Now the most supportive precedent for this would be *Geduldig v Aiello*⁴⁶ in which the Supreme Court

46. 417 US 484 (1974).

held that discrimination against pregnant women is not sex-based. The court noticed that the insurance scheme that the state provided that didn't cover pregnancy "divides recipients into two groups, pregnant women, and non-pregnant persons. The first is exclusively female, the second includes members of both sexes."⁴⁷ The trouble with this argument is that the persuasive authority of *Geduldig* is weak. The decision hasn't been overruled, but similar reasoning in the Title VII context has been rejected by Congress. And *Geduldig*'s reasoning has been almost universally condemned by scholars.

That suggests a second strategy. One might conceive that the marriage laws classify on the basis of sex, but say that this discrimination is necessary for the compelling interest of promoting the realization of one of the highest goods that human beings can achieve, the good of marriage, as Teresa has described it. And you could say that a law that maps that good in a misleading way by calling same-sex relationships, marriages, when it is not in fact what they ultimately metaphysically are, would miseducate the public about the goods that are really worth pursuing. The trouble with this argument—and I think this is the deepest problem with the kind of argument that Teresa has been offering—is that it relies upon a highly contestable set of ontological claims that probably no make sense at all outside of the context of a certain flavor of conservative Christianity. Now the court has held that to be constitutional, a law has to have a secular, legislative purpose. The promotion of the metaphysical reality of one-flesh unity doesn't seem to me to be capable of being plausibly characterized as such a purpose. Remember that when a sex-based classification must be defended, the burden of justification is demanding and rests entirely on the state. That's the doctrine. It is hard to imagine how a state could meet its burden by invoking this peculiar philosophical theory of marriage. It is hard to image a court endorsing these metaphysical claims.

At least I can't imagine what the opinion would look like.

COLLETT: Do I get to respond now? [*laughter*] No, that's okay.

SUNSTEIN: And now Mr. Coolidge.

DAVID ORGON COOLIDGE: Thank you very much to Jim and to the Roundtable for the invitation to participate in today's conversation. I have to tell you that I have the distinction of being the only person on this panel who is not a professor. You might consider that a liability or a benefit, but it's the truth.

Although we're in a debate format today, and although the stakes are high, I want to say that I do see this as an opportunity to learn. I say this because the question of marriage, or same sex marriage—however you want to formulate

47. *Id.* at 496 n 20.

it—is in many ways the question of how we are to live together in peace when we deeply disagree about matters, which all sides hold dear. Is our goal to eliminate all differences? Or is it to insist that differences must not matter? Or is it to learn to live with differences even though none involved will be satisfied with the results? If I were to state this in more religious-sounding language, I would say that the goal of the struggle over marriage is not to annihilate one's opponents, or to pretend that they don't exist, but in fact to learn to love them. And I don't mean that as a statement of pure sentimentality. I think that's at the heart of civic tolerance. It's based on my conviction that every person is a child of God, and that every person, however they identify themselves, has a contribution to make to American society.

Now, since I only have ten minutes too, I want to talk about three things briefly. First, marriage; second, democracy; and finally, in proper order, constitutional law. The core of my argument I suppose, is that I don't think we can discuss the third question without addressing the first two. So the first: it seems to me that the fundamental question if I can put it that way, is whether one believes that there is a there there, and if so, what it is. In that regard, I can think of at least four possible ways of defining marriage.

One is that marriage is simply an artifact of power relations over time. It may be benign, it may be malevolent, but it has no core to it, no lasting purpose to which it corresponds. It exists in society and law, but it is nothing more than we make of it. In such a case, the question of legalizing same sex marriage becomes merely a question of public policy.

Another view would be that marriage at its core—first of all that it has a core—is a contract between consenting adults who choose to live their lives together. Only the individuals are the “really real.” In such a case, there is no principled base that I can think of for limiting marriage to male-female couples, or to intimate relationships, or for limiting marriage to couples. And this is not just a point that was made in the first panel to be nasty or to talk about polygamy. I've heard this argument made by people on both sides of this issue. In fact, under this first view, it's not clear to me that there's even a basis for having marriage licenses as such, but perhaps just the enforcement of contracts.

A third approach is that marriage is, at its core, a legal means of enhancing social stability. In this more communitarian approach, people are viewed as genuinely relational beings who flourish in intimate relationships which benefit from an added degree of protection. In such an approach, state regulation is permissible and, again, there is no reason that marriage should not be extended to same sex couples. The real question then becomes why should marriage be limited to sexual relationships or relationships of only two? It's the same

conundrum, I think. After all, intimacy flourishes in many settings, and it's generally only Americans who always confuse sex and intimacy.

Fourth, last but not least, marriage may be viewed as a social institution built around the reality that we are embodied as male or female and that together as male and female, form unique communities of difference which extend community across the generations. According to this view, same sex couples cannot marry. They cannot marry because, lacking a sexual difference, they cannot simultaneously offer themselves to one another, form a community of difference, and potentially offer the world the gift of new life. Any of these particular functions—pleasure, partnership, procreation, parenting—can be done in a variety of contexts, as has been pointed out already, and I do not know anyone who would disagree with that. But, no other community does all of these simultaneously regardless of any state regulation. The role of the state then becomes not one of enforcing purely private contracts, or of creating marriage as a useful social policy, or redefining it when it chooses to, but of recognizing it, and here I sound like Teresa. In fact, I'm repeating Teresa. Recognizing marital status, protecting it through rights and responsibilities and, as seems prudent, offering it benefits—three different areas all of which could be talked about, and be disaggregated and discussed in ways that Professor Nussbaum brought up.

So it strikes me that these are the four predominant views of marriage in play and it's hard to dialogue with the first view because it assumes that there is no there there and so it's hard to know what to talk about. There's a lot to talk about between the other three.

The second question is the question of democracy. At the present time, the official law of marriage in every country of the world is based on the fourth view. But clearly this is in flux and we are seeing experiments based on other views. The recent law passed by France is a good example. No state or country has yet legalized same sex marriage, but it may happen and it may happen very soon. In situations such as ours in the United States, public opinion is still roughly two to one in favor of the fourth view, for what that is worth, but a significant minority of Americans appear to be changing their minds. The question is whether and, if so, how these conflicts should be resolved. Among many supporters of same sex marriage I hear a rhetoric—and I'd be happy for my colleagues here to tell me that it's not their rhetoric—that suggests that the American people are not qualified to deliberate and decide this question. Somehow this very important question, which has always been and still is primarily the province of legislatures, cannot be entrusted to the authors of our state and federal constitutions or their elected representatives. In fact, the whole idea of doing so is repulsive. If we ask where this view comes from, the

only answer I can come up with is the tendency to view all contentious issues, including this one, through the paradigm of race. According to this narrative, there is the victimizing majority represented by the legislatures and the people, and the victimized minority whose defenders are the courts. In such a case, the only way to vindicate the victims is to remove the issue from the people. Would that the issue were so simple.

By that logic, the first three views of marriage I described above are entirely defensible and the fourth is nothing but bigotry. By that logic, there seems to be no recognition that we have here not a clash between victims and victimizers, but a clash between viewpoints about the definition of marriage. It could actually be that all sides are sincerely putting forth viewpoints that have every right to be evaluated in the rough and tumble of American political clash and compromise. It could be that this way of addressing the issue is much more conducive to a lasting civic peace.

Finally, a couple of brief thoughts on constitutional law—briefer than the subject merits. Based on the above, you might think that I would be dubious about using privacy or equality or autonomy to evaluate this issue in such a general way and you're right. It's not like our federal jurisprudence is crystal clear. It's a hodgepodge. You can spin it in a variety of directions, I think we all know that. We can debate *Loving*,⁴⁸ we can debate *Zablocki*,⁴⁹ we can debate *Turner*,⁵⁰ we can debate *Romer*,⁵¹ we can debate *VMI*.⁵² How the right to marry relates to rights of privacy or rights of association doesn't seem clear to me in the current case law. How questions of discrimination addressed in *Romer* and *VMI* apply to questions surrounding marriage is a cottage industry. I have nothing profound to add to that discussion. It just seems to me, from the perspective of one who has the view of marriage that I do, that if one is, for better or worse, going to litigate these matters, attempts to resolve them solely by reference to individual rights are non-starters. If we take the constitution to be at heart, a means to advance individual autonomy over and against social institutions and the state, we are just peddling politics in the guise of law. We should get out of the courts and make our arguments before the court of public opinion and the people's representatives, not just as part of a litigation strategy—which is always done anyway—but because we believe that all men and women are created equal and that all deserve an equal opportunity to decide these issues. If the people and their representatives decide that marriage

48. *Loving v Virginia*, 388 US 1 (1967).

49. *Zablocki v Redhail*, 434 US 374 (1978).

50. *Turner v Safley*, 482 US 78 (1987).

51. *Romer v Evans*, 517 US 620 (1996).

52. *United States v Virginia*, 518 US 515 (1996).

is merely an individual contract or just a means of social stability and choose to redefine it, so be it. Others will disagree, but we will have followed the rule of law. On the other, hand it might turn out differently. Either way, we might be able to live better together in peace. Thank you.

MARK STRASSER: Good afternoon. In *Baehr v Lewin*,⁵³ a plurality of the Hawaii Supreme Court held that the state's same sex marriage ban implicated equal protection guarantees. That statute discriminated on the basis of sex, both facially and as applied. To talk about discrimination might mean merely classified, and that's basically what the plurality suggested, or perhaps, in addition, that it involved some kind of invidious distinction. That was left for the trial court to determine. Now the lower court's task in Hawaii was to examine the statute to see whether it was narrowly tailored to promote compelling state interests. That was just because of a particular aspect of the Hawaii Constitution imposing strict scrutiny on gender classifications. Something that wasn't unusual about the Hawaii Constitution was when gender would be viewed as implicated. So, this might have interesting implications for other courts, either when they are examining their own state statutes in light of their own state constitutions which perhaps explicitly mention gender, perhaps then making this a strict scrutiny analysis or, as well, whether federal equal protection guarantees will be implicated.

Most states, however, will use—even if they find gender discrimination—the lower standard, as you know. The challenged classification must serve important government objectives and be substantially related. Now it's clear that there are important differences between men and women. Nonetheless, they must be related to the interests asserted in so far as we're going to talk about the statute at issue as being constitutional. I'd argue they don't play the requisite role. Clearly the state has several interests in marriage, and they've been discussed: provide the setting for the production and raising of children, promote security and stability for the individuals themselves, leading to happier and more productive lives, which is a benefit for society. These, of course, are reasons to allow same sex marriage. Whether through adoption, surrogacy, artificial insemination, or perhaps just having had a child through a previous marriage, same sex couples are having and raising children. This has importance here and, had we been talking about substantive due process, I argue has importance there.

In *Zablocki*, the Court said "[I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our

53. *Baehr*, 852 P2d 44.

society.”⁵⁴ Now same sex parents do have rights—rights to privacy with respect to their children. Following *Zablocki*, at least there’s a suggestion that maybe the right to enter this relationship ought to be recognized. Nonetheless, courts and commentators are suggesting that procreation is a reason not to allow same sex unions, so let’s look at the argument. Commentators and panelists here have suggested that only a man and a woman can have a child through their union yet the state’s interest in the next generation is not only in children produced through the union of the different members of a married couple else our adoption laws would be much different. It’s unlikely, for example, that adoptive parents and biological parents would be treated the same in the eyes of the law. It’s unlikely that Congress would be trying to push adoption. It’s unlikely that legislatures would have created a step-parent exception to make it easier for adults not biologically related to the children to adopt them.

Suppose things were otherwise. Suppose the state had no interest in children raised either in single parent homes, in homes where there’s a step-parent or in homes where there’s an adoptive parent. Even so, more would need to be established to show why same sex marriage should not be recognized. The question would be how recognizing this would somehow harm important state interests. Would it harm existing marriages? It seems unlikely people would divorce because same sex couples were allowed to marry. It seems unlikely that people would refuse to marry because *they* could. Suppose I’m wrong: suppose people would refuse to enter into the relationship then. It might seem that then the state would have a compelling interest, yet this argument would clearly have surprising results. Analogously, if only in *Loving* people had thought to say “If they can marry, I won’t,” that would have been enough. You’d get a heckler’s veto for marriage. Perhaps it would be thought that if same sex marriage was allowed, marriage would crumble. Yet, as Justice Blackmun suggested in *Bowers*, there’s ample reason for believing that people would not think better of murder, cruelty or dishonesty.” Obviously, that’s a different but related context.

Some commentators believe it important to establish that different sex unions are better than same sex unions. First, I suspect that this tack is wrong-headed. It seems likely that some kinds of marriages are better for some, others for others. Even were the project not wrong-headed, it might be difficult to develop the objective criteria: children versus no children, handicapped children versus non-handicapped children. How do you compare marriages with lots of money and no children, children and less money. Even if we could

54. *Zablocki*, 434 US at 386.

55. *Bowers v Hardwick*, 478 US 186, 212 (1986) (Blackmun dissenting).

agree—suppose we had the criteria—it's pretty clear the state does not say that only those who will have the optimal marriage will be allowed to marry. Perhaps the question to ask, as has been suggested here, is not better or worse but what is essential to marriage? My interest, at least, is what's essential for the civil institution. So, merely, for example, because it would not meet some religious definition should not suffice. For example, a religion might say, "A marriage with someone not of this religion is not a marriage in our eyes" or "A marriage with someone not of the right race is not a marriage in our eyes." This might be essential for the religion but that's presumably not what's at issue here. If Vermont, for example, comes to recognize same sex marriages then at least for the state, and for purposes here, I believe that suffices.

To determine whether same sex couples can fulfill the essential purposes of marriage, we should look at what the state has implicitly or explicitly stated are its purposes. If we do that, the procreation argument at best sounds a little hollow. Consider the claim, as has been offered, that marriage is for the purpose of providing a setting for the raising of the next generation. That would be one purpose rather than the only purpose. Even if it were the only purpose, that would preclude some from marrying but not same sex couples. In the previous panel, we were talking about how individuals are doing in parenting, not whether but how. Now it might be thought that there's no reason to have to figure out what the state says. Suppose you have a state that says the following: "There is a compelling interest in protecting the essential nature of marriage which involves a man and a woman." Yet at least one of the lessons of *Loving* is presumably that the state cannot merely announce its perceived interests and have that upheld.

Let me talk for a moment about equal protection and orientation discrimination. It might be argued that really what's going on is discrimination on the basis of orientation and not sex. To determine this is an empirical question. One question would be what would a state say if two heterosexuals of the same sex wanted to get some of the benefits that we were talking about earlier. Would the state say yes? Would the state say no? If the state allows this then presumably we have orientation discrimination although there will be some ironies in so far as procreation is so important then you're going to say no to some people who may in fact be raising children but yes to some who in fact may have no interest in raising children. It's difficult to see what purpose such a statute would promote that was legitimate but that clearly would be orientation discrimination. Were it to establish full inferior status then there will be the *Romer* questions alluded to and we're putting aside even the individual interests in marriage—these are the state interests. The state might be argued to have a compelling interest in morality. Arguably that would be a

reason to promote stable, long-standing same sex relationships. Perhaps it should be thought “no, let’s just let the state decide what its own vision of morality is and enforce that.” Presumably both *Loving* and *McLaughlin*⁵⁶ would show why that is not an acceptable option.

As to whether in fact same sex marriage bans involve sex discrimination or orientation discrimination, this is an empirical question. We can see how laws will be applied. If in fact it’s sex discrimination, then we can see whether there are important purposes served. I would suggest the following: if the reason that this is offered, that same sex marriages should not be allowed, is that the state has a compelling interest or even an important interest in precluding individuals who cannot reproduce through their union, but that same interest is not recognized when, for example, the elderly or those either incapable of reproducing or who simply don’t want to have children—won’t be applied there—and further, if it’s also the case, as is the case in several states, only certain people who *cannot* reproduce will be allowed to marry—if you look at some of the first cousin statutes—then I would suggest that that reason is not the real reason. If it’s argued that the reason is to provide a setting for the raising of children but nonetheless those who are raising them will not be allowed to marry, it seems that really can’t be the reason. One of the benefits, at least, of imposing heightened scrutiny will be that either real reasons will be offered or it will be clear that there aren’t such reasons. Thanks.

GEORGE DENT: Let’s begin by asking why society, through government, should single out for honor this relationship called marriage. It is important to remember that gay marriage is not singled out for disfavor. There are many sexual and/or loving relationships, including relatives, marriage to animals, and polygamy, that are not eligible for this honor. One valid reason to revere traditional marriage is that it is intrinsically good. We value life, liberty, and the pursuit of happiness as intrinsically good but these are also mysteries, as Andy Koppelman said, or as some others would say, metaphysical mumbo-jumbo. That is you can’t show empirically that life is better than death, but since we can’t prove the intrinsic goodness of this claim, I don’t think there’s much point in dwelling on it and in any case Professor Collett has already talked about it.

There are, though, two reasons for honoring traditional marriage that are accessible to most people. First, traditional marriage is the best milieu for nurturing children. Gay couples can adopt children, but adoption is different from bearing children and any person or group of people could adopt, so this is no reason to honor gay marriages above any other group. Second, traditional

56. *McLaughlin v Florida*, 379 US 184 (1964).

marriage focuses human energies in socially productive ways. Men are especially prone to be disruptive and self-destructive. Marriage to a woman and fatherhood tend to point men in the right direction. Many arguments for gay marriage discuss gender stereotyping and taboos against homosexuality. Those issues are interesting, but they're not relevant to the marriage issue that we're discussing here. We're not discussing criminal sodomy statutes and no law forbids, for example, an effeminate man to marry a masculine woman.

The analogy of gay marriage to interracial marriage is a textbook example of the errors that can result from formalistic thinking divorced from reasoned reality and common sense. Anti-miscegenation laws had the purpose and effect of racial subordination. Traditional marriage has the purpose and effect of providing for children and maximizing human potential, not of subordinating either sex. Andy Koppelman says sex discrimination should prevent not only subordination of women, but any imposition of gender classifications on people's free choices. He also says we can't rely on gender classifications if any individual might prove an exception to it. This is wrong. A college legally may, and I think should, separate women's and men's basketball teams because of the physical differences between men and women even though some women are bigger, stronger, and better basketball players than some men. The argument is interesting because one area in which we agree that gender differences are important is marriage. That's one thing on which we all agree, otherwise there would be no reason to argue for rights to same sex marriage any more than the right to have the same sex teller when you go to the bank. Nobody would care about that. This is one area where we agree: gender differences are important. This example also shows that gender distinctions aren't always wrong, but I agree that we shouldn't make such distinctions without good reason.

I've already said that the main reason for honoring traditional marriage is to provide the best shelter for children. Proponents of gay marriage sometimes say that even their apparent defeats, like adoption of the Defense of Marriage Act, are really victories because they provoke discussion, and inevitably discussion will lead intelligent people of good will to support gay marriage. I agree that this discussion can be beneficial, but that's because I think it can help society to recall the social importance of marriage, a fact that we seem to have forgotten. By the way, on this point I would agree with what Martha Nussbaum said earlier this afternoon: it's heterosexuals who have made a mess of marriage. The answer is not to throw in the towel. The answer is to straighten things up.

Social support for marriage is actually becoming more important for two reasons. First, the needs of children are greater. In an agricultural society,

children don't need much education or socialization to learn their roles. Today, children need lots of attention and the best source of attention is caring parents. But, and this is the second point, the modern world often undermines good parenting. The anonymity and mobility of modern life enable parents, especially fathers, to neglect or abandon their families without incurring community condemnation. Our resources for encouraging good parenting are limited. No one wants to throw unwed parents in jail. Perhaps our best weapon, then, is to exalt traditional marriage as the most fertile ground for good parenting.

Advocates of gay marriage focus on material benefits of legal marriage. The issue of material benefits is a legitimate one, but why tie it to the definition of marriage? Maybe a widower should be able to give medical benefits to his mother who quits her job to care for his young children. But why would we say that he must marry his mother in order to get these benefits? The answer clearly is that this is primarily a debate about honor and respect. The material benefits of marriage are generally paltry and often outweighed by the detriments, like the marriage penalty tax. Gay activists know that the real point is that the validation of gay marriage would be the most significant possible acceptance of homosexuality as equal to heterosexuality. But why not condone homosexuality if it makes gays happy and does no harm? Recognizing gay marriage would cause harm by discrediting the institution. Most people consider gay marriage a caricature of the real thing. The concern is not that approving gay marriage would cause people to become homosexuals. The problem, rather, is that validating gay marriage would make marriage seem less honorable, less respectable, and thereby make it less likely that people would marry or stay married. Social attitudes influence the stability of marriage. If marriage becomes a less honored institution, it will also become less stable.

Some say that conservatives, whatever that means, should favor gay marriage as good for gays. How would I know if marriage is good for gays? Some gays praise promiscuity and ridicule gays who want to imitate a heterosexual marriage. Others say they don't personally want marriage, but if it's legally available for straights, they want it available for them too. Of course, they would then reject it, so it's questionable whether many gays would marry or stay married. At least the burden of proof should be on those who demand approval. This was something that was raised in the first group session—who bears the burden of proof? I think the burden of proof should be on those who demand approval of something that no society in history has ever legitimized and that concerns an institution for the raising of children, the most important job that any society does. In other contexts, some people have asked whether a compromise would be possible. For me, it is, on the basis that homosexual

relationships be tolerated but not honored to the same degree that traditional marriage is honored. However, I suspect that the loud forces on both sides of the debate will reject this, or any compromise.

SUNSTEIN: Those were really excellent presentations, and they were all so amazingly on time. I feel a little bad that, as the last speaker, so much has been said that has to be processed. These remarks are going to be about two puzzles. One has to do with the source of the distinction between domestic partnership and marriage—a distinction that such diverse people as Judge Posner and President Clinton believe is very important to insist upon and a question on which the last remarks were illuminating. What is that distinction about? The second puzzle, which I think is a linked puzzle, has to do with Andy Koppelman's argument that discrimination on the basis of sexual orientation in the context of marriage is a form of discrimination on the basis of sex. I must say I've been convinced by this argument, and I'm going to try to say why, at the same time, I don't believe that the Supreme Court should accept the argument, largely for reasons of institutional role, about which one of the speakers offered some remarks. So, this is about the difference between domestic partnerships and marriage and about the view that discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex.

There has been a reference to *Loving v Virginia*,⁵⁷ probably the best-named case in the history of American law. You knew who was going to win. There's a welfare rights case called *King v Smith*⁵⁸ and, in America, Smith was found to win. *Loving* was going to win this one. But we take it for granted that that case was right, but let's puzzle a little bit about the difficulty of it at the time. The argument made by the Lovings was that this was a form of race discrimination. I can't marry someone of an opposite race, but if I was of the other race I could, so this is a form of race discrimination. The response that was made to the Lovings' claim had two parts. First, the district court insisted—with explicit theological reference, by the way—on the naturalness of racial differences, saying that these are God-made differences that legitimately drive policy. More interestingly, there was a claim that this was actually equal because whites were no more prohibited from marrying blacks than blacks were prohibited from marrying whites, so if there was any inequality it was discrimination against people who wanted to marry people of different races. It wasn't discrimination against African-Americans at all. That was the argument that the legal culture and the Supreme Court had an extremely hard time responding to: that this law isn't a form of race discrimination at all. The way

57. *Loving*, 388 US 1.

58. 392 US 309 (1968).

the Supreme Court ultimately responded to it was, for the first and only time in its history, to use the words “white supremacy.” What the Court tried to do was to get in back of the formally discriminatory at first glance classification, at second glance not really formally discriminatory and to say that the discrimination that we see before us stands or falls as a commitment to white supremacy.

Now the question to be asked, then, is whether discrimination on the basis of sexual orientation reflects a commitment to male supremacy. I confess that I believe that it does and the reason that it does is it embodies a judgment that there are two kinds of people, men and women, and it reflects a concern that the institution of male-male relationships and female-female relationships disrupts, though in quite different ways, the sexual stereotypes that accompany the distinction of humanity into two kinds. I don’t think the Supreme Court should accept that argument. It’s too early. It’s a democratic argument, not a judicial argument though it is a constitutional argument. That’s the basic claim.

Now let’s shift a bit to the distinction between domestic partnership and marriage and see what might underlie the distinction. There is a very eloquent suggestion that procreation is for marriage and other things are for domestic partnerships. The difficulty for me at least with that argument is that too many marriages involve people who are old and infertile or young and infertile, or just not interested in children. It’s not that interesting that my mother got remarried after my father died but she did. She was in her sixties and I’m pretty sure she wasn’t fertile. Her procreative potential I think, technologically speaking, was, if anything, less than that of many gay couples. In any case, there are too many counter examples.

What I think socially speaking—this is not a comment about any individual—but socially speaking what underlies the distinction is the expressive character of recognizing marriage and the debate is one about nothing material but about the expressive character of law. The last speaker put his finger on it with the thought that to allow homosexual marriages is to legitimate same sex relationships, or to approve them in ways that domestic partnerships don’t threaten to do. I do believe that’s right and, socially speaking, that that’s the core of the difference. What is the statement that is being made by same sex marriages and why is there such contestation about that when the material consequences are so low? We might just isolate the fact that it’s a statement we’re concerned about and nothing material, or very little material, if the compromise suggested would go through. I think the underlying expression is that gay people ought not to be excluded by virtue of their homosexuality and there’s no sense in which they’re second-class citizens

in the United States. This is not a suggestion that everyone who opposes same sex marriages believes that gay people count as second-class citizens. It's a more general statement about the dynamic of the debate and the social meaning of the exclusion to heterosexuals and homosexuals alike. Martha Nussbaum reflected an interesting concern that marriage isn't the greatest thing in the world always and that the mere availability of marriage to same sex couples might actually undermine freedom because it would put them in the position of choosing an option which they would rather not have available because it would pressure—the word was “push” I think, offered by the philosopher Claudia Card—her into marriage when she really didn't want to be there. There's an interesting suggestion there about the extent to which an option might deny freedom because a social norm might act on the option so as to push people toward it and they might rather not have it there, but I don't think that's sufficient justification for denying same sex marriages because of the asymmetry between heterosexual and homosexual couples and because of the expression of exclusion and, socially speaking again, “contempt” I think is the right word, that the exclusion imposes on gay couples.

I've talked a bit about second-class citizenship and exclusion, but I think that's not the only expression that the content of our law currently makes. This will link the two parts of my remarks, the one about *Loving v Virginia*, the other about the expressive function of law. I think the deeper expression, and the sense in which we're all implicated in this, not just gay couples who want to get married, is the insistence that our marriage law as generally conceived offers: that there are two kinds of people, men and women, with accompanying social roles. That's an insistence that's damaging not only to homosexuals. It's damaging to gay men, to lesbian couples, to heterosexual women and to heterosexual men, though in quite different ways.

I think we'll go down, just like the first time, and have comments that anyone would like to make about anyone's remarks—each person gets to talk about one person's remarks! Self-criticism is perfectly appropriate.

STRASSER: I'm starting here as well. Oh good. How about I say a little bit and put it in the form of a question at the end but it won't be too long, I promise. This is for Professor Dent.

We talked a little bit about *Loving* and there are lots of cases in which interracial marriage has been challenged. It's just that *Loving* was the first that said you can't do that. Of course, this was coming up in the state courts because it was believed the federal government didn't have a role in this. After the Civil War, various courts addressed this and said, “If we allow interracial marriage, we're going to have people bringing all of their wives—we can't prevent polygamy and we can't prevent incest. That's what is going to happen

as soon as you open up the door.” It seems to me analogous. The same arguments have been used traditionally to say we don’t want to take an extra step. I’m not saying it’s a good argument, I’m just saying it might sound familiar. I believe the *Loving* Court suggested, although it talked about white supremacy, that even if that had not been at issue, they nonetheless would have held that way, so I guess that’s my question for Professor Dent. If this hadn’t involved racial subordination and if really it could be credited that the state was just doing what it said, keeping the races separate and allegedly there were legitimate reasons, I’m wondering what you think. Would that do it?

COOLIDGE: This is sort of an awkward question because I want to ask Mark, and it’s going to be awkward for him and I to wait until the end.

STRASSER: And I don’t get another chance!

COOLIDGE: I’m chewing a lot on what Professor Sunstein was saying and I’m trying to understand if the core of the argument that he’s making—but I’m asking you, not him—is that if one does not believe that the sexual dimension of a same sex relationship is a good thing, does that mean therefore that I hold you in contempt? Because I heard that as the implication of his question and I want to know that. I’m very willing to hear whatever your answer might be.

SUNSTEIN: I can answer that because I don’t have any question for anybody. I did not mean that at all about any particular person. This is really a question about the socially understood meaning of the act on the part of, let’s say, broad segments of the population confronted with laws that they support or despise. So just like you could have supported a literacy test just because you want people to be literate, the social meaning of a literacy test for our culture might be that you want to exclude African-Americans, as it was. So it’s very much a contextual argument, not an a priori argument. Not an argument about any particular person.

COLLETT: I am intrigued by the clear indication from the last comments that there is some sort of disrespect of those who agree with what Professor Nussbaum suggested earlier, which is that we should truly look at how we aggregate benefits in this society and how we allocate benefits. My practice base is elder law, and I represent a number of elderly people who have no familial relations surviving. The reciprocal beneficiary law of Hawaii struck me as a very sensible way to accommodate people with whom I had had significant conversations about how you engage in this private ordering of your life to ensure that you achieve the objectives that you have. It also accommodates the material benefits that you say, and I think is largely true, are really not the subject of this debate. The material benefits include ensuring that the intestate succession laws reflect the desires when you don’t have to go through the process of writing a will or a power of attorney or all of those sorts of things.

It strikes me that Professor Koppelman has mistaken me for John Finnis. I'm deeply honored, but I am not John Finnis, and my argument is different from John's although I have tremendous respect and wish that I had the intellectual horsepower that that man does.

My argument is more that the state has a purpose in recognizing and regulating sexual intercourse because of its procreative potential. Regardless of the intentions of the parties who engage in it, the fact is, if we accept Gudmacher's study that we're wrong fifty percent of the time. The fact that the line is a line that is overinclusive doesn't illegitimate the state's interest in regulating sexual intercourse because of that procreative capacity which is different from the argument that John makes.

KOPPELMAN: I'll segue right in. First of all, as a matter of what actually goes on in American society, I offer the generalization that sexual intercourse is massively unregulated! Now it's not clear to me that more regulation of sexual intercourse would be a good thing. I'm not sure that I want the law to be more active in this area than it is. There is another issue about vulnerable people, and protecting vulnerable people, where again I think that we are in agreement that there are people who form relations of economic dependency, people who are called into existence in a condition of massive dependency. We want to structure the law in such a way as to be able to accommodate that.

A problem that a few of the speakers have alluded to is whether it is possible for us to arrive at some common ground given massive disagreement about whether, at the core, it is the case that the sexual relationship between a man and a woman is per se good in a way that no sexual relationship between persons of the same sex can be. I think this is why the law discriminates between the two pairs of eighty year-old people and allows the heterosexual eighty year-old couple to marry and not the homosexual eighty year-old couple to marry. It ain't procreation. It's got to be something about the nature of the relationship itself. The reason why I perhaps mistakenly conflated you with Professor John Finnis—of Oxford University, who has made an extremely philosophically sophisticated defense of the heterosexuality requirement in marriage and we published a debate about this—it seems to me that since the law discriminates between relationships on the basis of nothing else than the heterosexual relationship, you have to find some quality about just that and not just children that's a basis for this distinction. The reason that this issue is so emotionally fraught is that some people see something wonderful about heterosexual coupling that is just not possible, not evincible, not capable of being realized by homosexual coupling and then the puzzle is, after we finish glaring at each other, can we agree on any set of legal rules? This is the attraction of domestic partnership. The debate is open about honor and respect

and about material benefits. The material benefits are not completely inconsequential given the way that health insurance is structured in the United States. Part of what is driving the domestic partnership debate is that people want health insurance. They want some basis for getting it.

George was skeptical about whether any proponent of same sex marriage would be able to live with that sort of compromise. I can, for the time being. And since in the long run we're all dead, perhaps that's good enough.

DENT: I'll answer Mark Strasser's question in a roundabout way, beginning with a confession that I am a recovering libertarian. There's no mystery what caused me to change my mind. My wife and I had children and a libertarian vision of the world works very well if everyone in the world is a competent adult who can make his own decisions and fend for himself. When you throw children into the equation, it starts to break down. Good parenting requires tremendous sacrifices and many people are going to make those sacrifices no matter what the state says. Unfortunately as we know, we don't have to look far to see many parents do not. The question is how do we get parents—how do we encourage parents—to make those tremendous sacrifices?

To put it another way, if tomorrow morning we read in the paper that some scientist has created a robot that does a great job at raising children, then to my mind this whole debate has changed. Maybe then I'm back to my libertarian position—that is to say, why should the state care if you're married or not? Gay and traditional marriages are treated equally and then the state does not care about either of them. That brings me around to Mark's question about anti-miscegenation laws: if the Court had been persuaded that this was not a matter of white supremacy would the result have been different? That's a hard question for me to answer because it's like an extension of a world in which there are robots who can do outstanding parenting. Maybe the best answer I can come up with is to think of the rule against intermarriage in Jewish law. What is the purpose for that? Some people say that it is a way Jews have of saying we're better than everybody else. But many Jews at the same time accept the argument that for thousand of years we have been an embattled tribe and intermarriage is a threat to the survival of the tribe—certainly to survival in America today. So that's at least one circumstance where I could at least see an argument against intermarriage. Of course, it's not a legal matter, it's a matter of Jewish law. I guess I have a hard time answering Mark's question, but I guess I could possibly imagine some circumstances somewhere where a law against, or a principle against, intermarriage might make some sense, as possibly it does in the case of Jewish law.

SUNSTEIN: Questions? Comments?

AUDIENCE: I have a question for Professor Collett about procreation. That obviously has become an issue for many people on both sides of this issue. In light of the fact that there is a distinction that—I think you tried to bring out—potential procreation matters, not necessarily actual procreation. I wondered if you could illuminate why that is one of the necessary—one of the essential—characteristics of marriage? From my perspective in the Divinity School—so all that metaphysical mumbo-jumbo actually is what I work with—I want to know where that comes from and whether or not that is changing because of the other demographic realities of today such as overpopulation and undercare for the children who are already being born.

COLLETT: Let me peel your questions off in reverse order. The birth of the seven billionth person is a cause of celebration in that—I believe this is accurate—if you were to take the entire world population and place them in the state of Texas, my home state, at a density that we find in metropolitan New York, that is all it would take geographically. Malthus would have had us believe that we would be so overpopulated that we would be engaging in cannibalism to survive at this point. Quite the contrary has been proven and there are many economists, primarily in South America, who suggest that you can't develop an industrial economy, a technologically based economy, without a certain population base. A big problem that has faced a lot of the developing nations is that they have not reached the population base yet to support or sustain an industrial or technological economy. I am not persuaded by Malthusian arguments that we are in fact overpopulated.

That's a very different argument than the argument about the abandonment or neglect of children. In that respect, I would share with you a comment that I received from the principal of the very nice suburban middle school that one of my daughters goes to, when she and I were visiting. I said "You have to excuse me, I have to leave because I have a Supreme Court committee meeting and I have to get to it." She said "It's so refreshing to find a family where both parents are engaged outside of the home and yet your children are not simply being pet sat." I said "I'm not sure I know what that means," and she said "It's the sort of parenting style that says while you're a baby you're cute and cuddly and we'll play with you like a puppy but once you achieve a certain age and difficulty, we're going to put you in the backyard with your food and water and leave you to mature on your own." I'm not sure that there is not a real problem with neglect of children, and I do not think it's confined to the inner city as so often it is mischaracterized in the press. That leads to sort of a critique of what has been the underlying assumption of much of the feminist critique of the existing social order, which is that women were not fulfilled in the home. Some of the most interesting work being done in

feminism today is work that suggests that in fact there are some underlying values of those norms that are not being well served and that the task is to get them served in a way that is fair and allows for the full development of both individuals in that marriage.

That's a very long way of then heading to the procreation question, which is I truly believe that the fulfillment of the human person lies in self-giving. It is not simply an exercise of satiation that can come from consuming. Parenting, although tremendously challenging—I have a teenager right now and a preadolescent and a husband who is wonderful thankfully—is something I would not forego for all the money in the world, although there are nights like the other one when our son brought home grades based on zeros that I would have foregone. I think procreation is the essence of self-giving and contraception is saying “I give you everything but my reproductive capacity.” That may be legitimate in certain limited instances but I don't think it's legitimate through the entire existence of the marriage. It's got to be a full giving: “I give you myself, my hopes, my dreams, and the procreative potential of our marriage.”

STRASSER: Is it o.k. to just add something? One of my interests is what the state laws actually are and how marriages are treated. There is no requirement, not only that you have children, but that you have to have sex. You can have a marriage voided because one of the parties said, “That's what I thought we were going to be doing and we're not,” but if there's an agreement beforehand, the state recognizes the marriage. It's unusual, at least, to say “not only no children, but no sex is fine,” but here the difficulty that you can't have children through your union ought to suffice.

COLLETT: But Mark, the mirror has two faces is a rather contemporary development in the law and in fact, certainly there are still states where, as you say, you can get the marriage annulled from lack of sexual consummation. Separate and independent of that, to my knowledge there is no case law that would enforce the agreement that we not have sex although we have the benefit of marriage.

STRASSER: Yes. All I was saying is that it allows for it and the idea of getting it voided is that one of the parties says . . .

COLLETT: Complains?

STRASSER: That's right.

AUDIENCE: Something that all of the speakers who have spoken in favor have mentioned to a certain extent is this notion of procreation, particularly with respect to the elderly or those for whom it is simply not possible—the procreative potential does not exist even though there may be a heterosexual relationship. Those of you who have spoken against have not addressed that. I

am curious why it is in the state's compelling interest for me to be able to marry an eighty-two year old woman where there is no procreative interest whatsoever, but I cannot marry the man I consider to be my husband when the relationship might have the first three of Professor Collett's important ontological features of the marriage but neither situation can have the last.

DENT: I would give you a couple of answers to that. One is that, in many cases, to make such a determination would require invasion of privacy of the kind that our government, fortunately I think, has never undertaken. All we ask is, "Is it a man and a woman?" We're not going to require you to undergo physical examination . . .

AUDIENCE: I'm sorry. I don't think that there's any invasion of privacy in assuming that a woman who is eighty-two years old can't have a baby . . .

DENT: You get into line drawing questions especially with modern technology allowing older women to have children, where this is becoming possible. Why get into that? And the second is, if a man and a woman really can't have children and they nonetheless want to marry, they are doing they're best to follow the traditional pattern. That is an inspiration to other people. That is to say to the young man "Look, even this older couple who can't have children wants to marry because it's an honorable relationship. It is something that you should respect and something that is good for you."

AUDIENCE: And the relationship that I have with another man is thus dishonorable? Am I correct in inferring that from what you have just stated?

DENT: Certainly that is the attitude that has been traditional in most societies throughout history, yes.

AUDIENCE: And that's a reason for legislation—tradition? If people of the same race, to bring up *Loving* again, couldn't marry basically based on traditional reasons, there really are no logical arguments for it then.

DENT: If there's another planet with red and green—I'm dealing with human beings as they are. If human beings were other than as they are, what would we do then? I frankly don't find pursuing that type of question very fruitful.

MADIGAN: One last question . . .

AUDIENCE: If what's important about marriage is providing for children, why not just have really strong laws about recognizing parents or families with children as opposed to laws recognizing marriage whether or not there are any children?

COLLETT: I think in the social ordering that that's one of the sort of arrangements that Professor Nussbaum suggested might in fact be something we should consider. Then the question becomes is it going to be a matter of democratic process where you and I come together with our representatives and

dialogue and say it's not that there's not a compelling interest in the protection of children but it's not narrowly tailored enough, the idea of marriage, and so let's rethink it. If we're going to accommodate all of these benefits, we're going to attach them to those whose sexual intercourse, whether intentional or not, results in children. My argument would be, I'm willing to entertain that at the legislative table and talk about that. I think my concern is I would want more of a commitment than a "Whoops, now I'm caught into the thralls of law and I'm now required to be in union with this woman and help her raise this baby." We've seen that work with welfare reform, and it hasn't worked real well. But it's certainly something that I find within the realm of imagination and not an illegitimate way of structuring society.

DENT: I tend to disagree with you Teresa. What are you going to do? Shoot people for not reading to their children?

COLLETT: No, I just beat my husband for that! *[laughter]*

COOLIDGE: Now there's a reason for marriage!

MADIGAN: I know we have one in the back corner. This is going to be the last question.

AUDIENCE: Why is this debate not really couched in terms of separating marriage into an instrument of the state and an instrument of the church? Because I think, really, it kind of helps us define what this debate really is about, because marriage as an instrument of the church really is about following biblical law or rabbinic law. But as an instrument of the state, it really is about equal rights.

DENT: Because I think society has an important interest in the raising of children.

KOPPELMAN: One of the points about separating out the honor with respect to material benefits, one of the odd things about the law of marriage, is that the state seems to be perceived as honoring, as sanctifying, certain relationships. I think that one thing that gets lost in the same-sex marriage debate is that even if you get state recognition, you don't necessarily get everything. And so, this means, I think, that if you lose on same-sex marriage, you don't lose everything, because there's such a variety of perspectives in society.

One thing that there continues to be deep moral disagreement about is the status of the marriages of people who are divorced from previous marriages who have still living spouses. And the people in those marriages are recognized in the law, but that's not taken to be legal repudiation of the moral and theological beliefs of, for example, Catholics who hold the position of the Church. The state just doesn't take a position on the theological views. I think state recognition of same sex marriage could be understood in the same way.

COOLIDGE: One other quick thought on your question. It's a good question, and maybe it was confusing having the rabbi and the pastor talking just to the extent that it sort of felt like it conflated the two, but I would just say that to formulate it the way that you did is to answer the question the way that you did. And, the question that remains open is: what do equal rights mean? I mean, rephrasing it in those terms doesn't solve the question. And, the other question that it doesn't solve is: what is the proper relationship, if any, between folks who are religious or folks who aren't, who are both advocates in areas of public policy, and what legitimate role they have, you know, when we're making decisions together as a society, and I certainly, I agree that whatever the United Methodist Church does with marriage is not what the state of Illinois will do with marriage necessarily, but I certainly would not deny or argue that Greg Dell doesn't have the right to not only argue his point as a pastor, but to go down and argue his point in Springfield, which he may well have done under other circumstances.

COLLETT: And one of the interesting systems that we find when we study the issue from an international perspective, is that there are in fact legal systems where the regulation of the marriage is conducted in a secular court in accordance with the religious community of which the marital partners are members. So that a secular court will allocate the rights and duties of a Roman Catholic couple in accordance with Canonical Law, a Jewish couple in accordance with Rabbinical Law, a Calvinist couple in accordance with Calvinist Law. One of the problems, of course, with such a system is that not all people are members of religious communities, and so you'd have to have some body of secular law for the agnostics or for those who are not, and not all religious bodies, most of the ones that we are familiar with in the United States, but not all religious bodies have any clear sort of guidance about property division and the appropriate allocation of custody and those sorts of things. But there are some interesting alternatives when you start thinking in terms across the world, that address the question very differently about integration of religious beliefs in the political sphere on this topic.

MADIGAN: I have to say I'd like to thank this panel in particular. It was great. Although I have to say that the funniest thing that I've heard, and I know it wasn't meant to be funny, is when David said that there's no community of difference in the same-sex couple. And what's funny to me about that is that every time I am with friends who are straight and we see two women walking by hand in hand, the first thing they ask is, "Which one's the guy?" [*laughter*] I guess there are other heterosexuals who don't share the presumption that there is no community of difference.

COOLIDGE: There are.

MADIGAN: I would really like to thank Ellen Fulton and the members of the Roundtable board who worked very hard to make this all happen. I want to thank the panelists, especially those who traveled to be with us. I would leave with a thought of why these sort of talks are so important. We're not just talking and preaching to the various choirs. If you look in the past two years, someone walked into a Baptist church and shot eight people dead, screaming anti-Baptist rhetoric. A year later, a young man named Matthew Shepard was beaten to death after being identified as gay, and hung out on a fence, effectively crucified, you know, two millennia after the crucifixion we know of best in our tradition. What's sad about all this is that people don't always choose the best way of communicating rationally about subjects on which they disagree. That's what makes my admiration for our panelists so great, because they come to this discussion whole-hearted, and really listen to one another. It means a lot.

I will close by responding to something Dwight Duncan said, that was echoed in this panel, and that is: no society in history has ever recognized same-sex marriage. I would say, given that nobody disputes that in every one of those societies, some same-sex sexuality was going on (I mean, that's why it's in the Bible, because it was going on), there may have always been people who had those inclinations, yet marriage was never open to them. And so my response to Mr. Duncan's claim is that that should make us ask what humanity has lost in never having had a normative union between people with those inclinations. Maybe those people would be something entirely different. What we think of as homosexuality may really be something shaped by social ostracism. We don't know what gay people would even be like without this ostracism. Unfortunately, we'll all die never having known what they might have been like with the normative ideal of marriage to which they could aspire, the ideal that every person who is heterosexual has. I would encourage you not to take it for granted. I think the panelists, though, have made us think carefully about what the costs and benefits of an institution of same-sex marriage would be, and I appreciate that.

Thank you very much.