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# Response to Martha Nussbaum's "A Right to Marry?"

David Novak†

## AGREEMENT AND DISAGREEMENT

The question of same-sex marriage concerns every morally sensitive citizen. It has been the subject of debate everywhere, especially among scholars and intellectuals. That is why, no doubt, the Brennan Center for Justice invited me to comment on Professor Martha Nussbaum's Essay entitled "A Right To Marry?"<sup>1</sup> Our opposing views on this hotly debated question are well known. In fact, we have debated this question several times before.<sup>2</sup> I will begin this discussion by emphasizing a point of agreement between Professor Nussbaum and myself before getting to our points of disagreement. Indeed, indicating that point of agreement between us might lead to a clearer discussion of the points on which we disagree. In my conclusion, I will indicate another probable point of agreement between us, one that presently lies on the political horizon.

It is clear that Professor Nussbaum is dissatisfied with the present state of the institution of marriage in our secular society and its polity. I join her in that dissatisfaction. Therefore, I shall not defend the status quo ante by simply invoking *stare decisis* against her call for change, since I am also in favor of change. Instead, we differ over what sort of change each of us wants. Professor Nussbaum draws upon precedents that seem to be already changing the legal definition of marriage from a union of a man and woman into the union of two *persons*, irrespective of their sex. Conversely, I want to change or undo those very precedents that have led to a situation where what might be called "the

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1. Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667 (2010).

2. See Saul M. Olyan & Martha C. Nussbaum, *Introduction to SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* xii, xiv-xv (Saul M. Olyan & Martha C. Nussbaum eds., 1998); David Novak, *Religious Communities, Secular Society, and Sexuality: One Jewish Opinion*, in *id.* at 11.

traditional Western definition of marriage” can now be seriously and powerfully challenged. Bolstering this venerable definition of marriage, then, requires as much of a challenge to the conditions that have led to its present vulnerability as does a challenge to its very continuity. Since both of us are arguing for change, neither of us can assume a merely defensive posture. As such, I cannot say to Professor Nussbaum that the burden of proof is on her as the accuser as we are both accusers on this question.

Both Professor Nussbaum and I have very good reasons for wanting change, including reasons for asserting where that change ought to take place. Dealing as they do with *oughts*, these reasons are moral reasons. Hence our disagreements are moral disagreements. But the fact that we can disagree within a moral framework means that neither of us can or wants to remove the other from that framework by declaring her or him as being immoral, let alone amoral. Neither of us claims morality as being exclusively his or hers. Were that the case, we could only condemn each other rather than engage in a civil and reasonable debate. Furthermore, our disagreements are not legal per se in the sense that we are not arguing over the present definition of the law. That would be rather presumptuous inasmuch as Professor Nussbaum and I are philosophers; neither of us is a lawyer, a judge, or a legislator, even though the legal implications of what we say here today—especially here today in California—are obvious. Finally, our disagreements are not religious, even though Professor Nussbaum and I are religiously affiliated Jews (she a Reform Jew; I a Traditional Jew) having quite different views about what Judaism is and ought to be, including whether a same-sex union between two Jews can and should be celebrated as a Jewish marriage.<sup>3</sup> Yet, neither of us deduces our respective moral positions from authoritative theological propositions. And, even though my moral positions are more theologically influenced than Professor Nussbaum’s, that in no way gives them any more philosophical weight.<sup>4</sup>

## I

### REASONS AND PREJUDICES

To begin to analyze this issue, Professor Nussbaum and I must answer two questions. First, why is there an institution called “marriage” in a secular society at all? That is, why should a secular state recognize and structure, even encourage, human associations that have traditionally been called “marriages”? Second, if a secular state does institute marriage, how can that state deny equal

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3. Many Reform or Liberal rabbis officiate at the weddings of same-sex couples; but to my knowledge, no Traditional or Orthodox rabbi could or would do so. For a liberal Jewish justification of celebrating a same-sex union as a Jewish marriage, see Judith Plaskow, *Sexual Orientation and Human Rights: A Progressive Jewish Perspective*, in *SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE*, *supra* note 2, at 29.

4. For my views on the interrelation of theology and philosophy without, however, advocating that philosophical assertions be deduced from theological assertions or vice-versa, see DAVID NOVAK, *THE SANCTITY OF HUMAN LIFE* 15–26 (2007).

access to that institution to any physically and mentally normal couple who wants access to it—who wants to be married?

Professor Nussbaum emphasizes the right of equal access, stating for example, “when the state does offer a status that has both civil benefits and expressive dignity, it must offer it with an even hand.”<sup>5</sup> To bolster the equal access argument, some scholars have cited as precedent the argument used successfully to end racial segregation in American public schools.<sup>6</sup> That is, when the state *creates* public schools, those schools cannot then refuse to accept as students *anybody* who could be educated by them. Why? Because the purpose of public schools is to create as educated a citizenry as is possible. That assumes that an educated citizenry is in the interest of the common good. Educated people make better, more discerning, and more productive, citizens of a constitutional democracy such as ours than do uneducated people. Public schools are thus established to educate whoever is educable, irrespective of their race, religion, ethnicity, gender, or sexual orientation.

Even with this precedent, however, the state does not provide equal access to everybody. What about those persons whom the state cannot educate because of their severe physical, mental, or emotional impediments? Do they have a right to equal access to public education, a right the state is dutifully bound to facilitate the exercise thereof? How can one have a right one cannot possibly exercise? (To be sure, most of us think the state does have an obligation, that the state does have a responsibility to such disadvantaged persons, but that it is their obligation, their responsibility to care for them as best it can.) Segregationists used these arguments in the 1940s and the 1950s to argue that African Americans, unlike Caucasians, are basically uneducable, or only educable at an inferior level. Yet once the basic intellectual inferiority of African American children was shown to be a lie, racial segregation in public education was determined to be arbitrarily discriminatory because it was based on irrational prejudice rather than on a valid reason. In other words, only arbitrary discrimination is morally objectionable. So, for example, when a public school declines to accept a child who is severely mentally or physically handicapped, it is discriminating for a reason, namely, the school *cannot* educate this child; it does not have the facilities to do so. That is quite different from a school that does have such facilities but *will not* educate such a child.

The precedent that supports the argument for equal access to education does not similarly support the argument for legalizing same-sex marriage for another reason. And that concerns the difference between justifiable change and unjustifiable change of a legally-sanctioned institution like marriage.

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5. Nussbaum, *supra* note 1, at 688.

6. For an excellent discussion of the equal access argument, see Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081–2120 (2005).

Unlike public education, which the state instituted *de novo*, the state inherited marriage from traditions that predate the founding of the state. These traditions are pre-political in the way culture precedes secular society and its polity, and in many ways transcends them both.<sup>7</sup> Nevertheless, being pre-political does not mean there are no reasons for the traditional institution of marriage, or that these reasons are not publicly arguable. These reasons are universal, not parochial. Since traditional marriage already has reasons of its own, the state should not supply new and different reasons for an institution it only inherited and did not itself create. Indeed, to supply radically new reasons for something old essentially transforms it by radically redefining it. As such, marriage so radically redefined loses any essential continuity with what previously has gone by the name "marriage." Such radical redefinition makes one wonder whether the continued use of the very name "marriage" by those advocating this radical redefinition does not turn that very name into a homonym. However, as long as we do have the public institution of civil marriage as traditionally defined, the state should continue to support it as the status quo ante. And the state should also rectify any injustices that might have arisen within the institution of marriage, such as insuring that a wife not be considered an appendage to her husband in matters of domestic property. Nevertheless, correcting injustices that have arisen within the institution of marriage is quite different from declaring the traditional institution itself to be unjust because of whom it has included and whom it has excluded thereby.<sup>8</sup>

The most the state can honestly do in such appropriation of an institution that predates its founding (and in many ways transcends its operation) is to refine and reformulate in its governance of this institution the original reasons why this institution has deserved and still deserves social recognition and support. That should be done by judges, already designated by society to be the proper interpreters of the law. If judges cannot refine and reform the existing institution of marriage, then legislators who want this radical change should implement the abolition of this institution altogether, or they should subsume what used to be known as "domestic relations" under some other existing institution, such as private contracts. But, if they do that, they should be honest enough to stop calling what would not have been recognized in law as "marriage."

Naming does not create an actual entity; only God can do that.<sup>9</sup> Instead, naming is the way we signify what an entity already is. Naming is the way we formalize what had heretofore been informal. Thus "marriage" did not become the name of the domestic union of a woman with a man because someone said

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7. See JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997).

8. As Spinoza pointed out, any *de-finition* is necessarily exclusive (*determinatio negatio est*). See SPINOZA, *ETHICS I, Prop. VIII, Schol. 1*, reprinted in *A SPINOZA READER* 88 (Edwin Curley trans., Princeton University Press 1994) (1677).

9. See *Genesis* 1:3-5; *Psalms* 33:9.

“let there be marriage!” Instead, “marriage” became the name used to designate this already existing social relationship when it had to be distinguished from other social relationships that might look like it in some ways, yet are different from it in more essential ways. And this had to be done because confusion of two essentially different relationships could have serious social consequences. So, for example, whether a long-term relationship between a woman and a man is deemed a *marriage* or not has considerable consequences when property the couple has acquired has to be reassigned in the event they separate from each other.<sup>10</sup>

Let me emphasize now that by calling attention to the traditional origins and character of marriage, I am not arguing from, or even for, the authority of tradition. Instead, I am asserting that the Western tradition of marriage, being a union between a woman and a man, has good reasons for being limited to heterosexual couples, thus excluding all other relationships, such as homosexuality, polygamy, polyandry, or “polyamorous” arrangements (that is, domestic partnerships involving sexual liaisons of more than two persons). These reasons allow me to argue for the rational validity of traditional marriage, both for what it includes and what it has to exclude. This means explicating and arguing for the purpose or end of marriage itself. Accordingly, I shall try to show that the traditional restriction of marriage to two persons of different sex is not arbitrarily discriminatory, thus making it essentially different from prejudiced, irrational kinds of social discrimination such as racial segregation.

## II

### WHY MARRIAGE?

In her Essay, Professor Nussbaum writes that “marriage . . . supports several distinct aspects of human life: sexual relations, friendship and companionship, love, conversation, procreation and child rearing, and mutual responsibility.”<sup>11</sup> She then divides the purposes of marriage into two distinct categories. The first category is what she calls the “expressive aspect,” which seems to include all of the purposes just mentioned, with the exception of procreation and child rearing. And it is about this expressive aspect that Professor Nussbaum states: “When people get married, they typically make a statement of love and commitment in front of witnesses . . . [S]ociety, in response, recognizes and dignifies that commitment.”<sup>12</sup> One could say that this distinction is based on the difference between public reasons and private reasons for any human activity—in our case at hand, the human activity of getting married.

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10. See PALESTINIAN TALMUD, *Ketubot* 5.2/29d.

11. Nussbaum, *supra* note 1, at 668–69.

12. *Id.* at 669.

The procreative aspect of marriage—starting and maintaining a family—is something publicly significant and certifiable. The state’s interest in procreation and familial continuity is because the state needs to replenish its citizenry regularly and thus ensure social continuity. As such, it is and should be governed by the laws of the state.<sup>13</sup> The expressive aspects, however, are the private reasons for marriage. They should not be governed by the laws of the state, however necessary they are for the private happiness that makes getting married and staying married personally appealing. In today’s parlance, these expressive aspects are about “relationships” rather than being about what in yesterday’s parlance were called “family relations.” Thus one used to distinguish carefully between one’s relatives and one’s friends, even when one privately valued the relationship with one’s friends more than one’s relations with his or her relatives.<sup>14</sup> The state has no valid interest in these private relationships and should not, therefore, interfere with them by governing them in any way. Accordingly, the state should limit its concern to what marriage publicly *effects* rather than with what marriage privately *affects* because these private affections become distorted when public interest in them inevitably leads to public control of them. The state should no more govern these private relationships than it should govern one’s friendships.

Since procreation combined with child rearing is the only truly public reason for marriage, I think marriage is essentially endorsed and structured by the state to best facilitate the procreation and rearing of children. Moreover, parents have the prima facie right to raise the new persons they have brought into the world as their own children, and into this particular polity as its new citizens.<sup>15</sup> By doing that, they are, among other things, acting as good citizens. The state should respect that parental right. When not exercised by the parents who bear that right, the state should enforce the duty of these parents to at least

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13. For the difference in Jewish tradition between marriage as a formal public institution as distinct from a private informal arrangement, see MAIMONIDES, *Laws of Marriage*, in MISHNEH TORAH 1.1–4.

14. “Better a close neighbor than a distant brother.” *Proverbs* 27:10.

15. It would be hard to argue, though, that a secular state may actually mandate its citizens to marry and thereby procreate in a socially authorized way, whereas such a mandate can be cogently made (although not actually enforced) by a traditional community on its members through its mediation of the divinely revealed mandate to “be fruitful and multiply.” *Genesis* 9:1; see BABYLONIAN TALMUD, *Sanhedrin* 59b; *Deuteronomy* 5:8; DAVID NOVAK, COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY 166–72, 177–78 (2000). A secular state, though, cannot see itself as being governed by any such divinely revealed mandate without, however, losing its very secularity by becoming “theocratic” (i.e., directly ruled by God’s law). The most *divinity* a secular state can recognize are divinely endowed or sanctioned rights. Perhaps the right (rather than the duty) to marry and procreate could best be subsumed under the right to “the pursuit of happiness” that Thomas Jefferson in the U.S. Declaration of Independence saw as something “unalienable,” i.e., what ought not be taken away from humans by other humans because they are “endowed by their Creator” with these rights. For the difference between a divinely mandated duty and a divinely endowed right, see DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 37–49 (2009).

make themselves known to their children and contribute to their physical support in whatever way possible, since these parents are responsible for their children coming into the world. Hence these children have a right, a justifiable claim, on their parents to fulfill their duty to them as much as possible. Only in cases of gross parental neglect should the state transfer the rights and duties of natural parents to persons willing and able to raise these children to maturity *in loco parentis*. But, absent any severe physical, mental, or emotional impediment to parenthood that inevitably leads to abuse or neglect, children are rightfully raised by their natural parents. In fact, were that *prima facie* right not respected, so that natural parents would have to argue why they are the best guardians of their own children by criteria other than their responsibility for bringing these children into the world, many people would probably opt out of parenting altogether.

I consider these rights of both parents and children to be natural, in the literal sense of their natal character, and natural in the sense of being pre-political and thus not entitlements from the state. It is the children's natural claim upon the humanly instituted state to enforce their parents' natural duty to them. Think of a child's claim on a "deadbeat dad" or "deadbeat mom," which we expect the courts and the police to enforce if that is the only way to get compliance from such irresponsible parents. And it is the parents' natural claim upon the humanly-instituted state to enforce their children's duty to care for them if they become disabled or infirm. Think of how many of us are disgusted when we hear of adult offspring who have abandoned their disabled or infirm parents when they could care for them or, at least, arrange for their care when the adult offspring themselves could not care for them.

In the case of children, maximally, this is the right of the now unborn child to be brought to birth—that is, not aborted in utero—and then raised by the two persons, the man and the woman, responsible for his or her conception, which is the event that marks the beginning of one's human being.<sup>16</sup> Minimally, this is the right for one to know who is still responsible for enabling his or her coming to be, and the right to at least be able to confront them when he or she or both of them have not exercised their proper parental responsibility. So, it would seem that a child can best exercise that right, that justifiable claim, when he or she is living in a family governed and cared for by his or her own father and mother; and a father and mother can best fulfill their parental duty when living together in the marital-familial relation of husband and wife. Maintaining, preserving, and promoting the traditional institution of marriage is the state's way of best facilitating the exercise of the natural right of children and the natural duty of their parents.<sup>17</sup>

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16. See NOVAK, *supra* note 4, at 27–50.

17. In SAADIA GAON, *THE BOOK OF BELIEFS AND OPINIONS* 141, 373 (Samuel Rosenblatt trans., 1948), the ninth century Jewish sage, Saadia Gaon, notes that the reason for the universal prohibition of adultery is to best enable parents and children to recognize each other and be related

Rights are rationally justifiable claims made by one person or persons upon another person or persons.<sup>18</sup> The public recognition of rights is what enables us to pursue our desires—minimally with legal impunity, maximally with social entitlement. It is therefore rational that an overwhelming number of children desire to be raised by their own mother and father, parenting in tandem as a married couple. Just ask children whose parents have divorced if they do not often feel that their natural right to an intact family has been violated. These feelings are justifiable, even if they can rarely be justified in a court of law. (Children cannot sue their divorced parents for “home-wrecking.”) Would many of us not sympathize with their complaint, either because we have suffered a similar fate, or because we would not want to suffer a similar fate? And it seems to be the desire of most people to raise the children they have enabled to come into the world, preferably in tandem with the spouse with whom they so enabled their children to be conceived and to be born. Just ask parents whose children have been taken away from them if they do not feel their natural rights have been violated. Would we not sympathize with their complaint, either because we have suffered a similar fate, or because we would not want to suffer a similar fate? And, unlike the feelings of the children of divorce whose violation cannot be justified in a court of law, sometimes these feelings of parents deprived of their children can be justified in a court of law, for example, in a custody hearing. Finally, think of the social pathology of communities in which a large number of children are not being raised by both parents, and where a large number of parents, especially a large number of fathers, have abandoned their children by fleeing from their natural parental responsibilities. In all such cases, those having social power and responsibility have to ask themselves whether they could have prevented, or at least alleviated, some of this social pathology by providing better enforcement and encouragement of the natural rights of children, and the natural rights of parents for their children and natural duties to their children.<sup>19</sup> Therefore, if the primary reason for the public recognition of marriage is to best enable children to be brought into the world and raised by their two natural parents, then it is clear why marriage should only be a union of one woman with one man. Only heterosexual couples are capable of doing that.

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to one another as a recognizable family. That mutual recognition is a natural right (what Saadia called a *mitsvah sikhlit*, “a rational commandment”) entailed by one’s being a parent of a child and one’s being a child of a parent.

18. See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* 18 n.22, 33–34, 214–15 (1997).

19. Surely, Aristotle’s best criticism of the trans-familial social scheme proposed by Plato in *Republic*, 457B–466D, is his warning of the social disintegration that is likely to occur in a society when the state attempts to totally displace the natural rights and duties of parents and children to each other. See ARISTOTLE, *POLITICS*, 2.1/1261a5–1262b35.

### III SOME OBJECTIONS

If the public reason for the institution of marriage is to facilitate procreation and the exercise of parental and filial rights and obligations, then it follows that the state should limit marriage to heterosexual couples, since only heterosexual couples are capable of procreating children. Neither two men nor two women can do that by themselves. Nevertheless, let us now consider some of the objections that Professor Nussbaum has raised that seem seriously to challenge the most commonly argued reason for the traditional definition of who are the only subjects of marriage.

One objection is that if marriage's sole public reason is procreation, and coincidentally being responsible for those whom a couple has procreated, then why has marriage never been "limited . . . to the fertile, or even to those of an age to be fertile," as Professor Nussbaum puts it?<sup>20</sup> I would answer that objection by citing the old legal principle: *de minimis non curat lex*, which could be translated loosely as "the law is only made for what usually obtains." The fact is, the majority of people who marry are fertile and are of an age to be fertile. And how could we reasonably establish a criterion to determine who is fertile and who is not? Any required test to determine one's fertile suitability for marriage would likely be a colossally humiliating invasion of the privacy of couples engaged to be married. Moreover, in an age when new reproductive technologies are enabling persons heretofore assumed to be sterile to become parents, almost no one can be presumed to be incurably infertile.

Even if a couple does decide between themselves *ab initio* not to have children, that is their private agreement which in no way impinges upon the public reason for marriage *per se*. In fact, historically, when couples did have to provide a reason or grounds for divorce, one could sue for divorce if one's spouse refused to procreate with him or her, even if there had been a private agreement between them initially not to do so. Moreover, it is a sign of how degraded civil marriage has already become where now in many jurisdictions there is "no fault" divorce; namely, there no longer need be any grounds or reasons at all for divorce other than one's wish not to be married anymore to his or her current spouse. That, by the way, is one precedent or trend that should be reversed, not built upon. When the grounds for dissolving a marriage become vague or absent, the grounds for initiating a marriage become equally vague or absent.

Professor Nussbaum objects that "gays and lesbians . . . can have and raise children (whether their own from a previous marriage, or children created within their relationship by surrogacy or artificial insemination, or adopted children)."<sup>21</sup> Let us now examine these examples of how gays and lesbians can

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20. Nussbaum, *supra* note 1, at 679.

21. *Id.* at 670.

“have” or “create” children.

The first example concerns children from a previous—and I assume heterosexual—marriage. Since children from a previous marriage can be and often are raised by a single parent after having been widowed or divorced, I fail to see what the addition of another adult adds to the family, especially when that new spouse functions *in loco parentis*, at least de facto, replacing the now displaced parent in the new domestic arrangement. How can a person of the same sex as that of the remaining parent possibly simulate the now missing other parent of the children remaining at home? Such a replacement strikes one as unnatural, inasmuch as a woman is now represented to function as the children’s new “father,” or a man is now being represented to function as the children’s new “mother.” This is an even greater problem if that new parent was the co-cause of the divorce because of his or her adulterous relationship with the natural parent of the children. Does this also not send a powerful message to the children that their natural mother or father regrets her or his very heterosexuality that led to the children’s conception and birth in the first place?

There is also the question of adultery and its connection to the question of custody of children after a divorce. That is, when an originally heterosexual couple divorces because one of the spouses decides he or she is really homosexual, is it often the case that this spouse discovered his or her homosexuality from having been involved in a homosexual relationship *already*? As such, if the other, heterosexual spouse has remained faithful to the marriage, could not the adultery of the now homosexual spouse be cited by the faithful heterosexual spouse seeking primary custody of the children on moral grounds? Needless to say, this logic would also apply to exclusively heterosexual adultery as well. In Talmudic language, one could say that the sinner not be rewarded for his or her sin, but that he or she should be penalized because of it.<sup>22</sup> However, since those seeking same-sex marriage want the full rights of marriage, the full obligations of marriage, like the obligation to resist adultery and the consequences of the violation of those obligations, should obtain for them as they do for everyone else.

The second example concerns surrogacy or artificial insemination, which creates a violation of a child’s natural right to have both natural parents raise him or her. In the case of surrogacy, two homosexual men request or hire a woman to be inseminated from the semen of one of them, or from a mixture of semen from both of them. In the case of artificial insemination, two homosexual women request a man to donate or sell his semen in order to impregnate one these women. Both cases, though, represent a conspiracy ab initio to prevent the child so conceived from being raised by his or her natural mother or father. This is the same conspiracy that a single woman joins when she has herself inseminated, usually without even any future plans for a

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22. See BABYLONIAN TALMUD, *Yevamot* 92b, and parallels.

marriage that could at least provide her child with a stepfather who might adopt her child. All of this is an intentional violation of a child's natural right to have either a father or a mother or both. And all of these present moral violations should goad people like myself to work for legal change in the whole area of family relations, including changing the laws that deprive an unborn child of his or her right to life. This right, especially, is the basis of all other rights, including the right to have parents who are responsible for one's upbringing.

Professor Nussbaum's last example concerns adoption. Despite all my talk about natural parentage and childhood, I am in favor of the institution of adoption. Surely, a child's right to being raised to adulthood is better upheld by adoptive parents than by natural parents who are unable or unwilling to raise their natural offspring. And, in principle, I am not opposed to a gay or lesbian couple being able to raise a child so abandoned by his or her natural parents. Surely, a child is better raised by two people who love him or her and each other, rather than being raised in the less personal setting of an orphanage, or by foster parents who are paid by the state to care for children nobody else wants, and at less cost than the cost of maintaining orphanages. Nevertheless, all things being equal, I think it is best for a child's filial rights that a heterosexual married couple be given preference over a homosexual couple in the adoption of a child abandoned by her or his natural parents. That is because a heterosexual couple can better simulate—perhaps improve upon—the heterosexual union that produced this child in the first place. This better simulates the duty of the natural parents to raise this child, a duty they would not or could not exercise. This, by the way, is not arguing empirically that, in Professor Nussbaum's words, "opposite-sex couples do better than same-sex couples," a point she regards as unproven.<sup>23</sup> I base my arguments on the concept of rights, not on the concept of utility. Thus my arguments are *a priori*, not *a posteriori*, even though I do think there is actual evidence that the optimal family setting for children to grow and flourish is a home led by that child's natural mother and father.

#### IV

#### MARRIAGES OR CIVIL UNIONS?

Although I have extrapolated on many points at which Professor Nussbaum and I disagree, I do agree with her when she says: "I personally favor the solution of leaving civil unions to the state and leaving marriage to religions and other private entities."<sup>24</sup> In fact, such a move would greatly

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23. Nussbaum, *supra* note 1, at 680.

24. *Id.* at 695. Nevertheless, I disagree with her categorization of religions with "other private entities," since religions are themselves public entities; indeed, they are more, not less, public than any of the institutions of a secular society or than a secular society itself. See NOVAK, *IN DEFENSE OF RELIGIOUS LIBERTY*, *supra* note 15, at 88–89.

strengthen the social prestige of religious marriage.<sup>25</sup> Yet neither of us is willing to give up on civil marriage, at least not yet. I suspect that giving up on civil marriage now would be an admission of political defeat for both positions. In Professor Nussbaum's case, it would seem to be an admission that the institution of civil marriage cannot ever really be reformed to include all those she wants included in it. In my case, it would seem to be an admission that civil marriage can never be restored to its richer and more coherent traditional meaning. However, since the United States is so divided on this question, the disestablishment of civil marriage altogether and its total replacement by civil unions might be the way this society will have to go for the sake of civil peace. It might be that the U.S. Supreme Court will have to make the momentous decision to cut this Gordian knot. Not being prophets or seers, however, means that neither Martha Nussbaum, nor David Novak, nor any of us partaking in this debate can predict with any certainty when, where, how, by whom, or even if that national Gordian knot will ever be cut. Additionally, even if the Supreme Court does rule, one way or the other, on the validity of same-sex marriages, the ruling would not likely resolve this issue for the civil society in which marriages take place. For whichever side lost its case before the Supreme Court would simply prepare for the next battle in this ongoing war of ideas, knowing full well that the Supreme Court has reversed itself in the past on several other debated ideas.

In conclusion, I do not think Professor Nussbaum has made a sufficiently compelling argument to radically redefine marriage as the publicly-sanctioned union of one woman with one man. That some lawyers, judges, and even elected officials have been persuaded by advocates of same-sex marriage like Professor Nussbaum is not enough to warrant radically changing a venerable institution in and for a democratic polity. The whole question, one way or the other, should be decided directly by the people themselves, perhaps by being provided the opportunity to vote on a constitutional amendment defining what civil marriage is and what it thereby is not. So, for the sake of truly public discussion and resolution of this burning question, this response to Professor Nussbaum is my small attempt to offer to those people who do not want civil marriage radically changed some reasons why their resistance to this change is rational, and not an irrational prejudice as sometimes charged by those who advocate this change.

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25. For an argument as to why religious marriage should be kept as separate as possible from civil marriage, see David Novak, *Jewish Marriage and Civil Law: A Two-Way Street?*, 68 GEO. WASH. L. REV. 1059-78 (2000).