

HEINONLINE

Citation:

Sacred: Religion, Sexuality, and the Law, 16 Cardozo
J.L. & Gender 637 (2010)

Content downloaded/printed from [HeinOnline](#)

Thu Feb 7 22:09:49 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

SACRED: RELIGION, SEXUALITY, AND THE LAW

FEBRUARY 9, 2010

MR. AMOL SINHA: Welcome to SACRED: Religion, Sexuality and the Law, the Cardozo Journal of Law and Gender's Symposium for 2010. I wanted to take a minute to explain my motivation for this event.

We live in a world facing radicalism, jihadists, Televangelists, megachurches, polygamist communes and hate crimes. We also live in a world with rape, pedophilia, sex rehab, porn addiction and incest. Extremes surround us, and stubbornness, and a lack of open communication lead to little compromise, partisan politics, injured people, genocide and warfare. I wanted this day to focus on religion and sexuality for two reasons. First, to talk about religion or sexuality in any context is considered extremely taboo. It can get really uncomfortable really fast. And to be able to talk about such issues openly and freely because of the common denominators of law and academia is simply remarkable.

Second, I don't know if this is a counter or a complement to the first, but religion and sexuality are significantly and perhaps inextricably intertwined. There is religiously-motivated sex and sexually-motivated religion. They're the sources of prejudice, bigotry, pride, and satisfaction, and they're the fodder for regret and guilt, shame and indulgence.

Finally, they're probably the two biggest forms of identification that we have as humans, and they have been for as long as mankind has existed. They're the driving forces of both action and inaction, and the bases for hotly debated legal and social issues. It takes a thorough understanding of both religion and sexuality to get to know and relate to someone individually or an entire community socially. And it takes open-mindedness and open conversation to progress our understanding of others' motivations.

I hope this symposium will be a forum to understand the world and its people a little better, as we're here today with phenomenal leaders of law, religion, and gender issues. So thank you very much for coming, and let's get started with the first panel, Polygamy in the United States.

I'd like to take a minute to introduce our moderator, Ed Stein, a man who wears many hats at Cardozo. He's a Vice Dean, and Professor of Law, and Director of the Program in Family Law, Policy, and Bioethics here at Cardozo. He's been teaching at Cardozo since 2000, but prior to that, he taught at the Philosophy Departments of Yale, Mount Holyoke College, and NYU, my alma mater. He's the author of numerous articles and books on legal and philosophical and scientific topics, including "The Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation,"¹ and "Without Good Reason: The Rationality Debate and Philosophy and Cognitive Science."² His current research interests focus on the intersection of family law and sexual orientation, gender and the law. He holds a PhD from MIT and a J.D. from Yale. Please join me in welcoming Professor Stein.

[applause]

PROFESSOR ED STEIN: Thanks very much. My role is relatively small today.

I'm going to introduce the speakers in turn, and moderate the discussion. The plan is that each of our three speakers will speak for approximately ten minutes. I'll be a little bit of a task master and try and keep them roughly on that schedule, since we're already running a little late. And then there'll be time for both my questions and your questions. I'll defer to your questions first, but feeling that I'll have some too.

The speakers that we have here today, I'll introduce them each before they speak. But the order that they will speak will be first we'll hear from Nelson Tebbe, then we'll hear from Vincent McCarthy, and then we'll hear from Nadine Strossen.

So first of all, we're happy to have with us today Nelson Tebbe, who teaches Constitutional Law, Religion the Law, and Professional Responsibility at Brooklyn Law School. He's come across the bridge or tunnel to talk to us today. His scholarship focuses on the relationship between religious traditions and constitutional law in the U.S. and abroad. His articles have appeared in *Georgetown Law Review*, *The Journal of Religion*, *Michigan Law Review*, and *University of Pennsylvania Law Review*. And he is the Chair-Elect of the Law and Religion Section of the American Association of Law Schools. Nelson joined the Brooklyn Law School from St. Johns Law School, where he

¹ EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS OF SEXUAL ORIENTATION (Oxford University Press 2001).

² EDWARD STEIN, WITHOUT GOOD REASON: THE RATIONALITY DEBATE AND PHILOSOPHY AND COGNITIVE SCIENCE (Oxford University Press 1996).

received a teaching award. And before teaching, he clerked for Judge John Walker of the U.S. Court of Appeals for the Second Circuit. And he practiced law at the American Civil Liberties Union and Davis Polk. And he was also a Fulbright Scholar at the University of Capetown. And was a classmate of mine at Yale Law School. So Nelson will talk for about ten minutes, and then we'll have our next speaker. So, Nelson.

MR. NELSON TEBBE: Great. So I'm delighted to be here. Thanks for having me. I've been working a little bit on the right to marry for same sex couples. I also work on religious freedom law. But I've never written anything or spoken about polygamy before. So I'll take this as an opportunity to extend some of my thoughts in those other areas to this issue, which is becoming, I think, increasingly pressing in the United States.

So in a piece that's forthcoming in the *Penn Law Review*, Deb Whitus [phonetic] and I argue that the best way to think about the right to marry for same sex couples is as a matter of equal access to civil marriage, and that the best doctrinal vehicle for that conception, at least in federal court which is where the battle has now been taken for better or worse, is the fundamental interest branch of equal protection law.

So here, I'd like to take the opportunity and the time to sketch out some thoughts about the implications of that argument for other non-traditional family arrangements, focusing on polygamy. Again, I'll limit myself to how federal courts ought to think about this, operating under a current doctrinal and pragmatic restrictions. I'll also assume that polygamy is about marriage. I'm not sure that that's right, although the Oxford English Dictionary tells me that it is right. I won't focus on informal plural unions so much, but on marriage as such. And I'll also assume that polygamy includes both polygyny and polyandry, as well as other forms of plural marriage, including polyamory. And I'll explain what all those are—well, at least I'll explain what some of them are.

My intuition here is that we can expect the opening up of new lines of social conflicts around non-traditional family structures in the coming years. And we can imagine or require that courts will properly be enlisted to help mediate those clashes. While it's difficult to imagine, I think, judges taking protective action with regard to polygamy any time soon, it's not completely inconceivable to imagine constitutional protection in the medium and long term.

I think that for two predominant reasons. First, there's increasing immigration into the United States from foreign cultures where polygamy is accepted in the mainstream of society. I work on Southern Africa, and there, that's absolutely the case. As just one illustration, the current President of the Republic of South Africa has many wives, or several, more than one. And they are, the wives are outspoken proponents of polygamy. These are educated, articulate women. So the charge of false consciousness, which is often leveled against wives who are involved in polygamous arrangements, is harder to level there, although perhaps not impossible.

I think the stronger social development is polyamory, or group marriage, where it becomes possible to imagine, for example, a gay couple and a lesbian couple who get together for the purposes of biological procreation. Fall in love and/or decide that the best way to raise the children would be to remain together in one household and seek marital status for that arrangement. This form of polyamory, or group marriage, I think, does not present the same social and political concerns that we're used to with respect to fundamentalist Mormon polygamy, for example.

So I'll make three points in the talk. First, I'll argue that polygamist families have an interest of constitutional magnitude in equal access to the government-sponsored institution of civil marriage. I think in many circumstances, that interest will be overbalanced by the state's legitimate concern for the welfare of women and children. In particular, I think a prophylactic rule that prohibits all polygamist arrangements in an overbroad fashion will sometimes be justified by those concerns of harm to women and children, combined with an awareness of institutional incapacities that make it difficult for authorities to detect that type of harm within the privacy of family structures. But polyamorous arrangements have begun to undermine the rationale for that kind of prophylactic rule.

Second, I'll argue that polygamists may have a due process right to be free from criminal sanctions. This part of the argument addresses a difference between the same-sex marriage debate and the debate over polygamy. Namely, that what's at stake in the same-sex marriage debate is access to the government recognized institution of civil marriage. With polygamy, private or religious marriage is also criminalized. Right? So it's not just access to state-sanctioned marriage, but it's the ability to marry at all, even in private or religious ceremonies. A due process argument could reach that if it's structured in the right way.

Finally, I'll address polygamy that's religiously motivated. My point here will be that while polygamy probably will not be protected either against exclusion or criminalization under the Free Exercise clause, it may clear threshold tests under more protective state constitutional provisions or state statutory provisions, like state versions of the Religious Freedom Restoration Act.³ Even then, however, polygamy bans will have to be, and might be justified by the government in the way I described just a minute ago.

So first let's take access to this government recognized institution of civil marriage. How should federal courts think about the right to marry in that sense? My argument is that the right to civil marriage is best conceptualized as a matter of equal access to government benefits and recognition, and that the most effective doctrinal vehicle, again, is the fundamental interest branch of equal protection law.

Civil marriage, I think, is best conceptualized as a government program that extends special material and expressive benefits to married people. States do not have an affirmative obligation to legally recognize marriage at all. Right? The State of New York could get out of the marriage business if it wanted to without constitutional difficulty under, I think, conventional understandings. But once the state does elect to offer civil marriage, it has a presumptive obligation to administer that program evenhandedly according to our way of thinking.

That's true even if the right to civil marriage would not be protected as a matter of freestanding due process principles, and even if the classification that's involved is not suspect under equal protection analysis. I think independent analysis is required.

There's some support for this in existing Supreme Court doctrine concerning marriage. And we lay that out in the paper; I won't describe it now. The Supreme Court has been unclear as to whether the right to marry, as it calls it, is grounded in due process or equal protection. That may be just confusion or it may reflect the kind of dual nature of the right. Moreover, there are cases outside the marriage context that we think support the notion that equal access is the appropriate framework to think about limits on important government programs.

³ Religious Freedom Restoration Act, 42 U.S.C. §2000bb (1993).

First, the right to marry has a similar conceptual structure to the right to vote. As you may or may not realize, you don't have a right, a federal constitutional right, to vote in state elections. So the State of New York could decide that the lieutenant governor ought to be appointed rather than elected, and we citizens of New York would have no federal constitutional complaint. However, once the state does elect or decide to offer elections, it has to administer those elections in an evenhanded way, or else bear the burden of justifying exclusions.

So the classic example is the poll tax. In a case called *Harper*, the Supreme Court struck down a poll tax even though there was not a federal constitutional due process right to participate in state elections, and even though the classification at issue, here on the basis of wealth, for example, was not suspect.⁴ When you put those two together, the concern raised a presumption of unconstitutionality.

Court access cases also bolster our approach. Similarly, there's no federal due process right to a criminal appeal in state court. If the State of New York wants to abolish criminal appeals, it could do that under the federal constitution. But once it elects to offer criminal appeals, it can't restrict them in certain ways. And, again, we can talk about the cases there if you like.

We also think that aside from the doctrine, there are theoretical considerations that make the right of equal access attractive. We think that it offers considerable conceptual appeal. In particular, it blends liberty and equality concerns that are at stake around exclusions from the right to marry, or from civil marriage in the right way. And it also draws on both traditionalists and progressive considerations in a manner that we think reflects the structure of the right of equal access to civil marriage.

So trying to apply that framework to polygamy, I would say a couple of things. First, exclusions from civil marriage for polygamists may also warrant a presumption of unconstitutionality. In the context of same-sex marriage, no state court that has applied heightened scrutiny has upheld exclusions from civil marriage. And the same might be true here. However, polygamy by contrast, as I mentioned in the introduction, raises concerns of harm to women and children that, I think, are not present in the context of same-sex marriage.

⁴ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

I'm not an expert on the empirics here, and I think the empirical data is going to play an important role in the legal debate. And I can't express a view on the validity of those concerns about harms to women and children. So I'll have to leave that to other people. I just want to emphasize that at least in principle, it's possible to imagine a justification for a prophylactic rule that bans all polygamy in a certain jurisdiction in order to protect women and children, even if the rule is self-consciously overbroad. The justification would be that the costs of an overbroad rule like that, that is prohibiting polygamy even where it's not harmful to women and children, are less than the costs of allowing polygamy and not being able to detect harm to women and children because it happens in the privacy of family structures.

In the context of same-sex marriage, two justifications for exclusion from civil marriage have predominated. They're both related to procreation. The first, there's a so-called responsible procreation argument. And then there's an argument about the optimal environment for childrearing. And some of these arguments have been successful in courts that have been applying rational-basis review. But, you know, I think they have significant problems in the same-sex marriage context. Whether they have the same problems in the context of polygamy, I think, is something we'd have to look at empirically.

Now, thinking about private marriage, this is marriage that does not happen in state-recognized ceremonies, but happens in churches or in private settings. Again, a difference between same-sex marriage and polygamy is that in the polygamy context, that type of marriage is criminalized by the state in many jurisdictions. And there's no domestic partnership or civil union status that's available to polygamist families.

*Loving*⁵ is the key decision with respect to criminalization of private marriage. Although the court relied on equal protection concerns there, that was the case having to do with anti-miscegenation laws. It also held that anti-miscegenation laws violated due process. So there's some hope there. *Lawrence v. Texas*, of course, also had to do with the criminal law.⁶ And there may be some relevance there, although the court seemed to go out of its way to limit *Lawrence* to non-marriage arrangements, and also to limit it to, you know, in ways that would not protect polygamy.⁷

⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁶ *Lawrence v. Texas*, 539 US 558 (2003).

⁷ *Id.*

So I think it may be difficult to convince courts to find a substantive due process right to marry that extends to polygamous unions. And that's mostly because of the backward-looking nature of due process inquiry. That is, it protects activities that are deeply rooted in the nation's history and traditions. Even if *Lawrence* had announced a kind of emerging awareness approach to substantive due process, it's not clear, and it won't be clear that some courts will review that as a consensus in favor of polygamy that's, in fact, developing. Opinion polls at the moment show that some 92% of Americans are opposed to polygamy. So that doesn't bode well for a due process kind of approach. Note that even if there is a due process right to marry multiple people in a private ceremony, that right could be overbalanced by the concerns, legitimate state concerns, about harm to women and children that I mentioned earlier.

With regard to religious freedom, I think it's probably the case that because polygamy bans are on their face neutral—that is, they don't single out religious groups for special prohibitions—they will be upheld, at least for the foreseeable future under the federal Free Exercise clause. We can talk about whether these bans really are neutral, but that'll be the posture. However, there's some better hope under state constitutional and statutory provisions that provide greater protection for religious people. I don't want to go on too much longer, so maybe I'll just leave it there.

PROF. STEIN: Thank you, Nelson. Our next speaker is Vincent McCarthy. He is Senior Counsel of the American Center for Law and Justice, and his work there emphasizes cases involving family law in both federal and state courts. After spending thirteen years in private practice, McCarthy joined the ACLJ in 1997, and his broad focus there is constitutional law. Vincent is a graduate of Fordham University School of Law. He also was the Associate Dean, instructing students at the University of Bridgeport School of Law in Bridgeport, Connecticut, and his teaching focused on constitutional law and civil procedure remedies. He lives in New Milford, Connecticut, and he also works to protect family, marriage, and the sanctity of human life. He's also married to the Senior Counsel of the ACLJ, Ann-Louise Lohr. Vincent.

MR. MCCARTHY: I apologize for being at somewhat of a disadvantage. I'm filling in for Jay Sekulow today, and I have prepared some, what I call notes, on proposed new marriage institutions and their impact on religious freedom. So I apologize to the extent that I'm not focusing on polygamy, and I am trying to give just a broad spectrum kind of analysis of some of the issues involved in the different forms of what I call gender and genderless forms of marriage.

Same-sex marriage and polyamory, which has been brought up previously, are part of a spectrum of genderless category of relationships, meaning that anyone of either gender can participate in either one of them with a member or members of either gender. Gender relationships start with two persons of either gender. If it consists of two persons of the same sex, it may or may not qualify as same-sex marriage. If it consists of two persons of different sexes, it can start out as marriage, which technically consists of two persons of different genders. But if the relationship is going to lead to polyamory, there's often a lack of fidelity to each other for life, which is a basic requirement of marriage.

As persons are added to the relationship, although the law may not recognize the relationship, it is now known as polyamory and it exists in our society in great numbers. In fact, *Newsweek Magazine* reported that as of, I believe it was 2006, there were 500,000 people practicing polyamory. I'm not saying that same-sex relationships inevitably lead to polyamory. But if the argument that same-sex partners mate for the radical change from opposite genders in marriage to same sex partnerships should also be applied to the number of persons in a relationship, i.e., that there should be no innate composition of the numbers of persons in a marriage, one can see how polyamorous relationships could eventually be viewed as a marriage.

Polyamory advocates would argue that if individuals of the same gender can marry, why can't more than two persons come together for the same or different genders and form a marital relationship based on the same considerations that form the basis of same-sex marriage. Why can't more than two persons form a relationship that receives societal approval and benefits? Polyamorous relationships require no gender limitations and are, like same-sex marriage, genderless. The argument of polyamorous couples for the benefits of marriage, which I'm sure we'll begin to hear in the not too distant future—and I've already read about in many law review articles—is that marriage is malleable and has changed in the past to accommodate cultural changes. At one time in parts of this country, members of different races were not allowed to marry and members of the same gender were universally excluded from marriage.

They will argue that, like same-sex partnerships, their relationships serve the same goals and social needs. They will argue that they have chosen to live together in an intimate relationship consisting of multiple partners for the purpose of mutual love and support, and cite *Goodridge*,⁸ *Kerrigan*⁹ and

⁸ *Goodridge v. Dep't of Pub. Health*, 798 NE 2d 941 (Mass. 2003).

⁹ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

*Varnum*¹⁰ and other same-sex cases for their right to come together in their own chosen group for the same reasons that same-sex partners do. As the number of polyamorous couples increase, it can be expected that they will argue that the culture has changed accordingly and rather than living outside the law, they should be accommodated within the definition of marriage.

A question that arises is whether to refer to gender relationships seeking societal approval as marriage or by some other name. Most writers argue that there can only be one social institution denominated quote marriage. Society must therefore choose according to these writers whether to recognize as marriage one man and one woman, or the union of any two persons, or the union of more than two persons of any gender. Social institutions survive only to the extent that they are accepted by the public, and their meanings are sufficiently understood and clear.

As Monte Neil Stewart argues in a recent article in the Harvard Journal of Law and Public Policy entitled, "Marriage Facts," a lifestyle without institutional context is like Monopoly money.¹¹ It resembles the true currency, but lacks the essential shared meaning that provides its value. Further, he argues, since man-woman marriage is a pre-political institution, it can survive on its own. But if a society wants to change its definition of marriage to genderless marriage, a post-political and, therefore, law-constructed and thus fragile institution, society will have to deinstitutionalize man-woman marriage and recreate a new genderless marriage institution into which every couple that professes to be married must participate. This is an argument also made by David Blankenhorn.

Genderless marriage is a radically different institution from conjugal marriage with different social goods and very different meaning. There are areas where the two institutions overlap, but most writers have emphasized where they diverge. Proponents of genderless marriage argue that same sex couples can form and participate in long, enduring, intimate relationships, which means they should be able to receive the social and economic benefits provided to marriage by society. For them, marriage is a partnership of two loving equals, who choose to commit themselves to each other—what *Hernandez v. Robles* referred to as the close personal relationship model of marriage.¹²

¹⁰ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

¹¹ Monte Neil Stewart, *Marriage Facts*, 31 HARV. J. L. & PUB. POL'Y 313 (2008).

¹² *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

Some genderless couples believe they are just as capable of raising children as man-woman partnerships. They seek to change the focus from procreation to the relationship of the parties in the marriage. They believe that they stand to gain as much from the refining benefits of marriage and make as many contributions to society as any man-woman couple.

Polygamy—I had to find something to say about polygamy. Polygamy is quite a separate relationship for which the arguments for legitimacy would have to be very different from those practicing polyamory. In the *Reynolds*¹³ case, decided by the Supreme Court, the law prohibiting polygamy was upheld¹⁴ because the court found on largely moral grounds, *Lawrence v. Texas* aside,¹⁴ that a religious practice could not violate the law of the land. If the same expert testimony that was introduced in the *Perry*¹⁵ case recently was put to the court today in a polygamy prosecution, it is likely that a court in Massachusetts or New Jersey would find polygamy to be legal. More likely, if the expert testimony was that polygamy served the same societal purposes as same-sex marriage, it is quite possible that a court would hold, under the Equal Protection clause of the United States Constitution, that polygamy was entitled to the same status as same-sex marriage.

In fact, polygamy might have a stronger argument than same-sex marriage for official recognition throughout the United States. Polygamy is made up of both genders. So a child would be exposed to a male and a female model, which would not be the case with same-sex marriage in which a child would be subject to only a single gender.

Finally, conjugal or traditional marriage. Conjugal or traditional marriage, on the other hand, requires one man and one woman. In the Law Review article referred to previously by Monte Neil Stewart, he critiques how courts in particular have mishandled what he calls “marriage facts”—the title of the article—in making important decisions regarding marital rights.¹⁶ Marriage facts, he argues, are important because marriage is an important social institution constituted by a web of shared public meanings. These meanings, he argues, form the basis of the social institutions which are the source of social goods that lead to the institution’s evolution and perpetuation.

¹³ *Reynolds v. United States*, 98 U.S. 145 (U.S. 1878).

¹⁴ *Lawrence*, 539 US 558.

¹⁵ *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009).

¹⁶ Stewart, *supra* note 10.

The meaning of marriage across time and cultures has nearly always been the union of a man and a woman, which provides at least six valuable social goods. One, society's best and perhaps only means to secure the right of a child to know and be raised by his or her biological parents. Two, the most efficient means yet developed to maximize the private welfare of children conceived by heterosexual coupling. Three, the indispensable foundation for that childrearing mode, mother-father childrearing, that correlates with optimal outcomes deemed crucial for a child's, and therefore, society's wellbeing. Four—and I know that there are objections to all of these things. I'm just trying to point out the different arguments in favor of the different forms of legal marriage. Four, society's primary and most effective means of bridging the male-female divide. Five, society's only means of transforming a male into husband-father, and a female into wife-mother statuses and identities particularly beneficial to society. Six, social and official endorsement of the form of adult intimacy, married sexual intercourse, that society may rationally value above all other such forms.

For those who believe in the paramount importance of traditional or conjugal marriage for society, the deinstitutionalization of man-woman marriage can only result in the loss of that institution's unique social goods. In *Hernandez v. Robles*, the New York's Court of Appeals opined that a man-woman marriage has resulted over centuries in a partnership of equals with equal rights joined to form a new family unit founded on shared intimacy and mutual financial and emotional support.¹⁷

What Stewart describes as conjugal marriage is made up of two individuals, one man and one woman, who agree to commit body and soul to each other for life, for better or worse, till death do us part. That form of traditional marriage, which I will also refer to here as religious marriage because of its similarity to religious marriage, is most accurately described in a number of Christian documents, most primarily a document called *Humanae Vitae*.

In this model of, again, conjugal marriage, a husband and wife must respect the relationship between the unitive and procreative purposes of marriage by remaining open to the procreative significance of marriage, which means that sexual relations with one's partner must be an expression of love for that partner, of self giving to that partner, and a recognition of the married partner's participation in the procreative act to bring children into the world who are also loved. Children, therefore, in a traditional marriage, are very much part of the marriage in which the parents' self-giving love to each other results not only in

¹⁷ *Hernandez*, 855 N.E.2d 1.

the creation of a spiritual and third person from this two into one, but further creates another human being very much part of and modeled after the husband and wife, who cooperated in their creation.

This right has been referred to as pre-institutional because it has existed for so long across all, at least western, cultural countries. The United States Supreme Court, in the *Skinner* case, stated, societies have always had a strong interest in the establishment of strong marriages because procreation is fundamental to the very existence and survival of the human race.¹⁸ When marriage is redefined to include same-sex marriage, a radical break is created with our understanding of marriage by rejecting its core feature, and exclusive relationship between a man and a woman.

This core belief has been rejected in cases establishing the right to same sex marriage. Some courts have even referred to the belief in traditional marriage as a form of bigotry. The California Supreme Court ruled in the California cases that society's interest in promoting a stable relationship for the procreation and raising of children is an insufficient basis for limiting marriage to relationships between a man and a woman.

I don't want to go on too much longer here. I think the point that I'm trying to make with regard to traditional or conjugal marriage is that it is centered on children, focused on the next generation. It attempts to sustain enduring bonds between men and women in order to give a baby its mother and father, to bond them to one another and to the baby. Conjugal marriage imposes on the father, the responsibility of fatherhood through the institution of marriage. A society without the institution of marriage in which heterosexual intercourse and childcare are largely a disconnected process would be chaotic from a dissent by Judge Cordy in the *Goodridge* case.¹⁹

There are many, many issues that arise out of the comments that I've made. For example, can society have more than one institution labeled marriage? How are new constitutional rights created? Does same-sex marriage qualify under *Washington v. Glucksberg* as a fundamental liberty right, liberty interest?²⁰ But I'm going to move here to the last point that I wanted to make is on religious freedom.

And that is the various forms of relationships that conflict with over 2000 years and more of our understanding of the nature of marriage have created friction

¹⁸ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁹ *Goodridge v. Dep't of Pub. Health*, 798 NE 2d 941 (Mass. 2003).

²⁰ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

with many of our oldest religious traditions, out of which our understanding of marriage originally arose. I am referring primarily in the west to the Jewish and Christian traditions, which form two of the largest religious traditions in the West. Although there are, of course, exceptions and cases at the margins, as a general rule, the religious beliefs of those traditions support what I have referred to as a conjugal, religious-based or traditional marriage.

Therefore, when a demand is made for official recognition of same-sex marriage, polyamory, or polygamy as the same as marriage, deserving of all the societal benefits and affirmations of marriage, of course, people are upset, because this demand counters what the overwhelming cultural beliefs of individuals have been for a very long time.

Exacerbating this friction is the insistence of those individuals seeking to introduce into the culture new forms of marriage, which they seek to have recognized as the same as marriage as it has existed for over 2000 years, the insistence that anyone opposing this is doing so based on an animus or hostility toward them. Within the last week, I received in connection with the Perry case, where I represented several individuals, briefs from many different religious organizations supporting the plaintiffs who seek to overturn Prop 8. What I find ironic about these submissions is that the plaintiffs have argued from the beginning of this case, including in their opening statements, that opposition to same-sex marriage stems from bigotry, hostility, and animus toward the homosexual and lesbian community.

It occurs to me that you can't have it both ways. You can't say that religious support for same-sex marriage springs from the best expression of religious belief, and at the same time, argue that all religious support for Prop. 8 is based on animus or bigotry.

Same-sex marriage, polygamy, and polyamory are viewed as outside the laws of nature by a majority of Americans. Thirty-one states have constitutional amendments prohibiting same-sex marriage, and another eleven states have similar laws. I found interesting a recent article, talking about a trip of the Pope to Great Britain because he opposes proposed laws that would take away the right of the Catholic Church to choose its own employees based on their marital status, sex, or sexual orientation and gender. This law would take away from the church its right to define itself, which in this country,

fortunately, is protected by the First Amendment under *Hurley*,²¹ *Dale*,²² and many other cases.

Those seeking to be included in the law of marriage cannot just make this significant and substantial cultural change by fiat from the top down. That's what happened with abortion, and even pro-choice people like Justice Ginsberg have expressed their belief that this issue would have been resolved perhaps better at the state level, where the political processes could have worked this problem through.

Returning again to the *Perry* case, even the plaintiff's own evidence was that most of the religious people who supported Prop 8 did so because they wanted to preserve traditional marriage, and believed that Prop 8 would take away many of their religious freedoms. What if a photographer, in good conscience, doesn't want to work a same-sex wedding? Should he be forced to do so under pain of a lawsuit or violation of the law? Forcing new forms of relationships onto society from the top down outside the political process may lead to some victories, but it also leads to the natural reaction against being pressured, which is why most states have expanded their laws to include same-sex marriage and also included exemptions for religious groups, and those who oppose same-sex marriage on grounds of conscience.

This has taken much longer than I had expected. So I think I'm going to end here. And thank you very much for your attention.

PROF. STEIN: Okay. And our final speaker is Nadine Strossen, who has written, lectured, and practiced extensively in the areas of constitutional law, civil liberties, and international human rights. From 1991 to 2008, she was President of the American Civil Liberties Union—the first woman to lead the nation's largest and oldest civil liberties organization. She retains leadership position in the ACLU as a member of its National Advisory Council and Co-Chair of its Campaign for the Future. The *National Law Journal* has twice named Professor Strossen one of the “100 Most Influential Lawyers in America.” She’s also been listed among the “350 Women Who Changed the World in 1976 to 1996,” as well as in the “100 Executives Leading the Digital Revolution,” and “America’s 200 Most Influential Women” in *Vanity Fair*, and “America’s 100 Most Important Women” in *Ladies Home Journal*.

[laughter]

²¹ *Hurley v. Irish-American Gay*, 515 U.S. 557 (U.S. 1995).

²² *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (U.S. 2000).

PROF. STEIN: Among other lists she's been on—in 2005, she was honored by the University of Tulsa College of Law and the *Tulsa Law Review*, which made her scholarly work the subject of their Legal Scholarship Symposium. She graduated from Harvard College and from Harvard Law School, where she was the Editor of the *Harvard Law Review*. And before becoming a law professor, she practiced for nine years in Minneapolis and then here in New York City. Professor Strossen.

PROFESSOR NADINE STROSSEN: I can project better from a standing position, so I hope this microphone—it is turned on. Great. I'd like to thank all of the organizers of this conference, including my prime contact, Amol. When he invited me, I did not have any room on my calendar. I do not have any room on my calendar. But he's such a persuasive advocate. And as you heard today, such an eloquent speaker. I really enjoyed those thoughts that you shared with us. I found them very powerful. And I hadn't even—I guess having been such a free speech advocate and practitioner for so many decades now, I had forgotten a childhood memory that you revived. My parents always said: the two topics that are absolutely taboo that you must never talk about in public are sex and religion. And that's what I've been doing for my entire adult life, breaking taboos, I guess.

I accepted Amol's persuasive invitation with the caveat that I would not have formal prepared remarks, but just some informal kind of off-the-cuff commentary. Although I will reserve my—I disagree with a lot of the points that were made by Vince, as you won't be surprised. I'm not going to focus on those in my opening remarks. Perhaps we'll have an opportunity, including with the audience, to engage in a give-and-take.

I thought it was kind of interesting that the topic was chosen, because, for me, polygamy is something that I have been sort of in the midst of a debate since the *Lawrence*²³ decision, kind of unwittingly. I was speaking shortly after the *Lawrence*²⁴ decision [*break in audio*] a pre-invitation, but it happened to coincide with that decision at your alma mater, Ed and Nelson, at Yale University. And during the question and answer session—I discussed the case among other things—somebody asked me what I thought the implications would be for polygamy, and what the ACLU's view was on polygamy, and the ACLU believes. And I, as a constitutional law professor, believe that in principle, the right of mature, consenting, mentally competent adults, free of coercion, should be able to make this choice as a matter of fundamental, what

²³ *Lawrence*, 539 US 558.

²⁴ *Id.*

lawyers call substantive due process rights. That's a freestanding, independent argument.

I then went on—and although I agree with Nelson—to say that you should win that argument doesn't at all mean that you necessarily will. But I think in terms of the constitutional principles, I agree with Justice Scalia's dissent in *Lawrence*²⁵ when he said the same principles that underlay the majority's rationale in favor of same-sex intimacy would also logically lead the court to hold that there is a fundamental right to choose to engage in other kinds of relationships that might violate the majority's sense of morality, including polygamy. I think he's absolutely correct.

I then went on, in answering this question at Yale, to note that the ACLU's position on polygamy was also grounded as a, what lawyers call, independently sufficient argument on religious freedom concerns for those who have a religious belief. In some cases, a belief in a religious duty to engage in this practice. And I thought, Well, I'm going to appeal all across the political spectrum here—right?—'cause I'll get the liberals who love substantive due process freedom of choice, and I'll get the conservatives who love religious freedom. And to my amazement, there was a hailstorm of protest. An article that was in the *Yale Daily News*—not the most widely circulated publication in the world—was picked up by bloggers, and columnists, and, you know, right-wing talk show hosts of the so-called “religious right.” And it still continues to have legs all these years later.

As I was doing a little bit of preparation for this talk—Amol said I only had to do a little bit—to my amazement, I found a very recent column from less than two months ago in the *Eagle Forum*, which was founded by Phyllis Schlafly, has collaborated both with Vincent's organization on some issues and with the ACLU on some issues. You might be surprised. It's that so-called religious right organization, but believes very deeply in data privacy. So they've been allies with the ACLU on some post-9/11 issues. But Phyllis and I have debated each other out the “wahzoo” for ancient history. She was somebody who really led the charge against the so-called Equal Rights Amendment, which would have officially given women, or protected against gender discrimination in the U.S. under the U.S. Constitution. So here's this column that she writes as I say less than two months ago. And it's touched on a number of themes that have been raised by both of our other panelists.

²⁵ *Id.*

If our government can not define marriage as the—oh, I’m sorry, like so she’s railing against same-sex marriage, but she then goes on to say we thought our nation had definitively settled the polygamy issue a century and a half ago, but it recently raised its ugly head. The ACLU’s feminist—that’s a negative term from her—feminist president Nadine Strossen—and she’s out of date because we have another feminist president who’s a faculty colleague of Nelson’s now—stated in a speech at Yale University that the ACLU defends the right of individuals to engage in polygamy. And in 2006 in a high profile debate against Supreme Court Justice Antonin Scalia, Nadine Strossen stated that the ACLU supports a constitutional right to polygamy.

Now she gets into the immigration issue, which I thought was very interesting. That’s a point that Nelson raised. And there’s kind of an eerie resonance with the old Supreme Court decisions going back to the end of the 19th Century, a really anti-Mormon decision, bristling with hostility against discrimination, not only against that religion, but also there are very strong overtones of racial discrimination and ethnic discrimination, which I pick up in the next reference that Phyllis Schlafly’s column makes. She says the massive immigration that the United States has accepted in recent years includes large numbers of immigrants from Third World countries that approve of polygamy. We wonder if polygamists have been allowed to immigrate to the United States and if they are continuing these unacceptable customs in American neighborhoods. So to me as a civil libertarian and advocate of principles of liberty and equality, they’re all coming together here. And just as, of course, in Justice Scalia’s dissent, he was using that comparison between polygamy and same-sex intimacy and the whole other what lawyers call a “parade of horribles” not to welcome liberty and equality for the other relationships that he listed as being logically related to the majority’s rationale on same-sex intimacy, but for the—exactly the opposite purpose, of course. It was a rhetorical device to scare people away. Look, the—if we allow this recognition for X, then Y is going to happen. And I just want to, you know, to put that in context, among the other parade of horribles that Justice Scalia said would follow from the Supreme Court’s decision in *Lawrence v. Texas*,²⁶ not only polygamy, but also fornication, the legal definition of which is any sexual intimacy between any two people who are not married. It is distinguishable from adultery and arguably you can say the government has some justification in terms of protecting the other marriage partner in adultery, but fornication is committed I suspect by the vast majority of my students, I’m sure not at Cardozo Law School. And another example is masturbation. Now can you imagine that the United States Supreme Court would actually uphold a law

²⁶ *Id.*

criminalizing masturbation? And yet Justice Scalia lumps it together with polygamy and fornication as something that, you know, this sky will fall if we follow through the principles in *Lawrence*²⁷ and allow these practices to be constitutionally protected. In fact, subsequent to the *Lawrence* decision, one state supreme court at least has struck down an anti-fornication law. In fact, I know of two. They were ACLU cases.

I do think that I would—I'm going to not go into detail here, but I did a little bit of research to see what litigation there had been post-*Lawrence*²⁸ about its application to polygamy and I came across a very powerful dissenting opinion by the chief justice—female, feminist chief justice. She and I have been on panels together—of the Utah Supreme Court, Christine Durham, which is a very powerful defense of the right to engage in polygamous relationships on independently sufficient grounds of free exercise of religion and also substantive due process. She thinks that it does follow from *Lawrence*.²⁹ And I—in response to your point, Nelson, about what we have to look at—I mean, to say that both of the—that this choice should be protected as a matter of religious freedom, as a matter of individual freedom of choice under the Due Process Clause, of course, as I always say to remind my students, it doesn't mean it's absolutely protected. It just shifts the burden of proof to the government under what we lawyers call strict scrutiny to show that the government has a countervailing interest of compelling importance that can not be promoted through means less restrictive than either outlawing the practice or imposing some other kind of restriction on it. And it's in that spirit I assume that Nelson talked about we'd have to look at the empirical evidence to see if there is any justification in terms of preventing harm to women and children. And, Nelson, I don't want to be unduly hard on you, but I cringe as a feminist when I hear women and children put together and I know that you didn't mean that. But we do have to separate out mature, consenting adult females from children who I think are entitled under the law to be treated separately. And Judge—Chief Justice Durham's opinion does go through, she cites a lot of empirical authorities and surveys that indicate that the fears that are associated with polygamous communities and relationships are often more often than not based on stereotypes and not justified by actual evidence. And she specifically refutes the suggestion that there should be a prophylactic approach. So I think everybody would enjoy reading her opinion.

²⁷ *Id.*

²⁸ *Lawrence*, 539 US 558.

²⁹ *Id.*

Okay, as far as—oh, and as far as children are concerned, I do have to say, again, putting it in a larger civil libertarian context, of course, protecting children from harm of any kind, including sexual abuse, is a governmental interest of compelling importance. But, of course, we all know that politicians sometimes very cynically, sometimes in good faith, raise the flag of concern for protecting children as a justification, a purported justification for depriving not only children, but adults as well, of freedom and equality. And that certainly has been true and Vince alluded to it, I understand not necessarily as an advocate, but just putting out some of the arguments there, we well know that in terms of LGBT rights, the rhetoric of protecting children has been consistently raised as a purported justification for suppressing those rights, but in many other fields as well. Censorship of sexually-oriented expression is constantly justified for the sake of the children. So we have to get behind the rhetoric, demand actual evidence.

And unfortunately because Mormons are associated with polygamy and continue to be a discriminated-against minority, indeed, even in the state of Utah, which is pretty close to a theocracy, it's a theocracy that is oriented very much against the fundamentalist branch of the religion that does still believe in and practice polygamy. And so there is a lot of opportunity for a very discriminatory selective enforcement. And I think the empirical evidence would suggest that the harms are not only—the alleged harms that result from polygamy are not only overblown, but are often invoked by ambitious politicians, by disaffected former members of the communities, and really those of us who care about individual liberty and procedural due process, as well as substantive due process, really have to be on our guard.

Let me just remind you of the notorious case from Texas a couple of years ago where something like 500 kids were removed forcibly from their parents and held hostage for months in terrible circumstances, then scattered around the state incommunicado, without access to lawyers, merely because of what turned out to be hoax of an accusation.³⁰ Ultimately with the support of the ACLU, among others, the Texas Supreme Court held that that was a gross violation of the rights of parents and children, even without getting into concerns about substantive due process and religious exercise—just the most basic procedural due process opportunity to have an individualized hearing rather than in effect being judged guilty by association just because of your beliefs. And so we really have to be on our guard against that.

³⁰ In Re Texas Dept. of Family Protect. Serv., 255 S.W.3d 613 (2008).

As far as women are concerned, I was very happy that Nelson from his own experience talked about the assumption of false consciousness that no woman who says that she chooses freely to engage in this kind of relationship can actually mean it. She must really be a dupe. There are a number of women in polygamous relationships who have been outspoken proponents of that choice, specifically from a feminist point of view. And interestingly enough, not only the ACLU has supported the freedom to make these choices, but also the National Organization for Women in Utah has been a very strong proponent of the freedom of adult women to enter into polygamous relationships.

There's one woman who has written a lot on this topic. Her name is Elizabeth Joseph. And I'm just going to read—she is a lawyer. And I have to admit when I—I first read a piece that she had in the *New York Times* some time in the nineties when in response to some raid on some fundamentalist Mormon compound out West. And I had the stereotype that, you know, this is really a bad thing for a woman, even if she—I defend her freedom to make that choice the way I defend other choices that I wouldn't make myself, but I saw it as very traditional and antifeminist. So I was first of all blown away when she described herself and the other wives and there was actually a photograph of all of them. She's a lawyer, one was a stockbroker, one was the only real estate agent in town, you know, very high-powered women. And she talked about this as kind of a feminist concept of we all help each other, we raise each other's kids and, you know, we don't have to sleep with him when we don't want to. Somebody else can do it.

And so let me just read you part of what she said. She talks about, you know, there's built-in childcare. Then she says it's helpful to—and friendship. It's helpful to think of polygamy in terms of a free-market approach to marriage. Why shouldn't you or your daughters have the opportunity to marry the best man available regardless of his marital status? And then she goes on to say that her husband is such a great husband because if you add up all of his years of marriage to other women, the guy has hundreds of years of marital experience. As a result, he is a very skilled husband. She then says polygamy is an empowering lifestyle for women. "It provides me the environment and opportunity to maximize my female potential without all of the tradeoffs and compromises that attend monogamy. The women in my family are friends. You don't share two decades of experience and a man without those friendships becoming very special."

She then ends with the punch line that polygamy is the ultimate feminist lifestyle. Well, you know, we may reject that conclusion, but I hope we would also reject negative stereotypes that it is necessarily inconsistent with feminist values.

Okay, I just want to say I mentioned the old Supreme Court decisions. And I want to read you a couple passages from them and tie it into the same-sex marriage issue because—or, you know, just the LGBT rights more generally. When I went back and read these Supreme Court decisions, which are still good law, by the way. They have never been overturned and eerily were cited by Justice Antonin Scalia in his opinion in the year 2000 that essentially gutted the Free Exercise Clause of the U.S. Constitution. And not coincidentally he then cites these nineteenth-century cases. And at first I was shocked as I always am when I read them. And then I thought, well, I shouldn't be shocked because this is the very same court that gave us *Plessy v. Ferguson*,³¹ right, that was upholding this pernicious doctrine of "separate but equal" in the context of race. And you see a lot of discrimination, as I said, not only on the basis of religion.

So *Reynolds v. United States* from 1878,³² which rejected a religious freedom defense of the practice of—against a prosecution for practicing polygamy by a devout Mormon, the court says—and, I'm sorry, for those of you who are familiar with the language in Chief Justice Burger's notorious concurring opinion in *Bowers v. Hardwick*,³³ which was overturned by *Lawrence v. Texas*,³⁴ it will sound eerily resonant.

Polygamy has always been odious among the Northern and Western nations of Europe and until the establishment of the Mormon Church was almost exclusively a feature of the life of Asiatic and African people. From the earliest history of England, polygamy has been treated as an offense against society, an offense for which the penalty was death.

And then in 1890 in a case called *Davis v. Beason*,³⁵ this one is if you could imagine, the court upheld the right to vote, which Nelson also talked about, a denial of the right to vote for anybody who belonged to a religious association that believed in polygamy. And I'm going to repeat that. You did not have to be a practicing polygamist. You did not even have to personally attest to a belief in polygamy. But if you belonged to a religious organization that professed a religious belief in polygamy, you were denied your right to vote. And the U.S. Supreme Court upheld that in 1890 and said bigamy and polygamy are crimes by the laws of all civilized and all Christian countries. Again, now think of some of this language in terms of rhetoric we hear about

³¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³² *Reynolds v. United States*, 98 U.S. 145 (1878).

³³ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³⁴ *Lawrence*, 539 US 558.

³⁵ *Davis v. Beacon*, 133 U.S. 333 (1890).

same-sex marriage. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women and debase man. Few crimes are more pernicious to the best interests of society. And he then goes on to—the Justice goes on, the Chief Justice, to mock the religious beliefs. I'll spare you that.

But now that you've heard those, hear from the late twentieth-century Burger's opinion in *Bowers v. Hardwick*.³⁶ Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. Blackstone described the infamous crime against nature as an offense of deeper malignancy? [phonetic] than rape, a heinous act, the very intention of which is a disgrace to human nature and a crime not fit to be named. To hold that the act of homosexual sodomy is somehow protected would be to cast aside millennia of moral teaching.

So the point that I'm trying to make is the negative parallel between the condemnation of polygamy and the condemnation of same-gender relationships, but I want to circle back in my very last words to where I started, which is the positive connection, the affirmation of individual freedom and equality.

So I'll end with what to me are always thrilling closing words from Justice Kennedy's opinion for the majority in *Lawrence v. Texas*.³⁷

I don't—I mean, I agree with Nelson that substantive due process is to some extent backward-looking, but only to some extent, as he obviously knows. That said, I thought that Judeo-Christian tradition going back to the Old Testament certainly had many revered examples of polygamy. So if one wants to have, you know, just a backward-looking vision that would certainly be encompassed.

But Kennedy really stresses the forward-looking thrust of substantive due process and other rights. He said had those who drew and ratified the due process clauses known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

³⁶ *Bowers*, 478 U.S. 186.

³⁷ *Lawrence*, 539 US 558.

Thank you.

PROF. STEIN: So thanks to all three panelists. We now have some time left for your questions or comments. So I'll open up the floor and call on people with questions or comments.

JUSTIN LAMORT: What factors does your organization consider or look at, what empirical data do you have?

VINCE MCCARTHY: I don't think we take the position that same-sex marriage is harmful to children. I know of no studies that have reached that conclusion. What we have said is that it's an experiment that for which we don't have longitudinal studies, so we really don't know what the effect on children will be. We do know the effect on a child raised by a mother and a father whose—who are the biological parents of that child. And that appears to be an optimal situation for a child. There are studies showing that children raised without a father, which I know is not the same thing as measuring what that child would do in a same-sex relationship because we—again, we don't really know over time, but we do know that a child raised without a father, and we have studies going back, well, at least 100 years on that, are—is impacted adversely in virtually all indicia of measuring growth. I mean, with grades in school, use of alcohol, drugs, et cetera, are higher for boys in particular who are raised without a father, okay. And, you know, that is what occurs when you have a child raised by two women and no father. But we don't take the position that a child is necessarily harmed who is raised by a same-sex couple because we don't know, you know, whether that is the case.

PROF. STEIN: Other questions?

KERRY ANNE HOFFMAN: How do you think popular media attention, what the public is viewing as polygamy, has either advanced the discussion on polygamy or changed people's views on polygamy? We see today shows like "Big Love," obviously just a television show, but this is something that a lot of people have access to and they're not reading all of the wonderful cases that we're reading, this is the view that society is getting of polygamy as something that's controversial that more people are kind of tuning in to. Is that helping us talk more about this topic or is it the way that it's portrayed is possibly negative for where we want to go with this discussion?

NADINE STROSEN: Well, thank you so much for raising it because among the many notes that I didn't have time to get to, I had made a little note about "Big

Love" I guess in response to Nelson's comment that we'll have to wait for culture and society to catch up. And the idea that there would be a primetime drama about this topic I think even five years ago would have astounded me. In fact, I must admit I don't really keep up on TV, so when I discovered the show, it had already been playing for a couple of years. And I thought—and my students were very ho-hum about it. Now I remember, this will date me, all of the flap about whether Ellen DeGeneres was going to come out as a lesbian on primetime TV. And that was seen as such a huge development, the idea that you could even have a character in that timeslot in that medium announcing and celebrating her sexual orientation. So it seems to me that, you know, "Big Love" is really a big deal, no pun intended.

PROF. STEIN: There was another hand in the back. Go ahead.

AMOL SINHA: Last year we hosted a speaker who was an escapee from a polygamist commune. She'd escaped the confines of her family because she was being raped as a child. She was forced to marry and she had kids before age 16. And she got out of it and now she lives in hiding. She talked about a deadlock. She said no matter who you complained to, they were all in on it. So I was wondering if you could comment on what to do in cases of government deadlock and is it just police ineffectiveness or government ineffectiveness of the political scheme or can something like the legalization of polygamy with effective regulation have a positive effect?

NADINE STROSSEN: Okay. Child abuse and everything that you described is against the law already, in Utah and everywhere else. So what you're describing are particular situations of failure of law enforcement, which exist in every context. I was just thinking, at New York Law School later this week, we're having a V-Day event that I'm also participating in, violence against women, and the ACLU Women's Rights Project, as well as founded by Ruth Bader Ginsburg, whose name was mentioned by Vince, among many other advocates knows the sad truth that in non-polygamous relationships we are constantly dealing with tragic situations where there is a law or indeed we had a case that went all the way to the U.S. Supreme Court of a specific, explicit protective order that the woman had gotten against her ex-husband and she begged the police repeatedly to enforce it.³⁸ She knew exactly where he was. He had kidnapped her three daughters. And I think some of you know the horrible bottom line of this case. He finally himself drove up to the police department. She hadn't been able to get them to respond. And it turned out that the three bodies of her murdered daughters were in the trunk of the car.

³⁸ Gonzales v. City of Castle Rock, 307 F.3d 1258 (10th Cir. 2002).

And the—and not only was there a failure of local law enforcement. I have to say there was a failure of the U.S. Supreme Court to enforce the—what we believe and what Ginsburg believed and unfortunately in a dissenting opinion the substantive due process right to that kind of protection.

So I think rather than zeroing in on polygamous communities or Mormon communities, we have to have strong and evenhanded enforcement of laws that already make these acts a crime.

Since you raised it and Nelson had as well, I want to just share with you one portion of justice—Chief Justice Durham's dissent in this opinion. And by the way, she apparently—I read her biography. She apparently has done a lot of study of Mormonism and throughout Utah history and to the present. She does acknowledge that there might be a special concern. She says I acknowledge the possibility that other criminal conduct may accompany polygamy. Such conduct may even be correlated with the practice of polygamy in a community that has isolated itself from the outside world, at least partially in fear of criminal prosecution for its religious practice. But then she goes on to say the state may not criminalize membership because that would be to impose a criminal penalty based on status rather than conduct. And then she talks about less restrictive alternatives, including effective enforcement of the existing laws. So that would be my primary response.

MR. NELSON TEBBE: Well, I don't disagree with most of that. I mean, it seems to me that I guess in principle I would say that I would stand by the idea that it's possible to justify a prophylactic approach to polygamy because there may be institutional incompetency on the part of various federal or—and state public officials to actually detect the types of harm that are independently criminalized. And if that's true, then—and these harms are, you know, very severe, so the state's interest is strong. So if that's true, then I can imagine a prophylactic approach being justified. I just don't know what the empirical support is, right? And I—you know, I read the Utah decision and the chief justice's dissent with interest, as you did. Her argument seemed plausible to me. But I—you know, I haven't seen the studies.

I do think in the case of same-sex marriage, the—there's no empirical evidence that same-sex couples can't raise children just as effectively as different-sex couples. And you might find that with respect to polygamy as well, but I just don't know. In principle, though, I can imagine a prophylactic approach.

You could imagine, though, even if there were a prophylactic rule in place that you could see as applied challenges from couples who say look—or, sorry,

families who say look, we're engaged in polygamy, but there's no—none of that concern applies to us here and we have a fundamental right to arrange our family as we see fit. And then you might be able to see a successful constitutional challenge, not to the statute at—on its face, but to the statute as applied to certain --

PROF. STEIN: Nelson, I'd like to sort of follow that up with a question, sort of push you on—a little bit on the kind of empirical support and this—and sort of how far you would go with some of that.

I think there's some empirical support for the following claim that stepparents, in particular step-husbands, are somewhat more likely to be abusive or to engage in sexual activities with their spouse's children from a prior marriage. Would that—if that empirical evidence is true, which I could give you some citations on, but if that were true, would that favor a prophylactic rule against second—a second marriage, that is allowing people not—you know, not here I'm talking about parallel two marriages, but getting divorced and then marrying again. Why do we think in some—I mean, it's—and I—I'm betting you don't think there should be such an approach.

MR. TEBBE: Correct.

PROF. STEIN: Right? You don't think, but why in the case of polygamy would—certain—empirical evidence seems to be appropriate in some—seems to be something we would be interested in some cases and not in others. What's sort of the balancing approach that leads you it seems to be interested in empirical evidence about polygamy, but not about serial polygamy, you know, parallel polygamy, that's—is it—is there an intuition that you have about it? Is it?

MR. TEBBE: Right. It's a great question. I—so, you know, of course, the type of interest that the state has in order to overcome a presumption of unconstitutionality is very strong. So you would, you know, how judges would actually apply this in a given case you don't know in advance. And you might counsel them to be sensitive to the fact that the interest has to be really compelling. I question whether the evidence, you know, is compelling enough, right, in the context of stepparents, right, to overcome that kind of very strong presumption. So that's the first thing.

Second, you know, prophylactic rules are really about institutional competence, right, and so I would wonder whether it's really the case that it's difficult for authorities to detect that kind of abuse or as difficult as it is in the

case of certain typical, actually existing, historically verifiable polygamist arrangements in the United States. The one that leaps to mind, of course, are compounds, right, polygamist compounds run by FLDS communities in Southern Utah and also Western Utah.

Then there's a veil—there's a sort of shroud of secrecy that makes it difficult I think for authorities to detect this kind of abuse, you know, partly—maybe because those arrangements are illegal, but maybe for other reasons as well. And so I would think that the institutional incompetency would be sort of a greater concern in the context of traditional kinds of FLDS compounds than it would be in, you know, suburban America when you're talking about stepparents. And so those were the combination of considerations that I would anticipate courts would look at. That seems, you know, more or less legitimate to me, although, you know, the concerns that Nadine raised are present in my mind as well.

NADINE STROSEN: Well, just if I could chime in, it was great—isn't this funny? We have two law professors grading a third law professor giving us a great question, so that's a great complement, right?

And you—but is a great question because it resonates not only with the issues that we're talking about today, but what also flew through my mind was racial profiling, including religious profiling post-9/11, how often and including in debates here at Cardozo have I been told that how many of the terrorists who have attacked the United States are Muslim and therefore why doesn't it make sense to have special prophylactic rules against Muslims in terms of protecting national security.

Now I totally understand that you're making a distinct argument when you talk about institutional competence. That said, the reason what you call a veil of secrecy one could say is availing themselves of the right of privacy, the freedom of association, the free exercise of religion -- and so I think, again, the neutral answer is to make sure that we have competent, aggressive law—vigorous law enforcement that is not overly aggressive because we certainly have seen examples of that in this scenario as well where the police are—and, again, as you know, Chief Justice Durham cites in her dissent very selective prosecution even of neutrally-written laws that are being violated by many individuals, but a pattern of more aggressive enforcement against polygamist couples, or more than couples I guess, polygamist families.

PROF. STEIN: I also had a question for Vincent. I wanted to ask a little bit about the ideal of the conjugal—of conjugal marriage that you talked about and its

relationship to legal marriage and to—I'm wondering what your view is or within this framework of talking about conjugal marriage how you think about couples who either have no intention of procreating, who are clearly unable to, so marriage between people very old or who for some reason the state knows that they're unable to reproduce or who say we have no intention of having children.

MR. VINCE MCCARTHY: Yeah, that question is always raised when—

PROF. STEIN: Right. I wanted to get your - -

MR. MCCARTHY: —you know, whenever we talk about this issue. And the answer to it is that—is what I said when I started, which was that I'm not talking about the marginal cases or the exceptions to the rule, which there are some. But they are a very small percentage of the cases of people who are heterosexual who want to get married, but yet don't want to procreate. My—actually the person I'm filling in here for today wrote a law review article on that subject and—or that at least covered that subject. And the answer is that, you know, the heterosexual model doesn't cover all cases, but it does cover the optimal situation. And that's I think what we need to not lose sight of is what is optimal under the circumstances. For example, a lot of people would think that well, at the ACLJ, we would be opposed to LBGT adoption of children under all circumstances. That's just not true. There may be circumstances where kids would be better adopted by a homosexual who had had a relationship with that child since birth and that child's parents weren't around, you know, something like that. But my answer is that, you know, the model that has been the one that has been used for, you know, a very long time is one that doesn't cover every single situation. There are exceptions.

PANELIST: But just to follow up a little bit, it's—it would be the—I haven't had the opportunity to sort of do the math on this, but presumably most people in the course of—well, that the model of conjugal marriage as marriage would be I think both over- and under-inclusive in the following sense that lots of children are born outside the context of marriage. And if you add to those, you know, to cohabitating or even non-cohabitating relationships in which children are born and married couples who don't have children, I think that probably the heterosexual, the sort of I don't know, you know, Ozzie and Harriet, Leave It To Beaver kind of traditional marriage—

[*Crosstalk*]

PANELIST: —in a way as a model of—for, you know, exclusive childrearing or something like that would actually be no longer the majority approach, even if it's in some sense the traditional approach. In other words, most families in which there's childrearing going on would be some kind of blended families, non-marital families, and many married—and if we sort of add to that the non-procreating married couples that, sort of, it would be a much smaller group. Would that—

[*Crosstalk*]

PANELIST: —would that change the - -

MR. MCCARTHY: —the heterosexual model starts from a complementarity of the two individuals, the male and the female. And it's that complementarity that provides the basis for that relationship. Now that may result on a biological level in sexual intercourse, which results in the birth of a child, procreation, but the complementarity still exists on all other levels. I mean, there's a whole section I didn't get into today talking about the whole history of traditional marriage and how it came about, but it was always based upon the fact that a man and woman served a purpose in society and that purpose was not only procreation, but also a coming together of the two members of the different sexes for a unitive purpose and a procreative purpose. So the unitive purpose, you know, survives as well in a complementary relationship.

NELSON TEBBE: So one thing that struck me about the arguments that you were making against same-sex marriage is that so many of them wouldn't apply to polygamous relationships, right? So—

MR. MCCARTHY: [Interposing] Right.

NELSON TEBBE: —there was the argument about two gender roles, which you acknowledged in your remarks. There would be in many polygamous situations parents of both genders present, right?

MR. MCCARTHY: Right.

NELSON TEBBE: The ancient status of monogamy is equaled by the ancient status of polygamy, at least in certain parts of the world. So I studied Southern Africa.

MR. MCCARTHY: Uh-huh.

NELSON TEBBE: There there's no question about it, polygamy is as ancient or more ancient than monogamous marriage.

MR. MCCARTHY: Sure. But I'm only talking about the Western tradition.

PANELIST: So—

MR. MCCARTHY: [Interposing] I'm not talking worldwide because frankly I don't know enough about—

NELSON TEBBE: [Interposing] But a lot of those people live in the United States now, right? And then also the focus on—

MR. MCCARTHY: [Interposing] Some of them live in the United States right now. I mean, you know—

PANELIST: [Interposing] What—but what about the—

MR. MCCARTHY: —you can't argue from the margins. That's what always happens, you know, is that when those of us who argue for heterosexual marriage, it's always everyone wants to argue the margins, so what about, you know, of an 80-year-old couple who can't procreate or what about, you know, two people who enter into a marriage relationship who don't want to have children. I mean, they truly are the margins. I mean, they're not the main, you know, body of people who get married, at least in terms of all of the statistics I've seen.

NELSON TEBBE: Well, on the margins point, you know, I keep thinking about *Loving against Virginia*, right.³⁹ At the time that that case was decided, interracial marriage was also a marginal practice. And public opinion at that time I think was less supportive of interracial marriage than public opinion is supportive of same-sex marriage today, right, and yet the court struck down bans on interracial marriage at that time, so.

MR. MCCARTHY: And it was right to do so and upheld the heterosexual model of marriage that we're saying is the optimal model. The optimal model has nothing to with the color of the skin of the people who are married. It has to do with the genders of the individuals and in *Loving*⁴⁰—

³⁹ *Loving*, 388 U.S. 1.

⁴⁰ *Id.*

NELSON TEBBE: [Interposing] Right. But, Vince, I know you've read the court's opinion and its language is very sweeping when it talks about the fundamental right of the individual to freely choose his or her spouse. It's—it really, I mean, there are a lot of phrases in that opinion that go way beyond the issue of racial discrimination alone.

MR. MCCARTHY: Right. But if what you're talking about is, you know, imposing a new form of marital relationship, I think you've got to be careful. And you've got to really look at also what the Supreme Court said in *Washington v. Glucksberg*⁴¹ when they said by extending constitutional protection to an asserted right of liberty interest, we to a great extent place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to breach new ground in this field lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this court. You know, any time there is a decision by the Supreme Court in the area of substantive due process, we always have serious concerns and serious problems. There are, you know, decisions the Supreme Court has made that I would agree with in the area of substantive due process, but I think the court has to be extremely careful because you're taking it out of the hands of the people who—from whom—who have to accept this for it to work. Because if they don't accept it, it's not going to work as, you know, and Dr. King said, you know, you can pass a law to stop people from lynching me, but you can't pass a law to get people to love me. And so by enacting these laws from the top down, and I'm talking about same-sex marriage, I think, you know, without the acceptance of the culture, I think you're going to create friction and it's going to be a problem very similar to the abortion problem.

NELSON TEBBE : Well, but if that had been the touchstone, then *Brown v. Board of Education*⁴² would've came out the other way, too.

MR. MCCARTHY: I know. And I agree with *Brown v. Board of Education*.⁴³ So, I mean, as I said, there are situations where I feel that the court has to step in and make a decision that is counter-democratic. I just don't think that this one of them.

PROF. STEIN : I think probably to keep things on time we should probably stop here, but I think probably the panelists who've been very generous with time

⁴¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁴² *Brown v. Board of Education* , 347 U.S. 483 (1954).

⁴³ *Id.*

will probably be a little more generous with their time if people have individual questions they want to ask them.

But thank you all very much for joining us.

[*Crosstalk*]

KERRY ANNE HOFFMAN: I want to thank you all so much for coming. This is when we are going to take our lunch break from 12:30 to 1:30. If anyone needs any suggestions on where to dine, there is a list of lunch suggestions outside. For our panelists, we're going upstairs to have a lunch -- so you can follow me there and we can continue this discussion.

Thank you, again, so much for all of your wonderful insight and thank you for moderating. So we'll see you back at 1:30 for our movie screening.

MR. AMOL SINHA: Hello. So we're about to start our final panel. It's entitled "Homosexuality, Islam and the Media." We'll start any minute now and it will go on until 5:00 p.m. and afterwards there will be a reception with plenty of food and drink in the lobby. So please stick around if that's enough incentive.

So as we saw with Parvez Sharma's film, there exists a serious clash between religion and sexuality in specifically Islam and homosexuality but as Parvez so powerfully put it, this clash is reconcilable. It's with efforts of educators and activists such as the one sitting beside me by which reconciliation and progression is possible.

So, for this panel, I'll introduce the speaker and then we'll either attack them with questions or they'll have a few words to say on their own and we'll go from there. So first I'd like to introduce Parvez Sharma. If you guys heard my very brief introduction earlier, this is the unabridged version. Parvez Sharma is a New York based writer and filmmaker. His first feature, which he directed and produced, "A Jihad for Love" which you just saw, is an international phenomenon with more than 8-million viewers in 49 nations in the first year of its release. The leading progressive journal *UTNE Reader* has named Parvez a visionary in its list of "50 Visionaries who are Changing Your World" in 2009. The winner of five international awards, the film has been released theatrically across the U.S. and in Canada and is being broadcast on TV screens around the world. This documentary deals with the difficult themes of Islam and homosexuality in a post-September 11th world and also seeks to challenge the

many stereotypes around Islam in a time when much of the religion and its one billion followers are misrepresented and misunderstood. Parvez is also a leading commentator on Islamic, racial and political issues, with his writings frequently appearing on *The Huffington Post*, *The Daily Beast* and other popular websites. He's engaged in a nationwide speaking tour, current and forthcoming writing and pre-production for a new film, partly set in his home country, India. He has previously worked as a television journalist in India and the UK, most notably for India's largest 24-hour news network, NDTV. He holds three Masters degrees and was educated in India, the UK and the US and has also in the past been an adjunct professor at American University, developing and teaching that university's first curriculum on Bollywood and other Indian cinemas. The US-based magazine Out has named Mr. Sharma one of the "Out 100" for 2008 or "one of the 100 gay men and women who have helped shape our culture during the year." He's the winner of the prestigious GLAAD media for Outstanding Documentary award in 2009. And Parvez also serves on the advisory board of the Human Rights Watch's LGBT Program. So please join me in welcoming Parvez Sharma. So you're on.

- We discussed earlier and I've been having informal conferences with my colleagues about the general laws of criminalization of homosexuality in Islamic culture and you have firsthand experience with this through your process of making film and as a gay Muslim. So could you please just talk to us about either what you've been faced with issues surrounding criminalization or faced with persecution directly or anything that developed in the process of making your film or in your life personally.

MR. PARVEZ SHARMA: All right. Thanks for watching the film. I'm assuming most of you've seen it or are familiar with it. And thank you for having me -- colleagues here.

I would say that the majority of Muslims in the world are not living under Shari'a law or under Islamic law. You know, the world's largest Muslim population is in Indonesia and I was closely followed by the Indian subcontinent which primarily comprises India, Pakistan and Bangladesh. So we have to be clear first of all that Shari'a is not the norm but exception as far as Muslim life goes around the world. Now the criminalization of homosexuality I think is sort of a direct result of the policing of morality as I see it by governments in many countries in the middle east, certainly in countries in the near east like Iran and recently Afghanistan and so on and so forth. But that policing of morality is, I feel, a particularly modern phenomenon that is post-colonial, if you will, which means that if you look—and the professor would probably speak to this, but if you look at 1428 years of

Islamic history, you see a kind of tolerance and acceptance of homosexuality that was pretty unique. That orientalist scholars of Islam, particularly from European cultures would look at as strange or sinful even that the kind of behaviors that went on in the Ottoman caliphate or even in the Mogul empires and would remark about that. So that was the kind of history that was inherited in many cultural ways throughout Islamic civilizations as they spread across the world. Interestingly, I felt—and I felt this way strongly in a very real way when I was making the film and traveling to so many countries—this film was made in more than 12 countries—interestingly that that legacy of criminalizing homosexuality, that policing of morality has really happened in post-colonial times after the British or the French left. And left many of these countries with of course hastily redrawn maps in the Middle East and elsewhere or on the Indian subcontinent but also with penal codes that criminalized homosexuality.

So, for example, in India, Pakistan and Bangladesh, as I said, taken together, that would constitute the largest number of Muslims in the world. If you took those three countries together, they have Section 377 of the Penal Code which is shared between all three countries which criminalizes homosexuality as sodomy or carnal intercourse against the order of nature. Now that is the kind of law, British law that has been left behind for those populations. In Pakistan, of course, you have a parallel system of Shari'a law where homosexuality is frowned upon but there has never been great clarity about what to do with the homosexual.

In countries like Iran, however, or Saudi Arabia, you get into a more complex picture. Iran being a theological state that inherited its constitution from ideas of Islamic revolution and is very deeply rooted in the Shia interpretations of Shari'a law does criminalize homosexuality. But once again, that criminalization is open to debate and question. So, for example, and I certainly don't pretend to be an expert on Islamic law, but for example, you know, for the act of fahisha or adultery, you need to have four adult male witnesses present in order to prove in a Shari'a court of law that something that would constitute illegal sexual intercourse or illegal sexual relationships has occurred. Now, you know, unless you're in an orgy it's very unlikely that you would have those four male witnesses present who would want to testify in court about it. Saudi Arabia again you end up with a very -- which is a strict interpretation of Islam constitution where homosexuality is definitely criminalized in some of the emirate states, the UAE, Yemen also, countries that border Saudi Arabia, there has recently been a lot of controversy around homosexuality being criminalized. But culturally speaking, men have had sex with men, women have had sex with women for, throughout Islamic history

and continue to do so in very large numbers. But they run into problems when there is a policing of the morality of the public—policing of the sexual act—which is carried out by governments. And I think “A Jihad for Love” tries to present in the most simple way possible a very complicated picture where there isn’t really unanimity amongst scholars, amongst governments even on what to do with the problem of homosexuality.

MR. SINHA: Now I remember reading recently that India has decriminalized homosexuality and I also remember reading recently that Pakistan is the first country to include on their government agency employment worksheets or applications a section for transgender applicants. Do you think that those two things in combination with each other are necessarily complimentary in the modern day Islamic world or are they, is one a good thing and one a bad thing? Because I can see how one could argue that in the Pakistani job application process that it’s just another reason to discriminate and to persecute. So in your experience in making the film or in your experience as an international traveler and international proponent of human rights do you think that that’s something that we should be concerned about?

MR. SHARMA: Well, the criminalization—the decriminalization in India is still being debated. It was decriminalized only in Delhi and in particular courts, in the high court system of that region. So whether the Supreme Court in India is going to uphold that and whether Parliament is going to ratify that is still debatable. However, it’s a very significant victory that is not necessarily one that had to do with any kind of religious dogma, as I said, or a religious interpretation of the law. But it was a particular challenge to this section in the Constitution, in the penal code, sorry, section 377 that has this whole list of behaviors that are not acceptable. And basically it says carnal intercourse against the order of nature. That’s the language. And then there’s sodomy but that’s also bestiality. So that’s what’s been challenged. Interestingly, in Pakistan there’s a similar challenge pending and going through the court systems, the civil court systems, not the Shari’a court systems, to their section 377. What you said about Pakistan legalizing or allowing job applicants to list, well, - - gender, whatever, you know, the whole idea of - - or a unit is, I think, very important and certainly people in Pakistan have said that it is possibly another way to target certain populations or identify them. But at the same time people feel that it’s an important victory.

We were just talking earlier, I personally, you know, do not agree with - - in the film completely. I understand his logic, I understand the discussions we can have in a room like this or - - invest in academia where we can think of theological solutions where we can talk about looking at the Koran in different

ways, where we can talk about liberation theology, you know, that would liberate homosexuality from all the dogma and all the stigma that religion brings with it. But I personally don't think that in our lifetimes we can have a theological solution to the problem of homosexuality that would be acceptable to more than one million Muslims in the world as different as they are, as varied as they are and as lacking in central authority as they are. There's no Vatican in Islam, right? So it's not like the Roman Catholic church and in our lifetime I don't think the Roman Catholic church is going to come down with a judgment saying that homosexuality is okay in that church. So why should Islam do that?

So these are separate phenomena I feel. There's the idea of religious reform, people living under Shari'a law or directly impacted by clergy policing morality or government policing morality and then people living under these remnants of colonial laws that criminalize homosexuality. And those battles are not just being fought in the Indian subcontinent but also countries in the Middle East like Lebanon where their particular section of the penal code is also being challenged.

MR. SINHA: So now taking a step away from the societal implications of criminalization of homosexuality, we saw in your film that it's a very personal battle also. It starts out, I guess the idea that at least I had of it was that one can be gay and hide or one can be gay and open about it and face abuse. So how does the personal battle necessarily either—I can present an argument saying that both options, either hiding or being open about it, hurts the cause. I think that if you're open about it, you're just drawing attention to the fact that there are people out there that are so against it, there's a majority against you, and if you hide, you're not drawing any attention at all. So how do you think that personal battle plays out in the real world? Like with your experience.

MR. SHARMA: You know, my biggest struggle personally when making the film was my struggle with my main instrument, which was the camera. I wished it was invisible and not present so many times because I feel that people don't necessarily want to come out into visibility as the only way to be free. I've said for a long time, for example, I don't think there needs to be a Pride March in Tehran. That is not suitable to that particular culture or to that particular context. And I would even dare to say that the vast majority of Muslims, given my experience of traveling and living among so many different kinds of Muslim communities would not prefer visibility; would prefer anonymity. You know, the activists working in all of these countries don't like LGBT Q-R-S-T-U-V, whatever—we keep on—all these labels that we feel so comfortable with in the West. So there's a definite reaction against that.

There's a definite reaction against people from here going and telling them what to do around coming out or whether coming out is even an issue. So I, you know, the terminology used is men who have sex with men, "MSM," or women who have sex with women, and people, I would say the vast majority of Muslims who have same-sex desire in this world will probably end up in heterosexual marriages or are already in heterosexual marriages because that's what society expects you to do, that's what your culture expects you to do, and that's what you do. In order to be a functional unit of society, of your own community or an Islamic community, you need to be part of the heterosexual institution of marriage. So same-sex desire then is lived out in private, is lived out anonymously and is for the most part tolerated as long as you're not marching down Main Street holding a Pride banner. So I struggled with these questions of visibility versus invisibility in pretty profound ways throughout the making of the film and even after the film.

You know, realizing that for someone like Miriam and Maha, those two women where one of them wants to be punished, she says so in the film, that invisibility was preferred and even though she had very strong opinions and a worldview, that was surprising at one point in the film she says the Hijab makes me feel free. Maybe because I'm a lesbian I didn't want other men to look at me in a particular way. Even though she has that capacity to understand things in a pretty unique way, at the same time she is so full of the dogma of, and the shame of her homosexuality that when I first met her, she could not even articulate the word "lesbian." She thought it would be—it took her two years to even say lesbian, to be able to say it and then to tell me that she was ready to be filmed. So she prefers her invisibility and I think she will continue to live with that for the rest of her life. But someone like Moussin on the other hand, is an activist, is an Imam, has a certain kind of religious respectability and has made it his cause to look for answers within the Koran and to sort of dissect the Koran, if you will, and come up with this kind of liberation theology reading of it. Which works in certain communities, certainly works for those people sitting in that room at the end of the film, but I am not sure if that discussion could be transplanted into a mosque in Islamabad or into a mosque in - - and, you know, everyone would nod their heads in approval and say yes, you're right. So I think it's very complicated.

MR. SINHA: I think I'm going to ask you one more question and then move on and then we'll take questions at the end of the panel for everybody. But now you mentioned a population called the "Hidra," the transgender or transvestite population in a lot of South Asian or Southeast Asian countries. Now is that, you know, society, necessarily prohibited by the Koranic text or is it something that even though it's prohibited, it's been accepted or de facto as being a part

of our society or, what's your experience with it because I know that at least on the face of it I hear about that population a lot more than I do of any underground gay Muslim population or any underground gay Hindu population or anything generally. There's always been a transvestite population. Even growing up I know, in America, my parents would tell me about urban legends about Hidras coming up to infants and kidnapping them and especially in the outcasts and they would kidnap them and castrate them and take them away and they would grow up to be, if they survived they would grow up to be transvestites and live on the margins. And, now is that necessarily prohibited by Koranic text or is that something that's through years of interpretation and through years of just visibility in society that that's both been kind of accepted but condemned at the same time?

MR. SHARMA: Right. I think it's a great question and a complicated one because for one, and I think the film makes this clear, the film is my primary -- but in the film I tried to point out that the Koran is pretty deliciously vague about homosexuality as we understand it. Now the main reference material in the Koran, like the Torah and the Bible, has to do with the story of Sodom and Gomorrah and the fate that, the horrible fate that came upon them. And there are different ways of reading that story of Sodom and Gomorrah and Moussin says it about inhospitality and certainly not -- of Lot or Lute [*phonetic*] as it is in the Koran. Now a person like Moussin or other people re-engaging with the Koran would also point out that during the Prophet Muhammad's time there are references available in the Hadeith literature for example, which are sayings attributed to the Prophet Muhammad or these anecdotes from his lifetime that talks about -- or a certain kind of torrid sex almost, if you will, of people who might be what we now know as transvestites who were part of the Prophet's household and his many wives, for example, were allowed to not veil in front of them because there was no sexual threat emanating from these --. So there seems to be a tacit sort of understanding that there was a space in Meccan society and in early Islamic society for the existence of transvestite-transgender identity. Now how much of that is remembered throughout in contemporary Islam is debatable certainly and not much of it is to be sure and how much of that translates into the cultural context of Hidras being acceptable in India and Pakistan is also debatable.

You know, they're very much a part of the culture in many ways. You know, even when I was born, my mother tells me the Hidras came and sang and you had to give them a certain number of saris and lots of money to make them go away so that, you know, they'd be happy. And you did not want to, you know, incur the wrath of a Hidra. So that cultural sort of acceptance has been a functioning unit of society that appears around births or marriages and as part

of that is definitely there in Islamic cultures, also in Hindu cultures, definitely in the subcontinent but also in Arab cultures. But that doesn't necessarily mean that you can have a discussion about it in our context here. You know, like LGBT, the "T" of LGBT would not make sense in Urdu or in Hindi or in Farsi or Punjabi. And so it's a very different animal, if you will. But if there is material to be looked for, it certainly is available in Islamic history and throughout the prophet's lifetime. How much of that material is acceptable to a million Muslims as an argument for either saying that homosexuality is okay or that the Koran, not the Koran specifically but that early Muslims are okay with different sexual identities is debatable. And there are also passages in the Koran that do talk about—there's a couple that talk about men -- desire for women and people like Moussin have taken on those passages and said that that means that there is an acknowledgement. But I'm not so sure.

MR. SINHA: Well, thank you very much. And let me introduce our next speaker. Marion Holmes Katz is an Associate Professor of Middle Eastern Studies at New York University primarily focusing on issues of Islamic law, gender and ritual. Her first book, *Body of Text*, deals with the reconstruction of early scholarly debates about the law of ritual purity and the underlying issues of community boundaries, gender and attitudes towards the body.⁴⁴ Recently, she published a monograph examining the forms of piety surrounding the celebration of the birth of the Prophet Muhammad. In 2006 to 2008, Professor Katz began a new project funded by the Carnegie Corporation, focusing on the issue of women's mosque access. She holds a PhD. from the University of Chicago. Professor Katz?

PROFESSOR MARION KATZ: Thanks. I am only giving some thoughts about historical background. So one thing that I think is perhaps useful to clarify since this is a law school and sort of lies, in particular when we were talking about polygamy earlier on in the framework that we're sort of operating in that when you talk about Shari'a, we're really talking about dress law in the sense that poor people who sort of subscribe to it as a -- system, it is a law independently of whether it is ever legislated or enforced by a state. So you can approach it on two very different levels. It matters to a lot of people for whom it is subjectively on the basis of personal religious commitment a set of binding norms and that can be true regardless of, you know, sort of the legal order of the state in which they may find themselves. But then we also find, you know, obviously the external constraints that can be imposed by, you know, -- the modern, western -- enforceable rules where you can have

⁴⁴ MARION KATZ, BODY OF TEXT: THE EMERGENCE OF THE SUNNY LAW OF RITUAL PURITY (State University of New York Press 2002).

punishment, you know, of various kinds. So I want to deal with both of those levels because I think for various people both of them are very important depending on the individual and the context.

I totally agree that there are no, you know, sort of arguments that are going to be instantaneously compelling for a million Muslims but at the same time I do think that it's true that—two things, both that gay Muslim thinkers who are in a position to express themselves in places like the United States have in fact come up with a lot of very interesting work on the subject. But I think one of the things that's also been sort of revealed by this is that the inherent, sort of locality of the Islamic legal tradition is such that you don't have to be, you know, sort of willfully—you don't have to engage in some kind of willful disregard of some kind of uniquely compelling and monolithic pre-existing interpretation to go in some of these directions.

In other words, because this has traditionally been a kind of legal discourse whose authority depends not on its promulgation by some kind of governing authority, but on the perceived inherent sort of Kermanudic coherence of the interpretations that the person is putting forward, there's always been, you know, sort of the possibility of multiple positions on a given legal issue and I think when you look at the issue—and really the issue of homosexuality is not one that classical jurists dealt with. They were not that interested in people's sexual orientation in the modern sense. They were not interested in, they were not interested in people's desires, not in the legal sense.

And one of the things that's interesting is that they configured their understanding of sexual desire extremely differently. Most classical scholars thought it was absolutely normal for a red-blooded man to be attracted to adolescent boys. And this is not a question of pederasty, they weren't talking about kids, they were talking about, and you know there's a term for it that's used in poetry, it's used in legal texts, but it literally means, you know, a young man who, you know, sort of has -- first growth of beard and the assumption, you know, you can encounter this in many places. The idea that someone with a healthy constitution, a male, will be attracted to such a person. And where this comes up as, you know, it's brought up in the film, Sufis are notoriously suspected of being inappropriately interested in the young men who participate in their activities. And when I say inappropriately, it's because this is to a certain extent stigmatized in the literature about it. And in fact Sufis in most cases are interested in representing the unabashed homoeroticism surrounding the image of the young man in the Sufi literature. Most Sufis historically have been interested in representing that not as an alternative sexuality but as, you know, sort of in non-physical terms. In other words, as

something that is, you know, sort of a shadowing forth of divine beauty, but you know, it falls far short of sort of an articulated, you know, sort of justification of actual romantic or physical relationships among males.

But to the extent that this gets raised as an issue, jurists who are less happy about the - - groups tend to look at them and say, look, you know, you're getting up to no good here. But the idea is not that this is an inappropriate desire, it's basically anal sex is an inappropriate act. So you don't have the sort of idea that there's some unusual category of people who have deviant desires. Instead you have the idea, well, this is well within the repertory of healthy, human desire. And by the way, they're much less interested in women in thinking about what they might want. But in general, pre-modern authors are very uninterested in stigmatizing that as a form of desire. The one exception is, well, maybe it's not the only exception, but the most prominent exception to this pattern is in fact not something about desire but in fact about, you know, - -. But there's a guy named Iben - - Josiah who died in 1351. He was Syrian. And in his own time he was rather an unusual thinker. He was not necessarily in the core of the mainstream, but retrospectively what one might term right-wing Islamic thinkers. People like say in - -, in Egypt, people who are sort of on the activist or what one might call - - fundamentalist end of the spectrum, have drawn very much on him and his teacher, Ibn - -, who in their times were unusual people. And Ibn dies in jail because he's so deviant in terms of, you know, in terms of his time.

Ibn Kahim actually seems to have been somewhat homophobic. So he's one of the very unusual pre-modern authors who actually says this is unnatural. He uses this whole sort of rhetoric, sort of inversion of the idea that to desire anal sex with another man is sort of, it undermines the - - which is a Koranic term for sort of the constitution, the fundamental constitution with which God has created people. That is an example of a pre-modern person who actually is sort of concerned about the desire aspect and who is actually in a way pathologizing it, in a way that actually anticipates some of the modern religious rhetoric surrounding homosexuality. That kind of thing becomes -- prevalent in a recent period. It's really weird for the pre-modern thinkers who overall don't have that attitude.

So the one problem that they really do deal with extensively is this question of anal sex. And the interesting thing about it is, you know, as Moussin - - the name of the Imam, brings up, well, you know, the one big proof text is this repeated chronic story of Lot or Lute. And that's what most people think of when they think of homosexuality or, you know, sex between men in the Koran. But, you know, as was pointed out as early as say - - a great legal

thinker of the 11th century, you know, and he's not the only person to have brought this up. -- in the 13th century. People realized you can't make a—you know, according to Islamic theory, you can't make—you can't derive a legal norm from a story, you know. It may be value laden, it may express a position, but you can't actually, you know, derive a law from it. So the problem that jurists were faced with was basically is this like illicit—basically there's this term in Islamic law which is Zinou [*phonetic*] which basically means penetrative heterosexual sex outside of a legitimate contractual relationship, which would be either marriage or concubine.

And so they sort of said well, you know, does anal sex between men fall, you know, is it basically the same thing or a close enough analogy so the same really severe penalties would apply? And there were two answers. Three schools of law said basically yes, it's more or less the same thing, the same penalties should apply. One school said no. Okay? You know, that's not a reasonable analogy and besides the statements of the Prophet supposed to have made about this are all ill-authenticated and none of them are correct. You know, you have people in like the 10th century saying these interpretations do not hold water. But think about that that's interesting is that if you say it's like -- , it's maximum, sort of maximum stigmatization but minimum prosecution? Because as Parvez has pointed out, it's almost impossible to prosecute Zina according to the procedural and evidentiary requirements of classical Islamic law. And that's what's really different about modern regimes like say the -- in Pakistan, what's going on, you know, in Iran, in, you know, the post-revolutionary period. What you have is this concept of -- , this concept of non-marital sex that is sort of detached from its traditional evidentiary and procedural requirements which were impossible to apply. You know, I cannot emphasize too much that it's not just modern liberals who want to say look, you can't do this. It's classical scholars. I mean, I have an example, a manuscript that I'm working with now of a 16th century scholar who's sitting in Mecca. I mean, he should know, right? This is very much the heartland. If he says basically there has never, from the time of the Prophet until now been someone who was convicted of Zina other than confessing, which some people sometimes did. But, you know, he basically says it's impossible.

And that's what's really different with what you have in these modern state situations. Now you have the, this one school of law, The Henify [*phonetic*] School of Law, which is a very important one which says no, it's not, you know, you can't make an analogy with Zina, there's no death penalty, which, you know, you would like to say okay, great, because it's better. You know, it's saying you can't stone someone for this, you know, you can't give them 100 lashes for this because it doesn't fall into this category. The problem with

that is that it, their alternative is basically well, you know, the state may have, you know, sort of interests in terms of the public welfare to monitor morality and in order to do that it is legitimate for a ruler to apply discretionary penalties, right? And it's really there, I mean, you know, there you get to the point where it's really pre-modern jurists are saying, and it's not just this issue, we're very deferential to the authorities, right? Not because it's Islamic law, not because the Koran says this, but because it's good to have public order and sexual propriety is part of public order. Again, I think it's different in the contemporary period because there really is a strong tradition with the pre-modern scholars of saying there is a huge private sphere and the public authorities have no business sort of proactively inquiring into people's private sphere, right? So the state may have an interest in regulating sexual morality but that stops at the door of everybody's house. And, you know, effectively you can't do much about it.

That changes a lot in some of these contemporary situations where there's much more, sort of intrusive inquiry into what people are doing. In other words, I mean a lot of people are pointed out that say what you might call the contemporary - - police. That wouldn't fly according to classical legal standards because it's too intrusive, right?

So—I've probably already taken too much time but that's what I wanted to say.

MR. SINHA: Great. Thank you very much. And our final speaker for today is Selly Thiam. She's a journalist and oral historian who is the founder and Executive Director of None On Record, Stories of Queer Africa, a transnational audio-based oral history project - - stories of Africans that identify as LGBTQ from the African Continent and the African Diaspora . Selly's work has appeared on NPR, PPS and *Color Lines Magazine*. Selly was formerly the producer of Story - - Initiative which collected over 2000 interviews from African Americans across the U.S. and Selly has a presentation that she has for us. And, please?

MS. SELLY THIAM: Yeah, I'll mix it up a little bit. Actually I was really psyched to come. Thanks for inviting me. I was excited - - because Parvez actually was one of my first assignments for Public Radio. I actually interviewed him in Chicago before the film came out. So I finally got to see the film today. So it was very exciting how things come full circle. And it's a beautiful film. So I'm very happy to be on this panel.

So I'm actually going to talk more from the perspective—I do a lot of work on the African Continent and we do some work in Muslim countries on the African Continent. So I have to kind of frame it within a larger context.

But I want to tell you a little about Not On Record and how it began. In 2004 a woman by the name of Fannie Anetti [*phonetic*] who was an LGBT activist was murdered in the offices of the Sierra Leone Lesbian and Gay Association. The details of her murder were very horrific. Her throat was cut, she was raped, her tongue was removed from her mouth. These are all very symbolic things within the context of which she was living in. Earlier that year she had actually returned from the UN in Geneva, she was in Geneva, she had given a speech about the rights for Africans and how she wanted, you know, more international support and pressure on the government Sierra Leone, other governments in Africa to protect their LGBT or queer citizenry. So when she returned, she was getting a lot of international funding to do this work. The details get a little skewed here. Some people say that, you know, she was murdered for the computer in the office, that's what some people say. But the details of the murder are so horrific that a lot of people believe that she was murdered to be silenced. She was one of the most visible LGBT activists in the country.

So when she was murdered the news, of course, came to the international papers and I read about it in Chicago where I was living at the time. To give some more context, my family is actually from Senegal. And so this is the first time that I'm seeing a West African lesbian and it's within this context. So it wasn't so much that I wanted to do research, you know, on LGBT Africans. What I wanted to do was, I wanted to hear the stories of people's different experiences. I have a specific experience because I was born in --. And Fannie had a very specific experience because she escaped Sierra Leone during the civil war and went to South Africa where she learned a lot about LGBT activists and because that's what was happening in South Africa at the time. So she always said she was going to go home to Sierra Leone to open this organization and that's what she ended up doing.

So once she was murdered, I decided to then travel. So I traveled through Canada, mostly North America to collect these oral histories and was eventually given a grant to go to South Africa where we collected oral histories about the people who had organized the first Pride march on the African Continent. So before I actually get into some of the work that I want to talk about today around Senegal, I actually would like for you guys to hear some of the voices of the people that we've collected along the way. So...

VOICE: The argument against homosexuality is two fold. It's UnAfrican and UnGodly. While documented evidence of the existence of homosexuality and same sex relationships is hard to find, the story can be told in the age old tradition of Africa or World History.

VOICE: A lot of us can't go home -- who we are and we are in exile in some way because of that and that doesn't make any sense to us as Africans.

VOICE: I couldn't walk to the shop without hearing at least one person -- represent her, yeah, bitch, we're going to get you, you're a woman, faggot.

VOICE: He said, you know, you can go to the jail for your life. I said if you throw me in jail for my -- I accept.

VOICE: I'm lesbian. I don't care what other people do behind closed doors. It's their, it's who they are and this is who I am. Let's love each other.

VOICE: And immediately when we jump on stage and grab the mic, we'll sing the song, -- . And you know, the whole club was just jumping, -- a standing ovation. And you know what? This is before they know who they are and they know where they stand.

VOICE: I'm disillusioned because I'm living in South Africa and there's so much that's going wrong, there's so much that has been promised that isn't happening.

VOICE: If they want me to go back to my country, I will go back to my country and I will still doing what I start doing before I came here because this killing -- and it's getting worse.

VOICE: You are nothing without the community. And we're responsible to the ancestors, where we must respond to those—and when I say ancestors, they're not dead. They're alive and they're watching.

VOICE: I've had to sort of let go of the fact that maybe I won't be on the family tree. And that's okay.

VOICE: But I'm African. I'm a lesbian. And I'm an AIDS activist.

MS. THIAM: I'm going to stay up here actually. So those are some of the voices from, we have people from -- and Senegal, South Africa, -- , Nigeria, all

talking about their personal stories. So what we've done recently is, as a team—we started off with just me walking, you know, like riding around collecting oral histories, writing grants, collecting more oral histories. And the reason why we picked audio as our main tool for collection as opposed to video was because most people at that time were very uncomfortable having their image taken. It was impossible to do. And the first time I attempted to do a video interview, the stories were very flat. I could not get people to go into details about their families, any detail about the things that they had experienced. But when it was just a microphone, people were a lot more honest and open about their experiences. So that became the tool in which we did lots of documentation. And later on more photography. So in the beginning, the archive set is, I would do a two-hour interview. And these physical interviews would be archived at the Gallery in Johannesburg or the Schaumburg, here in New York City. But then we produced these shorter clips so people could get like a snippet of people's stories. And that was the beginning.

So in this process over the last four years, what we've been able to do is create these collaborations with organizations that are doing, you know, this organizing and this political work on the continent, and then with LGBT African communities in the Diaspora, to support the media that they're doing around their campaigns.

So recently, we went to Senegal. And this is where this might have more specifics in what we're talking about today. So in 2008, actually in 2008, photographs from a gay wedding were published in a magazine called, *ECON* [phonetic]. And what happened at the time, I have to talk about just the political and economic environment, that was Senegal, some of these people were facing mass food shortages, there was no cooking gas in the country, people were beginning to riot. So Senegal is a 94% Muslim country and the brotherhoods are a big part of that political machine that is the Senegalese government.

So they took this opportunity, because the citizenry were so angry with the government for not providing food, for not providing sugar, for not providing oil, to make a statement about how Senegal was going to—how can I say it. The morality of the country was in question. So it was, not only was the government running the country into the ground because there was no food, but also, you know, the brotherhoods had to take over because they needed to clean Senegal, they needed to clean Senegal's image. So they married the two.

And the brotherhoods at that point, began to do an assault on the gay people within the country. So what happened next was during a conference—it was actually a Muslim conference in Senegal—*ECON* got a hold of photographs that were taken during a gay wedding. And the publisher of the magazine actually went to one of the more famous people who were in the photographs and said, you know, we won't publicize these pictures if you give us the names of all the gay, you know, men and women who are in government, who are famous, et cetera, et cetera. And the singer, whose name is Poppin Bya [phonetic]—I'm not sure, you might be familiar with his story—refused to out people that he knew were gay.

So *ECON* set the publication of the photographs with this Islamic conference, and it happened at the same time. So what happened next was a huge public outcry against what was seen as extremely un-African, was seen as sort of an affront to Islam, and a witch-hunt began in the country. So about 11 people were arrested for homosexual acts, including Poppin Bya. His house was stormed, people were jumping from windows from his apartment as the police ran in with their guns brandished, and he was arrested.

So actually, I want to play a little tiny clip of his interview. It's very small; it's about a minute and 14 seconds, I think. And we took his interview in 2008, in New York City. So I'm going to play that now.

VIDEO: [Poppin speaking]. My phone ring, everything called me, my friend called me, my family called me. Popp, you see the newspaper? I said, yes. What is it? I said, I don't know. So I don't know what I do. I no eat, I no drink, I no sleep, I don't do anything, I sit here. 5:00 in the morning the police come in my apartment.

[Interpreter speaks]. His friends ran up to the roof when they saw the police officers come up, and the police ran after them. They pulled out their guns and his friends were scared—four of them—and they jumped off the roof. One person, both is legs were broken and his face was disfigured.

[Poppin speaking]. Uh-huh. And the police don't know me. He come and he said to me, who is Poppin Bya? I said, I am. He said, you're lying.

[Interpreter speaks]. The police did not believe him. They said he was too young. They assumed that Popp was an older gentleman.

[Poppin speaking]. The minister interviewer. I had talked to the commissioner

from the police. I have arrested the gay—the commissioner had said to me, Popp, you no can stop your -- gay. I said, no. I can't change my life. I am gay. He said, you know, you can go to the jail for your life. I said, if you bring me in jail for my life, gay, I accept.

MS. THIAM: Okay. So Popp was arrested along with nine other people. Some of which actually died while imprisoned. But a few weeks later, because of international pressure and because he was such a public figure, he was released from prison. But they told him that they would only release him if he left the country right away, because they knew that there would be a witch-hunt for him.

So he then went to Gambia, but then the Gambian president knew that some of the men who had been arrested in Senegal were now in Gambia. So he gave them twenty-four hours to leave the country before they would be killed. So then, they went back to Senegal and had to hide out at this point. They were being chased by villagers and, you know, their houses are being ransacked. And eventually, Popp made it to Ghana, where he unfortunately was attacked again by a group of Senegalese citizens. But that attack actually led to his being brought to New York City where he received asylum.

So in this case, let me talk about media. Because what I was invited here to talk about was media. In 1998, Senegal began to have more privately owned media companies. Usually there was one, you know, state run radio station and one state run newspaper. So there was a lot of thinking that, you know, the media was going to be more, you know, inclusive and democratic.

What ended up happening, as far as that sort of environment, where we talked about how there was an economic decline. You know, there was an idea of this moral panic going through the country; and suddenly there are all of these magazines and radios vying for people to listen, for people to buy the papers—was that the journalist then became part of the problem. They were blackmailing a lot of the LGBT folks in the countries, to out people in the papers. This is actually huge, all over Africa. People get outed in the papers, particularly in Uganda. There's a lot of that going on there. And so it became part of the problem and there was no real democratic or, I could say, different voice within the media for the LGBT people in Senegal at that time.

So that actually leads me to—I'm going to go a little bit off topic, a little bit. Because a lot of Parvez's film, there's so many parallels between the stories that people were saying in the film, with a lot of the stories that we have collected are not on record. Particularly this whole idea of where we started a project called, Seeking Asylum, where we interviewed a lot of asylum

seekers who—and people looking for refugee status in North America who had come from different parts of Africa, along something that's called the Rainbow Railroad. Which, I really hate that name, but that's what it's called by a lot of NGO folks, the Rainbow Railroad.

So this is actually a story from Carlos Edibu [*phonetic*] from the Ivory Coast, and he actually fled the Ivory Coast because he was outed in the papers. So I'm going to play this and this is probably going to be the end of my media before I talk a little bit more about how media's playing a role in supporting LGBT activism on the continent.

VIDEO: We start organizing -- in 2003, because we have so many capable dying from AIDS. Almost every month, some people call me to tell me that, okay, this person died, and that was really too much for me. All the services were -- to this trade community. And when we talk about the work we're doing, they were like, okay, that's not really important because we already have a very big program about HIV, so you guys don't really need a special program for your community. But those people didn't know what the reality is for the gay and lesbian people in the Ivory Coast.

Many people experience more phobia in the hospital, especially for the transvestite people. Anytime they go there they are targeted with the nurses, with doctors, so they just decided to stop going to hospital. And because I was traveling a lot for some -- for some countries across Africa, I wasn't always there to go with them to hospital and they were very scared to go alone. So their health was getting very bad and in two months, five people who were living with me, died from AIDS.

In the same time, just because of homophobia, just because they're scared to be rejected by their family, the other members of the organization, they didn't want to come out, to speak, to talk at the radio, to talk on the TV, to something to help us with some newspaper. So I was alone, and that was really, really too much for me. When I finished work and I go home, sometimes I found some letters under my door saying that, okay, you should move from here because we don't need the gay people to be out -- . So in three months, I moved like, four times.

And I said, okay, I think it's time for me to move somewhere. I didn't know exactly where to go but I got two scholarships for the out gays, in 2006, and the AIDS conference, here in Toronto. And so when I came, I didn't plan to stay in Canada. I don't even know where I am, I don't know what is going on here, but we're struggling a lot, doing activism in Africa. I think what I did

gave me the strength to stay here in Canada. And what I was thinking about through this process was all the work I did in my country in the gay community. Who is going to continue this work? People are dying, and I left the situation like that to come here in Canada. I felt guilty about that.

Years are passing, but homophobia is still getting high and they're still killing gay people, lesbian people; in so many countries the government doesn't care. They even established some laws against gay and lesbian communities. They're still doing that and it's getting worse. So I think there is a lot of work to do in Africa. I'm here, but I'm still thinking about Africa. I'm still thinking about the Ivory Coast.

MS. THIAM: Okay. So what we've begun to do—I had talked a little bit about this. But the work in Senegal is actually a collaboration between - - and the International Gay and Lesbian Human Rights Commission, to collect stories. I think one thing that has been prevalent, is obvious for us collecting, in certain parts of West Africa, is the lack of women's voices. It took us a very long time to find a Senegalese lesbian who would be willing to talk on tape. And it had to be done anonymously. I was actually curious to see how Parvez was dealing with that in his film as well.

So through this work we've been able to find those voices, but also, the most important thing that I think that we have accomplished is going into different communities, working with community members there, and it's partly because we are African run. Even though some of us were born in North America or in Europe, but have strong ties to our homelands, that we can work with the communities there to also teach lots of different kinds of media collection abilities. Like digital audio recording, and video recording, and finding ways to be strategic about information that they release to the media. We still have a very long way to go.

At this point, a lot of the media entities are in relationship to the government. So if there is state sanctioned violence against LGBT people, the media is not going to have a lot of space to have a different viewpoint, other than what might be seen as homophobic or xenophobic.

Also, if the community or if the country has—is strongly homophobic, like what is going in Uganda, it is oftentimes very dangerous for journalists to have a different opinion, other than what is perceived by the norms.

But in playing Carlos' interview, there's something that, you know, is really particular to me. Is that people have been forced to leave their countries, particularly, people who have been in the forefront of some of this work. And sometimes when they leave or they're murdered, you know, the work stops. And I think that the quote that I think the man from Iran said when he landed in Toronto, was that how could he be free when so many people aren't free. It's something that resonates a lot with a lot of the people who have been forced out of their homelands and their countries.

But Carlos is interesting because he's been able to do the work that he did there, but in Toronto. So some successful media ventures are, there's a lot of blogging that's going on in the LGBT community in Africa. So that's been one way to get, you know, a different viewpoint out. The issues around radios and things like that, we haven't been able to get our stories on air, except for Kenya, which will happen in May of this year. So that's going to be the beginning of seeing how a not on record story will be broadcast on a country radio station, and see how it's taken. So I'll keep you posted on that goes. I mean this will be the first time that we do something like that.

But for now, we're really focusing on getting people the skills to make the media, to sort of make their case within the media landscape. I think that's it for now. I don't know if you have any questions.

MR. SINHA: So I guess I'll start the first question. I have two specific questions and then I'll open it up for general questions. So Professor Katz, you were talking about modern states that follow Islamic law being able to have discretionary penalties for homosexual activity. And I was wondering is this a phenomenon of state interpreting Islamic text, or is it a phenomenon of what the text actually says and the population accepting it. Or is it like and excessive entanglement between church and state, as we would call it here, but in the Islamic context?

PROFESSOR KATZ: Well, I think there's been this huge—and it's not just in the area of sort of -- , you know, dictate sexual immorality over -- . I think that with, you know, essentially the rise of the modern nations there has been a complete change in sort of what it means to assert that something is Islamic law. I mean things aren't Islamic law in the -- , or Saudi, or Sudanese, or, you know, Pakistani sons, to the extent that they have in these portions of their legislation that are represented in that way. It's not being defined as Islamic law for precisely the same reasons people define things as being Islamic law in the past. And I'm not saying that there was one sort of, kind of authentic way for things to be.

But I mean, you know, sort of the primary claim traditionally was that sort of something was Shari'a, because, or it was -- . You know, it was law in the sense of strictly human interpretation of God's will, because it was sort of accepted by the informal but persuasive acclaim of the community as being sort of the most -- interpretation. And, you know, that process, to whatever extent we understand it to have operated smoothly in the past, it's just been completely—I mean, you know, that is not procedurally the way things function now. Right?

So and there have certainly been efforts to theorize that, to sort of like equate the process, you know, sort of reaching a legislative majority in a modern parliament with the idea of consensus of scholarly opinion that might have applied in the past. But these are really, you know, there are huge discontinuities. So you're trying to say, you know, sort of whether something is or isn't Islamic law is completely in the eyes of the beholder. I don't think that there's necessarily—you know, it's really hard to do. You know, there has been public opinion research but the questions that can be asked about how do you really perceive the legitimacy of the concrete Islamic laws, the concrete laws that are sort of being presented as Islamic, in your particular society, those are really hard questions to ask.

So for instance, you know, John Esposito's relatively recent book who speaks for Islam, is based on a lot of polling data. But the ability of the pollsters, you know, their ability to ask—you know, you can ask do you think Islamic law is a good thing, and a lot of varying ends [*phonetic*] will say yes; but they didn't have the ability to go and say, this law, this is the law of the land now, do you think that's Islamic law. That's really hard to ask. Right? You know, I think if it were more possible to ask, I think that, you know, the results would be interesting but also really hard to interpret.

I mean, you know, I think it's analogous to public opinion on religious issues, in the United States today. And if you asked people what do you think Christianity says about abortion, how many people would—I don't know if historical background is what people should be drawing on. But I think it's certainly the case that people tend to have sort of a global sense of what Christianity says or what Islam says, that's very different from saying really being conversant would say, what did Aquinas have to say on the topic.

MR. SINHA: So does your explanation of that attribute to the fact that there is so many different punishments for homosexual activity? Like, it ranges from fine, to public flogging, to death. Now is that a matter of just strictly the state

saying that this is what we think the punishment should be. Or is it a matter of something deeper.

PROFESSOR KATZ: Yeah. I don't know. I'm primarily a medievalist, so I wouldn't be able to address, you know, individual situations and talk about the legislative history. But I mean one thing that I will say is that I think in most cases the claims that are being made are very sort of large scale. In other words, rather than trying to articulate some elaborate, theoretical justification for why this is Islamic law in the traditional sense, - - hermeneutic justifications for this, I think, to a large extent a lot of the time it gets articulated in terms of sort of sexual immorality is corrosive to Islamic society. Sexual permissiveness is associated with the West, in a very dichotomous way. You know, this is not—I think that you encounter it much more sort of in that form, that sort of, well, the enforcement of sexual immorality is a good thing. Rather than, you know, sort of really having some kind of really substantive public dialog about what it would mean for it to have an Islamic penalty for this.

MR. SHARMA: I think Egyptus [*phonetic*] is a very good example, if I may just add, in my field, mostly you see that. But Hosni Mubarak, in 2001 went and arrested Hosni Mubarak's government decided—went and arrested several hundred gay men that used to frequent that nightclub, on the Nile, which was called the Queen Bullet [*phonetic*]. Now this idea that I stated initially of the policing of morality or Islamically, you know, that we have to protect an Islamic morality or that these things are acceptable, that these are not, has been taken on by a regime in Egypt, which for all purposes has been anti-Islam for a long time.

Hosni Mubarak is certainly not someone who has, you know, particularly favored an Islamic state. Egypt does not have an Islamic constitution or a penal code that really would draw upon, extensively, from aspects of Shari law. But within the Arabic language they had the facility to use words like fahisha [*phonetic*], or adultery, or zinna [*phonetic*], which is extra-marital sex, and sort of equate and bring everything together, and then go on to say that what these men were practicing was zinna, was fahisha, was adultery, and was therefore wrong.

But the way it was reported in the press was really interesting, and you were talking about media earlier, this scapegoat thing of the gay individual by the state was carried out very successfully, in order to of course get brownie points with the Muslim brotherhood, who Hosni Mubarak was always very afraid of. But to the extent that, you know, all the papers in that country and around that

region, suddenly started talking of the discovery of a cult that was coming from shattan [*phonetic*], or satan, and that that cult was amongst other things, practicing anal sex.

The act of anal sex, of course, being the most despicable thing that possibly could happen and therefore needed to be policed so that the Egyptian idea of morality could be protected. And then of course, it became completely ridiculous and then the media went on to say, well we have connections to Israel and they're planning the downfall of the state, and so on and so forth. But that policing by a government that is not necessarily an Islamic entity was fairly interesting. And the way the Egyptian laws were interpreted in that case was very interesting. But the way it was portrayed to the general public, to the masses, as this defense of an Islamic good, or an Islamic idea of morality and something that existed outside of that, was particularly damaging to someone like Mazan [*phonetic*], in my film, who eventually got asylum then, in France.

MR. SINHA: And speaking the use of media, Selly and Parvez, both. Now you guys face an extremely uphill battle and I commend your efforts. But how do you deal with the majority media in the countries that you deal with? How do you deal with them drowning you out, essentially. Like it's easy to sit here in a room and preach to the choir, kind of, and talk to people who are essentially sympathetic to your causes. But how do you fight the uphill battle and make yourselves heard?

MS. THIAM: Well, as I said earlier, we have been working very diligently at penetrating the media in different governments. But the way that we can do this is to continue to fight. I mean I have—I present in the U.S., I present in Toronto, but I also present in South Africa, I present in Nairobi. I don't always assume that my audience is sympathetic, just to be clear. But I think for the most part, you know, getting community members these tools to be able to create their media is one of the first steps. And changing what is being distributed through media.

And I don't necessarily have the perfect answer for that. Although, every day we get up and we fight, and we continue, you know, like, we document. And I should say that, you know, for none on record in the beginning, it really was a community effort. Meaning that the act of sitting with someone who for the most part was very invisible, was enough. You know, to transform that person and to transform the people around that person. And as we have done that over and over and over again, and built this critical mass of people who basically work for free, we also are using those efforts to take on these larger entities. But it's a step - -.

MR. SINHA: And have you found that people who are listening to you, even though they might not be a 100% sympathetic to your cause, just the fact that they're listening to you means that they're willing to listen to you. That in itself is a big step. But how about the people that are completely blind to you and will not accept your views, and will not even tolerate your views, or shut off the radio when they hear you. And I assume that's a lot of the majority in a lot of these countries. So have you developed any media strategies or any sort of infiltration techniques to get into the ears of those people?

MS. THIAM: Yeah. A lot of what we've done in those situations is actually to do more smaller workshops. And I know that, you know, the idea of putting one of these stories on the radio and, you know, we've had situations where we've gone to very unsympathetic African environment and played these stories. And the entire time they've yelled at us at how un-African it was. There was no way to penetrate that at that time. And so on other tries that we've had, is actually, we do a lot of hand-on things. So we've had to collect people in rooms similar to what we saw in the film, and play these stories and have this debate.

And that has been far more successful, actually, than, you know, a blind broadcasting of the story. But again, you know, I don't know if I believe that a story is going to change an age held hatred of, you know, a queer person or an LGBT person. But what I do believe is that, you know, that as LGBT Africans we have to have a voice for ourselves, we have to fight for space. You know within these -- . Sometimes the most important thing is to empower the people who are the voiceless, more so than worrying so much about the people who don't make space for you in these media -- .

So it's two-fold, it's media but it's also community organizing. And a lot of times, you know, we talked about this a little bit earlier, is that I'm not sure that we can change someone's opinion. If they feel that this person is going to Hell or if they feel this person is an abomination. But what we do try to do is force the hand of the governments to respect the human rights of people. So that's also where the media is more effective than changing someone's religious or cultural beliefs.

MR. SINHA: If you have any comments, I'd love to hear them. But yeah, let's open it up for questioning from the audience. You have Jamie or Maria, either one. Project.

MARIA: My eyesight is so bad. You were talking about interviewing asylum --. But what about in the U.S. and Canada? I understand it must be different based on where they are coming from, but what about once they get here?

MS. THIAM: That's a great question and it differs, of course, from person to person. Actually, I'll speak of transgender friend who came here. His experience, I think, because he came from Kenya where he passed as a man for a long time, without having to have the actual surgeries, but then coming to the United States where the notion of black masculinity is very hyper. At least that's how he was perceiving it. He went through the transition here and is now, you know, if you see him you would say, okay, that is a man. Which is what he wanted. He wanted to feel that sense of being recognized as a man again and - - body.

But since being here and having transitioned, he's been arrested numerous times, because taking on that black male identity has also brought other social issues to the forefront that he never anticipated dealing with. Which is being like racially profiled by the police, not being able to find employment, not being able to have access to healthcare. So it has been a very difficult transition for him because of that, because he is of a certain class status where he's not living in, you know, these little enclaves of gay or trans-friendly neighborhoods that we've created. So his experience has been difficult. And as, you know, part of the African LGBT community here in New York, we've had to support him in a lot of ways.

For other people, for a group of Ugandans that we interviewed in Toronto, their experience has been that they had to prove—they had to talk about being gay in a way that they had never talked about being gay. Ever. Right? So they had to show photographs and they had to prove to this, you know, Canadian board that they were actually one gay, which was really difficult for them to do and it felt a lot to them like they were being abused.

They had to, you know, come out in a way that they had been—they were actually more—they weren't out in the way that we perceive being out. You know, like going to the gay neighborhood. They didn't want to talk about those things. So it became sort of abusive to them that they had to constantly prove that one, they were gay, and then they had to constantly prove that they had been the victims of human rights abuses back home, too. So that was another kind of traumatic situation for them.

Recently, Victor Macuseth [*phonetic*], who is a Ugandan activist who now lives in Capetown, came to Toronto to also meet with this group of Ugandan

refugee seekers. And the first thing that he said was, you know, because people are suddenly unemployed. They can't work in Toronto. They can't do the things they were doing when they were back home. And he said, I think I might be better off than the people who actually left the country to come to what was supposed to be a better opportunity for them.

So there's a lot of isolation, and also, you know, talking to Senegalese folks who are in exile in Belgium, they don't have anything and they miss home. You know, but they can't—there's no place where the two meet just yet. Do you know what I'm saying? So it is difficult and there have had to have been points where the community really has had to rally around particularly, economic issues. Like the issue that they had a place to stay, making sure that, you know, we could possibly help support enrolling them in school. So it has—it's an experience like a lot of people have when they immigrate. But also, it's also trauma as well. That's just a small cross-section. I have a lot more different kinds of stories, but that's a good idea how that's been.

JAYME LEGGETT: I was wondering with the increased number of Muslims in the World, has that had an enormous impact on the western world? Something about being gay and positive in the western world - - .

MR. SHARMA: I don't think the western world, if there is such a thing, is particularly gay positive all the time. I don't think that's necessarily true. You know, friends of mine who have come from other countries, have often spoken about the idea of invisibility in let's say, what we'd like to call the Muslim world. If we were to call it that at all. But, you know, men walking, holding hands, for example, is perfectly normal in India and Pakistan, or in Egypt. But here, would be stigmatized, and the gay marriage debate of course, in this country, is also a particular cause for all kinds of stigmas and discussion.

So let's not assume that things are always better here. And you said that—and I particularly find that to be true for people who had sought asylum and come from many of these countries, and have fallen upon bad times, not just economically but also culturally, coming into a western context where gay life is pretty much ghettoized into particular neighborhoods. And, you know, you're expected to conform into one kind of label that you would neatly fit into. Now that said, as I said earlier, that, you know, it's very easy sitting here in this academic environment, in the middle of New York City, to have this debate and to feel great about all the labels that we have for all of ourselves. An LGBTQI, I think they've added now. It being one of the ways to describe sexuality.

But it's practically impossible in outer Bengali or Farsi, or Benjabi [*phonetic*]. I'm talking only about Muslim languages, to find words of affirmation to even kind of identify around any of these issues in ways that we identify with them here. And I do respect that and I have heard from people in other countries. I speak from direct experience, that they told me we don't need you to come from America and tell us that, you know, having a gay pride march in Tehran is going to be the solution in that particular country, for gay rights activism, because it is not. And it's a completely different context. Invisibility is sometimes preferred. We have to understand that.

Some of the wildest—I live in New York, I've seen everything. And two of the wildest parties I'd ever been to in Tehran. And, you know, so in public there's a certain kind of persona where the state is policing your morality and your sexuality, and in private, surprisingly, or not surprisingly, you have access to exercising a great deal of sexual freedom in ways that would be very surprising to many of us here in this room. So I'm always very careful about making these assumptions about the Muslim world, for one, because there isn't one Muslim world.

And about people living in those other countries, with the assumption what we here know it better. Now that said, I think that there are problems and I don't think that any of the movements that happen here impact things positively. Anything they add to that rhetoric or that idea of homosexuality being a western disease, or coming in from the outside, through foreigners, whether Hosni Barak, in Egypt. When that government goes and arrests all of these gay men and locks them up in prison and then, you know, tortures them, and whatever else happened in that country, those are the kinds of arguments that are used against them, that they have been exposed to western ideas or to western values. So it's a pretty complicated picture. I hope the film actually helps the audience, or you, anyone, understand that.

JAIME LEGGETT: -- And Obama coming out against - - in Uganda. That is what I meant by gay positive.

MALE VOICE: In Uganda? Yeah.

MALE VOICE: [*Off mic*].

MR. SHARMA: Well, I won't speak for Uganda, but, you know. Didn't Rachel and I do a show about that guy who wrote the book here?

FEMALE VOICE: The family guy?

MR. SHARMA: The family guy, or whatever, that homosexuality can be cured and how that impacted the kill the gay bill. I don't know, but a friend of mine, Scott Long, he works at Human Rights Lodge, and he did a pretty landmark report on the situation in Iraq, where there have been reports, especially over the last year, where the Madiohmy [*phonetic*] has been targeting groups of gay men, particularly in Bagdad. Or men that look effeminate, and they've been killed and mutilated and murdered, and so on and so forth. And there apparently is a targeted campaign going out and looking for these men. And we had very major discussions about whether this administration, which was called upon by many activists here, should speak out openly about what is going on in Iraq and about the Madiohmy militias targeting these groups of gay men in the streets of Bagdad.

And he's an activist who actually went and got his hands dirty. And those are the kinds of activists I love. For example, you going to Senegal and actually working there on the ground. And he said, absolutely not. It would be very detrimental for the administration to interfere. Because then it would add to that logic, to that perverted logic of it coming from the West, and would add to the problem. So it becomes, it's really complicated to try and figure out how we, sitting here, can deal with real issues over there.

MS. THIAM: I want to complicate it a little bit, too. For Uganda, you know, it's interesting, because if you've been reading a lot of the press coverage, it talks a lot about how, you know, right-wing Christians have gone to Uganda and incited this sort of, you know, moral panic around homosexuality. Like the homosexuals are coming, you know, they're going to take over the country, this is the end of the Ugandan family, et cetera, et cetera. And also those organizations have also funded a lot of these, you know, faith-based initiatives that have been going on in Uganda. And it's been happening for a long time; for like, you know, the last eight years.

With SIMPA [*phonetic*], who actually, you know, constructed this bill, with the help of other people, when Obama and Hillary Clinton spoke out against the bill, putting pressure on the president of—the prime minister of Uganda—he spoke out against the harshness of the bill. He didn't necessarily say we want to get rid of the bill, but he says, you can't kill gay people, we can't kill people who have HIV, and then infect other people with HIV. We need to tone down the harshness of the bill because we have to think about, you know, our international relationships.

At this point, SIMPA, who has also been funded a lot by these right-wing, you know, organizations, said well, we can't have people from outside of the country dictate to us how we're going to deal with our homosexuals. Which, in some ways is, you know, a contradiction. Because in a lot of ways these right-wing organizations have been funding these particular movements, but once they're being shut down by international pressure, he's saying well, international pressure is now changing the way that we're looking at our gays.

So SIMPA, you know, he's been, he's now, you know, organizing this million march against homosexuality that's supposed to take place in Kampala, in a couple of weeks. Actually, I think it should be next week that it's supposed to happen. So supposedly a million Ugandans are going to meet, you know, in this major city to march against homosexuality. And also, you know, the international pressure from gay rights groups and different governments and organizations, to have them change this bill. So it is a complicated thing.

But I want to say, just in the Senegal situation, there's some similarities here. Uganda and Senegal, politicians are benefiting off of this moral panic. Because in Senegal at the time, you know, as I talked about earlier, there was a lot of economic despair going on in the country. And in some ways to distract from that, suddenly the gays became an issue. In Senegal, gay people, trans-women have been a part of the culture for so long, they have always been tolerated because Senegalese has actually had a reputation of being a very tolerable country. Now they became the scapegoats, people that you throw to slaughter.

And similarly, that's also happening in Uganda at this point. I mean there's so many social issues that are going on in Uganda that should be addressed by a million-man march, but they're going to get a million people to come to this major city to march against homosexuality. So in some ways, you know, people can say, oh, this is un-African, or this is against our traditions. But generally, just like here, people are using it for political gain.

MR. SINHA: Any other questions? - - ?

MALE VOICE: I had a question about - - . The sort of historical aspect, - - of colonial powers in many of the country even though many of the country are post colonial - - .

MR. SHARMA: I think the professor spoke very eloquently about that and this idea, you know, we're talking about the desire for the older man towards the

post-pubescent or pre-pubescent young man, not really being despicable. And I think that that's really important. Because those ideas of Victorian morality, and the Victorians are particularly famous for looking at sex as dirty, which, you know, influenced, in large part, the penal codes, let's say, that India, Pakistan, Bangladesh, specifically inherited from the British. Which are in direct opposition to constructs within Islam towards sexuality or towards homoerotic desire, through Islamic history.

Which, you know, for the most part has been tolerated and very often been celebrated, as - - whose words is so risqué, that, you know, I would not even dare to sometimes repeat it in an American setting, where he is talking about even anal penetration during the time and the call to prayer, is being called out. And there's so many examples like that.

So it's really interesting when you look at the 20th Century, I feel post-colonialism, where there's discussion of sexuality or homosexuality in particular, moves away from the culture into the bully pulpits of the Mullahs. And that really happens after the colonizers have left; after there have been religious revival movements in many of these countries, and governments have been formed in particular ways that are either connected directly to the clergy, or owe some form of allegiance, or freedom has been won from the colonizers through these religious revival movements.

And that's where the discussion moves from the culture into the mosque. And I think that that is a relatively modern phenomenon, in Islam, at least. And is something that is still continuing and something that gets most often expressed in the media, now in the 21st Century. The spokespersons for Islam now are those people in the mosques; those are the Muslims we are hearing from all the time. So they seem to color, then, our perception of how we look at Islam, how we look at Muslims, and how we might look at their sexual behaviors. That's how I look at it, at least.

MS. THIAM: Seems very thorough.

[*Laughter*].

MR. SINHA: Well, great. I guess we should wrap up now. But thank you all very much. [Applause]. So before we go out to the reception area, I do have a few "thank you's" for the day. First of all, I'd like to thank Erin Handler and Alex Osrow, in special events and communications, respectively. And Dean Wishart and Patrick, and the A/V team. And of course, my two awesome

assistants, Huseina and Damien, who dealt with my emails and relentless requests, and did it with, you know, some pride and grace, like their personalities, so thank you very much.

And the entire board of the *Journal of Law and Gender*, and especially my friend and Editor-in-Chief, Kerry Anne Hoffman. Her devotion and guidance to the journal and my personal life, has gotten me through the uphill emotional battle that is law school. And finally, thank you to the speakers on this panel and the prior panel. You're all doing very inspirational work and you're benefiting the world. So thank you very much. [*Applause*]. So there's food and drinks outside, so please help yourselves.

