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**OBERGEFELL’S SWORD:  
THE LIBERAL STATE INTEREST IN MARRIAGE**

Kari E. Hong\*

*Up until Obergefell v. Hodges, pro-marriage ideology was used to justify homophobic laws and the entrenched sexism of traditional marriages. Now that marriage equality is the law of the land, there is room for a new conversation over the meaning of marriage. Specifically, this essay argues that the proponents of traditional marriage were correct in asserting that the institution of marriage has benefits—intangible and tangible—that no other relationship currently provides to its members. Put another way, although those who defended traditional marriage were wrong with respect to their agenda, what if they in fact were absolutely right in that the marital relationship can provide something quite distinct and of great societal value?*

*After analyzing this proposition, this essay proposes a rethinking of the privacy doctrine. What if the right to be let alone—the prior means by which the citizen is best protected by the State—is in fact more harmful than helpful? This essay explores specific situations where the new state interest in the dignity of marriage paves the way for state intervention as a welcomed and needed benefit of marriage.*

In June 2015, *Obergefell v. Hodges* unequivocally established that same-sex couples have a fundamental right to marry.<sup>1</sup> During the forty-year debate over the merits of same-sex marriage, ideological rhetoric over the value of marriage was neatly divided. Conservative scholars lauded the institution of marriage and warned that its demise (whether through same-sex couples, divorce, or single-motherhood) would exact lasting damage on families and society.<sup>2</sup> Many notable liberal scholars pivoted away from the sanctity of marriage, instead calling for support for the parent/child relationship.<sup>3</sup>

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<sup>1</sup> *Obergefell v. Hodges*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2584, 2604 (2015).

<sup>2</sup> See generally George Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 *BYU J. PUB. L.* 419, 428–30 (2004) (arguing that same-sex couples, if permitted to marry, would have negative effects on children, such as promoting promiscuity, divorce, and instability and cause damage by severing biological ties of children from their natural parents); Maggie Gallagher, *Keynote Address: The Case for the Future of Marriage*, 17 *REGENT U. L. REV.* 185, 186 (2005) (“[E]very bad thing that can happen to a child happens more often when men and women don’t get and stay married. We’re talking about a wide range of indicators such as poverty, physical illness, infant mortality, mental illness, teen suicide, substance abuse,

Up until *Obergefell*, a traditional pro-marriage ideology was used in justifying homophobic laws and the entrenched sexism of traditional marriages. Inside and outside of courthouses, those who opposed same-sex marriage often did so by citing to inflammatory and faulty studies that suggested the most notable injury to a child—criminal activity for the boys, sexual promiscuity and adult-poverty for the girls, and a heightened risk of child molestation for both—arose exclusively from not having proper gendered parent figures in the home.<sup>4</sup>

The evidence upon which these assertions were made—and vigorously defended by state attorneys general in courtrooms—has now been debunked.<sup>5</sup>

But I do think that the proponents of traditional marriage were correct in asserting that the institution of marriage has benefits that no other relationship currently provides to its members. Put another way, although those who defended traditional marriage were wrong with respect to their political agenda, what if they in fact were absolutely right in asserting that there is something of great value in the institution of marriage?

Part I explores how, in the past 40 years, the state purpose in marriage was fundamentally redefined from a societal interest in procreation to an individual right to

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and school failure.”); Lynn D. Wardle, *The Disintegration of Families and Children's Right to Their Parents*, 10 AVE MARIA L. REV. 1, 2–3 (2011) (criticizing “intentional single parenting and parenting by same-sex couples, two recent popular relationship lifestyle trends” for their adverse impact on children).<sup>3</sup> See, e.g., Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 244–45 (2001) (“The concept of marriage, and the assumptions it carries with it, limit development of family policy and distort our ideology. . . . I argue that for all relevant and appropriate societal purposes we do not need marriage, *per se*, at all.”); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008) (“What I argue in this essay is that post-Lawrence efforts to secure marriage equality for same-sex couples must be undertaken, at a minimum, in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire.”); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 573 (2005) (“Both opponents and proponents of same-sex marriage champion the well-being of children. . . . I urge supporters to base their right-to-marry arguments on equality and, when considering the interests of children, to advocate for the social and legal supports necessary for optimal child outcomes in all families.”).

<sup>4</sup> For an overview of the arguments raised and criticisms of the proffered evidence, see Kari E. Hong, *Parens Patri(Archy): Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 9 (2003) (examining the policies behind states that passed laws to prevent same-sex couples to foster and adopt children on the basis that those children are harmed by the lack of traditional gender roles in those families. The article cites in detail the evidence, testimony, and briefing that the States used to justify these bans along with same-sex marriage bans.).

<sup>5</sup> See generally *Baskin v. Bogan*, 766 F.3d 648, 660 (7th Cir. 2014) (Posner, J.) (rejecting—and at times mocking—claims of harm purported caused by same-sex marriage); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991–95, 997–1003 (N.D. Cal. 2010) (after a 12-day trial with 19 witnesses, the federal district court made 80 findings of fact that concluded that no compelling state interest justified denying same-sex couples the right to marry) *vacated on other grounds and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013); see also Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1470 (2013) (challenging claims that marriage promotes responsible procreation among heterosexual couples).

self-determination. Prior to *Griswold v. Connecticut*'s privacy protections, the 50 states very much policed sex that occurred both inside and outside of marriages.<sup>6</sup>

As the scaffolding of the criminalization of sex fell, the state interest in marriage was largely unarticulated until the 2003 *Goodridge v. Department of Public Health* decision.<sup>7</sup> In the first case that affirmatively that extended protections to same-sex couples, the Massachusetts court no longer claimed that marriage was a hallowed institution that perpetuated civilization. Nonetheless, it too claimed that the private event of falling in love aggregated into a larger public project. Specifically, the intimate decision of choosing—or not choosing—a partnership with another became a critical act of self-realization and when chosen, an ability to share a common humanity with the larger population.

Marriage as a means of personal self-definition and shared humanity did not originate in the lesbian and gay community. Rather, the reshaping of marriage's purpose by heterosexual individuals is what permitted marriage equality to be logically and seamlessly extended by *Obergefell*.

Part II suggests that there indeed is something different, something unique that marriage offers to its participants. Sex, procreation, and companionship have been defined as the legal essentials of marriage. In an effort to articulate a transcendent value of marriage, I look at immigration and prisoner cases in which these essentials of marriage are absent. Whatever it is that makes us cry at weddings, these cases demonstrate that there is something intangible about marriage that, at times, will inspire the State to stretch to give sanctuary to those who are seeking a benefit that marriage uniquely offers. In this respect, *Goodridge* is correct. There are times that another's marriage reminds us all of our common humanity.

Part III proposes a tangible state interest in contemporary marriage: a new relationship between the citizen and the Liberal state. In a fascinating exchange between the *Obergefell*'s majority and Justice Robert's dissent, Justice Roberts criticizes the majority for fashioning a privacy right that had been previously unknown. Instead of a right to be let alone, *Obergefell* confers an affirmative protection to couples who were not harmed by any affirmative government intrusion, deprivation, or seizure. *Obergefell*'s sword becomes a means by which individuals can newly obtain government benefits instead of being merely protected from government harm. Taking this a step further, the essay ends with a call to rethink the concept of constitutional privacy and considers the contexts by which government intrusions into personal affairs may at times provide more protections than a privacy right that leaves its citizens to fend for themselves.

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## I. FROM PROCREATION TO LIBERTY: THE LEGAL PURPOSE OF MARRIAGE

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<sup>6</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>7</sup> *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

Much credit must be given to LGBT activists who have advocated for marriage equality.<sup>8</sup> However, *Obergefell* should not be proof that Americans have fully embraced LGBT equality.<sup>9</sup> Rather, the extension of marriage to same-sex couples arose from the fact that, over the past 40 years, most straight people had come to internalize a redefined purpose of marriage that was much more than procreation.

A. *Marriage Was The Exclusive Institution In Which Procreative Sex Was Permitted (And Supposed) To Occur.*

In the 2014 *Baskin v. Bogan* case, Indiana and Wisconsin defended their same-sex marriage bans on the basis that marriage must respond to unique issues only heterosexual individuals face: procreative sex. In particular, the States must “try to channel unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility.”<sup>10</sup> But Judge Posner, writing for a unanimous panel, tore apart the argument with facts, reason, sarcasm, and outright mockery.<sup>11</sup>

Although comical when said out loud today, procreation’s centrality to marriage—as it was understood fifty years ago—was correct as a descriptive legal statement. In practice, procreation has never been confined to marriage. There have been children born out of wedlock ever since there was wedlock.<sup>12</sup> Today, in the United States, approximately 40 percent of births occur outside of marriage.<sup>13</sup> However, up until

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<sup>8</sup> See, e.g., Molly Ball, *How Gay Marriage Became A Constitutional Right*, THE ATLANTIC (July 1, 2015), <http://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/>; Evan Wolfson, Editorial, *Op-Ed: Mary Bonauto is the Supreme Court Super Hero We Need and Deserve*, *The Advocate* (Apr. 15, 2015), <http://www.advocate.com/commentary/2015/04/15/op-ed-mary-bonauto-supreme-court-hero-we-need-and-deserve>.

<sup>9</sup> See generally Chris Isidore, *How Businesses Can Still Discriminate Against LGBT People*, CNN MONEY (Jun 26, 2015), <http://money.cnn.com/2015/06/26/news/companies/lgbt-discrimination/>.

<sup>10</sup> *Baskin*, 766 F.3d at 660.

<sup>11</sup> Judge Posner did not just disagree, but outright mocked the attorneys who defended Indiana and Wisconsin’s marriage bans. For instance, in summarizing the state’s arguments, he said, “Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.” *Id.* at 662.

<sup>12</sup> See generally Hong, *supra* note 4, at 12–13 (“[B]y the sixteenth century, adoption in Europe was not common, but when it did occur, was made through informal arrangements that were primarily motivated out of humanitarian or charitable impulses. The Christian Church opposed these arrangements, however, citing concerns that men were abusing adoption as a means to fold their illegitimate children into a legitimate family structure.”); Elisabetta Povoledo, *In Search for Killer, DNA Sweep Exposes Intimate Family Secrets in Italy*, N.Y. TIMES, July 26, 2014 (to find the killer of a child, “investigators embarked on the country’s largest DNA dragnet, taking genetic samples from nearly 22,000 people. . . . But what some praised as a triumph of modern science and 21st century sleuthing, has also set off a debate about the risks of privacy violations and the darkened corners of the past they can expose after the DNA testing also revealed something unknown even to the suspect’s family: that he was the illegitimate son of a man who had died in 1999.”).

<sup>13</sup> The most recent statistics from the CDC are that unmarried women account for 40.6% of all births in the United States. See Unmarried Childbearing, FASTSTATS, (last visited Sept. 16, 2015), <http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm>.

the 1960s, the 50 states marshaled their police powers to confine legal sex to marriage and to ensure that any sex that occurred in a marriage was procreative.

### 1. *Sex Outside of Marriage Criminalized As Fornication, Adultery, and Rape*

Sex outside of marriage was criminalized, punished as the felony and misdemeanor crimes of fornication (sex between unmarried adults) and adultery (sex outside of marriage where one person was married to another).<sup>14</sup> In these prosecutions, a person's marital status was a critical element of the crime. When relevant, defendants routinely would cite their own or their partner's marital status as a defense to the charged crimes.<sup>15</sup>

In this era, rape too was a crime, but not because the conduct violated a woman's sexual autonomy or consent. Rather, rape was a crime because the act violated a woman's chastity (and from its historical origins, the honor of the victim's husband, father, and brothers).<sup>16</sup> When rape occurred between adults, a woman had to prove that she had resisted—often with her utmost—her attacker's use of force during intercourse.<sup>17</sup> Absent proof that a woman resisted rape, she too would have been guilty of the crimes of fornication or rape.<sup>18</sup>

In contemporary rape law, marriage continues to delineate which sex acts are legal and which ones are not. The crime of statutory rape (sex between an adult and a minor) persists as a status crime, not requiring mens rea.<sup>19</sup> The fact that such an offense

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<sup>14</sup> See generally *Hopgood v. State*, 76 Ga. App. 240, 241 (1947) (“Under Code, § 26-5801, ‘there are three distinct kinds of indicatable sexual intercourse, viz. adultery, fornication, and adultery and fornication, the offense in each case being a joint one. If both parties to the criminal act are married, each is guilty of adultery; if both are single, each is guilty of fornication; if one is married and the other single, each is guilty of adultery and fornication.’”).

<sup>15</sup> *Hopgood*, 76 Ga. App. at 242 (granting a motion for a new trial on the basis that the prosecution failed to prove the defendant's marital status, which constituted insufficient evidence to establish the crime of fornication).

<sup>16</sup> Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 57 (2008) (in discussing the efforts to reform international law, Professor Halley observed the reformers' goal “not [to] legitimate and entrench the ideas that the rape of a woman harmed her because of its meaning to the men in her family or culture, or that it harmed a wife, daughter, or sister because it impugned a husband's, father's, or brother's honor.”).

<sup>17</sup> See, e.g., *People v. Warren*, 446 N.E. 2d 591, 593 (Ill. App. Ct. 1983) (reversing a rape conviction for insufficient evidence because the victim did not “in any meaningful way resist the sexual advances of the defendant. . . .”) (citations omitted).

<sup>18</sup> This absurdity continues in modern times. In 2013, a Norwegian tourist visiting Dubai reported she was a victim of a rape. The authorities immediately arrested her for unlawfully having sex outside of marriage. See Goulding, et al., *Dubai Rule Pardons Norwegian Tourist Convicted After She Reported Rape*, CNN (July 22, 2013), <http://www.cnn.com/2013/07/22/world/meast/uae-norway-rape-controversy/>. After international outcry, the rape victim was pardoned for the crime of unlawful sex outside of marriage. *Id.* With her pardon, however, her rapist too was released from prison. *Id.*; see also Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 27–28 (1998) (“[A]s Kristin Bumiller puts it--the woman's nonconsent was the element that divided one heterosexual crime from another, namely, the woman's nonconsent distinguished the man's crime (rape) from the couple's crime (fornication or adultery).”).

<sup>19</sup> “A majority of states make statutory rape (typically a person under seventeen years of age) a strict liability offense with respect to the child's age. This principle results in some prosecutions in which the intercourse is undisputedly consensual and the child is nearly the age of consent, with the defendant

is a strict liability crime makes its only potential defense—marriage—an even more remarkable exception.<sup>20</sup> The crime of rape also remains defined by marriage. Although the marital rape exception has been formally abolished, marriage reduces the seriousness of the offense and lengths of punishment.<sup>21</sup> Approximately half of the states “prescrib[e] lower punishment for marital rape, or . . . permit[] prosecution only when the husband has used the most serious forms of force.”<sup>22</sup>

Although Judge Posner mocked Indiana and Wisconsin’s attempts to articulate a contemporary state interest in limiting marriage to procreative sex, the notion that the law has forged a link between marriage and procreation is far from absurd. Indeed, marriage still casts a long shadow in the definition of contemporary sex crimes.

## 2. *Criminalizing Cohabitation and Specific Types of Marriages*

Based on concerns that procreation must reside within the confines of traditional marriage, criminal statutes also used to sanction those who lived together outside of traditional—defined as monogamous and white—marriages.

Illicit cohabitation—the crime of people of opposite sex living together—was criminalized. These statutes gained popularity after the Civil War as a means to harass interracial relationships and members of the Church of the Latter Day Saints.<sup>23</sup> Despite

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reasonably believing her to be of lawful age.” CRUMP, ET AL., *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* 356 (3d. ed. 2013).

<sup>20</sup> *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693–94 (9th Cir. 2007). California’s crime of statutory rape is not a crime of moral turpitude in part “because some conduct criminalized under § 261.5(d) would be legal if the adult and minor were married.” *Id.* In support of this conclusion, the Court cited Cal. Penal Code section 261.5(a) (defining “unlawful sexual intercourse” for purposes of 261.5(d) as involving intercourse “with a person who is not the spouse of the perpetrator, if the person is a minor”) and Cal. Fam. Code section 302 (permitting a minor to marry with written consent of a parent and a court order). *Id.*

<sup>21</sup> The marital rape exemption as a concept of immunity has been formally abolished in all 50 states. In 1975, South Dakota was the first state to abolish this exception and, in 1993, North Carolina was the last. See J.C. Barden, *Marital Rape: Drive for Tougher Laws Pressed*, N.Y. TIMES May 13, 1987, Battered Women’s Justice Project, Marital Rape at 4. Although few states follow the Model Penal Code’s recommendation to codify the marital rape exemption, they do follow the MPC’s recommendation to grade the seriousness of the offense based on the marital status of the parties rather than the nature of harm inflicted. See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465 (2003).

<sup>22</sup> SANFORD KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES CASES AND MATERIALS* 407 (9th ed. 2012). California for instance has separate statutes for rape of a non-spouse, section 261 and rape of a spouse, section 262. Under section 262, the rape “of a person who is the spouse of the perpetrator” has differently-defined conduct that would result in rape. Moreover, the statute contemplates “probation, fines” for punishment whereas section 261 is punished with prison.

<sup>23</sup> See generally *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1193 (D. Utah 2013) (striking down Utah’s cohabitation law as impermissibly vague); *United States v. Higgeson*, 46 F. 750, 751 (C.C.D. Idaho 1891) (“The crime of unlawful cohabitation is the living with two or more women as wives; of treating and associating with them as such; the giving to the world the appearance that the marital relation exists with them.”); RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 70–91 (Pantheon Books ed. 2003) (discussing various laws and cases criminalizing interracial relationships from the 1950s to 1976).. In 1882, unlawful cohabitation became a crime in the United States with the enactment of the Edmunds Act. See Erin P. B. Zasada, *Civil Rights-Rights Protected and Discrimination Prohibited:*

their nefarious origins, by the 1960s the majority of states had enacted them and used them against all cohabitating couples.<sup>24</sup> Even through the 2000s, these statutes were invoked in various property, intestacy, and landlord-tenant disputes as evidence of legitimate public policy and morals.<sup>25</sup>

Between 1800 and 1967, 40 states criminalized interracial marriages in some form or another.<sup>26</sup> The state interest in banning these relationships revolved around procreation, and specifically preventing the birth of children from these unions.<sup>27</sup> In 1967, *Loving v. Virginia* invalidated bans on interracial marriages but contemporary vestiges over the state regulation policing interracial marriages can be found.<sup>28</sup>

### 3. Contraception and “Unnatural” Sex

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*Living in Sin in North Dakota? Not Under My Lease* North Dakota Fair Housing Council, Inc. v. Peterson, 2001 Nd 81, 625 N.W.2d 551 (2001), 78 N.D. L. REV. 539, 541 (2002).

<sup>24</sup> “When the Model Penal Code [MPC] was published in 1962, most states in the United States criminalized nonmarital cohabitation.” Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. & FAM. STUD. 135, 141 (2005).

<sup>25</sup> Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245, 253 (1999) (observing that some “states refuse to recognize property agreements or rights arising between unmarried cohabitants for two reasons: such relationships are against public policy and cohabitation remains a crime in some states.”). One of the most famous examples was the North Dakota Supreme Court decision from 2001, holding that landlords could lawfully refuse to rent to unmarried tenants. *See* N. Dakota Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 553 (N.D. 2001).

<sup>26</sup> Every state whose black population exceeded 5% passed anti-miscegenation laws targeting black and white couples. *See* Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 833–38 (2000). Alaska, Connecticut, DC, Hawaii, Minnesota, New Hampshire, New Jersey, Vermont and Wisconsin never passed these laws. *See id.* On the West Coast, states passed anti-miscegenation laws targeting the Chinese, Japanese, Filipino, and Southeast Asian populations. *See id.* In the first case to strike down these statutes, Justice Traynor noted the “absurdity” in a Court figuring out who falls within the categories of race as defined by the legislatures. *See* *Perez v. Lippold*, 32 Cal. 2d 711, 729 (1948) (“Blumenbach classified man into five races: Caucasian (white), Mongolian (yellow), Ethiopian (black), American Indian (red), and Malayan (brown). Even if that hard and fast classification be applied to persons all of whose ancestors belonged to one of these racial divisions, the Legislature has made no provision for applying the statute to persons of mixed ancestry. The fact is overwhelming that there has been a steady increase in the number of people in this country who belong to more than one race, and a growing number who have succeeded in identifying themselves with the Caucasian race even though they are not exclusively Caucasian.”).

<sup>27</sup> *See* *State v. Jackson*, 80 Mo. 175, 179 (1883) (“It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments.”).

<sup>28</sup> *See* Mark Joseph Stern, *North Carolina May Soon Let Clerks Refuse Marriage Licenses to Gay and Interracial Couples*, SLATE, June 2, 2015, [http://www.slate.com/blogs/outward/2015/06/02/north\\_carolina\\_law\\_lets\\_magistrates\\_refuse\\_marriage\\_licenses\\_to\\_gay\\_and.html](http://www.slate.com/blogs/outward/2015/06/02/north_carolina_law_lets_magistrates_refuse_marriage_licenses_to_gay_and.html) (discussing state legislation to permit clerks to refuse to issue marriage licenses to gay, interracial, and interfaith couples if the union offends the clerk’s religious beliefs).

Even within marriage, States policed what type of sex could occur. Sodomy—even when consensual—was defined as unnatural sex, which was in essence sexual contact that could not lead to procreation.<sup>29</sup>

Although it was not illegal for married couples to use contraception, it was illegal for doctors—and others—to advise, counsel, and provide information and contraception to married couples.<sup>30</sup> The purpose of these statutes was to prevent married people from engaging in sex that could not lead to procreation.

Marriage then was never a license to engage in any type of sex. To the contrary, the old legal framework compelled marital sex to be exclusively procreative in nature and practice.

#### 4. *Legitimacy Laws and Parentage*

Having children outside of marriage has never been a crime. But legitimacy laws branded those children and imposed lifelong disadvantages to them. Under the common law, nonmarital children had no right to parental support and no right to inherit from or through a parent. They faced legal and societal barriers when they sought public office, entry into professional associations, or to transfer their own property at death. Until the late 1960s, some states issued birth certificates in which the term “bastard” was written underneath the space for “father” if a child’s parents were not married.<sup>31</sup> This family law apartheid furthered the criminal laws’ sanctions against sex outside of marriage.

Today, as much as the legitimacy distinctions have been formally abolished, differential treatment towards children born outside of wedlock arguably remains.<sup>32</sup>

For children born inside of marriages, marriage also continues to play an vital role in determining the parent-child relationship. All states have the presumption that the parties to a marriage are a child’s parent, albeit each state has varying rules on when and

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<sup>29</sup> *Cohen v. Cohen*, 200 Misc. 19, 103 N.Y.S.2d 426, 427 (N.Y. Sup. Ct. 1951) (introducing husband’s sodomy conviction as a means of receiving a divorce based on adultery in divorce proceeding. The court denied the petition because sodomy is a crime against nature, which is different from the sexual intercourse required in the statute’s act of adultery).

<sup>30</sup> *See, e.g., Buxton v. Ullman*, 147 Conn. 48, 58, 156 A.2d 508 (1959) (upholding attack against law preventing use of contraception by married couples because “despite the occasional hardship which might result, the greater good would be served by leaving the statutes as they are.”). *But see Griswold*, 381 U.S. at 485–86 (overturning such laws because “[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.”).

<sup>31</sup> Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 347 (2011); Nancy Polikoff, *Children of No One*, LA TIMES (May 20, 2008) (“Under common law, a child born outside marriage used to be fillius nullius, the child of no one. In the Middle Ages, it was even a lesser crime to kill a person who had been born to an unmarried woman.”).

<sup>32</sup> In 1968, the Supreme Court first articulated that treating children differently based on their parents’ marital status constituted invidious discrimination. *See Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (“We start from the premise that illegitimate children are not ‘nonpersons.’”). For a discussion of continuing impact of illegitimacy laws on society and the law, *see Maldonado, supra note 31, at 349*.

how this presumption can be rebutted.<sup>33</sup> This doctrine allows both parties to a marriage to be full parents without the necessity of adoption and even when there is no biological tie to a child.<sup>34</sup>

In sum, the States' attempts to link same-sex marriage bans to procreation proved futile in the same-sex marriage debate. However, historically the states exercised their police powers promote, permit, and order procreation inside and outside of marriage. Indeed, to the extent that residual policing occurs (such as in rape and legitimacy laws), it is akin to the shadow of coverture on marriage: a fact that fascinates the politically-minded but does not function to regulate behavior as effectively as it once did.<sup>35</sup>

*B. Early Marriage Equality Cases Mirrored The Legal Reality That The Primary Purpose of Marriage Was Procreation*

It is from this context that the pre-*Obergefell* lines of marriage cases must be analyzed.

*Baker v. Nelson* was the first case in which two gay men challenged a state clerk's decision not to issue them a marriage license.<sup>36</sup> In 1971, there was no law in Minnesota expressly limiting marriage to members of the opposite sex. The Minnesota Supreme Court nonetheless dismissed any statutory ambiguity on the grounds that it was

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<sup>33</sup> See generally Ashley Jacoby, *The New Kinship: Constructing Donor-Conceived Families*, 31 SYRACUSE J. SCI. & TECH. L. REP. 251, 262 (2015) (“Still, perhaps the strongest factor in determining parenthood is based on the historically rooted marital presumption; dating back to the 1700s, the marital presumption dictated that a married man and woman were the parents of a child born into the marriage. Today, the presumption remains entrenched in state law throughout the nation, and applies to both heterosexual and homosexual couples (where homosexual marriage is recognized).”); June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 220–21(2011) (in assigning parental rights, “[p]references for marriage, biology, or parental function are ideological and when the choice among policies is squarely presented, the states split along ideological lines. . . . Thus, Utah, Louisiana, and Michigan have issued opinions embracing the importance of marriage, and Texas, Iowa, and Missouri have emphasized the importance of biology, all in relatively absolute terms. The states that offer the starkest contrast to these seemingly clear-cut resolutions are states such as California, Massachusetts, and New York, which prefer more contextualist decisions.”).

<sup>34</sup> See generally David Dodge, *At The Cutting Edge of Gay Family Law*, N.Y. TIMES, June 17, 2014 (“The case before Judge Torres concerned a married lesbian couple who, after conceiving with donor sperm, petitioned for approval of a second-parent adoption for the non-gestational mother. (Why did that sound so familiar?) In a surprise decision, since she had approved many such petitions in the past, Judge Torres ruled that adoption was neither ‘necessary nor available’ in this case since a ‘presumption of parenthood’ exists for all married couples.”).

<sup>35</sup> See *supra* note 32 and accompanying text (legitimacy) and notes 19–22 and accompanying text (rape). Coverture—the legal status whereby a married woman lost the right to vote and own property was formally repealed. The “1 Buy, 2 Sell” rule in various states is an example whereby its operation remained etched in contemporary law. See e.g., Mike Jaquish, *One to Buy, Two to Sell*, REALTY ARTS, June 13, 2011, <http://blog.mikejaquish.com/2011/06/13/one-to-buy-two-to-sell-60-seconds-in-real-estate-cary-nc/> (a realtor explaining about North Carolina’s law that both spouses have to consent to sell a property even when one spouse exclusively owns the property).

<sup>36</sup> *Baker v. Nelson*, 291 Minn. 310, 311 (1971), *appeal dismissed* “for want of a substantial federal question” in *Baker v. Nelson*, 93 S. Ct. 37 (1972).

“unrealistic” to think the drafters intended marriage to extend to people of the same sex.<sup>37</sup> The plaintiffs raised a second argument, raising a federal constitutional question, on which the Minnesota Supreme Court was equally dismissive. In explaining how the right to marry was limited to heterosexual individuals, the state court observed—in the most cursory manner—that “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”<sup>38</sup>

I believe it is a mistake to write off *Baker v. Nelson*’s citation to procreation as outdated anti-gay discrimination.<sup>39</sup> To the contrary, what is notable is that procreation was presented as such an obvious, central, and defining aspect of marriage that no further explanation (or citation outside of The Book of Genesis) was needed.<sup>40</sup>

*Baker v. Nelson*’s unassailable assumption that marriage could only exist with the promise of procreation was not confined to heterosexuality. To the contrary, *Loving v. Virginia*, which was decided four years earlier, reinforces the purpose of marriage to be procreation.<sup>41</sup> In explaining the value of marriage, the Supreme Court noted that marriage was “fundamental to our very existence and survival.”<sup>42</sup> This phrase was not intended to be hyperbole. Rather, the Supreme Court supports “our very existence,” with a citation to *Skinner v. Oklahoma*, the case ending the State’s ability to sterilize its citizens.<sup>43</sup> Procreation becomes an essential element of marriage, as marriage is the exclusive means by which the species propagates itself. The unassailable axiom is that marriage exists for producing children, and without marriage, no more children would be born.

Viewed from our contemporary eyes, this centrality of procreation to marriage seems confusing and anachronistic. But in 1967 (the date of *Loving*) and 1971 (the date of *Baker*), society was continuing to police, and still criminalize, sex outside of marriage.

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<sup>37</sup> *Baker*, 291 Minn. at 311.

<sup>38</sup> *Id.* at 312.

<sup>39</sup> For years, legal commentators criticized the Supreme Court’s decisions, such as *Baker*, which mirrored the larger society’s animus against and “pity” towards gay men and lesbians. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 192–93 (“The legal penalties imposed upon homosexual people are deep and cruel, and they enforce a pervasive social censure. . . . Most Americans disapprove of people who engage in homosexual conduct.”). Since *Windsor*, federal and state judges have been articulating pointed criticisms of these prior decisions as anachronistic and discriminatory. See, e.g., *Baskin*, 766 F.3d at 660 (Posner, J.) (“*Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned.”).

<sup>40</sup> The irony, of course, is that Genesis is not the place to find models of happy monogamous heterosexual pairings. Rather, God found favor with the fathers of the Judeo-Christian religion—Abraham, David, Jacob—and those religious figures were in adulterous, bigamous, and polygamous relationships.

<sup>41</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>42</sup> *Id.*

<sup>43</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 542 (1942) (holding that under equal protection, the State cannot sterilize those convicted of larceny when those conviction of embezzlement are subjected to the same punishment. “We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses.”).

In this context, procreation as a—if not the—defining state interest in marriage was quite rational and reasoned.

### C. *From Goodridge to Windsor: Rethinking The Primary Purpose of Marriage*

In the history of social change, it is easy for legal scholars to be reductive in our thinking, to trace shifts from one Supreme Court decision to another. What is lost in this method is that progress usually is not made in full steady strides. To the contrary, state courts show the fits and starts that occur as society grapples with the collateral issues that legal equality ushers in.<sup>44</sup>

*Obergefell* will most certainly be published in casebooks documenting marriage equality for lesbian and gay individuals.<sup>45</sup> However, the *Obergefell* decision was not the first decision to recognize the social zeitgeist regarding how marriage changed. Rather, it was the 2003 decision, *Goodridge v. Massachusetts*, a decision from a decade earlier, that did so.

In 2003, *Goodridge* made history as the first state court that fully and forcefully extended marriage to same-sex couples.<sup>46</sup> Unique to *Goodridge*, the Massachusetts Supreme Judicial Court did not ask the question of whether gay and lesbian couples could

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<sup>44</sup> By way of example, *Loving v. Virginia* is usually called up as the case that ended the country's ban on anti-miscegenation laws. But 19 years earlier—in 1948—the California Supreme Court was the first to strike down an anti-miscegenation law—six years before the Supreme Court ended segregation as a violation of equal protection in *Brown v. Board of Education*. See *Perez*, 32 Cal. 2d at 729. For an excellent discussion on how *Perez* had a more robust discussion of the harms of anti-miscegenation laws than what is found in *Loving*, see R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 844–45 (2008).

<sup>45</sup> See HARRIS & CARBONE, FAMILY LAW (2015) (updating Family Law book with *Obergefell* citation in August 2015).

<sup>46</sup> In 1993, Hawaii became the first state to have its judiciary suggest that the denial of marriage to same-sex couples might be an equal protection problem. *Baehr v. Lewin*, 74 Haw. 530, 559, 852 P.2d 44, 58 (1993) (holding that the plaintiffs may have articulated an equal protection right to marriage and remanding the case for an evidentiary hearing on that question). In 1998, Hawaii's voters, however, undid the judicial ruling by amending their constitution to bar such unions. As an unintended lasting impact, the possibility of same-sex marriage was the impetus for the enactment of the federal Defense of Marriage Act. See Richard Socarides, *Why Bill Clinton Signed the Defense Of Marriage Act*, NEW YORKER (Mar. 8, 2013) (“As Republicans prepared for the 1996 Presidential election, they came up with what they thought was an extremely clever strategy. A gay-rights lawsuit in Hawaii was gaining press coverage as an initial series of preliminary court rulings suggested that gay marriage might be legally conceivable there. Clinton was on the record opposing marriage equality. But Republicans in Congress believed that he would still veto legislation banning federal recognition of otherwise valid same-sex marriages, giving them a campaign issue: the defense of marriage.”). In 1999, Vermont became the first state to expressly declare that the denial of marriage to same-sex couples violated Vermont's “Common Benefits Clause,” a state provision that operated as a more robust form of the federal equal protection clause. *Baker v. State*, 170 Vt. 194, 202 (1999). However, this court decision too was diluted by the legislature that refused to extend marriage to same-sex couples. See Liz Halloran, *How Vermont's “Civil” War Fueled the Gay Marriage Movement*, NPR (Mar. 23, 2013) (“It seemed radical at the time, and tore the state apart so wretchedly and publicly that historians were hard-pressed to come up with a parallel.” The irony is that in short order, civil unions, “Vermont's pioneering law is viewed by many as an artifact.”).

be excluded from marriage.<sup>47</sup> In so doing, the decision avoided the pitfalls of prior decisions that noted the historical absence of these relationships or were mired in the contemporary moral opprobrium against gay people.<sup>48</sup>

Instead, *Goodridge*'s starting point instead was “[s]imply put, the government creates civil marriage.”<sup>49</sup> *Goodridge*'s deft turn reframed the question from a plaintiff same sex couple asking for an exception to the longstanding history of civilization, to rather, examining what was the purpose of marriage for all of us. In answering this question, *Goodridge* made three notable contributions to the framing of the marriage debate.

First, *Goodridge* enumerated the hundreds of private and social advantages that the State conferred on those who married.<sup>50</sup> Marriage was taken outside of the moral and religious debates of the day.<sup>51</sup> *Goodridge* squarely defended marriage as a public institution that was properly defined by state government.

Second, *Goodridge* redefined the personal commitment to marriage to be “the decision whether and whom to marry is among life’s momentous acts of self-definition.”<sup>52</sup> Instead of the linchpin that perpetuates the human race, the act of falling in love with another was seemingly a much more pedestrian: a choice that some people made, and others did not.

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<sup>47</sup> *Goodridge*, 440 Mass. at 320 (recognizing that marriage traditionally involved heterosexual couples and dismissed that significance because “that history cannot and does not foreclose the constitutional question.”).

<sup>48</sup> *Andersen v. King Cnty.*, 158 Wash.2d 1, 44, 138 P.3d 963, 986 (2006) (upholding state DOMA statute because “As we explained earlier in this opinion, there is no history of marriage in this state that includes same-sex marriage. Thus, the citizens of Washington have not held a privacy interest in marriage that includes a right to marry a person of the same sex.”); *Hernandez v. Robles*, 7 N.Y.3d 338, 362, 855 N.E.2d 1, 9 (2006) (“The right to marry someone of the same sex, however, is not “deeply rooted”; it has not even been asserted until relatively recent times.”); *Baehr*, 74 Haw. at 553, *as clarified on reconsideration* (“Whether the Court viewed marriage and procreation as a single indivisible right, the least that can be said is that it was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental. This is hardly surprising inasmuch as none of the United States sanctioned any other marriage configuration at the time.”).

<sup>49</sup> *Goodridge*, 440 Mass. at 321.

<sup>50</sup> *Id.* at 322 (“Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities.” The Court then listed the specific statutes and benefits that benefit those who are married.)

<sup>51</sup> In 2003, no mainstream religious organizations supported same-sex marriage. Robert P. Jones, *Religious Americans Support Gay Marriage*, THE ATLANTIC (Apr. 28, 2015), <http://www.theatlantic.com/politics/archive/2015/04/religious-americans-support-gay-marriage/391646/>. “The highest levels of support among major religious groups came from white mainline Protestants, of whom 36 percent favored same-sex marriage, and Catholics, with 35 percent support. Nearly two-thirds of the religiously unaffiliated, by contrast, supported same-sex marriage.” *Id.* But, by 2015, “the debate has shifted from one between religious and non-religious Americans to one that primarily pits older, conservative Christians against moderate, progressive, or younger Christians, Jews, and the religiously unaffiliated.” *Id.*

<sup>52</sup> *Goodridge*, 440 Mass. at 322.

Third, *Goodridge* reimagined how the institution of marriage contributed to society. “Because it fulfills yearnings for security, safe haven, and connection that express our common humanity. . .”<sup>53</sup> Of note, a person’s most intimate act of falling in love continued to aggregate into a larger public purpose. The personal decision to marry became a means to stake out an identity. The public impact of such a decision permitted one’s identity to be a shared currency that was recognized and accepted by many.

The state interest in marriage was no longer was an exclusively heterosexual function of procreation or perpetuating the species. Instead, the right to marry became fundamental because it permitted someone to partake in the full range of human experience. Those who choose to marry share a means of publicly expressing their inclusion in a shared attribute of dignity and membership in the larger community.<sup>54</sup> For gay men and lesbians, they were no longer excluded from the biological function of procreation. To the contrary, a gay man’s or lesbian’s act of falling in love with another became a recognized trait, extending an invitation to the previously-exiled into an invited, included community.<sup>55</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> For criticisms of the elevation of marriage to serve this purpose, see Michael Cobb, *The Supreme Court’s Lonely Hearts Club*, NY TIMES, June 30, 2015 (“Certainly Justice Kennedy’s sense of marital ‘dignity’ is over the top. But it’s not just sentimental rhetoric: It’s a kind of legal ‘term of heart’ that can keep you up at night. The words and the value they communicate are impossible to avoid, and often difficult to resist. It’s as if the words of Justice Kennedy and my grandmother, who, on her deathbed, begged me to get married, have melded together in my head, declaring my life lacking — emotions meet law and then throw me into a state of emotional insecurity.”).

<sup>55</sup> In 2003, *Goodridge*’s redefinition of the marriage debate was not at all embraced. To the contrary, from 2004 to 2012, 41 states raced to amend—and successfully amended—state laws and constitutions to prevent their courts from following Massachusetts. Following Hawaii’s 1996 decision, states first started amending their laws to exclude same-sex couples from marriage. In 2004, another wave of voter initiatives passed constitutional amendments. See James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004 (“Proposed state constitutional amendments banning same-sex marriage increased the turnout of socially conservative voters in many of the 11 states where the measures appeared on the ballot on Tuesday”); Tim Grieve, *Bush’s War Over Gay Marriage*, SALON, Feb. 26, 2004 (“While Americans are broadly supportive of gay rights, gay marriage is widely unpopular, particularly with blue-collar whites and African-Americans whose support the Democrats will need in November.”); see also interactive data found at <http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/>. In January 2012, the only 6 states that recognized same-sex marriage were Massachusetts, Iowa, Vermont, New Hampshire, New York, Connecticut, and the District of Columbia. See Erik Eckholm, *One Man Guides the Fight Against Gay Marriage*, N.Y. TIMES, Oct. 12, 2012. In May of that year, President Obama made history by being the first sitting president to say, in an interview with ABC news, “I’ve just concluded that for me, personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married. Phil Gast, *Obama Announces He Supports Same-Sex Marriage*, CNN, May 9, 2012, <http://www.cnn.com/2012/05/09/politics/obama-same-sex-marriage/>. President Obama did not announce any policy, propose legislation, or issue any executive orders. *Id.* Rather, his simple statement is now viewed as an Emperor Has No Clothes Moment, a time when suddenly people admitted that they too either supported same-sex marriage, or at the least, stopped efforts to oppose it. From that moment, no other state enacted legislation to stop same-sex marriage. In June 2013, 9 states had recognized same-sex marriage. After *United States v. Windsor*, voters and legislatures repealed bans, voters and legislatures enacted affirmative legislature, and courts struck down bans so that in June 2015, 37 states recognized marriage equality, leaving only 13 states subject to the Supreme Court *Obergefell* decision. See \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675 (2013).

In today's world, outside of the legal arena, procreation no longer resonates as the primary purpose of marriage. Sex outside of marriage has been decriminalized.<sup>56</sup> Young people no longer save themselves for marriages.<sup>57</sup> (Indeed for those that do, they are the curiosity of reality shows.)<sup>58</sup>

Gay people thus were not granted marriage rights neither because of a shift in gender roles in heterosexual marriages nor as an embrace of a larger LGBT equality movement. Rather, straight people no longer required procreation to occur in marriages; marriages no longer required procreation to bring value to a marital relationship.<sup>59</sup> It is precisely this shift in the societal understanding marriage that no longer required procreation to be its defining element that allowed marriage to be logically—and legally—extended to same-sex couples in a seamless manner.

## II. SEARCHING FOR A TRANSCENDENT STATE INTEREST IN MARRIAGE

### A. *What If In Fact There Is Something Special About Marriage?*

As mentioned above, the forty-year debate over the merits of same-sex marriage was marked with an ideological divide. Conservative scholars lauded the institution of marriage and many liberal scholars were skeptical of the emphasis on and importance of the institution.<sup>60</sup>

Now divorced from the nefarious ends of divesting rights from lesbian and gay citizens, new conversations have begun regarding what may be the value in marriage. Specifically, there are two notable ways by which marriage is different from other relationships.

First, there is a post-modern, formalist function to marriage. When the state of California gave every single of the estimated 1,400 legal rights and benefits to same-sex couples that it gave to opposite-sex couples, the omission of one single word—the title of

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<sup>56</sup> See *supra* notes 14–37 and accompanying text.

<sup>57</sup> John Blake, *Why Young Christians Aren't Waiting Anymore*, CNN (Sept. 27, 2011) (“80 percent of unmarried evangelical young adults (18 to 29) said that they have had sex—slightly less than 88 percent of unmarried adults, according to the teen pregnancy prevention organization”).

<sup>58</sup> See *19 Kids and Counting*, a recently cancelled reality show focused on a conservative Christian family that did not use birth control and did not permit their children to engage in sexual activity before marriage.

<sup>59</sup> Nicholas DiDomizio, *11 Brutally Honest Reasons Why Millennials Don't Want Kids*, CONNECTIONS.MIC, July 30, 2015 (“According to data from the Urban Institute, birth rates among 20-something women declined 15% between 2007 and 2012. Additional research from the Pew Research Center reflects a longer-term trend of women eschewing parenthood as the number of U.S. women who choose to forego motherhood altogether has doubled since 1970. This trend is fascinating, in part because there's long been a taboo associated with people (particularly, women) choosing to opt out of parenthood.”). In Gallup polls, those who found it “morally acceptable” for unmarried men and women to have sex increased from 53% in 2001 to 68% in 2015. Those who found it “morally acceptable” to give birth outside of marriage also rose from 42% in 2001 to 61% in 2015. Gallup Poll, available at <http://www.gallup.com/poll/117328/marriage.aspx>.

<sup>60</sup> See *supra* notes 2–3 and accompanying text. *But see* MARRIAGE AT THE CROSSROADS (Marsha Garrison & Elizabeth Scott eds., Cambridge 2012) (collection of essays discussing aspects of policy that promotes marriage and non-marital families).

marriage—mattered. The Ninth Circuit observed that a constitutional right may even attach to “the extraordinary significance of the official designation of ‘marriage.’”<sup>61</sup> Writing for the majority, Judge Reinhardt observed that “[a] rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of ‘registered domestic partnership’ does not.”<sup>62</sup> There is growing scholarship that contends that the act of marriage itself, the formalization of a private relationship into something larger does indeed create something larger that cannot be replicated in other relationships.<sup>63</sup>

Second, others have started to excavate and name the intangible benefits that may arise from marriage.<sup>64</sup> That said, an inquiry into the intangible benefits will be a tangled one at best. We have a century-worth of cases recognizing various values that marriage has had in the lives of its citizens. Traditionally, those benefits have been conferred to only one party, most specifically husbands rather than wives.<sup>65</sup> Nonetheless there have been notable moments when courts have started to recognize some transcendent values in marriage that do provide benefits that are arguably desirable in contemporary times.

To contribute to what may be an intangible benefit uniquely arising from marriage, in the next section, I wish to look at three cases where the traditional essentials of marriage—sex, procreation, and companionship—are not just absent, but impossible.

### *B. Seeking A Transcendent, Intangible Benefit in Marriage*

In 2002, in *Gerber v. Hickman*, a prisoner brought a section 1983 claim, asking the warden to give him permission to send through the mail a vial of sperm to his wife so that his she may attempt procreation with medical assistance.<sup>66</sup> The en banc court upheld the warden’s denial, but a vociferous dissent by Judge Alex Kozinski took to task the

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<sup>61</sup> *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed.2d 768 (2013).

<sup>62</sup> *Id.*

<sup>63</sup> See generally Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2009–10 (2014) (discussing the transformative effects of formalizing relationships such as marriage).

<sup>64</sup> See MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (Beacon Press 2015) (in this beautiful memoir, Professor Ertman makes a compelling case as to how marriage has been different for her in defining her relationship to her wife and their relationship with their child). For instance, kindness appears to be a quality that those in marriage may be likely to acquire. Social scientists are realizing that kindness operates like a muscle, which if exercised, can be learned and developed. See Emily Esfahani Smith, *Masters of Love*, THE ATLANTIC, June 12, 2014, <http://www.theatlantic.com/health/archive/2014/06/happily-ever-after/372573>. This is not say that unmarried people are not kind and cannot acquire kindness, but social research is suggesting that for those in the crucible of marriage, in order to maintain intimacy with another, they must learn and exercise the qualities of kindness and generosity if they wish to have a happy marriage. If it is shown that those qualities are developed and are imported into other aspects of a person’s life, perhaps it was too early to dismiss the work of conservative authors who defended traditional marriage’s functional value.

<sup>65</sup> See generally *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 651 (1993) (striking down contract awarding property to wife who agreed to take care of her dying husband) (“It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. The paramount interests of the community at large is a matter of primary concern.”).

<sup>66</sup> *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) (en banc).

holding that “the right to procreate is inconsistent with incarceration.”<sup>67</sup> In engaging in the legal issues in the case, Judge Kozinski cited to state regulations that do permit prisoners to potentially procreate when conjugal relationships are granted. His fiery dissent, however, is more powerful as a means to question what can a marriage provide to parties when they cannot procreate and—with the permanent separation of a term of life imprisonment—cannot share lives in the way that those living together do?

In 1964, in *Matter of Peterson*, a 56-year-old citizen met a 49-year-old woman who was a citizen of Iran.<sup>68</sup> The husband was a widower, and the wife had an adult daughter from her first marriage. They first met when the woman (later wife) answered an ad placed by the man (later husband) looking for a housekeeper with marriage as a potential result. When the citizen applied for his wife’s green card, the immigration agency initially deemed the application fraudulent, citing as proof the couple’s initial meeting, and their admissions that they sleep in separate bedrooms and have not, and will not, engage in sexual intercourse. On appeal, the Board of Immigration Appeals (BIA)—an agency known for restrictive, if not draconian, interpretations of immigration law—reversed. The BIA did not quite explain how and why, but noted with sympathy that the husband was a widower in genuine need of a housekeeper. In a conclusory manner, the BIA found that “[t]he reasons for the marriage appear to be far sounder than exist for most marriages.”<sup>69</sup>

The most obvious shared insight from the *Gerber* and *Peterson* cases is that companionship is an aspect to marriage that the State recognizes and values. The State’s protection of marriage benefits its own citizens and society at large (cynically, it serves as private welfare, more optimistically, the means by which the State may have a role in giving the pursuit of happiness to its citizenry).

But the third case, *Freeman v. Gonzales*, prevents companionship from being the only available answer to the question as to why there is a State interest in contemporary marriage.<sup>70</sup> Under our immigration laws, U.S. citizens are allowed to bring their spouses to the country and give them lawful permanent residence.<sup>71</sup> This is more than settled practice and policy; it is the defining hallmark of our immigration system.<sup>72</sup>

In 1997, Congress wrote a confusing provision regulating what happens when a citizen spouse dies during the petition process. A circuit split arose, and *Freeman* was one of the courts that defended the statutory interpretation that even when a citizen dies, his widow can enter and live in the US. “Under the express terms of the statute, Mrs. Freeman qualified as the *spouse* of a U.S. citizen when she and her husband petitioned

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<sup>67</sup> In employing humor in a way that only Judge Kozinski can, he criticizes the penological interests in the five steps that would be involved in the prisoner’s request. *Gerber*, 291 F.3d at 629 (Kozinski, J., dissenting).

<sup>68</sup> *Matter of Peterson*, 12 I. & N. Dec. 663, 664 (BIA 1968).

<sup>69</sup> *Id.*

<sup>70</sup> *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

<sup>71</sup> Immigration and Nationality Act, 8 U.S.C. § 1153 (2006).

<sup>72</sup> Two-thirds of lawful immigration occurs through family relationships with citizens or other lawful permanent residents. INA § 203, Jacquellena Carrero, *The Immigration Line: Who’s on It and For How Long*, NBCLatino, Apr. 11, 2013.

for adjustment of status, and absent a clear statutory provision voiding her spousal status upon her husband's untimely death, she remains a *surviving* spouse.”<sup>73</sup> In 2009, President Obama signed a law, firmly establishing that the *Freeman* rule will be uniformly applied. As a result, when a citizen dies, his or her widow—a foreigner who is a citizen from another country—can now enter and live in the US, a coveted privilege conferred only to the spouses, children, and parents of citizens. This change in immigration law is profound by recognizing that the benefits of marriage do not extinguish even in death.

These three cases survey instances when sex, procreation, companionship—and even a spouse—are not just missing, but completely impossible in the marital relationship. These cases are significant, because usually, when these essentials are absent, the State will not recognize a formal relationship. Most states expressly define consummation as an essential statutory element of the marriage.<sup>74</sup> For most everyone but the Petersons, the federal government will require consummation as proof that a marriage is not fraudulent when conferring immigration benefits.<sup>75</sup> The vast majority of states require both people to be present and alive for a marriage to be recognized.<sup>76</sup>

*Peterson, Gerber, Freeman* defied these general rules. It is interesting that the courts defended the marital relationship—and their exceptions to the general rule—without being able to name what it is precisely about the relationships that compel such sympathy. Whether it be a platonic companionship, a security, an ideal, or even posthumous identity and caretaking function, marriage is providing important benefits we have yet to easily articulate. Nonetheless, as much as these cases do not conclusively name what it is, they signal a trailhead, a path that is worthy to undertake to identify and articulate what that intangible aspect of marriage is. Regardless, these cases suggest something intangible, something of value exists in marriage. In this respect, *Goodridge* appears correct. Perhaps whatever it is that makes us cry at weddings, these three

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<sup>73</sup> *Freeman*, 444 F.3d at 1039-40.

<sup>74</sup> See generally Ga. Code Ann. § 19-3-1 (West) (“To constitute a valid marriage in this state there must be: (1) Parties able to contract; (2) An actual contract; and (3) Consummation according to law”). This area is a complicated one and the litigation testing the statutes usually arises in common law marriage claims after an (alleged) divorce or death in which one party was seeking benefits from another, an estate, or the State. See e.g., *Edwards v. Edwards*, 188 Ga. App. 821 (1988) (involving inheritance based on common law marriage through action in probate court).

<sup>75</sup> Congress and the BIA have statutes and case law stating that consummation is not required to prove the existence of a valid marriage. See *Matter of M*, 7 I & N. Dec 601 (BIA 1957). Nonetheless, in immigration proceedings, citizens and non-citizens are often required to answer questions about their sex lives. See *Adi v. United States*, 498 F.Appx. 478, 482 (6th Cir. 2012). Individual immigration officers will find a marriage invalid in the absence of convincing evidence as to why there is consummation. See Nina Bernstein, *Do You Take This Immigrant?* N.Y. TIMES, June 11, 2010 (in explaining the marriage fraud interview, the reporter observed, “And were they ready to answer far more intimate queries from a government official hunting for signs their marriage was fake? ‘Embarrassing questions,’ explained the Manhattanite, Lindsay Garvy-Yeguf, 28, the butterfly tattoo on her foot growing jittery, as her husband, Gunes Yeguf, 31, turned paler in his dark suit. ‘They might ask you about your sex life.’”).

<sup>76</sup> See generally Andrea B. Carroll, *Reviving Proxy Marriage*, 76 BROOK. L. REV. 455, 457 (2011) (“[A] proxy marriage is not a valid marriage at all in most states. Only five American states have recognized otherwise, and nearly all in an exceptionally narrow context involving military personnel. So serious is the contempt for proxy marriage that the doctrine has been rejected throughout most of this country for almost seventy years.”).

marriages are examples whereby another's marriage reminds us all of our common humanity.

### III. The Counterintuitive Liberal State Interest In Contemporary Marriage

As much as articulating an intangible state interest in marriage is a difficult—yet important—journey, contemporary marriage does offer an important opportunity for citizens to redefine their relationship to the Liberal state.

*Parens patriae*—the doctrine that the State has a role to protect those who cannot otherwise fend for themselves—is a means by which the modern State exercises its authority to protect the vulnerable, most often children and the mentally incompetent.<sup>77</sup> When the State intervenes for the purpose of protecting the vulnerable, the vast majority of Americans do see State involvement as a normative good.<sup>78</sup>

Asking the State to lend additional support married couples, those with the most resources and protections, is a counterintuitive, if not morally questionable project.<sup>79</sup> In

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<sup>77</sup> *Parens patriae* empowers the state to confer “protection for those unable to care for themselves.” BLACK'S LAW DICTIONARY 1114 (6th ed. 1990); see also Sarah Abramowicz, Note, *English Child Custody Law, 1600-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1346–47 (1999) (explaining that *parens patriae* is “the ancient English doctrine that the King, as the father of the nation, has the power to act in protection of the nation's weak and powerless, namely infants, idiots, and lunatics. Today, in both the United States and England, *parens patriae* is used in a variety of contexts, from protection of the mentally ill to the law of juvenile courts, in order to justify the state's power to intervene.”).

<sup>78</sup> See generally Michael Levenson, *Baker Says State Will Review DCF Handling of Auburn Child*, BOSTON GLOBE, Aug. 17, 2015 (in story about the death of a two-year old child in foster care, the newspaper talks about how the Republican governor ran on a platform to “revamp the troubled child welfare system” and a class action suit that attempted to increase the state agency’s intervention on behalf of children who are facing neglect and abuse).

<sup>79</sup> Contemporary marriage does not appear to be an institution in need of extra support. Although sometimes difficult to always quantify, those in happy marriages are often the beneficiaries of financial security, health, and happiness. “Today married people in Western Europe and North America are generally happier, healthier, and better protected against economic setbacks and psychological depression than people in any other living arrangement.” Stephanie Coontz, *MARRIAGE, A HISTORY* 309 (Viking 2005). “But using averages to give personal advice to individuals or to construct social policy for all is not wise. . . . [I]ndividuals in unhappy marriages are more psychologically distressed than people who stay single, and many of marriage’s health benefits fade if the marriage is troubled.” *Id.* at 310. Although the marriage rates have declined for the general population, those with college degrees are marrying—and staying married—at rates not seen since the 1950s. Indeed, in the first ten years of marriage, the divorce rate for college graduates is 11%. See generally Pamela Paul, *How Divorce Lost Its Groove*, N.Y. TIMES, June 17, 2011 (“As noted by the National Marriage Project study, ‘Highly educated Americans have moved in a more marriage-minded direction, despite the fact that historically, they have been more socially liberal.’ . . . According to a 2010 study by the National Marriage Project at the University of Virginia, only 11 percent of college-educated Americans divorce within the first 10 years today, compared with almost 37 percent for the rest of the population. . . .). Moreover, despite the lack of judgment on whether others should or should not marry, young Americans continue to hold individual aspirations for their own marriage. For those without college educations, 81% wish to marry; for those without college educations, the numbers climb to 92%. In a Gallup poll from June 20 to 24, 2013, the numbers broke down to 22% currently married (not college graduate) and 45% (college graduate) and 59% never married and want to get married (not college

today's society, it is the unmarried people, especially those with children, who face the vulnerabilities that arise from a lack of legal protections and economic insecurity. A number of scholars have noted disadvantages, and at times harms, that the institution of marriage can perpetuate. Martha Fineman and Clare Huntington have been among the most persuasive voices, calling for reforms to support for non-marital family units.<sup>80</sup>

Although I am in full agreement with the need for responding to those outside of marriage, I seek to make a case for the State intervention and support of those who do opt for marriage.

#### *A. Privacy As The Fundamental Right To Be Let Alone*

As a preliminary matter, I wish to first revisit the assumption that it is the right to be let alone that provides essential protections to our selves and democracy. It is an understatement to contend that privacy is a valued commodity. As Justice Brandeis articulated 100 years ago, the Founders “undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>81</sup>

From a citizen's right to control his home and destiny, American life has been imbued with a sense that an individual's right to privacy is a precondition to achieving essential freedoms and liberties.<sup>82</sup> The First, Second, Fourth, Fifth, Ninth, and Tenth Amendments reinforce the idea that the right to be let alone—and left alone—from the State remains a vital, contemporary protection we receive from our democratic institutions. For instance, in the pressing question of whether the National Security Agency may watch and record the electronic communications of U.S. citizens, in 2015,

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graduate) and 47% (college graduate). Gallup Poll, available at

<http://www.gallup.com/poll/163802/marriage-importance-dropped.aspx>.

<sup>80</sup>See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIP* (Oxford 2014) (arguing how the legal regulation of families stands at odds with the needs of families); see also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (Routledge 1995) (arguing that the best interests of children and women are served outside of marriage and reform is needed to support dependency and caretaking).

<sup>81</sup>*Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting) (in dissenting from a decision upholding the government's collection of evidence by wiretapping, Justice Brandeis wrote a forceful opinion arguing that for a citizen's right to be let alone is a fundamental value in our democracy); see also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (articulating the “right to be left alone” in tort contexts).

<sup>82</sup> See ALEXANDER DE TOQUEVILLE *DEMOCRACY IN AMERICA* (1825). Most non-lawyers speak of having affirmative rights to education, safety, health, and guns. The notion that the Constitution confers not only individual rights (a new concept, born of the 1950s), but also affirmative rights (as opposed to negative rights) is presumed correct. But reveals a fundamental misunderstanding of how our Constitution limits government intrusion rather than guaranteeing affirmative rights and privileges that other countries' constitutions do.

the first court to curtail that practice did so by expressly invoking the need to stop “the intrusion of government into private matters.”<sup>83</sup>

In family law, privacy also has been embraced as an expansive, dynamic doctrine, preventing the State from intruding upon familial decisions relating to procreation, abortion, child rearing, education, and family formation.<sup>84</sup>

Family scholars have robustly critiqued the conditional nature of these protections. Functional—and presumed functioning—families are let alone by the state. A family that possesses either a Man or Money (preferably both) may raise its children with as much confusion and chaos as it pleases as privacy shields inquiries and intrusion by the State. By contrast, what Martha Fineman has called “public families”—families that are marked as inadequate or inferior—are subject to State “regulation, supervision, and control.”<sup>85</sup> The disruption of divorce, poverty, and abuse invites—and compels—the State to intervene.<sup>86</sup>

Underlying these criticisms is the unspoken assumption has been that a family’s right to be let alone is ultimately a desired state to which all families normatively should belong.

But what if it is not the State intervention that is in fact the problem? What if it is rather the underlying biases that sort out some families for regulation—rather than a family’s public status—that is the root of the matter? Stated another way, what if the problem of regulating, policing, and punishing public families arises from the biases seeking conformity to a normative ideals but not the vehicle of State intervention, standing by itself?

### *B. Obergefell’s Sword: Rethinking State Harm As Arising From No State Intervention*

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<sup>83</sup> See, e.g., *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 793 (2d Cir. 2015) (holding that the NSA’s collection of telephone metadata exceeded statutory authority).

<sup>84</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (abortion); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (family formation); *Moore v. East Cleveland*, 431 U.S. 484 (1977) (extending familial protects protections afforded to caretakers to grandparents who raise children); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (procreation); *Griswold*, 381 U.S. (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child-rearing); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (family formation).

<sup>85</sup> MARTHA ALBERTSON FINEMAN, *supra* note 83 (defining “public families” as those in which the mother-father-child triad is missing, specifically, when a man is absent from a family, the family is subject to surveillance, regulation, and punishment).

<sup>86</sup> See generally *Hodge v. Jones*, 31 F.3d 157, 168 (4th Cir. 1994) (rejecting a civil right challenge to a state’s records of suspect child abusers on the basis that the plaintiff parents “have not demonstrated a violation of any federal constitutional or statutory right of familial privacy. The confines of that right were not so clearly established that, even if Defendants’ acts did impinge the Hodge family’s zone of privacy, they could objectively or reasonably have known that their conduct violated the Due Process Clause.”); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J. L. & GENDER 113, 118–19 (2011) (“[I]t is poor women’s and families’ poverty that subjects them to the suspension of the rights to privacy. . . . [T]he reliance on the welfare state (for medical services or otherwise) makes ‘public’ even the family that has managed to fulfill heteronormative ideals.”).

Much has been written about the trifecta of *Griswold*, *Eisenstadt*, and *Roe*, but the right to privacy has taken on new qualities in the marriage equality movement.

Beginning in *Lawrence v. Texas*, it was the right to be let alone that paved the way for *Obergefell's* recognition of same-sex marriage. *Lawrence* begins with the precise pronouncement that “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.”<sup>87</sup> It is this predicate formulation of privacy that leads to the abolishment of state laws criminalizing what is otherwise consensual, intimacy between adults.

Twelve years later, when establishing that marriage is a fundamental right that must be conferred to same-sex couples, *Obergefell* cited to *Lawrence* a dozen times to support its reasoning and result.<sup>88</sup>

But of import, *Obergefell* articulated a new intrusion of the State, which is not regulation or punishment of private choices. Rather, the harm inflicted on those from whom marriage is withheld is “the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”<sup>89</sup> Privacy no longer is a carved out realm, a space apart from the State’s views in which individuals may order their lives in peace. Rather, Justice Kennedy articulates a privacy right that demands that the State remove itself from public expressions that inflicts humiliation and stigmatization onto others. In so doing, the State then must arbitrate values and affirmatively protect those who are vulnerable to non-legal and intangible injuries. The State suddenly becomes a guarantor of affirmative benefits.

In his dissenting opinion, Justice Roberts strongly objects to *Obergefell's* new definition of privacy. In objecting to the conclusion that recognition of same-sex marriage is required by the constitution, he observes that “[n]either *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here.”<sup>90</sup> Justice Roberts notes that [u]nlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here *involve no government intrusion*. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is ‘condemned to live in loneliness’ by the laws challenged in these cases—no one.”<sup>91</sup> Justice Roberts affirms that “the laws [limiting marriage to opposite-sex couples] in no way interfere with the ‘right to be let alone.’”<sup>92</sup> To again emphasize the perceived break that *Obergefell* makes from prior precedent, “petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the

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<sup>87</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>88</sup> *Obergefell*, 135 S. Ct. at 2600 (Roberts, J., dissenting).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

shield provided by constitutional liberties into a sword to demand positive entitlements from the State.”<sup>93</sup>

*Obergefell* is important because for the first time, the privacy doctrine is no longer a means to let people alone. The harm imposed on same-sex couples by the State is not the harm envisioned by Justice Brandeis. It was not an unwanted intervention in the sacred realm that caused injury, but rather, the State’s *lack of intervention* that inflicted the harm on the couple. Under the guise of privacy, State intervention then becomes a powerful tool to obtain needed benefits and protections.

### C. *Extending Obergefell’s Sword To Other Contexts*

Predicated on the *Obergefell*’s proactive privacy right, I explore then how State invention in marriage can be a means to create more public families and more families subject to State intervention.

It seems counterintuitive to want this. Why would anyone want to invite the State into their personal affairs, casting judgments on what they should or should be doing? But the reality is that many private families, individuals who are fully functioning, are in need of the benefits of State intervention that are currently only provided to public families, those who are subject to government policing and supervision. To provide two concrete examples, immigration and polygamy illustrate how State intervention is the only means to protect the harm facing married couples.

#### 1. *Immigration: Kerry v. Din*

In a case decided 11 days before *Obergefell*, the debate between the constitutional protections afforded to a citizen married to a foreigner illustrate how *Obergefell*’s sword is the only means to remedy specific harms in the immigration context.

In *Kerry v. Din*, Mrs. Din, a U.S. citizen, petitioned for her husband to join her in the United States.<sup>94</sup> The consular officer denied the husband’s request for an entry visa, citing only the inadmissibility ground relating to terrorism. No further reason was given, and under the immigration rules, no review of a consular decision is permitted. The non-reviewability of an action by a consular officer is a very problematic policy. News reports, and criminal dockets for that matter, contain brazen examples of corrupt consular officers, profiting handsomely without the benefit of immediate oversight.<sup>95</sup>

Writing for the majority, Justice Scalia mocked the dissent’s call for a constitutional recognition for Mrs. Din to live with her spouse in the United States. “Nothing in the cases Din cites establishes a free-floating and categorical liberty interest in marriage (or any other formulation Din offers) sufficient to trigger constitutional

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<sup>93</sup> *Id.*

<sup>94</sup> *Kerry v. Din*, 135 S. Ct. 2128, 2132, 192 L. Ed. 2d 183 (2015).

<sup>95</sup> Calvin Godfrey, *U.S. Consulate Officers Gone Wild*, VICE, Sept. 4, 2013,

<http://www.vice.com/read/the-corrupt-secrets-of-the-american-consulate> (reporting on the arrest of a consular officer who netted \$10 million in a fraudulent visa scheme).

protection whenever a regulation in any way touches upon an aspect of the marital relationship.”<sup>96</sup> Indeed, *Din* focused on the fact that a request to know the reasons as to why the federal government will not let a spouse enter the country is not akin to the State’s exercise of authority in the form of “dispossess[ion] of property, [being] thrown in jail, or even executed.”<sup>97</sup>

But Mrs. Din was seeking more than simply a right to live with her husband anywhere in the world. Mrs. Din was seeking the right to know the basis for a decision and an opportunity to correct a factual or legal mistake if one so existed. Most often embedded as procedural due process rights, the respect afforded individuals who are treated with fairness is significant. For those whose lives are fundamentally altered by government decisions, being left in the dark—with the confusion and doubts over the process—is often much more painful than the closure that comes from a final decision.

Here, the Din family received no protection from being left alone. To the contrary, the removal of the State powers from reviewing the consular decision is the precise harm the Dins are seeking to remedy. As it stands, an immigration petition is a lesser right afforded to an alien, a realm of foreign policy over which Congress is given great deference.<sup>98</sup> By contrast, Mrs. Din could have very much used *Obergefell*’s sword to ensure that her marriage—and the attendant right to choose to marry a specific person—received the affirmative rights of notice and fair process from the federal government. *Obergefell* thus offers the possibility that a citizen’s marriage is a legal status to which heightened protections will attach. Absent such legal status, oversight, rather than any intrusion, is what causes Mrs. Din’s marriage to diminish in stature and operation.

## 2. Polygamy

Polygamy is another example by which recasting State intervention as an affirmative right changes the current debate. In naming the elephant in the room, in light the contemporary state interest in marriage to be personal self-determination and public common humanity, I find it quite difficult to articulate why legal recognition should not be conferred to polygamous marriages.

As wryly observed in courts when faced with states calling for traditional marriages, it is only polygamous marriages that are truly traditional in that they are the one family formation that can be found across time and cultures.<sup>99</sup> Indeed, polygamy is

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<sup>96</sup> *Kerry*, 135 S. Ct. at 2135.

<sup>97</sup> *Id.* at 2133.

<sup>98</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (commenting on Congress’s plenary powers to shape immigration law); Juliet Stumpf, *The Crimigration Crisis: Immigrants, Crime, and Sovereign Power*, AM. U. LAW. R. 367, 392–93 (2006) (discussing how the contemporary criminalization of immigration law is a break from past immigration policies that were viewed more akin to foreign policy decisions).

<sup>99</sup> Indeed it’s been said that “polygyny, whereby a man can have multiple wives, is the marriage form found in more places and at more times than any other.” *Baskin*, 766 F.3d at 667 (citing STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 10 (2006)).

flourishing in parts of the modern world, including by Jacob Zuma, the South African president who is married to four wives.<sup>100</sup>

In 2013, the State of Utah, and in 2011, the Canadian government has attempted to articulate the harms that polygamy has on women and children.<sup>101</sup> But these overgeneralized harms are recycled claims that had been offered and rejected when used to justify anti-miscegenation laws, same-sex marriage bans, and marriage between first cousins.<sup>102</sup> Indeed, as observed by a 2013 district court decision, if incest, rape, or child abuse is present in these marriages, the state has the full authority of its criminal laws to pursue crimes that occur in any other family.<sup>103</sup>

Moreover, as a practical matter, non-monogamy and polygamy appeal to a small minority of the population. Any concern that a right to marry multiple parties would wreak havoc on society at large ignores the lack of any contagion effect outside of the small community for whom this marriage best reflects their values.<sup>104</sup>

But, polygamous families have no affirmative right to seek marital recognition based on the old privacy doctrine. Akin to same-sex couples pre-*Obergefell*, a state's failure to issue marriage licenses inflicts no punishment, no seizure, and no unwarranted intrusion in their lives. If this is the framed question, the answer stops short of marriage for all.

*Obergefell's* sword, by contrast, recasts the issue of non-recognition into one whereby the government will recognize some functioning families but not others. When reframed in this context, it is very hard to articulate any distinction in a state conferring marriage rights to some consenting adults but not others.

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<sup>100</sup> *Baskin*, 766 F.3d at 677 (“There is no acknowledgment that a number of countries permit polygamy—Syria, Yemen, Iraq, Iran, Egypt, Sudan, Morocco, and Algeria—and that it flourishes in many African countries that do not actually authorize it, as well as in parts of Utah.”); see also Aislinn Laing, *Jacob Zuma Faces Losing 1.2 million Support For Four wives*, THE TELEGRAPH, June 20, 2012.

<sup>101</sup> *State v. Holm*, 137 P.3d 726 (Utah 2006) (upholding bigamy statute); *Brown*, 947 F. Supp. 2d at 1228 (rejecting stated harms in striking down bigamy statute); Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, ¶ 8 (Can.) (upholding polygamy ban).

<sup>102</sup> See *supra* notes 27–28 (discussing *Perez v. Lippold's* rejection claims of harm on progeny of mixed race children); Hong, *supra* note 4 (discussing and rejecting the evidence of harm to children of same-sex couples as junk science); Denise Grady, *Few Risks Seen To The Children Of First Cousins*, N.Y. TIMES, Apr. 4, 2002 (“Dr. Motulsky said medical geneticists had known for a long time that there was little or no harm in cousins marrying and having children.”).

<sup>103</sup> In addressing this claim, the federal judge quoted an excerpt from a dissenting opinion in a related Utah Supreme Court decision: “The State has provided no evidence of a causal relationship or even a strong correlation between the practice of polygamy, whether religiously motivated or not, and the offenses of ‘incest, sexual assault, statutory rape, and failure to pay child support’ . . . Moreover, even assuming such a correlation did exist, neither the record nor the recent history of prosecutions of alleged polygamists warrants the conclusion that [the Statute] is a necessary tool for the state's attacks of such harms. For one thing, *I am unaware of a single instance where the state was forced to bring a charge of bigamy in place of other narrower charges, such as incest or unlawful sexual conduct with a minor, because it was unable to gather sufficient evidence to prosecute these other crimes.*” *Brown*, 947 F. Supp. 2d at 1220 (quoting *Holm*, 137 P.3d at 775 (Durham, C.J., dissenting in part) (internal citations omitted) (emphasis added in *Brown*)).

<sup>104</sup> *Brown*, 947 F. Supp. 2d at 1228 (strongly criticizing the Orientalism and anti-Mormon prejudices that led to Utah banning polygamy as a condition for statehood).

Immigration benefits and polygamy are but two examples whereby *Obergefell's* more affirmative intervention into the marriage relationship would confer state protections currently unavailable when the parties are left alone. The examples are meant simply to illustrate the importance of rethinking state intervention as a desired good in specific circumstances instead of a categorical invasion for which no good may be gained. For many intact families, the potential for affirmative, positive benefits from the State is very much a needed benefit that protects them from third parties or another branch of government.

## CONCLUSION

This essay has been an attempt to ask more questions than it answers. Starting with the premise that marriage can provide unique and desirable value is the beginning of articulating what precisely such value may be. The answer to that question most likely includes recognition that the old privacy doctrine, the right to be let alone, may have run its course. At a minimum, there are specific contexts in which the involvement of the State in personal affairs is precisely the needed salve for an otherwise irreparable and irremediable injury. The lasting impact of *Obergefell* may not at all be limited to the recognition of same-sex marriage. To the contrary, if Justice Roberts' dissent is correct, *Obergefell's* sword may be the precise remedy for which many citizens who are vulnerable to the harms—arising from the lack of state intervention—have been waiting.