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**AFTER OBERGELL:  
THE LIBERAL STATE INTEREST IN MARRIAGE**

Kari E. Hong\*

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>

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>

Although wrong with respect to their political agenda of valuing traditional marriage over other family structures, what if the defenders of traditional marriage in fact

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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); Maggie Gallagher, *Keynote Address: The Case for the Future of Marriage*, 17 *REGENT U. L. REV.* 185, 186 (2005); Lynn D. Wardle, *The Disintegration of Families and Children's Right to Their Parents*, 10 *AVE MARIA L. REV.* 1, 2–3 (2011).

<sup>3</sup> See, e.g., Martha Albertson Fineman, *Why Marriage?*, 9 *VA. J. SOC. POL'Y & L.* 239, 244–45 (2001); Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2686 (2008); 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).

<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).

<sup>5</sup> See generally *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).

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 self-determination. Prior to *Griswold v. Connecticut*'s privacy protections, the 50 states 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 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.

Part II suggests that there is something different and 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 an intangible, transcendent value of marriage, I look at immigration and prisoner cases in which these marriage essentials of marriage are absent.

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. This essay ends with a call to rethink the concept of constitutional privacy and considers the immigration contexts as one by which government intrusions into personal affairs may provide more protections than a privacy right that leaves its citizens to fend for themselves.

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

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

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

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

<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/>.

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.*

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>10</sup> Today, in the United States, approximately 40 percent of births occur outside of marriage.<sup>11</sup> However, up until 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>12</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>13</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>14</sup> The fact that such an offense is a strict liability crime makes its only potential defense—marriage—an even more remarkable exception.<sup>15</sup> The crime of rape between adults also remains defined by marriage. Although the marital rape exception has been formally abolished, marriage

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<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> See generally 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. . . . [T]he 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>11</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>.

<sup>12</sup> See generally *Hopgood v. State*, 76 Ga. App. 240, 241 (1947).

<sup>13</sup> *Hopgood*, 76 Ga. App. at 242.

<sup>14</sup> “A majority of states make statutory rape 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 reasonably believing her to be of lawful age.” CRUMP, ET AL., *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* 356 (3d. ed. 2013).

<sup>15</sup> *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693–94 (9th Cir. 2007).

reduces the seriousness of the offense and lengths of punishment.<sup>16</sup> As evident in rape law, marriage still casts a long shadow in the definition of contemporary sex crimes.

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

Illicit cohabitation—the crime of people of opposite sex living together—was also 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>17</sup> Despite their nefarious origins, by the 1960s the majority of states had enacted them and used them against all cohabitating couples.<sup>18</sup>

Between 1800 and 1967, 40 states criminalized interracial marriages in some form or another.<sup>19</sup> The state interest in banning these relationships revolved around procreation, and specifically preventing the birth of children from these unions.<sup>20</sup>

## 3. *Contraception and “Unnatural” Sex*

Marriage was never a license to engage in any type of sex. Sodomy—even when consensual—was criminalized as unnatural sex.<sup>21</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>22</sup>

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<sup>16</sup> Since 1993, the marital rape exemption as a concept of immunity has been formally abolished in all 50 states. See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1521 (2003). California for instance has separate statutes for rape of a non-spouse, section 261, and rape of a spouse, section 262. CAL PENAL CODE §§ 261, 262 (West 2013). Under section 262, the rape “of a person who is the spouse of the perpetrator” has differently-defined conduct that would result in rape. *Id.* at § 262. Moreover, section 262 contemplates “probation, fines” for punishment whereas section 261 is punished with prison. *Id.* at §§ 261, 262

<sup>17</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. Higgerson*, 46 F. 750, 751 (C.C.D. Idaho 1891); RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 70–91 (Pantheon Books ed. 2003). 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: 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>18</sup> Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. & FAM. STUD. 135, 141 (2005).

<sup>19</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). On the West Coast, states passed anti-miscegenation laws targeting the Chinese, Japanese, Filipino, and Southeast Asian populations. See *id.*

<sup>20</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>21</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).

<sup>22</sup> See, e.g., *Buxton v. Ullman*, 147 Conn. 48, 58, 156 A.2d 508 (1959) (upholding a law preventing use of contraception by married couples because “the greater good would be served by leaving the statutes as they

*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>23</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 "unrealistic" to think the drafters intended marriage to extend to people of the same sex.<sup>24</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>25</sup>

I believe it is a mistake to write off *Baker v. Nelson*'s citation to procreation as outdated anti-gay discrimination. 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>26</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, reinforced the purpose of marriage to be procreation.<sup>27</sup> In explaining the value of marriage, the Supreme Court noted that marriage was "fundamental to our very existence and survival."<sup>28</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 ended the State's ability to sterilize its citizens.<sup>29</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.

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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.").

<sup>23</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).

<sup>24</sup> *Baker*, 291 Minn. at 311.

<sup>25</sup> *Id.* at 312.

<sup>26</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. *Genesis* 16:1–16, 29; *1 Chronicles* 3.

<sup>27</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>29</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 542 (1942).

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. 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 usually 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>30</sup>

*Obergefell* will most certainly be published in casebooks documenting marriage equality for lesbian and gay individuals.<sup>31</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>32</sup> Unique to *Goodridge*, the Massachusetts Supreme Judicial Court did not ask the question of whether gay and lesbian couples could be excluded from marriage.<sup>33</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>34</sup>

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<sup>30</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>31</sup> See HARRIS & CARBONE, FAMILY LAW (2015) (updating Family Law book with *Obergefell* citation in August 2015).

<sup>32</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). In 1998, Hawaii's voters undid the judicial ruling by amending their constitution to bar such unions. 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. See *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, <http://www.npr.org/2013/03/27/174651233/how-vermonts-civil-war-fueled-the-gay-marriage-movement>.

<sup>33</sup> *Goodridge*, 440 Mass. at 320.

<sup>34</sup> *Andersen v. King Cnty.*, 158 Wash.2d 1, 44, 138 P.3d 963, 986 (2006); *Hernandez v. Robles*, 7 N.Y.3d 338, 362, 855 N.E.2d 1, 9 (2006); *Baehr*, 74 Haw. at 553, *as clarified on reconsideration*.

Instead, *Goodridge*'s starting point instead was “[s]imply put, the government creates civil marriage.”<sup>35</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>36</sup> Marriage was taken outside of the moral and religious debates of the day.<sup>37</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>38</sup> Instead of the linchpin that perpetuates the human race, the act of falling in love with another was seemingly much more pedestrian: a choice that some people made, and others did not.

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>39</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>40</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>41</sup>

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<sup>35</sup> *Goodridge*, 440 Mass. at 321.

<sup>36</sup> *Id.* at 322.

<sup>37</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/>.

<sup>38</sup> *Goodridge*, 440 Mass. at 322.

<sup>39</sup> *Id.*

<sup>40</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, <http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html>.

<sup>41</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



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>42</sup> Young people no longer save themselves for marriages.<sup>43</sup> (Indeed for those that do, they are the curiosity of reality shows.)<sup>44</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 bring value to a marital relationship.<sup>45</sup> It is precisely this shift in the societal understanding of marriage 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>46</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 marriage—mattered. The Ninth Circuit observed that a constitutional right may even attach to “the extraordinary significance of the official designation of ‘marriage.’”<sup>47</sup> Writing for the majority, Judge Reinhardt observed that “[a] rose by any other name may

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prevent their courts from following Massachusetts. See Tim Grieve, *Bush's War Over Gay Marriage*, SALON, Feb. 26, 2004, [http://www.salon.com/2004/02/26/gay\\_marriage\\_15/](http://www.salon.com/2004/02/26/gay_marriage_15/).

<sup>42</sup> See *supra* notes 14–37 and accompanying text.

<sup>43</sup> John Blake, *Why Young Christians Aren't Waiting Anymore*, CNN (Sept. 27, 2011).

<sup>44</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>45</sup> Nicholas DiDomizio, *11 Brutally Honest Reasons Why Millennials Don't Want Kids*, CONNECTIONS.MIC, July 30, 2015. 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>46</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).

<sup>47</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).

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>48</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>49</sup>

Second, others have started to excavate and name the intangible benefits that may arise from marriage.<sup>50</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>51</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>52</sup> The en banc court upheld the warden’s denial, but a vociferous dissent by Judge Alex Kozinski took to task the holding that “the right to procreate is inconsistent with incarceration.”<sup>53</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>54</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

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<sup>48</sup> *Id.*

<sup>49</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>50</sup> See MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (Beacon Press 2015).

<sup>51</sup> See generally *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 651 (1993).

<sup>52</sup> *Gerber v. Hickman*, 291 F.3d 617,619 (9th Cir. 2002) (en banc).

<sup>53</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>54</sup> *Matter of Peterson*, 12 I. & N. Dec. 663, 664 (BIA 1968).

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>55</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>56</sup> Under our immigration laws, U.S. citizens are allowed to bring their spouses to the country and give them lawful permanent residence.<sup>57</sup> This is more than settled practice and policy; it is the a defining hallmark of our immigration system.<sup>58</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 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>59</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>60</sup> For most everyone but the Petersons, the federal government will require consummation as proof that a marriage

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<sup>55</sup> *Id.*

<sup>56</sup> See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

<sup>57</sup> Immigration and Nationality Act, 8 U.S.C. § 1153 (2006).

<sup>58</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.

<sup>59</sup> *Freeman*, 444 F.3d at 1039-40.

<sup>60</sup> See generally Ga. Code Ann. § 19-3-1 (West); See e.g., *Edwards v. Edwards*, 188 Ga. App. 821 (1988)

is not fraudulent when conferring immigration benefits.<sup>61</sup> The vast majority of states require both people to be present and alive for a marriage to be recognized.<sup>62</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 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.

*Parrens patriaie*—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>63</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>64</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. In 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

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<sup>61</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 at MB1.

<sup>62</sup> See generally Andrea B. Carroll, *Reviving Proxy Marriage*, 76 BROOK. L. REV. 455, 457 (2011) (noting that only 5 states recognize proxy marriages, and nearly all in an exceptionally narrow context involving military personnel.”).

<sup>63</sup> *Parrens patriaie* 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).

<sup>64</sup> See generally Michael Levenson, *Baker Says State Will Review DCF Handling of Auburn Child*, BOSTON GLOBE, Aug. 17, 2015 ).

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>65</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 “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>66</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>67</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.

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>68</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,

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<sup>65</sup>See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIP* (Oxford 2014); see also MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (Routledge 1995).

<sup>66</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>67</sup>See ALEXANDER DE TOQUEVILLE, *DEMOCRACY IN AMERICA, VOLUME I* 244–47 (1825).

<sup>68</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) (same); *Griswold*, 381 U.S. (procreation).

and control.”<sup>69</sup> The disruption of divorce, poverty, and abuse invites—and compels—the State to intervene.<sup>70</sup>

Underlying these criticisms is the unspoken assumption has been that a family’s right to be let alone is ultimately a desired station 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*

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>71</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>72</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>73</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

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<sup>69</sup> MARTHA ALBERTSON FINEMAN, *supra* note 80, at 177–78.

<sup>70</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.”); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J. L. & GENDER 113, 118–19 (2011).

<sup>71</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>72</sup> *Obergefell*, 135 S. Ct. at 2600 (Roberts, J., dissenting).

<sup>73</sup> *Id.*

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>74</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>75</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>76</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 shield provided by constitutional liberties into a sword to demand positive entitlements from the State.”<sup>77</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.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

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>78</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>79</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 protection whenever a regulation in any way touches upon an aspect of the marital relationship."<sup>80</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>81</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 let alone. To the contrary, the removal of the State powers from reviewing the consular decision is the precise harm the Dins were 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>82</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

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<sup>78</sup> *Kerry v. Din*, 135 S. Ct. 2128, 2132, 192 L. Ed. 2d 183 (2015).

<sup>79</sup> Calvin Godfrey, *U.S. Consulate Officers Gone Wild*, VICE, Sept. 4, 2013, at 1, <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).

<sup>80</sup> *Kerry*, 135 S. Ct. at 2135.

<sup>81</sup> *Id.* at 2133.

<sup>82</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).



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.

### 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.