ESSAY

THE INCOHERENCE OF MARITAL BENEFITS

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INTRODUCTION

En route to finding the Defense of Marriage Act (DOMA) an unconstitutional violation of the Fifth Amendment's Equal Protection Clause, the Second Circuit Court of Appeals in *Windsor v. United States*[1] gave short shrift to one of Congress's primary arguments in defense of the Act: that the federal government has a compelling interest in limiting federal marriage benefits to opposite-sex couples because traditional marriage has the laudable purpose—or function—of channeling the heterosexual sex that creates children into a way of life that provides the optimal environment for the rearing of those children.[2] In other words, DOMA aims to minimize irresponsible heterosexual sex and procreation, thereby limiting the number of children born outside of marriage and minimizing the dependency of single parents and their children on state assistance. As a number of courts—whether state or federal, and whether operating under state or federal constitutional guarantees[3]—have done in reviewing DOMA, the

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1 699 F.3d 169 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012).

2 *See id.* at 187-88 (rejecting the Bipartisan Legal Advisory Group's (BLAG) argument that DOMA advances the goals of "responsible childrearing").

3 *See* Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1, 13-15 (1st Cir. 2012) (discussing and dismissing various justifications for DOMA); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 991-93 (N.D. Cal. 2012) (discussing the "responsible procreation and child-rearing" argument); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 (D. Mass. 2010) ("readily dispos[ing]" of the responsible procreation argument); *In re* Marriage Cases, 183 P.3d 384, 431-32 (Cal. 2008) (discussing and dismissing same); *see also Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684,

Second Circuit gave the "responsible procreation" argument only cursory treatment. Essentially, the Second Circuit reasoned (no doubt, correctly) that extending federal marriage benefits to all married couples—both same- and opposite-sex—will not affect the incentives of heterosexual couples to marry, and therefore should not threaten any state interest in encouraging marriage among heterosexuals who, by force of desire or nature, may be inclined to produce children as a result of their mutual lust.[4] Finding no state interest sufficiently compelling to justify what appears to be an irrational classification, the court declared DOMA unconstitutional.[5]

The Supreme Court may or may not reach the substantive merits of *Windsor*. But if it does, the responsible procreation argument warrants greater attention, *not* because the Second Circuit's conclusion was wrong—surely the state's interest in incentivizing the responsible procreation of heterosexuals does not justify the discriminatory treatment of gays and lesbians—but because the reason the argument fails is quite a bit weightier than the Second Circuit's mechanical treatment of it suggests. The responsible procreation theory fails not because it is bizarre or incoherent; it is considerably more coherent, albeit dated, than either the Second Circuit or traditional marriage's many critics seem willing to admit. Rather, it fails because the argument behind it rests on premises that are no longer true—if they ever were—and because the exclusions it suggests, however coherent, are now simply cruel and unwarranted.

Just as importantly, although rarely noted by marriage equality's advocates, the failure of the responsible procreation justification for the exclusion of same-sex couples from marital benefits also suggests the irrationality of the exclusion of other forms of family—and indeed, of single individuals—from this form of federal largesse. In other words, the irrationality of the responsible procreation argument also highlights the irrationality—and cruelty—of governmental preference for married persons across the board and, in turn, of civil marriage altogether. I'll take up these points consecutively.

2699-2700 (2004) (arguing that the state's asserted interest in responsible procreation is "substantially underinclusive"); Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781, 783 (2012) ("The roots of responsible procreation are undoubtedly religious, and its presuppositions are in considerable tension with current social and legal realities." (footnotes omitted)); Robert J. Pfister, *Marriage Equality in Bankruptcy Court: Joint Petitions for Same-Sex Couples*, 32 CAL. BANKR. J. 109, 112-15 (2012) (discussing the history behind the Obama Administration's decision to stop defending DOMA's constitutionality).

[4] *See Windsor*, 699 F.3d at 188 (arguing that DOMA does not affect heterosexual couples' incentives to enter marriage "in any way").

[5] *Id.*

I. THE CASE AGAINST RESPONSIBLE PROCREATION

The problem with the responsible procreation argument[6] is not that it is incoherent, as was argued by the Second Circuit and by numerous commentators.[7] There is nothing incoherent about a social policy that promotes raising children in intact families headed by two married partners. After all, the contention that children in such families fare better than their peers who lack those advantages is supported by an abundance of social science.[8] Nor is there any irrationality in encouraging those who want to engage in the kind of opposite-sex sex that creates children to cabin their heterosexual sexual activities within those marriages. This, however, presumes that their sex leads to children, and that children raised in stable marriages are indeed advantaged. It is similarly reasonable to use carrots as well as sticks to encourage this form of social organization. In other words, to favor marriage over both single parenthood and mere cohabitation by offering federal as well as state benefits to the former, but not the latter, is completely consistent with a state policy promoting childbearing within the context of marriage. And such favoritism is far less punitive than earlier policies that penalized "illegitimate" children both financially and legally,[9] that encouraged the social stigmatization of unwed mothers (as was commonplace until

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6 That is, the argument that the societal need to channel procreative sexuality into marital forms, so as to ensure better outcomes for the children who result from that sex, justifies limiting federal marital benefits to opposite-sex couples. *See* Nice, *supra* note 3, at 783 ("[T]he responsible-procreation [argument] surmises that same-sex couples already procreate responsibly and that the rights and responsibilities of marriage should be limited to furthering the goal of encouraging more responsible procreation by heterosexuals.").

7 *See, e.g.*, Jacob Combs, *Analysis: The Prop 8 Plaintiffs Debunk the 'Responsible Procreation' Argument for Good*, HUFFINGTON POST BLOG (Mar. 1, 2013, 10:26 AM), http://www.huffingtonpost.com/jacob-combs/analysis-the-prop-8plain_b_2783530.html?utm_hp_ref=gay-voices ("This type of 'reduction to the absurd' logic points out the central, inescapable flaw in the Prop 8 proponents' reasoning: when you take the issue of sexual orientation out of the equation, it is fundamentally absurd to limit the institution of marriage only to couples who can procreate.").

8 *See, e.g.*, LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 124 (2000) (reaching the conclusion that "[o]n average, children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings").

9 *See For 'Unwed Fathers', Laws Are Changing*, N.Y. TIMES, Apr. 30, 1972, at 68 (describing the various ways that illegitimate children were disfavored before the law, while claiming that "[t]he legal relationship between the father of an illegitimate child and his offspring is slowly being redefined").

well into the 1970s),[10] or that either limited welfare payments to unmarried parents or conditioned those payments on work assignments.[11] In fact, we still limit such welfare payments and have done so since the Clinton Administration initiated the policy in the 1990s.[12] And of course, under current law, we continue to withhold from single and unmarried parents various benefits that they would enjoy were they married.[13] None of this is incoherent. In fact, it all makes perfectly good sense if it is true that children fare better in married households, and that heterosexual sex carries with it a high risk of conception and procreation.

Nor is this argument as divorced from our current understanding of marriage's purpose as its critics claim it to be. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[14] first enacted during the second Clinton Administration and renewed during the Bush years, was explicitly aimed at bolstering precisely this understanding of marriage. The entire point of that law, as stated explicitly in the law's preamble,[15] was to reduce single mothers' dependency upon government, and to encourage in its place dependency upon a husband wage earner in a traditional marriage. Marriage was inscribed into that law as *the* necessary moral precondition of child bearing and child rearing, and the host of economic incentives and disincentives that the law created were all aimed at engineering—or concretizing—that moral connection: if you want children, then marry the children's father. If you have a child and don't marry the child's father, then you have done something grossly irresponsible, so don't turn to the government for assistance. PRWORA thus represented a legalistic reinvigoration of a host of mid-century cultural norms and

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10 *See* Sara McLanahan & Irwin Garfinkel, *Single Mothers, the Underclass, and Social Policy*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 99-100 (1989) (analyzing data from 1980, which highlighted the increased social isolation that resulted from unwed motherhood).

11 *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 402(a), 110 Stat. 2105, 2113 (codified as amended at 42 U.S.C. § 602(a) (2006)) (requiring that all parents receiving assistance under the program engage in work).

12 *See id.* § 401(a), 110 Stat. 2105, 2113 (codified as amended at 42 U.S.C. § 601(a)) (citing as a primary purpose of the Act, the reduction of needy parents' dependence on government benefits through the promotion of marriage).

13 For instance, the Family and Medical Leave Act (FMLA) requires qualifying employers to provide leave to employees in order to care for a legal spouse, but not for an unmarried partner. *See FMLA Frequently Asked Questions*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/fmla/fmla-faqs.htm#7 (last visited Feb. 17, 2013) (requiring, as a "[q]ualifying condition[]" of the Act's benefits, that the individual cared for be a "spouse, child, or parent").

14 110 Stat. 2105.

15 *See* 42 U.S.C. § 601(a) (citing, as a primary goal of the Act, "end[ing] the dependence of needy parents on government benefits by promoting job preparation, work, and marriage").

practices that had begun to recede in the more "permissive" decades, beginning with the 1960s: the stigmatization of illegitimacy; the punitive stance toward unwed mothers who were often forced into either life-threatening back-alley abortions or pregnancies followed by coerced adoptions; employment practices toward such mothers, which went some distance toward ensuring a life of poverty; the more-than-symbolic laws against fornication[16] and adultery;[17] and the array of state laws establishing a husband's paternity of children born during the time of the marriage,[18] DNA tests notwithstanding. All of these practices operated jointly so as to channel procreative sexuality and the children that resulted therefrom into the marital domain.

Of course, this identification of marriage as the only institution within which procreative heterosexual sexual activity could safely—and hence morally—occur, was a cultural identification; it was not founded upon a dictionary definition and although it was both supported and enforced by law, it was not itself inscribed in law. It was inscribed, however—and quite firmly—in scores, if not hundreds, of social practices from that time period, ranging from childhood ditties ("first comes love, then comes marriage, then comes Susie with a baby carriage"), children's games of "house," and prom night rituals, to tragi-farcical "shotgun marriages" as well as, most centrally, conceptions of marital sex as a morally (and legally) obligatory duty of wives and an entitlement of husbands, unhindered by conditions of mutual consent, pleasure, or desire. "Irresponsible sex" then became, by definition, heterosexual sex outside of marriage, while "responsible sex" was sex within marriage, and a host of legal, as well as cultural, incentives and disincentives directed such sex into the institution of marriage. Have the critics and courts that find the procreative responsibility argument so incoherent as not to be cognizable[19] simply forgotten all of this?

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16 *See, e.g.*, IDAHO CODE ANN. § 18-6603 (West 2013); 720 ILL. COMP. STAT. ANN. 5/11-40 (West 2011); MISS. CODE ANN. § 97-29-1 (West 2012).

17 *See, e.g.*, ALA. CODE § 13A-13-2 (2013); COLO. REV. STAT. ANN. § 18-6-501 (West 2013); FLA. STAT. ANN. § 798.01 (West 2012); GA. CODE ANN. § 16-6-19 (West 2012); 720 ILL. COMP. STAT. ANN. 5/11-35 (West); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2012); MICH. COMP. LAWS ANN. § 750.30 (West 2012).

18 *See* Michael H. v. Gerald D., 491 U.S. 110, 116, 132 (1989)(holding that a state statute creating a rebuttable presumption that a child born to a married woman living with her husband establishes the paternity of the husband does not violate principles of due process or equal protection).

19 *See* Windsor v. United States, 699 F.3d 169 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012) (citing with approval other decisions, including Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1 (1st Cir. 2012), and Pedersen v. Office of Pers. Mgmt., C.A. No. 10-1750, 2012 WL 3113883 (D. Conn. July 31, 2012), which found that DOMA lacked any *rational* basis).

The problem with the "responsible procreation" argument is therefore not that it is incoherent. Rather, the problem is that the entire argument is premised on the now-false claim that there exists a strong causal connection between procreation and heterosexual sex. Since the invention, development, and promulgation of near foolproof birth control, it is not heterosexual sex that leads to procreation. Rather, it is *uncontracepted* heterosexual sex that leads to procreation. Nor is heterosexual sex even a *necessary condition* of genetic procreation, given the now commonplace usage of in vitro fertilization (IVF), surrogate pregnancies, and adoptions by same-sex couples of children genetically tied to one of the partners. Heterosexual sex, in other words, is no longer either necessary to, or sufficient for, the conception of children who are genetically connected to the parents who will raise them.

These technological advancements in reproductive methods have also wrought changes in our moral understanding of sex. For most of us today, "irresponsible" heterosexual sex is not sex that is *outside of marriage*. Rather, it is heterosexual sex that is either unwanted or nonconsensual, that inflicts personal harm or causes injustice,[20] or, significantly, that is uncontracepted (if no child is wanted). Given the constitutionally protected status and widespread availability of contraceptives, marriage is no longer needed to serve the state interest that both states and BLAG continue to assert[21] as the basis for a preference for heterosexual marriage: to provide an institutional framework that encourages heterosexuals to engage in responsible sex—that is, sex which leads to children with the healthiest life prospects. Therefore, the way to responsibly corral heterosexual sex is *not* by channeling such sex into marriage, but by insisting on the use of birth control.

States' and BLAG's continued insistence that marriage is the best way to corral heterosexual sex, despite the obvious reality that this function of marriage is no longer necessary, is unduly cruel. The sticks once used to compel the identification of moral or responsible heterosexual sex with sex within marriage—the criminalization of adultery and fornication; the

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[20] For example, we continue to stigmatize infidelity, defined as sexual activity that violates the mutual promises of sexual partners. Additionally, anti-prostitution laws are typically premised on the idea that even when prostitutes willingly enter into the sex trade, they endure violence that society should not tolerate. *See, e.g.*, Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 349-51 (2006) (discussing competing feminist views on prostitution).

[21] *See, e.g.*, *Windsor*, 699 F.3d at 187-88 (reviewing and rejecting BLAG's contention that DOMA "facilitates the optimal parenting arrangement of a mother and a father").

financial and legal disadvantage of illegitimate children; the stigmatization of unwed mothers; and the refusal, beginning in the mid-1990s, to extend the full advantage of state and federal benefits to single parents[22]—all now seem anachronistic and voyeuristic at best and sadistic, rather than functional, at worst. If the purpose of all of this state regulation of family, parenthood, and sexuality is to deter childbirth outside of marriage in order to avoid the high costs of unplanned children and unwanted or unstable families, then the obvious and more effective way to prevent all of that irresponsible procreation is by encouraging the use of birth control. Likewise, most of us now recognize that there is no longer any good reason (although there may be plenty of bad ones) to continue to police extramarital sex, to stigmatize unwed mothers, or to penalize illegitimate children. Again, to continue to do so is simply cruel.

This shift in understanding is now squarely reflected in our cultural conversations about marriage, sex, and children. Increasingly, we try to instill in our children not so much a moral aversion to "sex outside marriage," but rather, a moral aversion to "irresponsible sex," understood as sex that is either not fully consensual, not mutually desired, or injures third parties or the participants themselves, as well as sex that is uncontracepted, assuming no pregnancy is desired.

Sex, then, has not become demoralized, the fears of social conservatives notwithstanding. The moral code around sex has not disappeared. It has simply changed, and radically so. Marriage is no longer viewed, by many, as *the* moral precondition of sex. This is largely because marriage is no longer the only—or even the most optimal—way to ensure that children do not unintentionally and irresponsibly result from sex outside of marriage. In a post–birth control and post-IVF world—in which the causal link between heterosexual sex and the reckless conception of children is broken—it is not one's marital status, but rather consent, desire, the absence of other harms, and responsible *contraception* that have become the moral preconditions of responsible sex. And we are all the better for it.

In fact, with respect to our current moral code regarding sex, marriage is simply irrelevant. Sex outside of marriage, as well as sex within it, is subject to the same moral constraints. With the advent of birth control, legal abortion, IVF, surrogacy, and same-sex couple adoptions, the once strong connection between heterosexual activity and procreation has been severed. In its wake, the moral connection between marriage and responsible sex has been severed as well. Moral sex—inside or outside of

22 *See supra* notes 9-12 and accompanying text.

marriage—is consensual, desired, harmless to others, and contracepted. What's marriage got to do with it? Nothing.

Where, then, does this leave the quest for a rational justification for the federal government's refusal to bless same-sex marriages with the largesse of federal benefits? On obviously shaky footing. To the degree that the protection and promotion of child welfare was once the point of civil marriage—and again, I believe there was a time when it clearly was—that purpose has been undercut not by gay marriage, but by birth control, and long before the idea of gay marriage ever entered the picture. If the point of marriage is no longer to channel heterosexual sex into responsible institutions in order to protect the lives of children whose conception, without contraceptives, would have been inevitable, then there is hardly any harm done by diluting this purpose, which has long since been swept into the dustbin of history.

There is, then, no longer any legitimate reason to exclude same-sex couples from the federally bestowed benefits that accrue to marriage. Married parents who adopt, as well as same-sex married couples who avail themselves of surrogacy arrangements through the use of IVF, are as capable of forming and supporting healthy families from which children benefit as are heterosexuals who marry and produce children through sexual conception. The intact family, and the stable relationship from which children benefit, is *not* the marriage defined by heterosexual sexual activity. It is the family defined by long-term commitment and the dedication to raising and caring for children.

II. THE CASE AGAINST CIVIL MARRIAGE: WHAT'S SEX GOT TO DO WITH IT?

The harder, and more troubling, issue that should now be pressing upon us is not the one currently in front of the Supreme Court, regarding the exclusion of same-sex couples from the financial benefits of marriage. Rather, we ought to confront the lack of any clear rationale for excluding *anyone* who is parenting—or indeed, anyone caring for dependents—from such benefits. We should be asking, in other words, not only why we are excluding same-sex married partners from the federal benefits of marriage, but also, why we are refusing to grant these benefits to any others. Why should the federal government bestow financial benefits on *any* married partners—either same- or opposite-sex—that are not equally bestowed on unmarried persons, who may, after all, also be parenting? If we have turned our back on the utility of marriage as a way to safeguard the children that

result from heterosexual sex, what other reason might there be for singling out married people for the receipt of unique federal benefits?

The remaining justifications for favoring marriage over other living arrangements offer no basis for distinguishing between same- and opposite-sex marriages. Children do seem to fare better in families led by married partners, but this is equally true for children of same-sex partners as for those of heterosexual partners.[23] If we want to encourage people who wish to parent to enter into this optimal relationship for parenting, then we might want to favor marriages (of either sort) over other relationships. But if the purpose of civil marriage is now the improved life prospects of children in intact families, then "marriage" is both over- and under-inclusive: plenty of married persons have no desire or intention to parent, and plenty of unmarried couples and single people do. If the policy is to be true to the facts on the ground, we need a reason to favor not only those married people who parent or wish to parent, but to favor marriage per se. Why favor married partners over either unmarried partners or single people who also wish to establish intact families? And, more crucially, why favor married partners who express no intention whatsoever to parent over unmarried partners or single people who do possess such desires?

The only remaining justification, or "point" of doing so, in my view, is that the institution of state-governed and state-recognized marriage operates fairly well as a semi-privatized social welfare net, which ultimately relieves the state of some of its burden of caring for the weak, sick, unemployed, or otherwise vulnerable. Married partners do seem to fare better than unmarried partners at navigating the vagaries, valleys, pitfalls, and veils of

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23 *See* WAITE & GALLAGHER, *supra* note 8, at 124-40 (summarizing the advantages that children of married parents have over those children whose parents are not married); William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE OF CHILD. 97, 104 (2005) (arguing that available data does not support the contention that opposite-sex marriage is better than same-sex marriage at furthering the interests of children); *see also* Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children's Long-Term Well-Being*, 9 VA. J. SOC. POL'Y & L. 71, 75-76 (2001) (concluding that children with married parents fare better than those with divorced parents in terms of academic success, conduct, emotional and psychological adjustment, self-concept, and social relations); Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 J. FAM. PSYCHOL. 355, 366 (2001) (concluding that the welfare gap between children of married parents and children of divorced parents has widened over time); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 879 (2005) (concluding that "a rich literature on cohabiting and marital relationships suggests that marriage provides a substrate of relationship characteristics among the adults that inure to the benefit of their children").

tears that life presents.[24] An important body of research demonstrates that married partners better absorb catastrophic losses—such as the loss of a job or the onset of a serious illness—than their nonmarried peers.[25] As the argument goes, they live more cheaply simply by virtue of economies of scale, and, by virtue of their long-term commitments, they undertake long-term projects and apparently plan more wisely for the future. Their lives, in short, are more *stable*—financially as well as emotionally—and for both reasons, they are presumably happier. Each of them individually, moreover, is less likely to require state assistance to feed, house, educate, or clothe their children or themselves. In short, married people are less of a strain on state coffers. So long as the cost of giving married people additional benefits is less than the savings generated by virtue of their relative financial wellbeing, the state's provision of such benefits is a win all around. Marriage, on this understanding, is *not* the institution that morally and financially corrals irresponsible sex. It is, rather, a semi-privatized social welfare net that corrals and privatizes caregiving. According to this argument, spouses can care for each other better and more cheaply than the state can care for either of them. Furthermore, marriage is a privatized social welfare net that actually works: it benefits the parties that enjoy it, and saves the state considerable costs in the process.

Clearly—and again, assuming this is the best justification for the outflow of state and federal benefits to married couples but not to single individuals who also might join or form households for the purpose of bestowing care on each other—there is no reason whatsoever for reserving these benefits to opposite-sex married couples rather than all married couples. These couples are not just *similarly* situated with respect to this understanding of the purpose of marriage—they are *identically* situated. The exclusion of same-sex married couples from federal benefits is simply absurd, if the point of marriage is to help couples internalize the costs of their own care, thus alleviating the state of the burden of caring for those participating in the

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[24] *See* WAITE & GALLAGHER, *supra* note 8, at 32-33 ("Hundreds of studies demonstrate that those who feel they have someone they can rely on to help out in times of trouble have better mental health and greater well-being." (citing J.S. House et al., *Structures and Processes of Social Support*, 14 ANN. REV. SOC. 293 (1988))); Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 483-507 (1995) (concluding that married people, on average, have longer lifespans, greater happiness, greater wealth, and less alcoholism than single or cohabiting individuals).

[25] *See* WAITE & GALLAGHER, *supra* note 8, at 31 ("Married people are better off because they have someone who will take care of them when disaster strikes. A spouse acts as a sort of small insurance pool against life's uncertainties, reducing the need to protect oneself from unexpected events by oneself alone.").

marriage. If this is, in fact, the underlying point of civil marriage, the constitutional question raised by *Windsor* answers itself.

And that is a reasonable and constitutionally sound resting spot, save for one complication. If this is the point of "marriage," there is also no convincing reason to limit the understanding of who is and isn't married, and who is and isn't entitled to the federal and state benefits that flow from that status, to couples who join together *sexually* and perform a ritual for the purpose of setting up households of mutual care and provision. If the point of the institution—and the point of privileging it economically—is the superiority of care that such parties bestow on each other, there is no reason to limit either the appellation or the entitlements to couples who have a sexual connection. What, after all, has sex got to do with it?

Rather, it would seem that *any* two—or more—people who form a household and provide for each other, and perhaps for others, the requisite care, services, and mutual help that render the married household optimal for dependents are equally worthy of federal largesse. A grandmother and mother who live together and raise the mother's small children, siblings who live together and provide care and support for aging parents, friends who come together to provide care and nurturance for each other, and surely a single man or woman raising children on his or her own—all of these groupings constitute caregiving arrangements that internalize, or privatize, the provision of care, thereby lifting the burden from the state. As a result, all should presumably be entitled to state and federal recognition. If the point of civil marriage is its efficacy as a privatized social welfare net, then perhaps all of these units could and should be understood as marriages, and should be rewarded with federal benefits accordingly.

I do not mean this suggestion as a reductio ad absurdum. The state's interest in marriage, today, is surely more rooted in the social utility of private parties' mutual promises of long-term care, nurture, and love than in recognizing the legitimacy, responsibility, or nature of their sexual activities. If so—and if that state interest is rational—then presumably the state's solicitous attitude toward married partners ought to extend to all citizens who come together with long-term commitments to each other to engage in this vital and loving work. All such persons provide care that is of tremendous value to those who receive it, and which, in turn, saves the state significant resources. If we reward married couples for this way of life because we acknowledge that the care typically bestowed by married partners on each other is socially worthwhile (not just to them but to all of us), then shouldn't we also recognize other forms of caregiving commitment, regardless of the caregivers' sexual relationship or lack thereof?

CONCLUSION

Would it be possible to recognize these other forms of caregiving? What would such a world look like? It might not be so different from the one we now inhabit. Rather than the federal pension benefits, social security benefits, widows' and widowers' exemptions, and health insurance benefits, with which we now reward people solely for the act of marrying, we could instead bestow on all persons who provide to particular others a substantial amount of care a federal "caregiver's benefit," pegged to foregone income, or, perhaps, to need, or to some other metric that strikes our representative legislators as fair. Such a benefit would bring our practice more in line with the best justification we can articulate in a post–birth control world for bestowing so many privileges on married persons. We currently bestow these benefits, for the most part, on opposite-sex married partners, regardless of their caregiving status, and with no analogous benefit for (though perhaps not for long) same-sex couples or (with no change in sight) nonmarried people similarly situated in every relevant sense.

If caregiving is the reason we do so, it is time we consider bestowing that largesse on *all* caregivers, rather than limiting it to one subset of sexually active partners whom we allow to sign up for the weak proxy of marriage.

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