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An Argument Against Civil Marriage

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Permit me to begin with a report of an incident that occurred during the period of the Irish "troubles" as recounted to me by a colleague. Apparently, it was the practice on the part of both sides of the conflict to establish roadblocks in order to stop automobiles for inspection before allowing them to continue. The driver of each automobile was asked, "Are you a Catholic or a Protestant?" The wrong answer could have extremely serious adverse consequences. At one such roadblock, a driver was stopped and asked, "Are you a Catholic or a Protestant?" The driver answered, "I am neither. I am a Jew." That response met with a follow-up question: "Fine, but tell me, are you a Catholic Jew or a Protestant Jew?"

In Utah, other than Mormons, everyone is a Gentile. I am proud to be identified as a Jewish Gentile. As a committed Jew, I share the distress of many fellow citizens of faith in wake of the decision of the Supreme Court of the United States in *Obergefell v. Hodges*.

The Sages of the Talmud had scant regard for the pagans of antiquity. Not only did they find their religious views and practices to be theologically odious, they regarded the lifestyle adopted by them as morally repugnant. Reportedly, the pagans were untrustworthy, and had little regard for human life. Licentiousness was rampant among them, promiscuity endemic and homosexuality very much a part of the culture of their day.

Nevertheless, the Sages found them to have manifested one redeeming quality and, for that reason alone, worthy of an accolade: they did not draft marriage contracts for homosexual unions (Babylonian Talmud, *Hullin* 92b). To be sure, the Sages, in that statement, were damning with faint praise, but the praise was genuine. The Sages gave pagan libertines high marks for not having also established homosexual marriage as a legally recognized institution.

Almost modern in their perspective, the Sages recognized that, arguably, society might grant license to consenting adults to act as they choose. What individuals do or do not do may be regarded, within reasonable parameters, as

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their own affair. But such conduct does not require the imprimatur of the legal system. Certainly, consensual immorality does not demand protection of law in the guise of enforcement of a contractual undertaking. The idolators of whom the Sages spoke received an encomium for recognizing that, although sinners do indeed sin, it is not necessary for society to enshrine sin as a legal norm. In 1892, in *Church of the Holy Trinity v. United States*, Justice David Brewer wrote, "[T]his is a Christian nation."[1] If so, it is no more than reasonable to presume that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."[2]

Today, jurists would find those statements, if not embarrassing, at least quixotic. But the learned Justice found no contradiction between those pronouncements and the protections afforded to all citizens by the First Amendment. As a Jew, I can say only, "Amen." Would that the social and legal institutions of our country were grounded in Judeo-Christian morality! At least insofar as the public arena is concerned, and probably the private as well, we live in a post-Brewer, post-Christian society. The issue involved in *Obergefell v. Hodges*[3] does not involve a matter of individual morality or personal liberty. The issue is one of societal mores, public institutions, and the nature of our legal system.

Of course, Justice Brewer lacked the power of prognostication that would have enabled him to perceive that the Establishment Clause would one day be made binding upon the states by the Supreme Court's decision in *Everson v. Board of Education*.[4] Moreover, Justice Brewer's pronouncement clearly reflects a literal interpretation of the Establishment Clause as prohibiting only the establishment of a state church, but in no way precluding governmental preference of religion and religious values. The Framers of the Constitution certainly envisioned a Christian nation, *de facto* if not *de jure*. Indeed, the Bill of Rights did not at all interfere in the ongoing relationships with established religions that then existed in nine of the thirteen states. The last of those states disestablished religion in 1833. Quite to the contrary, the First Amendment was designed to prevent the establishment of a *national* church that would effectively supplant the churches established by the various states. As a matter of historical fact, the Bill of Rights was made binding upon the individual states, rather than upon the federal government exclusively, only after the various state churches had long been disestablished.

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1. Holy Trinity Church v. United States, 12 S. Ct. 511, 516 (1892).

2. *Id.* at 514. Much later, Justice George Sutherland remarked in a similar vein, "We are a Christian people . . . , according to one another the equal right of religious freedom . . . ." United States v. Macintosh, 283 U.S. 605, 625 (1931) (quoting *Holy Trinity*).

3. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

4. Everson v. Bd. of Educ. of Ewing Twp., 67 S. Ct. 504 (1947).

Constitutional jurisprudence subsequent to enactment of the Fourteenth Amendment may effectively preclude government action to promote policies viewed with high favor by the Founding Fathers, but it explicitly affirms that the state may—nay, must—maintain "strict neutrality" with regard both to implementing and impeding such values. The decision in *Obergefell* gives rise to a number of concerns that beg for resolution in a manner consistent with the newly-announced expansion of Fourteenth Amendment protections.

There is a remarkable Talmudic aphorism (*Yoma* 86b) that declares, in rough translation, "If a person commits a transgression and repeats it, by the third time the act becomes permissible." In the process of repetition, the act comes to be regarded as inherently innocuous. In contemporary nomenclature we might describe this phenomenon as a process of desensitization. With repetition, that which was originally regarded as morally repugnant loses its odium to the point that it is regarded as morally neutral and hence simply a matter of personal preference.

A nineteenth-century rabbinic scholar quipped: "The Sages spoke of the third time that the act is performed. But what if the person commits the same infraction a fourth time? After having already transgressed three times, how does he now look upon the act?" That scholar's incisive answer to his own question was, "By the fourth time, the act is not viewed merely as a permissible form of conduct; it is regarded as a *mitzvah*!" There is a psychological progression: The repugnant becomes neutral and the neutral then becomes laudable. Habituation leads to desensitization; desensitization leads to approbation.

The Hebrew word "*mitzvah*" has found its way into English dictionaries and, in the vernacular, the term has acquired the connotation of "a good deed" or what an ethicist might term a "*bonum per se*," and hence deserving of a merit badge. However, in the Supreme Court decision the institution of same-gender marriage has become a *mitzvah* in the original and more fundamental meaning of the term. In Hebrew, the term "*mitzvah*" denotes that which has been dogmatically commanded by the Deity. As the revealed word of God, a *mitzvah* embodies and expresses a positive value or set of values. In our democratic society, the Constitution is recognized as a close secular approximation of Holy Writ. And, if I may coin a phrase, homosexual marriage has now become a constitutional *mitzvah*. Same-sex marriage is not simply recognized as morally neutral, or even as a pragmatic manner of regularizing sexual activity, but as a normative, constitutionally-mandated institution. The matter has been taken to a new level. Homosexual activity has been infused with an aura of secular constitutional sanctity as witnessed by the state's obligation to recognize it as a normative legal institution.[5]

5. The ramifications may be even more far-reaching. Since Lawrence v. Texas, 539 U.S. 558 (2003), as a matter of constitutional law, homosexual conduct cannot be made subject to criminal sanction. Extramarital relations, at least for the present, do not enjoy similar protection. It is now quite conceivable

This concern cannot be dismissed with the observation that the moral and the legal are not co-extensive spheres and that legal recognition is not to be equated with moral acceptance. Frequently, to the lay mind, morality coincides with legality; that which is legal is often equated with that which is moral. *Obergefell* is not simply a decision regarding an arcane matter of law; it is a constitutional imprimatur readily perceived as a Good Housekeeping seal of moral approval.

At this juncture in constitutional jurisprudence, the issue is not whether the state shall condemn or whether the state shall countenance homosexual activity; the question is whether the state shall promote the practice or withhold its imprimatur. Whether one endorses or whether one challenges the decision on constitutional grounds, the decision will be perceived as state endorsement. There is nothing to suggest that such was the direct intention of the Court, and indeed, even champions of the cause should be willing to acknowledge that either approbation or opprobrium on the part of the Supreme Court would be misplaced. Yet, the appearance of moral approbation is a matter of concern and constitutes the first consideration auguring in favor of remedial action consistent with the Court's perspective concerning Fourteenth Amendment liberties.

There is a second concern as well. The result of the decision in *Obergefell* is the creation of a potential conflict between discharge of a civil duty and violation of conscience. That potential conflict quickly became actual in the incident involving Kim Davis. As a city clerk charged with issuing marriage licenses, Ms. Davis was required, pursuant to the Supreme Court decision, to issue a marriage license to all qualified same-gender applicants. She, however, believed that, as a matter of conscience, she dared not become complicit in giving effect to a homosexual union. It is not clear whether Ms. Davis felt constrained not to aid and abet conduct she believed to be immoral, or whether she construed affixing her signature on the license as tantamount to condoning the act, or both. Whatever the precise nature of her qualms, her dilemma was real. Ms. Davis was placed in a situation in which she would have been compelled to choose between obedience to law and obedience to conscience.

As a society, we value both obedience to law and obedience to conscience. Both represent social as well as moral values. It is not healthy for society to force a choice between those values. The First Amendment was expressly designed to protect freedom of conscience. *Smith v. Employment Division*[6] authorizes enforcement of law even when such enforcement conflicts with obedience to conscience, but explicitly invites harnessing the political process on a case-by-case basis to petition legislative authorities for redress of imbalances created by the decision.

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that homosexual adultery within a same-gender marriage might be subject to punishment as a violation of the marital bonds.

6. Emp't Div., Dep't of Human Res. v. Smith, 110 S. Ct. 1595 (1990).

No ethicist would subscribe to the view that obedience to law morally trumps objections of conscience in any and all circumstances. The Nuremberg trials and the court-martial of Lieutenant Calley are egregious cases, to be sure, but instances in which even jurists acknowledge that disobedience to immoral laws is a legal mandate even when confronted with the certainty of suffering legal consequences. Whether obedience to the dictates of conscience is of sufficient moral import to require disobedience of law in refusing to issue a marriage license for a legally eligible couple is itself a matter of conscience. The legal system is not required to be antagonistic to qualms of conscience. At the very least, it should adopt a stance of neutrality.

Nor is the resignation of Ms. Davis from her position as city clerk a viable solution to the dilemma. It is not inconceivable that some individuals might find resignation by an official, in order to enable another person to commit an act that the first official finds to be unconscionable, to be itself a violation of conscience. But that is not the issue. Society has two choices. It may choose to create solutions in which some persons feel compelled to exclude themselves from certain areas of employment, and hence, from full participation in governmental and social functions in order to maintain fidelity to scruples of conscience. Abortion is an obvious, albeit contentious, example. The right to undergo an abortion is constitutionally recognized. Society perceives a need to make abortions available. Those who regard abortion as morally repugnant do find themselves excluded from employment in positions in which participation in abortion is integral to performance of their professional and/or civil duties. Respect for individual conscience augurs for accommodation of the moral commitment of such persons in one way or another. That option is clearly preferable, particularly in a society that celebrates diversity. It is for that reason that statutes requiring reasonable accommodation of religious practices have been enacted. The first form of accommodation is obviation. If the need for offending behavior is eliminated, the dilemma simply disappears.

Finally, some have articulated a recognition that extending constitutional protection to same-gender marriage may lead to a denial of free exercise. There have already been cases in which caterers, florists, and photographers who have refused to make their services available for homosexual weddings have been found to be in violation of statutes requiring non-discrimination by providers of public accommodations.[7] Discussion of the free exercise defense against violation of public accommodation provisions is beyond the scope of the present endeavor and out of place in this context if for no other reason than

7. *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); *In re* Klein v. Oregon Bureau of Labor & Indus., Nos. 44-14 & 45-14 (Comm'r of the Bureau of Labor & Indus. of the State of Oregon Jan. 29, 2015) (order granting summary judgment); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015).

that those cases arose before *Obergefell* in jurisdictions in which homosexual marriage was legalized by state law.

But there is a potential problem that is far more serious. No one has argued that a clergyman who, in solemnizing a marriage, serves not only as a religious functionary but also as an officer of the state, may be compelled to officiate at the wedding of a homosexual couple. But as quoted in *Obergefell*, no less a personage than the Solicitor General of the United States has opined that "the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage."[8] Whether constitutional scholars agree or disagree with that assessment is essentially irrelevant. Even if that contention is entirely without merit, religious denominations should not be forced to shoulder the costs of defending against such allegations.

In his dissent, Justice Thomas makes the point that our society has both religious institutions and secular legal institutions. It is inevitable that the two will come into conflict with one another and, as a result, generate discord in one form or another. His observation is simple, obvious, and well-taken. There are bound to be conflicts between this newly announced constitutionally guaranteed right and the already existing right of free exercise. No one can fully predict in which arenas those conflicts will arise and no one could possibly identify all potential situations that might be subject to such conflicts. But, assuredly, such conflicts will arise.

There is at least one decided case in which the outcome might have been a foregone conclusion had it been adjudicated pursuant to *Obergefell*. *Russell v. Belmont College*[9] involved litigation pursuant to the Equal Pay Act. The Act provides for parity between the genders in matters of remuneration—equal pay for equal work. The clear purpose of the Equal Pay Act is to prevent discrimination against female employees. Belmont College, a religious institution, made bonuses available to heads of households, provided that the head of the household was a male; a female head of household performing the same services was denied a bonus. Belmont College's professed justification for its unequal treatment of male and female employees was that it is the man who is responsible for supporting the family. That principle, asserted Belmont College, was rooted in religious belief. A woman, it was contended, has no concomitant religious obligation. Accordingly, the college's administrators concluded, only the male who discharges a religious duty in supporting his family is entitled to assistance in fulfilling that duty. In effect, the college argued that to facilitate discharge of a religious duty by its employees was itself the religious duty of a religious institution. The court recognized the apparent cogency of that argument, but nevertheless ruled against Belmont

8. *See Obergefell*, 135 S. Ct. at 2626 (Roberts, J., dissenting) (citing Transcript of Oral Argument, Question 1 at 38).

9. Russell v. Belmont Coll., 554 F. Supp. 667, 676–77 (M.D. Tenn. 1982).

College because of deficiencies in the argument as well as on technical reasons without resolving the constitutional issue.

Obergefell extends the protection of the Fourteenth Amendment to same-gender marriages. In constitutional jurisprudence, later amendments supersede earlier enacted amendments.[10] Thus, the protections of the chronologically later Fourteenth Amendment supersede those of the earlier promulgated First Amendment. Extending equal protection rights to all who seek to enter into a matrimonial relationship should serve not only to generate the right to marriage itself regardless of the prospective partner's gender, but also to confer gender-neutral rights within the marriage to each of the parties. Consistent with that doctrine, it should follow that obligations of support and maintenance as well as alimony must be gender-neutral as a matter of constitutional law. A First Amendment free exercise objection could no longer be asserted against a Fourteenth Amendment right.

Similar concerns were expressed with regard to the proposed, but never enacted, Equal Rights Amendment. The concern was that its provisions would be accorded priority over First Amendment free exercise protection in areas of religious practice. As a result, for example, religious denominations might have been denied the right to bar women from serving as members of the clergy.

The potential implications of *Obergefell* are even more far-reaching. A clergyman authorized to celebrate marriages serves as an officer of the state by virtue of the fact that he is empowered to perform a ceremony that establishes a state-recognized civil marriage. In many, if not all, jurisdictions, a clergyman is bound by legislative enactments circumscribing the marital unions at which he may legally officiate, e.g., consanguineous marriages as defined by secular law rather than by the tenets of his faith, and the circumstances in which he may perform such marriages, e.g., only pursuant to the issuance of a valid marriage license. The clergyman does not enjoy the prerogative of declining the privilege of serving as a state official in order to escape the onus of those regulations. Such provisions of law may be constitutionally troublesome but, to date, they have not been challenged.

As a result, a marriage celebrated by a clergyman—an officer of the state—is quite apparently "state action." If so, the Fourteenth Amendment, as interpreted by the Supreme Court in *Obergefell*, might well be invoked to prevent a clergyman—as an officer of the state charged with performing a state action—from refusing on religious grounds to perform a marriage ceremony on behalf of a homosexual couple.

Historically, something of that nature did occur, although not in a nation that subscribed to the First Amendment or its legal equivalent. Prior to the

10. *See* Schick v. United States, 24 S. Ct. 826, 827 (1904); *see also* RONALD D. ROTUNDA & JOHN E. NOWAK, VI TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 23.17 (5th ed. 2013).

French Revolution, matters of marriage, divorce, and personal status were entirely within the jurisdiction of ecclesiastic authorities. After the French Revolution a new legal institution arose—civil marriage. Religious authorities retained jurisdiction over religious aspects of marriage but civil authorities controlled the civil nature of the marriage. To this day, in some European jurisdictions, separate civil and religious ceremonies are required.[11]

Later, in the Hapsburg Empire, under the provisions of the *Ehepatent* of 1783, later incorporated in the Civil Code of 1786, marriage became the preemptive domain of the state.[12] The law, however, failed to provide for civil marriage ceremonies. Quite to the contrary, solemnization of the union by a clergyman was a requirement for a legal marriage. Clergymen were empowered by the state to solemnize marriages. But not only were they empowered to solemnize marriage, they were required to do so upon pain of penal sanction. Provided that a proper marriage license had been issued, the clergyman was required to officiate at the marriage even if its solemnization was in violation of his religious conscience and deemed void by the tenets of his denomination.

Toward the end of the 18th century, Rabbi Raphael Nathan Tedesco, the Chief Rabbi of Trieste, then part of the Hapsburg Empire, refused to perform a marriage on behalf of one of the members of his community who had been previously married in a religious ceremony and who had subsequently obtained a civil divorce, but whose first marriage was not dissolved by means of a Jewish religious divorce. The rabbi was threatened with expulsion.[13]

What is the solution? From my perspective, the most appropriate solution would be to restore the *status quo ante*—to reestablish the legal landscape as it existed before the French Revolution, *viz.*, to recognize marriage as a religious matter and to abolish civil marriage entirely. Each religious denomination would be free to regulate marriage in accordance with its tenets; every individual would be free either to enter into a denominational marriage or not to do so.

Abnegation of marriage, even non-sacramental marriage, is not a matter to be taken lightly. Marriage brings at least a measure of stability to the heterosexual relationship and in social and psychological strengthening of familial bonds creates a positive milieu that can only redound to the benefit of children born of the union. Unfortunately, in our permissive age, to our great

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11. Alan M. Dershowitz, TAKING THE STAND: MY LIFE IN THE LAW 410–11 (2013) (the author has proposed that we adopt this model by reserving marriage to religious groups exclusively and by providing for registration of a civil union for legal purposes); *see* Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES (Dec. 3, 2003), http://articles.latimes.com/2003/dec/03/opinion/oe-dersh3.

12. *See* LOIS C. DUBIN, THE PORT JEWS OF HABSBURG TRIESTE: ABSOLUTIST POLITICS AND ENLIGHTENMENT CULTURE 175 (Aron Rodrique & Steven J. Zipperstein eds., 1999).

13. *Id.* at 185–92. *See also* J. David Bleich, *A 19th Century* Agunah *Problem and a 20th Century Application*, 38:2 TRADITION 15, 18–19 (2004) (brief discussion of the marriage incident).

loss and deep regret, those highly positive effects of marriage have long since become attenuated. That is not to say that the values fostered by marriage have been completely, or even largely, eroded. Rather, it is a matter of assessing moral costs versus moral benefits in adjudicating between competing public policies.[14]

But abolition of civil marriage is not going to happen. Although, in recent decades, a growing number of individuals have eschewed marriage of any nature, religious or civil, others find marriage to be socially and legally beneficial in many different ways. Life has become exceedingly complex; many social and legal institutions and privileges are predicated upon establishment of a formal marital relationship. Nor is civil union a suitable alternative. For purposes of the present discussion, examination of details is unnecessary but, in its effect, civil union is essentially marriage by another name.

There exists, however, a concept already enshrined in statutes governing specific areas of law that suggests itself as a remedy for the current problem. The Uniform Health-Care Decision Act establishes the category of a "close friend."[15] In New York, the Public Health Law provides that a person who lacks a next-of-kin and who has not executed a health-care proxy may have health-care decisions made on his behalf by a person who files a simple affidavit stating that he is a "close friend" of the patient.[16] In New York, that

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14. One must also be mindful of the newly emerging phenomenon of "proto-religious" marriage. "Religious denominations" have sprung up whose sole "religious" function and purpose is to ordain "clergy" empowered by the state to perform marriages. Those functionaries minister to couples who do not wish to identify with a faith-community but who, for whatever reason, seek to be united as a couple by means of something other than a sterile civil ceremony. Even were civil marriage to be abolished, that option would remain open to persons who do not desire a sacramental marriage but yet seek the benefits of a formal ceremony.

15. UNIF. HEALTH-CARE DECISIONS ACT § 5(c) (1993); *see also Default Surrogate Consent Statutes*, A.B.A. (June 2014), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_default_surrogate_consent_statutes.authcheckdam.pdf (The National Conference of Commissioners on Uniform State Laws gave the "close friend" its stamp of approval in the Uniform Health-Care Decisions Act, approved by the American Bar Association on Feb. 7, 1994. Alaska, Delaware, Hawaii, Maine, Mississippi, New Mexico and Wyoming have all enacted the Uniform Health-Care Decisions Act. Arizona, California, Colorado, District of Columbia, Florida, Illinois, Maryland, New Hampshire, New York, Oregon, Rhode Island, South Dakota, West Virginia, and Wisconsin have not enacted the Uniform Health-Care Decisions Act but give some form of health-care decision-making authority to "close friends" (or, in the case of Oregon, "adult friends."). Oregon uses the term "adult friends," and Rhode Island includes non-relative friends within the term "family caregiver."). *See* Martina Mills & Charles P. Sabatino, Summary of Health Care Decision Statutes Enacted in 2010, A.B.A. COMMISSION ON L. & AGING (2010), http://www.americanbar.org/content/dam/aba/administrative/law_aging/sum_hcds_09_10.authcheckdam.pdf (According to the Uniform Law Commissioners, as of July 2010, forty-four states and the District of Columbia have adopted the Revised Uniform Anatomical Gift Act. Almost all of those states have statutes that permit close friends to make postmortem anatomical donations as agents. Delaware, Illinois, Louisiana, Maryland, Massachusetts, New York, and Pennsylvania have not yet adopted a version of the Act. A bill providing for adoption of the Act is currently pending in the Pennsylvania legislature.). *See* S.B. 180, 199th Gen. Assemb., Reg. Sess. (Pa. 2015).

16. In its current form, the statute defines a "close friend" as:

person even has the authority to challenge the health-care decision of a lawfully-recognized decision-maker.[17]

The proposal is very simple. In place of marriage, we might catalogue the areas in which, at present, marriage is a matter of legal significance. We might then legislatively empower every person to designate a "close friend" for any or all of those purposes. The close friend would be endowed with the privileges and prerogatives currently enjoyed by a spouse or next-of-kin. The close friend might be any person, of either gender, related or unrelated.

Implementation of this proposal would not only obviate the constitutional problem posed by *Obergefell*, it would also eliminate what I perceive to be an inequity created by our existing legal system.

Some years ago, I was asked to perform a marriage but, unfortunately, I had no choice other than to decline. The situation involved a nonagenarian who was on his deathbed. His caregiver was a woman thirty years his junior. She was the daughter of his second wife, i.e., his stepdaughter. She had been caring for him since her mother had died some twenty-five years earlier. She remained single, whether because she devoted herself to the care of her stepfather or due to other circumstances I know not; nor is the reason for her spinsterhood of any consequence. For twenty-five years, she filled the role that, in other circumstances, would have been filled by a loyal, devoted spouse. Now, facing his imminent demise, the aged gentleman wished to marry his stepdaughter, so that she might become entitled to Social Security benefits as his widow. Legally, there was no impediment to the marriage. As a matter of justice and equity, I am more than persuaded that she deserved such benefits. However, as a rabbi, I could not officiate at such a marriage. According to the provisions of Jewish law, the marriage, between a stepfather and a stepdaughter, would have been void.

Social Security regulations could readily be amended to provide survivor's benefits to any properly designated "close friend." Designation of the stepdaughter as a close friend would have led to a just and equitable result. Certainly, this is not to suggest that a ninety-year old person be given the capacity to name a ten-year old child as the recipient of survivor's benefits to be paid over the course of a lifetime. Obviously, for the proposal to be economically viable, the extent of such benefits must be capped by a dollar amount, limited to individuals older than, or only a certain number of years junior, to the person naming the proposed recipient of survivor's benefits, or limited in some other matter. Designation of a close friend for other purposes

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> [A]ny person, eighteen years of age or older, who is a close friend of the patient, or relative of the patient (other than a spouse, adult child, parent, brother or sister) who has maintained such regular contact with the patient as to be familiar with the patient's activities, health, and religious or moral beliefs and who presents a signed statement to that effect to the attending physician.

N.Y. PUB. HEALTH § 2961(5) (McKinney 2010).

17. *Id.* at § 2973(1).

would require other limitations and other forms of fine-tuning. For example, it would be prudent that the category of a close friend for purposes of health care not include persons below the age of legal capacity for other purposes.

This proposal would redress the imbalance between liberty of conscience and constitutional law that has arisen in the wake of *Obergefell*. That such a chasm need not and should not exist has also been recognized by the United States Supreme Court: "We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[18] Those lines were not written by a jurist known for conservative views. They were written by a Supreme Court justice whose credentials as a liberal are unimpeachable; they were the words of Mr. Justice William Douglas, writing for the majority in *Zorach v. Clauson*.

The proposal may appear to be utopian—and it probably is. But what appears to be utopian today may come to be recognized as pragmatic tomorrow, next year, or next century. Absent the prodding nature of vision, the utopian will never become the actual. And if not people of faith, who then should be the visionaries?

18. Zorach v. Clauson, 72 S. Ct. 679, 684 (1952).