MARRIAGE, FAMILY AND CHANGING SOCIETAL DEFINITIONS

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The "Gay Marriage Debate" consumes most resources of the Queer community and is the single issue that defines the Queer experience for many average citizens. This is a political mistake. While it is important for all to have the right to marriage if they so choose, the larger issue is government and society taking into account alternative relationships, families, and definitions of what units have access to the rights and protections that marriage affords.

The structure of the American family has gone through drastic changes. Legislators and the courts have struck down traditional views of marriage and family in order to protect the Constitutional right to privacy and to create a more equal society. People of all classes have the right to privacy and to experience marriage. As more people enjoy access to the institution of marriage, many follow who want the same rights. In the 1967 Supreme Court case *Loving v. Virginia*, an interracial couple fought and won their right to marry. This created a precedent used by many, including queer couples who challenge the courts to grant them access to marriage. However, there are still groups of people varying in sexuality, marriage, and parenthood who also desire validation in law and society as a family unit. In order to ensure democracy, protect privacy, and create a more equal society for the welfare of the nation, the legal system must respond to changing societal norms and definitions of family by allowing any couple access to marriage. However, marriage should not define what constitutes a family; notions of family in a just society should be designed to include alternative relationships, not perpetuate certain types of relationships as inferior.

The 1967 U.S. Supreme Court case *Loving v. Virginia* established that an interracial couple's right to marry was protected under the Equal Protection and Due Process clauses of the Fourteenth Amendment. The Court was asked to decide if a state law that singled out couples by race and denied them access to marriage based on race was legal or an "arbitrary and invidious discrimination" (*Loving*). Justice Warren wrote the opinion of the Court stating that it was unconstitutional to deny the couple their right to marry as "the freedom to marry, or not marry, a person of another race resides in the individual and cannot be infringed by the state" (*Loving*). The Court recognized that the Virginia anti-miscegenation law was based on past views, that people of different races should not procreate in order to keep the white race dominant. Indeed, the law was a product of "the doctrine of White

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Supremacy" (*Loving*). In a just society, the basic idea of family and marriage should not reinforce ideas of inequality such as racism. The Court legitimized the existence of interracial couples not only to protect their right to privacy but also to create a more equal society. To this end, the Court granted their right to marry and did away with the traditional law.

In order to uphold democracy and the welfare of all of its citizens the legal system must also acknowledge the existence of queer couples and their Constitutional rights to privacy. In *Baehr v. Lewin*, the Hawaii Supreme Court ruled in favor of same-sex marriages. According to Justice Levinson, the same argument set forth in *Loving* to justify interracial marriage could be applied to queer couples. Hence, "the freedom to marry, or not marry, a person of another [sex] resides in the individual and cannot be infringed by the state" (*Loving*). The Court rightly believed they had to rule in accordance with changing societal norms. They could not deny couples their Constitutional right to privacy and marriage simply because of their sexual preference; "Constitutional law may mandate, like it or not, that customs change with an evolving social order" (*Baehr)*. Again, the notion of family and marriage should not perpetuate discrimination and the idea that a certain type of citizen is inferior to another. Statutes denying queer couples their rights to privacy often reflect traditional views of homophobia rooted in our culture that are harmful to the welfare of a democratic nation that intends to provide equal freedoms for all of its citizens.

Though a ruling against same-sex marriage would violate the Constitutional protections of privacy of a certain type of citizen based on homophobic views, there was a dissent in the *Baehr* case. Justice Heen believed that race was not interchangeable with sex because the basic function of marriage is to procreate, something that can not be done by homosexual couples; "our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children" (*Baehr*). Many proponents of the limited view of marriage rely on traditional and religious appeals that homosexuality is sin and that children should not be exposed to such acts. However, the Constitution clearly outlines a separation of church and state, and it is not the job of the legislature or the courts to mandate morals. As Justice Marshall pointed out in *Goodridge v. Department of Public Health*, a Massachusetts Supreme Court case that ruled in favor of same-sex marriage, "our obligation is to define the liberty of all, not to mandate our own moral code" (*Goodridge*). Further, it is detrimental to society for the idea of family to perpetuate the supremacy of one type of community over another; "laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family" (*Goodridge*). In order to adapt to changes in society and ensure equality for all of its citizens, the legal system should not define marriage by procreation and should grant queer couples the right to marry if they so choose.

Though the right to privacy and marriage should not be denied to

any person based on race, sexuality, or parentage, marriage should not define what constitutes a family. Limited views of marriage as the only ideals for children and family invalidate the prevalent existence of single parents and unwed couples of all sexualities who have successful family units; "cohabitation rates have increased tenfold among heterosexual partners and…whether heterosexual or gay or lesbian, [they] are increasingly having children out of wedlock, as are many single women who live alone" (Coontz 3). Though the limited view of family may have been dominant in the past, societal norms have changed, and alternative parenting models have been accepted and endorsed in order to respect the rights of all types of communities and create a more equal and open-minded society for the benefit of all peoples, especially children.

Proponents of defining family through heterosexual marriage often cite the welfare of children as the basis of invalidating alternative forms of family. However, case law has shown that at times, the best interest of the child prevails within a non-traditional family. In *M.A.B. v. R.B.,* the New York Supreme Court, using the best interest of the child standard, "a gender-neutral referent which allows mothers and fathers to compete for custody on an equal footing," granted a gay man custody of his teenage son (Packard Foundation 1). The Court recognized that the father's homosexuality did not mean that he was an unfit parent. Instead, the court "required that a causal connection [between the father's sexuality] and its adverse effect upon the child should be shown" (*M.A.B.*). Justice Willen determined that due to the child's improved behavior while under the care of his father in the past, it would be in the child's best interest to live with the father (*M.A.B.*). It is unjust to limit the conception of family to that of heterosexual married partners with children because it reinforces traditional stereotypes of homosexuals and unwed parents as inferior citizens.

Furthermore, some courts have attempted to protect the limited traditional view of family in extreme ways that prove illogical alongside the best interest of the child standard. In the U.S. Supreme Court case *Michael H. and Victoria D. v. Gerald*, the Court denied a biological father parental rights to his daughter, Victoria, without examining his parenting abilities. The Court justified this ruling by saying that even though he had Victoria in his care for some time, because he fathered her through an affair with a married woman, he was not a part of that family unit. Justice Scalia believed that the state's interest in preserving marriage was more important than granting the biological father rights to his child with whom he already had a relationship (*Michael H.*). The Court relied on the traditional reasoning that a "child born to a married woman living with her husband is presumed to be a child of the marriage" (*Michael H.*). The decision of the Court is one that sees the creation of a child outside of marriage as inferior; however, notions of family should not perpetuate such discrimination. As Justice Brennan writes in his dissent, "the only difference between these two sets of relationships is…marriage…. the critical fact in denying Michael a constitutionally protected stake in his

relationship with Victoria" (*Michael H.*). The state infringes upon an individual's rights and protects traditional views illogically when it values a limited view of family over the best interest of a child. In any regard, it is in the best interest of a child to have the right to a relationship with her or his fit biological parent.

As society grows, new types of relationships form and become the norm. Just as individuals within society become more accepting of alternative forms of relationships, so should the legislature and the courts. If democracy is to prevail, our legal system must strive for more equality amongst citizens. Institutions such as marriage should be accessible to all as "marriage is much more than a relationship sanctioned by law. It is the centerpiece of our entire social structure, the core of the traditional notion of 'family'" (Stoddard 483). Further, marriage should not define what constitutes a family, as such a limited view discounts many alternative family units. The idea of family should not be exclusive; it should be inclusive and perpetuate the fundamental values of our nation such as equality and protection for all citizens. Indeed, the only way to ensure the right to privacy of all citizens, and incorporate changing societal norms and modes of relationships is to "keep our eyes on the goals of providing true alternatives to marriage and of radically reordering society's view of family" (Ettelkbrick 486).

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