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The Case for Gay and Lesbian Marriage

By Mielle Abbey-A Schwartz

Courts and legislatures grant a heterosexual couple the legal right to marry. (Krause 37) Why has this legal right not been extended to include gay and lesbian couples? The legal definition of family has no doubt broadened:

> *In* Moore v. City of East Cleveland, *for example, the Supreme Court granted constitutional protection beyond nuclear families to extended families. Despite this social and legal evolution, [however,] courts and legislatures continually have refused to grant gay and lesbian couples family status. (Harvard* ed. 94)

Even the legal substitutes for marriage, common-law marriage and marriage by contract or declaration, have been denied to gay and lesbian couples, while available under some jurisdictions to heterosexual couples. (94)

Is this prohibition of same-sex marriage constitutionally justifiable? Are the proposed interests of states in prohibiting same-sex marriage justifiable by the stan-

dards of constitutional law? These two questions will structure the course of the argument to follow in favor of legitimizing gay and lesbian marriage.

> The importance of extending the marriage right to gay and lesbian couples is unassailable.

The Advantages of Marriage

Before delving into both a legal justification for same-sex marriage and a consideration of the opposed interests forwarded by states, the question must first be asked: Why is it important to extend the marriage right to include gay and lesbian couples? Why is it important that there be a legal declaration of married couple status? There are two answers to the preceeding questions. First, marriage is considered a central institution of American society, one of serious symbolic meaning to the couple. (95) It certainly cannot be peremptorily concluded that same-sex couples have less interest in the symbolic meaning of marriage than heterosexuals. Second, marriage affords critical economic and legal advantages to a couple. Married partners are entitled to tax, insurance, and housing benefits, succession benefits upon death of a spouse, and worker's compensation (which provides benefits to dependents of covered employees), to name a few. (95,102,108)

In terms of legal advantages, housing law serves as a clear example. New York City's Rent and Eviction Regulation 2204.6[d], for instance, holds that:

> ***no occupant of housing accommodations shall be evicted...where the occupant is either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant.*** **(104)**

In 1988, a New York appellate court prohibited a gay partner from remaining in an apartment of his deceased lover pending further litigation. The court asserted that the regulations did not protect homosexual partners in this respect, since according to the state legislature, the partners were not legal spouses; they were not legally recognized as a family. (104)

Hence, the importance of extending the marriage right to gay and lesbian couples is unassailable. Denial of this right is of serious concern and certainly merits inquiry. The first of the two questions posed earlier may now be addressed: Is the prohibition of same-sex marriage constitutionally justifiable? The following argument will demonstrate that denial of the same-sex couple's right to marry falls far outside the ambit of the Constitution. The denial of this right does not merely *border* on the unconstitutional; it *wallows* in the unconstitutional.

The Right to Privacy: Personal Choice **and Intimate Association**

The right to marry freely derives from the constitutional right to privacy. (96) To marry freely implies first not being forced to marry, and more importantly to the issue at hand, retaining the freedom of personal choice in terms of whom to marry.

As an implied constitutional principle, the right to marry is understood only as part of the right to privacy and not vice versa. As such, it is a substantive right of individuals. Therefore, regulations of those who are married as well as those who would marry are equally suspect as impinging on the right to marry. (Mohr 130)

Although the right to privacy has no explicit mention in the Constitution, the Supreme Court has often found a penumbra of privacy in the First, Third, Fourth, Fifth, and Ninth Amendments. For example, in the 1965 case of *Griswold v. Connecticut* (to be discussed in greater detail shortly), Justice Douglas described the Fourth and Fifth Amendments as containing references to

> Denial of the same-sex couple's right to marry...does not merely *border* on the unconstitutional; it *wallows* in the unconstitutional.

privacy:

> ***The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment...The Fourth and Fifth Amendments were described in*** **Boyd v. United States,** ***116 US 616 [1886], as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." (Gunther*** **505)**

Based upon Supreme Court precedent, a right to privacy certainly exists.

It must now be asked whether or not the right to marry whom we want to is inherent in the general right to privacy. In *Loving v. Virginia* (1967), this right was clearly articulated:

> ***The Court firmly established marriage as a 'basic civil right of man'***

[ue., of human beings]. (Harvard **ed. 95)**

Justice Warren handed down the decision in *Loving v.* ***Virginia:***

> ***The case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by [Virginia] to prevent marriages between persons solely on the basis of racial classifications violates [the] 14th Amendment...we conclude that these statutes cannot stand. [The Virginia appellants, a black woman and a white man, were married in the District of Columbia, returned to Virginia, and convicted of violating Virginia's ban on interracial marriages.] (Gunther* 626)**

This case marked a step toward a recognition of freedom of personal choice in marrying. *Loving* protected "intimate adult unions from societal prejudice." *(Harvard ed.* 95)

The concept of personal choice in marriage, however, was not explicitly articulated until *Cleveland* ***Board of Education v. LaFleur* (1974). *(Harvard* ed. 96)** In *Loving,* the decision was cast more in terms of racial equality, while in *Cleveland,* the Court declared:

The states mistakenly suggest that same-sex couples cannot reproduce and that they are therefore unable to give birth to or raise children.

> ***it has long recognized that freedom* o/personal *[emphasis mine] choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. (Harvard* ed. 96)**

Should not homosexuals thus be allowed to choose homosexual marriage partners, as heterosexuals are legally allowed to choose heterosexual marriage partners? Courts and legislatures, however, continue to presume that a man-woman pairing is legally necessary for marriage, even though the Supreme Court has affirmed marriage as a personal choice. Typically, the requirement that marriage be between members of the opposite sex has not even been explicitly written into marriage statutes. The statutes have only implied the dictionary definition (Krause 37) that marriage involves the union of "husband and wife." *(Webster's* 869) Thus, the freedom of personal choice has been clearly legitimized within the general right-to-privacy framework; choosing a partner in marriage is a personal choice, a private choice.

Legal grounds for same-sex marriage can further be justified in terms of intimate association, which falls under the right-of-privacy framework as well. In *Roberts* ***v. UnitedStates Jaycees (1984),* the Court explained that:**

> ***the freedom of association extends to "certain kinds of highly personal relationships" that "act as critical buffers between the individual and the power of the State."***

Under this theory, the state simply has no authority to pressure individuals into heterosexual relationships by giving only those relationships the benefits and protections of the law. *(Harvard* ed. 97) Marriage can assuredly be considered a highly personal relationship.

Standards of Scrutiny

The second question posed earlier may now be addressed: Is a state's interest in prohibiting same-sex marriage justifiable? States have claimed that prohibiting same-sex marriage encourages procreation, encourages traditional values, and promotes societal and familial stability. (99-100)

Before delving into the interests at hand, it is first important to briefly discuss the manner in which state interests are addressed within constitutional law. Since marriage is considered a fundamental right under*Zablocki v. Redhail(1978),* "critical examination of the state interest advanced [is] required [by constitutional law]." *(Gunther* 554) Judges must apply strict scrutiny in assessing state interests since marriage is of fundamental importance. In the *Zablocki* decision, Justice Marshall explained that ***Griswold:***

> ***established that the right to marry is part of the fundamental 'right of privacy' implicit in [the] Due Process clause ['nor shall any state deprive any person of life, liberty, or property without due process of law']. (Gunther* 554)**

Any state interests restricting this right must therefore be strictly scrutinized. A "fundamental" right triggers strict scrutiny (554), as opposed to regular scrutiny. The state's interests must not simply be rationally related to its goals; they must be compellingly related.

Countering State Interests

The states mistakenly suggest that same-sex couples cannot reproduce and that they are therefore unable to give birth to or raise children. Before considering if this interest in procreation is rationally or compel-

lingly related, one must first ask whether or not the interest agrees with Supreme Court precedent.

Marriage and procreation have in fact been separated from one another in Supreme Court precedent. In *Griswold* v. *Connecticut* (1965) (503), the Court struck down a Connecticut statute which prohibited the use of contraceptives and held that married couples should be allowed to use them. Just to note, the Court did extend this right to unmarried couples in *Eisenstadt* v. *Baird* (1972). *(Gunther* 514) Hence, the Court has historically supported contraception within and without marriage. How, then, can states possibly claim a necessary linkage of marriage with procreation, when the two have historically been separated? As Mohr writes, "...marriage is not morally or legally contingent upon the ability to have children...." (131)

State legislatures have helped to create and perpetuate the supposed social fact of heterosexuality.

Nevertheless, we can proceed to ask: Is the state interest in encouraging procreation compelling?

> *The prohibition on same-sex marriage cannot withstand* any *(emphasis mine) level of scrutiny because states cannot articulate legitimate interests that are [even] rationally related to the restrictions they impose. {Harvard* ed. 99)

Although, the fundamental status bestowed upon marriage requires that the state's interest in restricting marriage be compelling, this interest is not even rationally related to the restriction imposed: gay and lesbian couples can have children through surrogacy and artificial insemination. Moreover, many heterosexual couples either cannot or choose not to have children. In fact,

> *the prohibition on same-sex marriage may in fact discourage procreation; some same-sex couples may elect not to have children precisely because their relationship is not sanctioned by the state.* (98-100)

States also claim that prohibiting same-sex marriage encourages traditional values. This interest is:

> *nothing more than an appeal to eliminate diversity, an interest explicitly rejected by the Supreme Court. As Justice Blackmun has noted: [tjhe legitimacy of secular legislation depends...on whether the State can advance some justification beyond its conformity to religious doctrine.* (100)

Lastly, states claim that prohibiting same-sex marriage encourages societal and familial stability. It simply cannot be assumed, however, that gay men and lesbians cannot have relationships as committed and long-lasting as heterosexuals might.

> *The level of commitment in same-sex relationships may in fact be higher than that in heterosexual relationships, given the psychological, social, and legal obstacles that gay couples must overcome in order to stay together.* (100)

Moreover, who is to say that gay and lesbian couples cannot create stable, safe, healthy environments for their children?

Enforcing Heterosexuality

Why, then, do states dare to advance interests as unreasonable as those discussed above? Feminist writer Adrienne Rich argues that society has deemed heterosexuality compulsory. Society has deemed heterosexuality a social fact, and, she suggests, has tried to teach its constituents what is considered sexually "normal." (Rich 641) This standard of supposed sexual normalcy has been inflicted upon lesbians, for example, through overt violence, threats and discrimination. (638-39) States seem to feel that heterosexuality is indeed a social fact; thus, they will impose any passable "interest" in order that the status accorded to heterosexuality remain as such. State legislatures have helped to create and perpetuate the supposed social fact of heterosexuality:

As long as one member of a couple is preceived as male and the other is perceived as female, the guise of heterosexuality has been perpetuated, the states are satisfied, and the union of the partners is legitimized.

> *[a] nuance is added by litigation involving 'transsexuals' who have been held unable to contractmarriage before a sex change operation was performed...but whose marriage has been held valid if contracted after the operation.* (Krause 38)

If one partner of a gay couple, for example, undergoes surgery to look like a woman, the state will allow the couple to marry. According to the state's purported interest of encouraging procreation, however, this decision is irrational. The internal reproductive organs of the transsexual, after all, are not altered in such an operation. Procreation, as the state wrongly perceives it, would not be enhanced, since both members of the couple would still have male reproductive organs. The fact that states contradict their own purported interest shows that the courts and states are mainly interested in creating and perpetuating a view of the world as heterosexual. As long as one member of a couple is perceived as male and the other is perceived as female, the guise of heterosexuality has been perpetuated, the states are satisfied, and the union of the partners is legitimized.

Classifying Sexual Orientation

The equal protection clause does not prevent the states from classifying people into different groups when the classification bears a relation to the ability to perform or contribute to society. *(Reed)* People are classified on the basis of intelligence and physical ability, for example. It has been held that since these kinds of classifications can indeed bear a relation to how a person may perform or contribute to society, they are nonsuspect classifications. *(Frontiero* 646) Some classifications, however, are deemed suspect; that is, they bear little if no relation to the ability to perform or contribute to society. Race is a suspect classification, for example, while gender has been treated as semi-suspect. (Gunther 642) A suspect classification must endure a stricter test than does a nonsuspect classification. The former must not only bear a clear relation to the state's purported objective; the interest which calls upon such classification must also be **com**pellingly important, "with no less invasive means available" of satisfying the interest. (Thomas 71)

Unwittingly or not, the courts imply that sexual orientation bears some relation to a person's ability to perform or contribute to society.

Sexual orientation, however, has not achieved suspect classification status. *(Harvard* ed. 99) Thus, it must only pass the rational basis test in order to be used as a legitimate classification. Unwittingly or not, the courts imply that sexual orientation bears some relation to a person's ability to perform or contribute to society. Is this really the case, however?

The courts must raise sexual orientation to suspect status if prohibitions against same-sex marriage are to be lifted. In the midst of prohibition, homosexual couples have done what they can: "...gay men and lesbians have sought to adopt their partners in order to leave them property" under adult adoption plans. (116) Jurisdictions are beginning to change the rules, although slowly.

> *Berkeley, California has...passed domestic partner legislation giving gay couples the same rights to city benefits asmarriedcouples...* (Mohr 43)

Given that much homosexual conduct remains criminal (Krause 38), however, it may take a while before homosexual marriage is given serious consideration.

Conclusion

As has been shown, no clearly articulated constitutional justification exists for prohibiting gay and lesbian marriage. It must be assumed, then, that states and courts have engaged and continue to engage in their own moral prejudices, stigmatizing same-sex marriage as a threat to the supposed sexual normalcy of heterosexuality. Courts and legislatures should start accommodating the Constitution rather than their legally unsubstantiated values. Clearly, same-sex marriage is legally justifiable. The sooner this legal right is recognized, the better.

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Affirmative Action's Influence on the American Work Ethic

By Chris Tucker

In a large embassy outside the United States, a vacancy has occurredfor supervisor of the typing pool A civil service examination is administered to all interested in qualifying to fill the vacancy. The passing score on the exam is 70. The current clerical and secretarial staff of the embassy is overwhelmingly white, and of the fourteen supervisors only one is black and one of Asian descent. Of those eligible by reason of seniority and superior performance in their current positions, the top score is earned by a white woman—89. The next two scores are also achieved by a white woman—one 86 and one 83. A black woman earns a score of 79 and a Chinese man earns a score of 69.

The position will go to ...

(A) The white woman who scored highest, the 89

(B) Any one of the top three scorers, whomever the personnel officer likes best

(C) The black woman who scored 79

(D) The Chinese man who scored 69.

(Floyd 68)

If one were to believe that the United States government still rewarded hard work and achievement with awards and promotion then common sense would lead you to choose answer A. It is painfully obvious, however, that this is no longer the case. The appropriate answer is C. Yes, the black woman, although ranked fourth by test score, would receive the position solely because of her ethnicity or race.

As taken from a practice American Foreign Service Officer Examination, one of the many US civil service exams, this question exemplifies the influence that the affirmative action program has had on the performance of our government. Affirmative action was conceived during the Eisenhower administration with the express purpose of advancing members of under-privileged minorities toward leadership positions. Although the rationale behind this program is quite noble, what affect is it having on our nation as a whole? Prior to the conception of this program, our nation operated, ideally, with a policy of "advancement to the most deserving." Unfortunately racism and the nepotism of "old boy networks" were impurities in the system that needed to be eradicated. If the goal of the program's creators was to force-feed minorities into the establishment with total disregard to both level of qualification and the efficiency of the bureaucracy then, in effect, they were successful. But most would maintain that this was not the intention.

If the goal of [affirmative action's] creators was to force-feed minorities into the establishment with total disregard to both level of qualification and the efficiency of the bureaucracy then, in effect, they were successful.

Another motivating factor behind the implementation of affirmative action was the relatively small number of minority role models in high-level positions in corporate America and the government. Without such models, it was thought that there would be no motivation for any member of a minority group to aspire to reach such high plateaus in American society. The attempt to create ethnic role models was also clear through the admissions policies of many universities and colleges. But in actuality, does this social advancement program achieve its goals?

It has been found that racial discrimination lias not been reduced but rather shifted against the majority rather than the minority.

It has been found that racial discrimination has not been reduced but rather shifted against the majority rather than the minority. Just as this sample problem suggests, a person included under the 'white' or Caucasian racial heading could be passed up for promotion indefinitely even though he or she a quite clearly proved