Building up Families by Breaking down Marital Status as a Barrier to Adoption

By Leah Whetten-Goldstein

Introduction

In New York 1972, a forty-two-year-old unmarried woman petitioned to adopt an unrelated thirteen-month-old baby, known as Baby H.[1] In the case of *In Re Adoption of H.*, the New York state court stated that at thirteen months old, Baby H. was considered a "highly adoptable child."[2] The court was skeptical about an unmarried woman being a parent for such a highly adoptable child and emphasized that the joint responsibilities of a mother and a father are ideal for a child's physical, financial, and psychological security.[3] The court also stated that if Baby H. were adopted by the unmarried mother, the baby would suffer additional hardships in addition to the ones that any adoptive child would suffer.[4] The court was concerned that, not only would Baby H. suffer from being separated from her natural parents, she would also suffer the feeling of being "not even worthy of care in a normal family."[5] The court then contrasted the petitioner to a married couple, Mr. and Mrs. M., and emphasized that Mr. and Mrs. M. had been married for seven years.[6] In addition, the court liked that Mrs. M. stated she would immediately forego her work in order to care for Baby H.[7] Because of these differences, the court decided that it would be in the best interest of Baby H. to be in Mr. and Mrs. M.'s custody instead of the petitioner's.[8] Therefore, the court held that Baby H. would be granted to Mr. and Mrs. M. and denied the petitioner's petition for adopting Baby H.[9]

1. *In re* Adoption of H., 330 N.Y.S.2d 235, 238–39 (N.Y. Fam. Ct. 1972).
2. *Id.* at 245.
3. *See id.*
4. *Id.* at 246.
5. *See id.*
6. *Id.* at 247.
7. *Id.*
8. *See id.* at 247–48.
9. *Id.* at 248.

This case was decided in the 1970s, and in the interim, dramatic changes in legislation[10] and landmark constitutional cases[11] have broken down some barriers to adoption and attempted to give same-sex and unmarried couples status equal to married couples.[12] However, despite these changes in law, this Comment argues that discrimination persists against unmarried couples adopting children. It is not unusual for young, white, and healthy infants to be adopted by married couples and for children of color who are older or have special needs to be adopted by unmarried adults.[13] In fact, adoption statistics show that about twenty-five percent of special needs children adoptions are by single adults.[14] The disproportionate numbers of children with special needs being adopted by single parents restricts the types of families that unmarried adults can create. Many people, including our lawmakers and judges, subconsciously want to put these "ideal parents" with the "ideal children." In many instances, placing "ideal children" with "ideal parents" is considered under the court's "best interest of the child" analysis.[15] In fact, most cases where gay and lesbian parents are granted an adoption occur when the child has nowhere else to go.[16] This legal process further perpetuates and normalizes the image of a traditional family unit and sends the message that some people are not as worthy to be considered a family. As a result, children are being used as a "reward" for people who live a specific familial lifestyle. Barriers to adoption are barriers to the reproductive right to make a family. The implied assumption that the ideal parent is married prevents people from forming families on their own terms.

10. *See* discussion *infra* Section I.D.

11. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that the prohibition of certain private homosexual activities between consenting adults is unconstitutional); *see also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state's ban on the use of contraceptives violated the right to marital privacy).

12. *See* discussion *infra* Section III.

13. Molly Cooper, Note, *What Makes a Family? Addressing the Issue of Gay and Lesbian Adoption*, 42 FAM. CT. REV. 178, 1841 (2004).

14. *Id.*

15. Elizabeth P. Miller, DeBoer v. Schmidt *and* Twigg v. Mays*: Does the "Best Interests of the Child" Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 508 (1994) (stating that the best interest of the child standard focuses only on the needs of the child instead of the rights and needs of the parents or other authorities involved).

16. *See* Katherine Young, *The Supreme Judicial Court of Massachusetts Gives Unmarried Couples Standing to Petition to Adopt Children, but Is This Really an Endorsement of Non-Traditional Families?*, 2 SUFFOLK J. TRIAL & APP. ADVOC. 41, 56 (1997).

This Comment proceeds in three parts. Section I examines the current adoption law and process. Section II considers the problems that the current law creates, specifically the barriers it creates for unmarried adults seeking an adoption. Section III argues that these barriers conflict with the fundamental right of marriage. I conclude by suggesting that states' current adoption laws should be amended to add language specifically stating that a judge cannot take marital status into account when analyzing the best interests of a child in adoption cases.

I. Background

A. History of Regulating Families and Defining Parenting

The United States legal system's role in shaping what a family should look like is not a new concept—states play a huge role in determining the parent-child relationship in adoption.[17] This is because states have the power to decide whether the adopter is fit to be a parent and whether it is in the child's best interest to be adopted by the petitioning adult.[18] Five famous examples of our courts setting legal precedent on who can parent include: *Skinner v. Oklahoma*,[19] *Buck v. Bell*,[20] *Stanley v. Illinois*,[21] *Qullion v. Walcott*,[22] and *In re R.S.I.*[23]

One of the most extreme methods of regulating parenting in United States history is sterilization. In *Buck v. Bell*, the Supreme Court upheld the sterilization of a woman born out of wedlock because she was considered "feeble-minded."[24] But there is little evidence that Carrie Buck was unable to be self-sufficient or mentally impaired in any

17. *See* Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 308–09 (2006).

18. *Id.*

19. Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that laws permitting the compulsory sterilization of criminals are unconstitutional if the sterilization law treats similar crimes differently).

20. Buck v. Bell, 274 U.S. 200 (1927) (holding that a state statute permitting compulsory sterilization of the unfit, including the intellectually disabled, "for the protection and health of the state" did not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution).

21. Stanley v. Illinois, 405 U.S. 645 (1972) (holding that a father's marital status was not determinative of his fitness as a parent).

22. Quilloin v. Walcott, 434 U.S. 246 (1978) (holding that a biological father who had no relationship with his children could not assert a power of veto when it came to another adopting his children).

23. In re *I.R.S.*, 445 S.W.3d 616 (2014) (stating that incarceration can be used as a factor when determining parental rights).

24. *Buck*, 274 U.S. at 207.

way.[25] However, not only was she born out of wedlock, she give birth out of wedlock as well.[26] The Court rationalized her sterilization by stating that "feeble-minded" people were harmful to the country's economy and resources.[27] In fact, the Court suggested that it was doing Carrie a favor because these types of "feeble-minded" people would not be able to take care of themselves, let alone a child, and sterilization would reduce their struggle to survive.[28] According to the Court, "three generations of imbeciles are enough."[29] While *Buck v. Bell* has never been overturned, sterilization practices themselves have since then been viewed by society as unjust and an infringement on a person's liberty and privacy.[30] As a result, compulsory sterilization is no longer legal.[31]

After forced sterilization laws grew less popular,[32] the Supreme Court continued regulating the composition of families by defining who is a parent and who gets the rights and responsibilities of a parent.[33] In *Stanley v. Illinois*, Peter Stanley never married, but he lived and had children with his partner.[34] In 1972, an Illinois statute stated that if a mother and father were unmarried, the father would automatically lose his rights to his children once the biological mother died.[35] After Stanley's partner died, Stanley's children were taken from him and forced into the foster care system.[36] The Illinois Supreme Court upheld this statute, reasoning that it was important because single fathers usually have a hard time raising a child appropriately by themselves.[37] However, this statute was struck down by the United States Supreme Court[38] as being over-inclusive because, while some bad fathers may be unmarried, not all unmarried fathers

25. MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 870 (Robert C. Clark et al. eds., 1st ed. 2015).

26. *Id.*

27. *Id.* at 207.

28. *Id.*

29. *Id.*

30. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L. J. 806, 811 (1986).

31. *Id.*

32. Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 U. LOUISVILLE J. FAM. L. 311, 315–17 (1996).

33. *See* MURRAY & LUKER, *supra* note 25, at 268 (introducing three Supreme Court cases discussing who is a parent: *Stanley v. Illinois*, 405 U.S. 645 (1972), *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Lehr v. Robertson*, 463 U.S. 248 (1983)).

34. *Stanley*, 405 U.S. at 646.

35. *Id.* at 645.

36. *Id.*

37. *Id.* at 647.

38. *Id.* at 659.

are bad fathers.[39] It stated that maintaining a family has a higher value than speed and efficiency in the court system.[40]

The United States Supreme Court continued to define parenting in *Quilloin v. Walcott*.[41] In *Quilloin*, Leon Webster Quilloin filed to gain visitation rights to his biological child and to block the adoption of his biological child from the child's step father,[42] but his request was denied.[43] Like in *Stanley*, Mr. Quillon was not married to the child's biological mother.[44] Yet, unlike Mr. Stanley, he did not see or support his child on a regular basis.[45] Also, Quilloin did not petition for these rights until someone else submitted an adoption petition eleven years after the child was born,[46] which the Supreme Court found showed Quilloin's lack of commitment.[47] In the end, the Supreme Court upheld the lower court's conclusion that Quilloin was unable to prove a parent-child relationship with the child and denied the adoption.[48] In supporting its decision, the Court emphasized that legal custody is a "central aspect of the marital relationship" and held that a man who later becomes divorced bears full responsibility for his child.[49] Yet, if a man has a child out of wedlock, he does not automatically have those responsibilities.[50] This contrast emphasizes the importance the Court places on marriage when it comes to deciding parental rights, again reinforcing the United States' focus on the importance of marriage.

The history of the Court determining who is able to parent also extends to a person's criminal record.[51] In *In re R.I.S.*, C.S. was a married father, but the mother made a request for the children to be placed in a temporary foster home after he was incarcerated.[52] Once in foster care, the York County Children and Youth Services petitioned to change reunification to adoption and terminate the birth parent's parental rights.[53] C.S. appealed and petitioned to keep his

39. *Id.* at 654.
40. *Id.* at 658.
41. Quilloin v. Walcott, 434 U.S. 246, 247 (1978).
42. *Id.* at 247.
43. *Id.* at 256.
44. *Id.* at 252–53.
45. *Id.* at 246.
46. *Id.* at 249.
47. *Id.*
48. *Id.* at 256.
49. *Id.*
50. *Id.*
51. *In re* R.I.S., 36 A.3d 567, 572 (Pa. 2011).
52. *Id.* at 569.
53. *Id.*

paternity rights over his children.[54] The Supreme Court ruled that incarceration can never serve as grounds for terminating paternity alone.[55] However, courts should consider a stable upbringing when analyzing the best interest of the child. In other words, a person's criminal history does not automatically terminate their parental rights, but it can be used as a factor in weighing what is best for the child and determining a person' right to parent, which thereby serves as an indirect barrier to parental rights.

Factors like marital status, discussed in the section below, have been used by courts to determine which adults should become parents. For example, the cases discussed in Section II demonstrate the general preference to give children to married couples. For the married parent to be granted adoption of the child, the court must say it is in the child's best interest to be placed with a married couple. Therefore, there is a focus on the positive things a married couple could provide for a child to make the child have an easier life, like individual attention and multiple positive role models. Although it seems obvious that a child should have the most support possible to succeed, these characteristics in a person do not determine their ability to parent or provide a happy and healthy life for a child. As a result, nontraditional families, including unmarried adults, often encounter barriers and biases during the adoption process.

B. Adoption Law and Process

Adoption laws differ by state and are primarily statutory.[56] Despite each state's ability to have their own unique adoption laws, many adoption requirements are similar throughout the United States.

Age is a shared criterion among most states, where a person must be at least eighteen or twenty-one years old to adopt.[57] There are a few variations on the age requirement. For example, in Georgia and Idaho, a person must be at least twenty-five years old to adopt.[58] In California, Georgia, Nevada, New Jersey, South Dakota, Utah, Idaho, and Puerto Rico, the petitioning adoptive parent must also be ten to fifteen years older than the child they are adopting.[59]

54. *Id.*
55. *Id.* at 574–75.
56. Mary Kate Kearney & Arrielle Millstein, Article, *Meeting the Challenges of Adoption in an Internet Age*, 41 CAP. U. L. REV. 237, 243–44 (2013).
57. *Id.* at 246.
58. *Id.*
59. *Id.*

Seventeen states require that the adoptive parent reside in that state for sixty days to a year prior to petitioning for adoption.[60] South Carolina and Indiana have exceptions that allow non-residents to adopt children with special needs.[61] Other states like Mississippi, New Mexico, Illinois, and Rhode Island have a rule that non-residents can adopt a child in their state if done through an adoption agency that is a resident of that state.[62] This illustrates how detailed rules in the adoption process have the potential to block a person from adopting a child and building a family. Adoption regulations and requirements are important to safeguard children, but the more of them there are, the more exclusive the adoption process becomes.

Another requirement common to all states is that all prospective adoptive parents must complete a home study.[63] Home studies can vary, but they all consist of meetings between the adoption agency, social worker, and prospective adoptive parent.[64] The purpose of the home study is to make sure that the child will be adopted into a home and family that is "equipped" to raise the child.[65] The home study takes place in the prospective parent's house and typically requires the prospective parent to supply birth certificates, a marriage license, personal references, and a child abuse clearance.[66] When trying to determine if a person is equipped to parent a child, many norms relating to "what a family should look like" cross over into "what is good for a child," such as mental health, job status, marital status, and sexuality. There is an assumption in our society that a "normal" family is a nuclear family that consists of a married couple with biological children.[67] In the intimate nuclear family, there is an underlying assumption that children should have a mother to raise them and a father to financially provide for them.[68] Even in professional literature, a "traditional" family is often referred to as the normal and best-functioning way to have a family.[69] But current historical, psychological, and sociological studies do not support the notion that the traditional family is

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 248.
64. *Id.*
65. *Id.*
66. *Id.* at 249.
67. Silvia Sara Canetto, *What Is a Normal Family? Common Assumptions and Current Evidence*, 17 J. PRIMARY PREVENTION 31, 32 (1996).
68. *Id.*
69. *Id.*

the most "healthy" family dynamic.[70] Despite studies saying otherwise, the idea that the best family is a "normal family" still exists today and tends to be a major hurdle for nontraditional families.[71] As a result, these home studies often favor a specific type of couple—those who are healthy, young, and married.

For example, in *Bernhardt v. Lutheran Social Services of Nat. Capital Area, Inc.*,[72] the Court of Special Appeals of Maryland upheld the withdrawal of an adoption because the social worker reported that the couple was also seeking a divorce.[73] Originally, the appellant and her husband applied to adopt a child through Lutheran Social Services on May 28, 1974, and an infant girl, Deborah, was placed with them on March 11, 1976.[74] On May 11, 1976, a social worker made a site visit and found the couple and their home environment satisfactory for raising a child.[75] However, a month later, the social worker discovered that the couple was having marital difficulties and had been separated for a number of months.[76] In late October 1976, the social worker sent a second report recommending that Deborah be removed from the Bernhardt home.[77] After hearing this report and the change of marital status, on December 2, 1976, Lutheran Social Services ordered that the child be immediately removed from the appellant, but the appellant and her ex-husband refused.[78] The court denied Bernhardt's petition for custody but ordered the child to remain in Bernhardt's custody pending appeal.[79] At trial, the court reasoned that even though removal of Deborah would cause distress to the family, the appellant was not without fault because she failed to communicate her marital difficulties and change of marital status to the local adoption agency.[80] This decision further exemplified the court's emphasis of marital status in adoption cases and how it can create a barrier to adoption.

70. *Id.* at 31.

71. *Id.*

72. *See* Bernhardt v. Lutheran Soc. Servs. of the Nat'l Capital Area, Inc., 385 A.2d 1197 (Md. Ct. Spec. App. 1978) (upholding the withdrawal of an adoption due to divorce).

73. *Id.* at 1199.

74. *Id.* at 1198.

75. *Id.* at 1199.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1201–02.

Before a state court can finalize an adoption, the adoptive child must live with the adoptive parents for six months.[81] After those six months, the adoption agency still has the right to remove the child if it determines it is in the child's best interest to do so.[82] In the end, the adoption process is long and involves many steps. While this process is created to help give children stable homes, it also shapes and regulates what a family should look like.

C. Breaking down the Marital Status Barrier Through Same-Sex Marriage

Because most same-sex couples could not marry in the United States until 2015, there remains a huge overlap between adoption barriers based on sexuality and marital status.[83]

In *In re Adoption of Charles B*,[84] Mr. B. was allowed to adopt Charles even though he was unmarried and living with another man. Mr. B. was Charles's psychological counselor and received permission from the Department of Human Services to take Charles home with him for several weekends.[85] Later, Mr. B. petitioned to adopt Charles.[86] The trial court found that it was in the best interest of Charles for Mr. B. to adopt him, but the appellate court reversed the judgment and prevented the adoption.[87] However, what is most notable about the decision is the dissent, which stated that this case was not truly about marital status, but rather was about Mr. B.'s sexuality as a gay man.[88] While the dissenting opinion clearly confirmed that it should not be illegal for homosexuals to adopt, it also stated the burden of proving that their sexuality will not have an "adverse effect" on the child should be on the homosexual petitioner.[89] The dissent demonstrates the overlap between marriage and sexuality. Until recently, same-sex couples were not allowed to get married in the United States. Before *Obergefell v. Hodges* in 2015, most states prohibited same-sex marriage.[90] Because of this, many gay adults who wanted to adopt had to adopt their children as single parents.

81. *Id.* at 1199.
82. *Id.*
83. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).
84. *In re* Adoption of Charles B., 552 N.E.2d 884, 885 (Ohio 1990).
85. *Id.* at 884.
86. *Id.*
87. *Id.*
88. *Id.* at 890.
89. *Id.*
90. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

Historically, homophobia was so pronounced that society felt that same-sex couples were even a danger to children.[91] It was commonly believed that same-sex couples, specifically men, were immoral pedophiles who would sexually molest children if they were allowed to adopt them.[92] This fear shaped adoption laws across the country.[93] In 1977, Florida became the first state to pass a statute prohibiting same-sex couples from adopting, stating that "no homosexual may adopt"—this statute was not struck down until 2008.[94] Utah also enacted a law that allowed single adults to adopt, but it prohibited unmarried co-habiting couples from adopting.[95] This law disproportionately affected gay couples as gay marriage was illegal in Utah at that time.[96]

Notwithstanding these fears, there is no link between a person's sexual orientation and their ability to successfully parent. In response to these fears, many studies were later published showing that sexuality did not correlate in any way to child molestation or the ability to be a good parent.[97] If anything, due to the heightened requirements that same-sex couples had to go through to be granted adoption, traditional education and social skills markers for children raised by same-sex parents were higher than children raised by different-sex couples.[98]

A 2019 study in Australia found that children raised by same-sex couples had higher test scores and were seven percent more likely to graduate from high school than children raised by different-sex couples.[99] This study also found that children raised by same-sex couples performed higher on standardized tests and were 6.7% more likely to graduate college.[100] One explanation for these outcomes is that same-sex parents are often wealthier, older, and more educated than different-sex parents.[101]

91. Cooper, *supra* note 13, at 184.

92. *Id.*

93. *Id.* at 185.

94. FLA. STAT. ANN. § 63.042(3) (West 2015).

95. UTAH CODE ANN. § 78B-6-117 (West 2019).

96. UTAH CODE ANN. §§ 30-1-4.5, 30-1-8 (West 2019).

97. Cooper, *supra* note 13, at 186.

98. *Id.* at 185–86.

99. Heather Long, *Children Raised by Same-Sex Couples Do Better in School, New Study Finds*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/business/2019/02/06/children-raised-by-same-sex-couples-do-better-school-new-study-finds/?noredirect=on&utm_term=.03d3d0687cc5 [https://perma.cc/D2TF-J6SR].

100. *Id.*

101. *Id.*

The Washington Post compared the 2019 Australian study to a 2014 study from the Netherlands.[102] The Netherlands study showed that children of same-sex couples tended to be happier and healthier than their peers raised by opposite-sex couples.[103] The 2014 study found that it was liberating for parents to take on roles that suited their skills rather than defaulting to gender stereotypes, and that this created a happier and healthier home environment.[104]

These two studies were not outliers. Cornell University found that between 1980 and 2016 there were seventy-five studies concluding that children raised by same-sex couples were no worse off than other children, and that only four studies concluded they were at a disadvantage.[105] Also, the studies that concluded children of same-sex couples were at a disadvantage examined samples of children with divorced parents and other traumatic childhood events.[106] Alternatively, the 2019 Australian study successfully controlled the variable of divorce, which has been shown to have a negative impact on children's school performance regardless of their parent's sexual orientation.[107]

Since same-sex couples were not able to get married until recently, much of the emphasis in adoption law on marriage as a criteria to adoption was entangled with homophobia. This was another way that adoption laws were catering to one specific type of family—one that did not have unmarried or gay parents. These studies reflect the change in society toward accepting same-sex couples. As society has become more progressive, marriage laws have changed and become more tolerant of same-sex couples. Giving same-sex couples the right to marry broke down one barrier for families to adopt.

D. Current Adoption Laws

Today, most states have specific language in their state constitutions or statutes allowing a single parent to adopt.[108] For example, the

102. *Id.*

103. *Id.*

104. Lindsey Bever, *Children of Same-Sex Couples Are Happier and Healthier than Peers, Research Shows*, WASH. POST (July 7, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/07/07/children-of-same-sex-couples-are-happier-and-healthier-than-peers-research-shows/?utm_term=.E69c36f3c35d [https://perma.cc/2GLK-YKRK].

105. *What Does the Scholarly Research Say About the Well-Being of Children with Gay or Lesbian Parents?*, CORNELL U.: WHAT WE KNOW PROJECT, https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/ [https://perma.cc/6QRU-8KEC].

106. *Id.*

107. Long, *supra* note 99.

108. Cooper, *supra* note 13, at 183.

Arizona Constitution states: "An adult . . . whether married, unmarried or legally separated, is eligible to qualify to adopt a child."[109] Arkansas has a statute that simply lists "an unmarried adult" under the list of those "who can adopt."[110] New Hampshire similarly includes unmarried adults in its adoption statute.[111] Massachusetts simply states that a citizen of that state who is of age is able to adopt and excludes any language of marital status.[112]

Ambiguous statutes can be problematic for unmarried adults because courts tend to lean on the side of disfavoring the unmarried adult in an adoption case.[113] Even when the law is not ambiguous and specifically states that an unmarried adult is able to adopt, there have been instances where state supreme courts have reversed appellate decisions denying unmarried persons' petitions to adopt.[114] For example, in *In re Adoption of Charles B.*, the court of appeals denied Mr. B.'s petition to adopt.[115] The case went to the Supreme Court of Ohio, where the court stated, "Mr. B is included within R.C. 3107.03(B) and is, therefore, statutorily permitted to adopt."[116] As a result, the court enforced Ohio's adoption laws and made it clear that a person is able to adopt in Ohio even if that person is unmarried.[117] However, even when laws specifically give unmarried adults the right to adopt, the ability to adopt does not create a guarantee.[118] As shown in the cases in Section II.D, trial courts tend to find that placement with unmarried adults is not in the best interest of a child.

II. Problems with the Current Law

A. Using the Best Interest of the Child Standard to Reinforce Normative Values

When determining child custody, courts use the best interest of the child standard. When applying the best interest of the child standard, courts sometimes use the eleven *Albrite* factors: (1) the health, age, and sex of the child, (2) the determination of the parent who had continuous care prior to the separation, (3) which parent has the

109. ARIZ. REV. STAT. ANN. § 8-103 (2016).
110. ARK. CODE ANN. § 9-9-204 (West 2019).
111. N.H. REV. STAT. ANN. § 170-B:4 (2019).
112. MASS. GEN. LAWS ANN. ch. 210, § 1 (West 2019).
113. *See In re* Adoption of H., 330 N.Y.S.2d 235, 242 (N.Y. Fam. Ct. 1972).
114. *See, e.g.*, *In re* Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990).
115. *Id.* at 885.
116. *Id.* at 886.
117. *Id.*
118. *Id.*

best parenting skills and the willingness and capacity to provide primary child care, (4) the employment of the parent and responsibilities of the employment, (5) the physical and mental health and age of the parents, (6) the emotional ties between the parent and child, (7) the moral fitness of the parents, (8) the home, school, and community record of the child, (9) the preference of the child, (10) the stability of home environment and employment of each parent, and (11) other factors relevant to the parent-child relationship.[119] The final *Albrite* factor vests the judge with huge discretion as it permits the judge to use any factors the judge deems relevant in determining the best interest of the child.[120] The discretionary best interests of the child standard is applied by the courts in adoption and custody cases—according to this standard, courts make decisions based on what would be the "child's greatest benefit."[121] Courts tend to look at factors like parenting ability, consistency, and the child's safety, but this is not an exhaustive list.[122] Instead, this standard allows courts to make a holistic and individualized judgment when looking at each child's circumstances, but it can also be a barrier for unmarried people who seek to pursue adoption because it gives the court authority to disproportionately weigh factors like sexual orientation, lack of biological connection, and marital status.[123] As a result of this discretion, traditional family values tend to be reinforced when judges arbitrarily inject their own normative family views.[124]

Yet, even putting social stigma aside, nontraditional families are still currently at a disadvantage under the best interest of the child test.[125] This is because society has already accepted that the traditional, nuclear family relationship is in the best interest of the child.[126] In contrast, nontraditional families are at a disadvantage because they do not have the privilege of that presumption. Moreover, nontraditional families must face stigmas that do not affect traditional families, like the stigma of being a less-functional family.[127]

119. JUDITH AREEN, MARC SPINDELMAN, & PHILMILA TSOUKALA, FAMILY LAW: CASES AND MATERIALS 866 (Robert C. Clark et al. eds. 6th ed. 2012).

120. *Id.*

121. *Best Interest of the Child*, BLACK'S LAW DICTIONARY (11th ed. 2019).

122. Jennifer Wolf, *What the Child's Best Interest Standard Means in Custody Cases*, VERYWELL FAMILY (last updated Aug. 3, 2019), https://www.verywellfamily.com/best-interests-of-the-child-standard-overview-2997765 [https://perma.cc/2YT5-2UPA].

123. *See* Young, *supra* note 16, at 55.

124. Miller, *supra* note 15, at 513.

125. *See id.* at 57.

126. *Id.*

127. Canetto, *supra* note 67, at 31–32; Young, *supra* note 16, at 46–47 n.28.

Because of this discretionary best interest of the child standard, only two percent of adoptions are granted to unmarried couples.[128] In contrast, adoptions involving married couples amount to seventy percent of accounted adoptions.[129] This is because, while adoption laws will recognize nontraditional families' right to adopt, adoption agencies and judges show preference toward traditional families[130] due to the unsupported belief that a traditional family is the most stable environment for a child—in other words, a traditional family is in the child's best interest.[131]

These statistics show a disproportionate denial of adoption for people who are unmarried. If the best interest of the child standard continues to be this discretionary, the cycle of unmarried couples being disproportionately denied adoption will continue. Denying unmarried couples adoption because of negative bias simply prevents a specific group of people from forming a family on their own terms. This ends up creating a barrier for single adults to have children and a way to control families.

Rather than a discretionary standard leaving room for courts to continue supporting traditional family values,[132] the best interest of the child test should be factually specific and focused on only the adoptive parent's ability to provide a happy and healthy life for the child without taking into consideration the adoptive parent's sexuality, marital status, or other nontraditional family factors.[133]

B. Lack of Correlation Between Marital Status and Successful Parenting

Similar to the conspiracies on homosexuality, there is no correlation between marital status and parenting ability.[134] Children of single parents do not score differently on scales measuring self-esteem, social relationship competency, extracurricular activity, school performance, or health.[135] In fact, children raised by single parents on average often have more friends than their peers who are raised by married

128. Jessica R. Feinberg, Article, *Friends as Co-Parents*, 43 U.S.F. L. Rev. 799, 809 (2009).
129. *Id.*
130. *Id.* at 808.
131. *Id.* at 810–11.
132. *Id.* at 810.
133. *Id.*
134. *Id.* at 815.
135. Dominic Schmuck, *Single Parenting: Fewer Negative Effects of Children's Behaviors than Claimed,* 18 Mod. Psychol. Stud. 118 (2013).

couples.[136] This is because children raised by single parents rely on support outside of their nuclear family and are able to get that support through other avenues, such as friendships.[137] While it is true that multiple loving adults in a child's life will provide more support than only one adult, children are able to find that support through extended family members and friends. As a result, children raised by single parents are ultimately just as healthy and happy as those raised by married couples.[138]

While some studies have concluded that children raised by single parents tend to have negative behavioral issues, these studies were conducted disproportionately with children experiencing traumatic events in their early childhood.[139] A study that specifically used only children without early traumatic experiences found that there was no significant difference in negative behaviors of children raised by single parents compared to their peers who were raised by married couples.[140]

Furthermore, the Institute for Fiscal Studies examined the data of 10,000 three-year-old and five-year-old children.[141] The study found no developmental differences between children born to married parents and children born to unmarried parents.[142] The researchers also used data from the children's parents' own childhoods.[143] They later concluded that there were no developmental differences between being raised by married or unmarried parents.[144] This shows that there is no significance between a person's marital status and their ability to raise a child successfully.

C. Denial of Single Parent Adoption

As the statistics previously discussed show, single parent adoptions are being denied.[145] In the courts, the petitioning adult's marital status is a common factor. Usually the denied adult petitioning to

136. *Id.*
137. *Id.*
138. *Id.* at 119.
139. *Id.*
140. *Id.*
141. *Improving Social Well-Being Through Education, Research and Innovation*, NUFFIELD FOUND., https://www.nuffieldfoundation.org/child-development-and-marital-status [https://perma.cc/Y5QK-CCZU].
142. *Id.*
143. *Id.*
144. *Id.*
145. Feinberg, *supra* note 128, at 809.

adopt was unmarried or became unmarried during the adoption process.[146]

Even though other factors are used to justify the denial of an adoption petition, a person's marital status is heavily weighed when the court decides the ability of the petitioner to parent.[147]

Currently, all fifty states allow a single parent to adopt a child.[148] However, as previously discussed, that does not mean that everyone gets a fair opportunity for adoption—many unmarried adults have their adoption applications denied, especially if there is a married couple who also wants to adopt the same child or the child is seen as highly adoptable.[149]

For example, in *Van Kleek v. State Public Welfare Comm'n*,[150] a child was born out of wedlock, and his natural mother placed him with the petitioner and wife at the time, Lorayne.[151] Lorayne was arrested for intoxication four times, hospitalized twice, left the boy in a locked car on three different occasions, and left him in a hotel lobby once.[152] The petitioner later divorced Lorayne after the boy suffered burns while cooking under her care.[153] While the divorce was pending, the state decided that the legal care of the boy would go to the petitioner's brother and sister-in-law.[154] However, the state still let the boy reside in the petitioner's home and allowed the petitioner to provide physical care for the boy while in foster care.[155] While in foster care, the petitioner continued his relationship with the boy and received permission to visit him in his foster home once a month.[156] The petitioner wanted to adopt the boy as his son.[157] He showed he could care for the child by keeping a constant positive relationship with the boy, divorcing his wife after seeing that she was dangerous to the boy, and claiming that he would hire a housekeeper to aid him so he would be

146. David B. Harrison, Annotation, *Marital Status of Prospective Adopting Parents as Factor in Adoption Proceedings,* 2 A.L.R.4TH 555 (1980).

147. Feinberg, *supra* note 128, at 808.

148. *Id.* at 805–06.

149. *Id.* at 808.

150. Van Kleek v. State Pub. Welfare Comm'n, 450 P.2d 549 (Or. 1969) (denying parental rights even after raising the child).

151. *Id.* at 550.

152. *Id.*

153. *Id.* at 499–500.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

able to properly father the boy by himself.[158] However, the court ruled that because he was a single man in a trailer house, he would be unable to provide a stable home for the child.[159]

In *Matter of Kelley's Adoption*,[160] the Court of Appeals of Oregon also ruled that it was in a child's best interest to live with a married couple rather than the petitioner who had a history with the child.[161] Anthony Kelley was born in Dallas, Texas out of wedlock, and his natural mother placed him with his aunt, Daisy Dillard, while also signing consent for the child's aunt to adopt Anthony.[162] After Anthony's natural mother died, Mrs. Dillard petitioned for Anthony's adoption, and later Anthony's grandfather and step grandmother petitioned to adopt Anthony as well.[163] Mrs. Dillard had already raised eight children, and it was undisputed that she was a good parent to Anthony.[164] Yet, the court granted the adoption to the married couple even though they did not have a parent-child relationship with Anthony.[165] This ruling was supported by a child services division report stating that the married couple was best for the child because they were younger and Anthony would have two parents.[166] The court reasoned that a marriage of almost twenty years helped to show a stable, healthy, and happy household.[167] The judge even admitted that he had nothing against Mrs. Dillard, but emphasized the importance of a two-parent home and having a father-figure for the boy.[168] In short, the decision was rationalized by the parties' marital status and the idea that a child is best with a mother and a father.[169]

In *Ross v. Department of Health & Rehabilitative Services*,[170] the appellant, a widow, petitioned to adopt a seventeen-month-old child but was denied. At the time, the appellant had been the child's foster parent since the child was twelve days old.[171] However, despite the testi-

158. *Id.* at 551.
159. *Id.*
160. *In re* Adoption of Kelley, 541 P.2d 1304 (Or. Ct. App. 1975) (deciding a married couple was in the child's best interest).
161. *See id.* at 1306.
162. *Id.* at 1304.
163. *Id.*
164. *Id.* at 1305.
165. *Id.* at 1306.
166. *Id.* at 1305.
167. *Id.*
168. *Id.* at 1306.
169. *Id.*
170. Ross v. Dep't of Health & Rehab. Servs., 347 So. 2d 753, 754 (Fla. Dist. Ct. App. 1977).
171. *Id.*

mony that the child could possibly suffer psychological damage as a result of the separation, the court ruled that the appellant's marital status, combined with her age, made placement with her not in the best interest of the child.[172]

These cases create a standing precedent that supports granting adoption to married couples over single parents. In both liberal and conservative states, courts have found marital status an important factor in deciding what is best for the child, and these holdings have not been overruled.[173] As a result, a legally maintained parental hierarchy remains, despite success in statutes breaking down barriers and despite studies showing the success of single-parent adoption. Returning again to the case of *Baby H.*, the court in *Baby H.* described the infant as a "highly adoptable" because the infant was only thirteen months old.[174] In the end, Baby H. was given to a young, wealthy married couple.[175] Distinguishably, in the majority opinion of baby *Charles B.*, the court said that due to Charles's various issues (leukemia, low IQ, speech problems, and brain damage due to fetal alcohol syndrome), he was a "less adoptable" child compared to other children his age.[176] Baby Charles B., unlike Baby H., was allowed to be adopted by the single father who was treating him for trauma.[177]

III. Conflict Between Barriers to Adoption and the Fundamental Right of Marriage

A. Evolution of the Fundamental Right of Marriage

Denying or making it harder for a person to adopt because of their marital status is unjust because there is no correlation between marital status and successful parenting. Since a person has the right to choose to be married or to be single, hindering a person's ability to have a child based of their marital status also infringes on their fundamental right to be (or not be) married. In short, using a person's marital status as a barrier to adoption creates a conflict that "significantly burdens non-marital relationships and acts of sexual intimacy between adults because it forces them to choose between becoming a

172. *Id.*
173. Feinberg, *supra* note 128, at 808.
174. *In re* Adoption of H., 330 N.Y.S.2d 235, 245 (N.Y. Fam. Ct. 1972).
175. *Id.* at 248.
176. *In re* Adoption of Charles B., 552 N.E.2d 844, 884–85 (Ohio 1990).
177. *Id.* at 890.

parent and having any meaningful type of intimate relationship outside of marriage."[178]

One case that implemented a new protective standard and demonstrates the overlap of the right to marry and the right to have children is *Arkansas Dep't of Human Services v. Cole*.[179] Before the court's decision, Arkansas passed the Arkansas Adoption and Foster Care Act of 2008 ("Act 1") with a fifty-seven percent approval from Arkansas voters.[180] This law prohibited anyone living with their partner, but not married, from adopting a child or being a foster parent.[181] In 2011, the Supreme Court of Arkansas ruled that the new law was unconstitutional because it was a "violation of fundamental privacy rights."[182] In other words, the court clarified that the right to create a family (get married or have children) is constitutionally protected under the right to privacy and therefore it cannot be infringed. The court stated that the policy behind Act 1—to keep children away from home of unmarried cohabitation—in part served *against* the best interest of the child.[183] The court further noted that Act 1 was also not narrowly tailored enough to meet strict scrutiny.[184] The law was overly broad because, while in some scenarios it might help a child to be raised in an ideal home, it also prevented children from becoming part of loving and healthy families.[185] As a result of upholding single parent adoption, this decision demonstrates how imposing marital status as a barrier to adoption puts a strain on both the right to marry and the right to have children.

As seen in *Arkansas Dep't of Human Services v. Cole*, the right to marry is an implied right under the right to privacy.[186] Under the right to privacy, the United States Constitution implicitly guarantees individuals the right to marry any individual regardless of race, social status, or sexual orientation.[187] The history of forming the constitutional right to marriage can be divided into four periods of time: (1)

178. Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 433 (Ark. 2011) (upholding single parent adoption).

179. *Id.* at 429.

180. *Id.* at 431.

181. *Id.*

182. *Id.*

183. *Id.* at 443.

184. *Id.*

185. *Id.* at 442.

186. McLaurine H. Zentner, Comment, *Keeping "I Do" Between Two: A Post-Obergefell Analysis of Bigamous Marriage and Its Implications for Louisiana's Matrimonial Regime*, 78 La. L. Rev. 335, 342 (2017).

187. *Id.* at 341.

Pre-*Meyer*,[188] (2) *Meyer*,[189] (3) *Loving*, and (4) post-*Loving*.[190] Originally, the United States Supreme Court did not refer to the right to marry as a basic, fundamental, or presumed constitutional right.[191] However, the Supreme Court did mention "the right of marriage" and "right to marry" in almost three dozen cases before it officially held there to be a fundamental right.[192]

In general, these early cases established that history and tradition are touchstones for defining the constitutional scope of legislative restrictions on marriage and emphasized the societal importance of the right to marry. The cases also established the need for legislative marriage regulations and the strong presumption that the legislature does not intend to eliminate traditional acts of the institution of marriage.[193] Between 1923 and 1966, cases involving the right to marry often emerged in the context of divorce and established the right to marry as part of the private realm of family life, which the state cannot enter.[194] The next major development in the right to marry was *Skinner v. Oklahoma*,[195] where the Supreme Court noted: "Marriage and procreation are fundamental to the very existence and survival of the race." This case is relevant because it linked the right to marry and procreation,[196] which later paved the way for *Griswold v. Connecticut*.[197] Although the Supreme Court in *Griswold* reaffirmed several important right to marry doctrines,[198] the most important for our purposes was the linkage between marriage and child-rearing.[199] These cases connected the right to have and raise children as an important part of this right to marriage.

Still, none of these cases officially declared a fundamental, constitutional right to marry until *Loving v. Virginia*,[200] where the Supreme

188. Meister v. Moore, 96 U.S. 76 (1877) (emphasizing marriage as an important right and a societal interest).

189. Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that there is an unwritten constitutional right to marry).

190. Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790-1990*, 41 How. L.J. 289, 291 (1998).

191. *Id.*

192. *Id.*

193. *Id.* at 297.

194. *Id.* at 298–99. The right to marry was not directly discussed by the Supreme Court, but the Supreme Court still influenced the right to marry.

195. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

196. Wardle, *supra* note 190, at 300.

197. Griswold v. Connecticut, 381 U.S. 479 (1965).

198. Wardle, *supra* note 190, at 301.

199. *Id.*

200. Loving v. Virginia, 388 U.S. 1, 12 (1967).

Court held that the right to marry was constitutionally protected by the Fourteenth Amendment. In *Loving*, two Virginian residents of different races were married in the District of Columbia.[201] After the couple married, they were charged with violating Virginia's ban on interracial marriages.[202] The couple pleaded guilty, but the trial judge suspended their sentence on the condition that the interracial couple leave and never return to Virginia together.[203] The judge reasoned that God created separate races and did not want them to mix.[204] The couple then moved to the District of Columbia and challenged Virginia's law against interracial marriages under the Fourteenth Amendment.[205] The Supreme Court found that, because Virginia only prohibited interracial marriages involving white persons, the law violated the Equal Protection Clause and was "designed to maintain White Supremacy."[206] The Court also stated that the freedom to marry was a vital personal right and quoted *Skinner* in noting that marriage is "fundamental to our very existence and survival."[207]

The right to marry was expanded to same-sex couples with the help of *Lawrence v. Texas*[208] and *Obergefell v. Hodges*.[209] In *Lawrence*, the Supreme Court struck down a law that criminalized consensual sexual activity between two consenting adults of the same sex.[210] The Court held that an individual has a right to engage in intimate and consensual sexual conduct under the Due Process Clause of the Fourteenth Amendment.[211] Scholars of *Lawrence v. Texas* say that these anti-sodomy laws were formed by an interest in promoting procreative sex.[212] Thus, this new decision implied the recognition of a fundamental right to privacy.[213] Protecting all acts of intimacy under the right to privacy and extending the protection to same-sex couples helped pave the way for the Court in *Obergefell* to hold that the fundamental right of marriage extended to marriage of same-sex couples.[214] In *Obergefell*,

201. *Id.* at 2.
202. *Id.* at 2–3.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 11.
207. *Id.* at 12.
208. Lawrence v. Texas, 539 U.S. 558 (2003) (holding unconstitutional a statute criminalizing sodomy).
209. Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (legalizing same-sex marriage).
210. Zentner, *supra* note 186, at 342.
211. *Id.*
212. MURRAY & LUKER, *supra* note 25, at 6.
213. *Id.* at 66–67.
214. *Id.* at 67.

Justice Kennedy wrote that marriage is inherent in individual autonomy, supports a two-person union unlike any other, safeguards children and families, and is the keystone for the social order of our country[215]—once again restating the importance of marriage in this country.

It is unjust to make a person give up a fundamental right, such as the right to marry, to gain a privilege, such as adoption. Yet this is what happens when courts use marital status when considering the best interest of the child.

B. Solution

Current adoption barriers, including marital status, limit a person's autonomy in choosing how to have a family. Reproductive rights include a person's right to choose the number, spacing, and timing of children, and the right to access to the information and tools to create the autonomy to make those choices.[216] Reproductive justice occurs when people are able to decide if, when, and how they want to create and sustain their family on their own free will.[217] When laws prevent people from adopting based on their marital status, they restrict people from being able to create a family when and how they wish. Therefore, the laws infringe on people's right to marriage, their reproductive rights, and reproductive justice. Past cases have shown that it is not enough to simply have laws that allow single adults to adopt.[218] There must be additional statutes that forbid taking marital status into account, just like sexuality. Instead, courts should only focus on the welfare of the child through the petitioner's ability and commitment to provide for the child when evaluating the best interests of the child.[219]

Currently all states grant the right of single adults to adopt.[220] Some states, such as Arizona, Arkansas, and New Hampshire, have language in their statutes that list an unmarried adult as someone who is able to petition to adopt. However, since courts use the discretionary best interest of the child standard, unmarried adults have no protec-

215. Obergefell v. Hodges, 135 S. Ct. 2584, 2599–2600 (2015).

216. Ctr. For Reprod. Rights, Reproductive Rights: A Tool for Monitoring State Obligations 2 (2013), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_Monitoring_Tool_State_Obligations.pdf [https://perma.cc/8QSD-DCRB].

217. *What is Reproductive Justice?*, If/When/How, https://www.ifwhenhow.org/about/what-is-rj/ [https://perma.cc/MMN4-LRP9].

218. *See supra* Section II.C.

219. Young, *supra* note 16, at 61–62.

220. Feinberg, *supra* note 128, at 805–06.

tion against social biases and, as a result, their adoption petitions are disproportionately denied despite statistical evidence that shows marital status does not negatively affect a child's education or psychosocial development. This shows the need for more inclusive legislative language[221] that instructs courts to only look at the petitioning parent's actual ability to raise a safe and healthy child and not factor in stereotypes or biases.

Ideally, other states will set such precedent by stating these realizations and changing their adoption laws to become more inclusive.

Conclusion

Although adoption law does not require adoptive parents to be married, it currently expresses a preference for married couples.[222] Adoption law generally prohibits an unmarried couple from adopting an unrelated child jointly, and a single person may adopt only where a willing married couple is lacking.[223] This has created a parenting hierarchy. The government has controlled and regulated parenthood since the start of our country. However, the "traditional" family values that society is biased toward do not have any correlation with an adult's ability to raise a child. Yet, these factors are still used to favor traditional families, like married couples, under the best interest of the child standard, illustrating the need for additional statutes that forbid taking these factors into account when considering the best interest of the child.

221. Cooper, *supra* note 13, at 188.
222. Storrow, *supra* note 17, at 334–35.
223. *Id.*