

Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family

by

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Introduction

Alex and Terry meet on Date.com, both claiming to be divorced and looking for love. Alex tells Terry about his desire to remarry and have a family. Phone calls ensue, followed by dinners and two vacations in Puerto Rico. Alex and Terry are hot and heavy. Alex reiterates to Terry his longing to have a family again. Two months later, Alex drops Terry like a hot potato. A heartbroken Terry, looking to recover, sues for fraud and intentional infliction of emotional distress, a longshot.¹

Unhappy endings like that between Alex and Terry are neither uncommon, nor a modern phenomenon. What *has* changed is the way the law treats disputes between intimate or married persons and what, if any, remedies are available. Today, what looks like legal ambivalence towards romantic betrayals is a relatively recent development in domestic law. At one time, marital common law rules borrowed from English law (which came to be known as “heart balm” doctrines) protected the rights one spouse had for the other to remain faithful to the marriage, or of potential spouses duped into unlawful intercourse or false marriage proposals.

Change has occurred, not because the law ceased to care about protecting the institution of marriage, but because these common law doctrines have deep roots in outdated gender norms. Marriage is no longer a hierarchy or property arrange-

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¹ Brown v. Strum, 350 F. Supp. 2d 346, 351-52 (D. Conn. 2004).

ment, no longer necessarily only between a man and a woman, and no longer the only option for committed couples.

The same can be said for the prior common law treatment of the family, which outlined gendered parental functions by basing custody decisions on the “tender years doctrine,” a legal presumption that a child is better reared in the arms of its mother. The traditional gender-based roles of mother and father still persist today to some degree, though eroded by a newer custodial doctrine known as “best interests” of the child, which is designed to ignore the sex of the parent. Moreover, with the advent of the “stay-at-home Dad” and same-sex couple adoptions, the law continues to move farther away from the “tender years” presumption in perhaps to achieve a genderless parental rights system.

Domestic law’s modern evolution away from these common law doctrines defies the gender-polarized underpinnings of the American family and institution of marriage that lasted for so many years. Whether or not those underpinnings are still intact requires social and legal tracing through the last few centuries. This article will illuminate the neutralization of gender roles in marriage and parenting by walking through the extinction of common law doctrines, specifically heart balm actions and the tender years doctrine; and how the push for a genderless family model shows that the traditional statuses of “spouse” and “parent” have become more sacred than ever. It will then show how the current state of civil rights relating to marriage and parental laws has been a natural progression of that same neutralization.

Part I of this article will define the four classic heart balm doctrines known as “alienation of affections,” “criminal conversation,” “seduction,” and “breach of promise to marry” and their social foundations. It will also attempt to draw parallels between the disappearance of these doctrines with social and gender reconfiguration in the last several decades. Most significantly, it will explain how the vision of a genderless marriage has morphed a social and financial relationship into one of personal choice and achievement for couples.

Part II will discuss the history of the tender years doctrine, its basis in the theory of children as property, and the gender presumptions that defined “mother” and “father” as distinct family positions. It will explain how social and constitutional re-evaluation caused legislatures to trade the tender years doctrine for a

“best interest” standard. This section will examine the status of modern parental relationships and modern courts’ attempts to ignore gender when considering the welfare of the child.

I. Heart Balm Doctrines

A. *Alienation of Affections and Criminal Conversation*

Alienation of affections and criminal conversation are intentional tort actions for interference with the marital relationship.² Both alienation of affections and criminal conversation originated from the concept that wives are their husband’s chattel. The common law viewed marriage as a master-servant relationship in which wives owed husbands certain services for which husbands may asserted their proprietary rights.³ In alienation of affections and criminal conversation suits, the plaintiff is the wronged spouse and the defendant is the third party intruder to the marriage. At first, a wife had no remedy under alienation of affections or criminal conversation since marriage conveyed to her no interest in her husband, nor did a woman have any legal capacity to enforce her rights.⁴

The two actions often overlap, but differ in that alienation of affections applies where someone has wrongfully interfered with a spouse’s rights to service and companionship,⁵ whereas criminal conversation applies only when sexual intercourse has occurred.⁶ The former is a remedy for more general injury to the marriage, while the latter action is one for adultery.

1. Alienation of Affections

All of the following four elements are required for a successful alienation of affections action: (1) marriage at the time of injury, (2) a defendant’s wrongful conduct with the plaintiff’s spouse, (3) loss of affection, and (4) a causal connection between

² Nathan P. Feinsinger, *Legislative Attack on “Heart Balm,”* 33 MICH. L. REV. 979, 988-989 (1935).

³ Kay Kavanagh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 327 (1981).

⁴ Kavanagh, *supra* note 3, at 328.

⁵ *Fitch v. Valentine*, 959 So.2d 1012, 1019 (Miss. 2007).

⁶ Feinsinger, *supra* note 2, at 989

defendant's actions and that loss.⁷ The defendant's actions must be intentional and a substantial factor causing the injury, but no financial loss need occur for the plaintiff to recover.⁸ These requirements are designed to determine whether reimbursement is appropriate for the value of the "love, society, and companionship", lost to the plaintiff spouse at the hands of a willful and knowing intruder.⁹

Alienation of affections began as a remedy for husbands only, predicated on the right to his wife's consortium in general. As for the wife, her affection for her husband was presumed and evidence of a complete lack of marital affection only mitigated the defendant's damages.¹⁰ Nor was the fact that husband and wife were separated a complete defense because the law also presumed a possibility of reconciliation.¹¹

What most distinguished the alienation of affection action from criminal conversation was that no sexual relationship between the defendant and wife was required. A defendant needed only interfere with the wife's state of mind to be liable for interfering with the husband's rights to services and companionship.¹² In addition to paramours, close relatives have been successfully pursued for alienation of affections.¹³

2. Criminal Conversation

An action for criminal conversation is based on a spouse's exclusive right to sexual intercourse with the other.¹⁴ A husband's right in the property of his wife was at one time viewed as including the right to her sexual relations.¹⁵ To pursue a claim for criminal conversation, there must be, first, an actual marriage and, second, sexual intercourse between the defendant and

⁷ LEONARD KARP & CHERYL L. KARP, *DOMESTIC TORTS* 272 (Joan Goldsmith et al. 1989).

⁸ *Id.* at 272-273.

⁹ *See* Fitch, *supra* note 4.

¹⁰ Feinsinger, *supra* note 2, at 994.

¹¹ *Id.*

¹² *Supra* note 3, at 324.

¹³ KARP & KARP, *supra* note 7, at 274.

¹⁴ *Bearbower v. Merry*, 266 N.W.2d 128, 134 (Iowa 1978).

¹⁵ Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*. 52 COLUM. L. REV 242, 253-254 (1952).

adultering spouse during that marriage.¹⁶ Even where a wife voluntarily participated in the adultery, an action of trespass against the husband historically occurred because of the wife's inability to give legal consent.¹⁷

Recovery for this trespass is grounded in "the injury which the husband sustains by the dishonor of his bed, the alienation of his wife's affection, the destruction of his domestic comfort, and the suspicion cast upon the legitimacy of her offspring, the degradation which ensues, and the mental anguish which the husband suffers."¹⁸ To add insult to injury, a husband could even recover for the loss of his wife's "virtuous example" to his children.¹⁹ At one time, when a husband suspected his wife's infidelity, he might even watch or leave opportunities open to prove her guilt as long as he did not create the temptations or otherwise entrap her.²⁰ Criminal conversation is sometimes considered a strict-liability tort because the only available defenses are the statute of limitations or the plaintiff's consent.²¹

3. Demise of These Doctrines

It was not until the late nineteenth century with the passage of Married Women's Property Acts and supplemental legislation that many states also gave women an action against those who "stole the affections" of their spouses.²² Nearly every jurisdiction that considered the issue granted women access to suits for alienation of affections and criminal conversation, whether by statute or judicial interpretation.²³ The result was that the tort's original intent to enforce the rights of a master-servant relationship had lost its mooring. However, the reasoning in decisions to extend actions to women varied. Some commentators theorized that a wife had the same rights all along with no prior method of enforcement, others argued that the Married Women's Property

¹⁶ *Saunders v. Alford*, 607 So.2d 1214, 1218 (Miss. 1992).

¹⁷ *Kavanagh*, *supra* note 3, at 328.

¹⁸ Elliott Anthony, *The Action for Criminal Conversation*, 24, No. 8, *New Series* Vol. 15 AM. L. REG. 449 (1876).

¹⁹ *Id.* at 459.

²⁰ *Id.*

²¹ *KARP & KARP*, *supra* note 7, at 276.

²² *Feinsinger*, *supra* note 2, at 992-93.

²³ *Id.* at 993.

Acts gave women new rights, and some just asserted these new Acts were part of a larger social movement warranting an expansion of women's rights.²⁴

With women now able plaintiffs, courts attempted to re-fit the doctrines to make modern sense, but succeeded only in forming rules farther removed from social reality.²⁵ The Supreme Court of Pennsylvania elaborated on this problem in *Fadgen v. Lenker* when abolishing the state's female-inclusive action for criminal conversation:

It is clear, however, that the first step directed towards fusing the ancient with the 'modern' of 1959 was not sufficient revitalization such as to weather the rapid legal and societal changes witnessed over the past fifteen years. . .the Court in 1959 laudibly rejected the fictitious notion that a wife, like a servant, was the personal property . . . of the husband and that an action in criminal conversation was a right sacrosanct to none but the master. Still, the Court's extension to married women of the right to bring such a cause of action only delayed what today demands . . . total abolition.²⁶

Still, some states continued to deny women of these actions. One such state is Maryland, who instead chose to abolish the entire doctrine years later, finding it in violation of the state's equal rights amendment after holding that the Married Women's Act failed to create a new right from those that existed at common law.²⁷

Beginning in the early 1930s, lawmakers expressed concerns about blackmail, extortion and excessive damages that often re-

²⁴ Kavanagh, *supra* note 3, at 328-29.

²⁵ Feinsinger, *supra* note 2, at 993.

²⁶ *Fadgen v. Lenker*, 365 A.2d 147, 149 (Pa. 1976) (the dissent later argues that the question of property rights in one's spouse is irrelevant since men and women now share the protections of criminal conversation, who's true purpose is to protect the delicate and important interests of marriage).

²⁷ Kavanagh, *supra* note 3, at 328-329. Kavanagh explains that while the *Kline* court did not construe the Married Women's Property Act to affect substantive rights, there are a small number of courts that decided that in the case of an injured wife, husbands could no longer be awarded damages for loss of consortium since they had no legal right to their wives' services. She proposes that some courts understood the Acts as not only giving some of the same rights that men had to women, but actually changing the rights of spouses in respect to each other. For further discussion of the Married Women in Property Acts, see Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923).

sulted from heart balm torts.²⁸ In 1935, Indiana introduced the first bill to abolish these torts²⁹ and soon many other jurisdictions followed by adopting what became known as “anti-heart balm” legislation, prohibiting actions for alienation of affections, criminal conversation, seduction, and breach of promise to marry.³⁰ It was not until the 1970s, however, that courts stepped in and began to denounce these doctrines as artifacts of an obsolete concept of marriage.³¹ The courts’ reasoning shared the sentiments expressed decades ago by the Louisiana Supreme Court in 1927 when it reiterated the state’s refusal to acknowledge actions for alienation of affections in *Moulin v. Monteleone*.³² According to the court, Louisiana law never included rights for alienation of affections because “a man can have no kind of property in the company, care or assistance of one who is, in every sense, his equal in the eyes of the law.”³³ Louisiana’s theory that such laws are an improper attempt to control “human nature- not human conduct”³⁴ is mirrored in subsequent state court decisions abolishing the doctrine, such as Iowa’s, which found alienation of affections to be “itself a slander on marriage,” demeaning both the parties and the courts.³⁵

In a similar opinion, the court in *Bearbower v. Merry* focused on the individualization of husbands and wives by explaining that a major failure of the tort for criminal conversation in today’s society was that there are no applicable defenses.³⁶ It seems insensitive, the court reasoned, that they must ask about the frequency of intercourse but may not, when determining liability, consider the quality of the marriage when the acts were

²⁸ Kavanagh, *supra* note 3, at 330.

²⁹ Margaret F. Brinig, *Rings and Promises*, 6 J. L. ECON. & ORG. 203, 205 (1990).

³⁰ *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1770-71 (1985).

³¹ Pennsylvania was the first state to judicially abolish criminal conversation, while the state of Washington was the first to judicially abolish the doctrine of alienation of affections. See *Fadgen v. Lenker*, 365 A.2d 147; *Wyman v. Wallace*, 615 P.2d 452 (Wash.1980).

³² *Moulin v. Monteleone*, 115 So. 447 (La. 1927).

³³ *Id.* at 450.

³⁴ *Id.* at 448.

³⁵ *Fundermann v. Mickelson*, 304 N.W.2d 790, 791-92 (Iowa 1981).

³⁶ *Bearbower v. Merry*, 266 N.W.2d 128, 135 (Iowa 1978).

committed such as whether the wife was the aggressor, whether husband and wife were separated, or whether the wife was mistreated by her husband. Moreover, the court insisted that the results resemble a husband's sale of his wife's affections.³⁷

Among the seven states remaining today that still allow alienation of affections lawsuits,³⁸ Mississippi insists that the action protects marriage, not property rights.³⁹ In 2007, the *Fitch v. Valentine* decision not only justified the doctrine, but insisted that it is needed now more than ever to help salvage what is left of the traditional family.⁴⁰ Elevated as the last crusade for protection from marital interference, the court refuses to "get aboard this runaway train" despite popular changes in morals, "especially now that we have leveled the playing field."⁴¹ The counter-argument, best expressed in *Funderman v. Mickelson*, is that the court is not condoning promiscuity by denying the right of action, but abolishing it for the sole reason that people cannot recover for property that can never be theirs.⁴²

Whether alienation of affections and criminal conversation actions will soon be taking their last breaths has yet to be seen. While no longer a popular resource for betrayed spouses, the remaining jurisdictions to permit these torts do so in a fashion that is testament to traditional marital ideals like fidelity and posterity rather than to the subservience of women. As domestic torts have evolved to include interspousal suits such as intentional infliction of emotional distress, the adversarial positions have shifted from spouse vs. intruder to spouse vs. spouse (a perhaps fairer, but uglier battle). The point is that the "leveled playing field" now means pitting husband against wife and giving equal rights *and responsibility* to both.

³⁷ *Id.* at 131.

³⁸ Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, Utah (However, South Dakota abolished criminal conversation in 1981, Utah in 1991, and Mississippi in 1992.) See *Hunt v. Hunt*, 309 N.W.2d 818 (S.D. 1981); *Norton v. Macfarlane*, 818 P.2d 8 (Utah 1991); *Saunders v. Alford*, 607 So.2d 1214 (Miss. 1992).

³⁹ See *Fitch v. Valentine*, 959 So.2d 1012, 1019 (Miss. 2007)

⁴⁰ *Id.* at 1019 (citing *Bland v. Hill*, 735 So.2d 414 (Miss. 1999).)

⁴¹ *Id.* 1019-20 (citing *Bland v. Hill*, 735 So.2d at 421). For a similar argument, read the dissenting opinion by Justice Roberts in *Fadgen v. Lenker*, 365 A.2d 147, 153 (Pa. 1976).

⁴² *Fundermann v. Mickelson*, 304 N.W.2d at 794.

B. Seduction

Seduction occurs when a person, either by persuasion, deceit, fraud, or false promise, induces a chaste, unmarried woman to engage sexual intercourse.⁴³ The original purpose of the action for seduction was to promote “the social interest in preservation of female purity and prevention of illegitimacy.”⁴⁴ While seduction actions seemed to take patriarchal concerns to an extreme, it is evident that there more was at interest than unblemished, virgin souls. Under the common law, only those entitled to the services of the wrongfully seduced could bring an action for seduction.⁴⁵ This premise for this tort is based on the same “master-servant” relationship presumed for alienation of affections and criminal conversation, except that the master in this situation is the parents or other similarly situated persons.⁴⁶ Common law proclaimed that a child is the property of its father, to whom it owed its services.⁴⁷ However, what constituted service was an abstract idea that more reflected the emotionally wounded parent. In those courts that have even required evidence that any services were rendered, the court has found that lost services could be established by loss of an occasional household chore.⁴⁸ A daughter’s chastity, as a result, was treated as a commodity to be preserved until marriage transferred that property interest to another.

Although seduction suits were meant to protect the parents from the loss of services of their children, many jurisdictions eventually gave women a right to sue on their own behalf.⁴⁹ However, a woman’s separate right to recovery was often conditional, and the doctrine’s proprietary residue still persisted. Though most did not, a few states set either an age maximum or minimum of around twenty-one years old.⁵⁰ An age minimum implies that only a parent is entitled to bring the action until their

⁴³ 70 AM. JUR. 2D *Seduction* § 1.

⁴⁴ Feinsinger, *supra* note 2, at 988.

⁴⁵ KARP & KARP, *supra* note 7, at 279.

⁴⁶ *Id.* at 280.

⁴⁷ See DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 683 (2nd ed., 2009).

⁴⁸ Reporter’s Note, RESTATEMENT (SECOND) OF TORTS § 701 (1977).

⁴⁹ Feinsinger, *supra* note 2, at 987-88.

⁵⁰ *Id.* at 987.

right to the child's services are terminated by adulthood and until then, allowing the child their own action would result in double jeopardy.⁵¹ Conversely, an age maximum presumes that as an adult, a woman is capable of making her choice and no longer has any cause of action.⁵² This also could be read as punishing women who "let themselves" be duped by denying them recovery. Either way, it seems that jurisdictions struggled, as with alienation of affections and criminal conversation, to conform outdated concepts with the later recognition of women's individual legal rights.

Even though most women could eventually sue for seduction, exercising that right came with the risk of a considerable stigma. Feinsinger explained in 1935 that "[i]n view of its incidents of unpleasant notoriety, such an action is even less likely to be commenced by a self-respecting and innocent woman than an action for damages for breach of contract."⁵³ The "damned-if-you-do, damned-if-you-don't" quandary was a troubling result of legal attempts to give women an interest in their own sex.

Today, actions for seduction have been abolished in nearly all jurisdictions,⁵⁴ mostly through early anti-heart balm legislation. While there have been only a few seduction cases in the last century, there have been almost none in the latter half.⁵⁵ Some feminists argue in favor of the tort, arguing a loose idea of "fraud" where women should be able to address the injuries of what is essentially non-consensual intercourse.⁵⁶ Despite the differences in view, this feminist argument and the modern legislative trend to abolish seduction have in common is a refusal to support a sexually antiquated doctrine that protects women as property instead of individual persons with rights.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ For an example of a state that not yet abolished the action for seduction, see *Hodges v. Howell*, 4 P.3d 803 (Utah Ct. App. 2000).

⁵⁵ Reporter's Note, RESTATEMENT (SECOND) OF TORTS § 701 (1977).

⁵⁶ ABRAMS ET AL., *supra* note 47, at 413-14.

C. Breach of Promise to Marry

The fourth heart-balm action, breach of promise to marry, is founded both in contract and tort.⁵⁷ At common law, under breach of promise to marry, a woman had the right to sue her former fiancé for breaking off their engagement.⁵⁸ The law presumed that a man who breached his promise was a scoundrel and the woman was both justifiably outraged and faultless.⁵⁹ Often an expression of the jury's moral indignation, damages included those for mental anguish, humiliation, expenses in preparing for marriage, and a woman's subsequent loss of marketability.⁶⁰

Breach of promise to marry actions were intended to protect women's social standing because they were often denied a second opportunity for a lucrative marriage and therefore, the only acceptable option for financial stability.⁶¹ Even worse were a woman's options who failed to remain chaste until the wedding, though this may have increased her recovery or given rise to an additional action for seduction.⁶² Despite the fact that women had the right to pursue their interests in a promise to marry, the action shielded them only as the chattel of a property agreement. These assumptions also perpetuated marriage as an unequal institution under the guise of protecting the woman.

Along with alienation of affections, criminal conversation and seduction, breach of promise to marry was abolished by most jurisdictions by court decisions or anti-heart balm legislation. Breach of promise to marry shares the same criticism of the other torts as being based on outdated theories of property and marriage. In addition, as time progressed and modern ideas about marriage began to take hold, a woman whose fiancé broke their engagement no longer seemed injured enough to reward the damages resulting from the cause of action.⁶³

In current society, it is not unusual for an engagement to end without nuptials (or fear of becoming a spinster). However, those left standing at the altar with a broken heart and two

⁵⁷ *Heartbalm Statutes and Deceit Actions*, *supra* note 30, at 1770.

⁵⁸ Brinig, *supra* note 29, at 204.

⁵⁹ Feinsinger, *supra* note 2, at 984.

⁶⁰ *Id.*

⁶¹ Brinig, *supra* note 29, at 204.

⁶² *Id.* at 205.

⁶³ *Heartbalm Statutes and Deceit Actions*, *supra* 30, at 1778.

months' salary out of pocket for a diamond ring may not be without remedy. A few remaining jurisdictions still permit breach of promise actions,⁶⁴ while others have acquired new actions to recover property given in contemplation of a marriage that never happened.⁶⁵ Jurisdictions such as New York have adopted statutes permitting recovery, limiting damages to only what will put the parties back in their original position before the engagement.⁶⁶

Modern actions to recover for gifts made in consideration of marriage highlight a new conception of the property rights involved with engagement and marriage. A property interest in women as potential wives no longer exists. Only the objective costs of a promise to marry may now be valued because the marriage itself is no longer a business transaction where women are considered the commodity being traded. Instead, new rules celebrate marriage as a choice and a union that no longer stands for a gendered system of ownership and power.

D. Alternatives

While heart balm torts are now largely eliminated, there are other laws suggesting that the responsibilities of spouses or potential spouses have not been forgotten. Domestic tort law has expanded, primarily through the abrogation of immunities, to allow spouses and family members to sue each other under actions like intentional infliction of emotional distress, negligence, or exposure to sexually transmitted diseases.⁶⁷ Contract law has even found a way to protect the investment of engagement by permitting recovery of gifts in certain instances. Some form of no-fault divorce is now available in every state,⁶⁸ but covenant marriages

⁶⁴ ABRAMS ET AL., *supra* note 47, at 414.

⁶⁵ See *Lipshutz v. Kiderman*, 905 N.Y. S.2d 247 (N.Y. App. Div. 2010) (holding that the plaintiff was entitled to the return of the six-carat engagement ring given to the defendant when he found out that the defendant had obtained a "get" (a term for a faith-based divorce in Judaism) from her former spouse, but not a legal divorce).

⁶⁶ *Id.* at 183.

⁶⁷ For more information, see *supra* note 48, at 488-503 (discussing the history of interspousal immunity, its fall, and modern issues associated with interspousal tort suits).

⁶⁸ Nicholas Confessore & Anemona Hartocollis, *Albany Approves No-Fault Divorce and Domestic Workers' Rights*, N.Y. TIMES, July 1, 2010, at A21

with stricter divorce standards are sometimes available and some fraud actions still ask questions about the loyalty and success of the marriage. This begs the question whether new domestic laws have replaced the actions that once sought to protect marital and sexual interests. If so, are they distinguishable from heart balm statutes? If not, what are the modern justifications?

The reality is that modern laws have abandoned gender presumptions. By doing so, they have recaptured some of the privacy forfeited by treating intimate relationships like auction bids gone bad. In fact, most jurisdictions will deny heart balm lawsuits brought under the guise of an actionable tort.⁶⁹ Think back to *Alex and Terry*, a fact pattern loosely based on an actual case that denied the plaintiff's claims for intentional infliction of emotional distress and fraud on that very basis. Today, such a result would probably not surprise most people, but feelings may be different where a marital relationship already exists. In situations where there are cheating spouses, it is arguable that the law, having eliminated heart-balm actions, now fails to protect the institution of marriage. Heart balm torts were not as much about safeguarding marriage as they were about safeguarding property rights that no longer exist. Perhaps a better explanation for this change is that domestic law has "leveled the playing field" between men and women for both rewards and *risks* of marriage.

E. Deinstitutionalization/Individualism

On June 24, 2011, New York voted to legalize same-sex marriage. The origin state of the gay-rights movement, New York is the largest state authorizing same-sex couples to wed, and the most recent jurisdiction to join the fight for gay marriage alongside Connecticut, Iowa, Massachusetts, New Hampshire, and the District of Columbia.⁷⁰ The remaining majority of states still

(covering New York's decision to approve no-fault legislation, making them the final state to adopt some version of the approach).

⁶⁹ ABRAMS ET AL., *supra* note 47, at 412.

⁷⁰ Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, at A1.

grasp on the definition “between a man and a woman,” and some have passed legislation clarifying that restriction.⁷¹

Today, chances are that if you went around asking strangers to define the term “marriage” you would probably get a variety of responses. Marriage, in the legal and social context, has undergone so many recent changes that even the former touchstones of “husband” and “wife” are no longer necessary requirements. Once a property arrangement, marriage is now a choice.⁷² Andrew Cherlin, professor of sociology and public policy at Johns Hopkins University, describes this process as the “deinstitutionalization of marriage,” characterized by personal independence and declining social norms.⁷³ He proposes that “people marry now less for the social benefits that marriage provides than for the personal achievement it represents.”⁷⁴

The opposite argument is that despite current laws that envision marital equality between men and women, marriage has not changed much since the gender roles that subvert women still remain intact.⁷⁵ This position’s flaw is that it is too simple. It does not recognize the freedom of choice that Cherlin emphasizes. Even though statistics prove that many marriages continue to function as a gendered unit,⁷⁶ this does not mean that the fundamental purpose of marriage depends on that distinction.

On the other hand, the popularization of same-sex marriage seems to eliminate any questions about gender roles in marriage. Increasing support for gay and lesbian rights to marry backs the theory that a marriage is constructed of two *individuals*. The trend to recognize that a spouse is neither a husband nor a wife

⁷¹ Human Rights Campaign, *Statewide Marriage Prohibitions*, Jan. 13, 2010, available at [http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009\(1\).pdf](http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009(1).pdf) (listing the states with mini-DOMAs and state statutes).

⁷² Andrew J. Cherlin, *The Deinstitutionalization of Marriage*, 66 J. MARRIAGE & FAM. 848, 853-854 (2004).

⁷³ *Id.* at 851-853. Cherlin traces the history of marital views by describing two major transitions: first, “companionate marriage” with an emphasis on emotional satisfaction brought on by the Great Depression and World War Two, followed by, second, “individualized marriage” which focused on self-fulfillment brought on by marital demographic shifts in the 1960’s.

⁷⁴ *Id.* at 857.

⁷⁵ Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 544 (2007).

⁷⁶ *Id.* at 554-56.

under the law is a meaningful departure from principles of marriage once supported by heart balm actions. The fight for same sex marriage shows that marriage is still important as a symbol even if it has lost other practical purposes.⁷⁷ The fact that same-sex couples continue to fight so hard for the right to wed shows that marriage is among the ultimate of personal choices.

Most important of all, marriage alternatives help shed light on the desirability of the option to marry. Couples may decide not to wed at all, to cohabit, or to live separately. While an alternative arrangement, such as a domestic partnership or civil union may be viewed by many people as a second-class status for same-sex couples, others hail civil unions as the perfect gender-neutral alternative for *all* couples.⁷⁸ The hope is that archaic gender roles will disappear by removing all male-female characterizations of traditional marriage.⁷⁹ Elizabeth Scott, Vice Dean and Harold M. Medina Professor of Law at Columbia University Law School, argues that civil unions look good on paper to encourage legal commitment, but points out that there are problems with discarding all of the history that comes with marriage such as commitment norms, fidelity and emotional connectivity.⁸⁰

Marriage has evolved far from its beginnings as a business relationship, but we may not be ready to reject all of the traditions for which marriage stands. In fact, it seems to be quite the opposite. The positive traditions that society has held onto are what have turned marriage into a symbol of unity. As a result, the more jurisdictions to permit same-sex marriages, the more that symbol is likely to be reinforced instead of redefined.

II. Tender Years

A. Definition and History

The era of the “tender years” rule has come and gone, but arguably not without leaving a gendered shadow hovering over custody determinations long after the doctrine’s rejection. The rise and fall of the tender years doctrine traces a story that starts with presumptions about fathers, leads to presumptions about

⁷⁷ Cherlin, *supra* note 72, at 855.

⁷⁸ Scott, *supra* note 75, at 557.

⁷⁹ *Id.*

⁸⁰ *Id.* at 561-63.

mothers, and ends with a focus on children that at least attempts to decide custody without reference to stereotypical sexual characteristics of “mom” and “dad.” The good news is that parents of both sexes are willing to fight for their kids even if it means fighting each other. The end of the story delivers a message that parents are no longer defined by cookie-cutter roles and so the opportunity to parent has widened to those that want it, offering children different familial structures while offering different types of parents the opportunity be a part of that structure.

The tender years doctrine is a legal presumption that the mother is the best custodian for infants and young children. The theory is that mothers are biologically better designed to both raise children and to bond with them.⁸¹ The doctrine, supported by stereotypes, helped to perpetuate the image of women as being softer and more natural nurturers. Using this rule, judges historically automatically awarded custody of children to their biological mother unless they found that she was unfit to take custody.⁸² However, long before the tender years doctrine, male and female parental duties were not always so neatly divided.

In the early days of the American Republic, the father had sole control over his children because, under *pater familias*, he was the legal “master” of his family.⁸³ Being the leader and financial head of household, the father was entitled to the labor of his children and all of its benefits.⁸⁴ Fathers also participated and took pride in raising their children.⁸⁵ Women, it was believed, were neither able to provide for the family, nor intelligent enough to educate their children.⁸⁶ Therefore, as the children’s legal owner and the only capable parent, the courts almost always awarded fathers custody.⁸⁷

This did not begin to change until the nineteenth century, when society started to believe that children needed special at-

⁸¹ Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 *LAW & SOC’Y REV.* 769, 770 (2004).

⁸² *ABRAMS ET AL.*, *supra* note 47, at 683.

⁸³ *Id.*

⁸⁴ Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 *FLA. ST. U. L. REV.* 891, 897 (1998).

⁸⁵ *Id.* at 900.

⁸⁶ *Id.* at 897.

⁸⁷ *Id.*

tention.⁸⁸ The Talford Act of 1839 followed, which planted the roots of the tender years doctrine when it created a presumption of awarding mothers custody.⁸⁹ Moreover, a father's significant social role in the family declined when the Industrial Revolution drew men away from their homes to work in numbers never before seen.⁹⁰ These beginnings led to a long life for the tender years doctrine that did not fizzle out until the 1970's.⁹¹

B. Sex Stereotypes Give Way to Best Interests

Meanwhile, the feminized home-front was etched in stone. Mom went from de-facto child caregiver to a mythologized character, venerated for her motherly prowess.⁹² But this mythology created a double-edged sword for women. Saddled with the burden of all child duties, the powers of motherly affection were only enough to change the relationship of women to their children, not that of women to men. In expressing their support for the tender years doctrine, judges undercut women's ability to perform this important social role by clarifying that despite her inherent weakness, a mother's affections shine through.⁹³ Although the tender years presumption essentially transferred some ownership interest in the child to the mother,⁹⁴ women were doomed to a household servitude that stunted the evolution

⁸⁸ *Id.*

⁸⁹ McNeely, *supra* note 84, at 897.

⁹⁰ *Id.* at 897-98.

⁹¹ ABRAMS ET AL., *supra* note 47, at 684.

⁹² McNeely, *supra* note 84, at 900, 902 (“In her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood is fundamental.” (*citing* *Jenkins v. Jenkins*, 181 N.W. 826, 827 (Wis. 1921))).

⁹³ *Id.* at 899, *citing* *Freeland v. Freeland*, 159 P. 698, 699 (Wash. 1916) (“Mother love is a dominant trait in even the weakest of women”); *Duncan v. Duncan*, 80 So. 697, 703 (Miss. 1919) (Holding, J., dissenting) (“even though she be handicapped with poverty and human weaknesses, her care and protection of her offspring is more naturally efficient than that of any other person who might be more fortunately situated and endowed.”).

⁹⁴ MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 82-83 (University of Chicago Press, 1991)

of female norms not too far from their original status as marital property.

But men, as parents, did not fare much better. They became increasingly physically separated from their children and lost the traditional roles of parental caregiver, moral educator, head of household, and family supporter.⁹⁵ Increasing divorce rates in the later part of the twentieth century only made the problem worse.⁹⁶ A combination of societal shifts and custody law led to a drastic decline in a father's opportunity to parent.

The tender years began to lose favor in the twentieth century as it was replaced by the "best interests" standard, which focused on the children's interests instead of the parents' gender.⁹⁷ The shift in custodial law from the parent's property interest in their children to an overall interest in the children's well-being helped to justify a gender-neutral custody law. Further, in the 1970s, the Supreme Court's rulings finding gender a suspect class under the Equal Protection Clause gave courts the authority to be skeptical of even a best interest standard with similar results to the tender-years approach.⁹⁸

One example is the New York case *Watts v. Watts*, which held that the tender years doctrine violated state law, the Fourteenth Amendment, and could not be protected under the guise of "best interests."⁹⁹ The doctrine, the court explained, "is based on outdated social stereotypes rather than on rational and up-to-date consideration of the welfare of the children involved."¹⁰⁰ The court also made it clear that a fair custody law is not just about the children.¹⁰¹ "Although courts have properly held that the primary consideration in awarding custody of the children is the welfare of the child, it is indisputable that each parent's interests, their relationships with, rearing and custody of their children are of substantial importance."¹⁰² *Watts* clarifies that men

⁹⁵ *Id.* at 912.

⁹⁶ *Id.* at 905.

⁹⁷ McNeely, *supra* note 84, at 903.

⁹⁸ *Id.* at 924-26; *Watts v. Watts*, 350 N.Y.S.2d 285, 290 (N.Y. 1973).

⁹⁹ *Watts*, 350 N.Y.S.2d at 288-90.

¹⁰⁰ *Id.* at 288.

¹⁰¹ *Id.* at 290.

¹⁰² *Id.*

and women have an interest in raising their children as well as in equal protection of the law.¹⁰³

All states have now abandoned the tender years doctrine in favor of the “best interests” standard.¹⁰⁴ The best interests standard can be seen as equalizing each parent’s interest in the child.¹⁰⁵ An even better explanation is that the new standard views the family as *a set of individuals*, and not a property hierarchy, by shifting the focus to the needs of the child while maintaining recognition of the parents’ equal right to custody. This three-way balance proves that the modern family is diverse and dynamic enough that all interests must be weighed to make the best custody determination.

The problem with the best interests standard is the unlimited discretion of the court, which may leave judges unguided or able to hide their gender preferences under an endless list of explanations and factors. One study of judicial custody decisions determined that in recent years, a judge’s own gender influences whether he or she uses a tender years rule in a best interests disguise.¹⁰⁶ Some judges studied proposed that the tender years doctrine is still useful. Rather than simple stereotyping, one scholar argues that the tender years doctrine is a factual presumption that the mother is the primary caregiver, followed with a legal presumption that the primary caregiver is the best custodian.¹⁰⁷ Some other scholars similarly argue that because families themselves have not yet become gender-neutral, gender-neutral family laws actually disadvantage women in a way that feeds stereotypes by ignoring relevant factual trends such as women as primary caretakers.¹⁰⁸

¹⁰³ *Id.*

¹⁰⁴ ABRAMS ET AL., *supra* note 47, at 685. Many of those jurisdictions have adopted their best interest custody guidelines from the Uniform Marriage and Divorce Act and the American Law Institute’s Principles of the Law of Family Dissolution as the other leading custody model. *Id.* at 700-02.

¹⁰⁵ FINEMAN, *supra* note 94, at 88.

¹⁰⁶ Artis, *supra* note 81, at 271.

¹⁰⁷ Ramsay Laing Klaff, *The Tender Year Doctrine: A Defense*, 70 CAL. L. REV. 335, 343 (1982).

¹⁰⁸ Artis, *supra* note 81, at 775. Artis refers to Fineman’s arguments that the best interests standard fails women by mischaracterizing stereotypes as facts. For a further analysis, see FINEMAN, *supra* note 94.

However, there are also problems with making so many assumptions. Child custody is a fact-intensive inquiry that could easily deprive a child of a better parenting situation if a general rule is applied instead of examining each family's unique dynamics. Hopefully, parents contesting custody are doing so because they are protecting the best interest of their child rather than their checkbook or their pride. Going into every case under that positive assumption, there is no basis to make any part of a custody decision based on the gender of the parents since there is no factual proof that men or women are better equipped to raise a child.

Still, the stereotype persists that women are male-dependent and inherently weak.¹⁰⁹ And men, divorced fathers in particular, are popularly viewed as having a less necessary role in their children's lives.¹¹⁰ This attitude has helped contribute to an epidemic of disinterested or "deadbeat" dads in a society that never redefined traditional rules to fit modern divorce.¹¹¹ Father's rights movements have fought to regain fathers' reputations and their parental rights, albeit as fathers and not as masters, that they lost when the tender years doctrine made them a very specific group of gender discrimination victims.¹¹² Society may not have caught up with the law yet, but legal efforts to equalize mothers and fathers show that parenting, like marriage, is no longer about socially defined duties as much as freedom in personal lifestyle choices. Ideally, every individual has an equal chance under the new custody standard, regardless of the one parent's gender relative to the other.

C. Joint Custody Presumptions and Same-Sex Parenting

Joint custody statutes are another way in which the law has attempted to equalize custody between men and women while encouraging equal parenting as the most effective way to meet a child's psychological and emotional needs. Jurisdictions with these statutes either provide joint custody as an option, prefer-

¹⁰⁹ McNeely, *supra* note 83, 893-94.

¹¹⁰ *Id.* at 895.

¹¹¹ *Id.* at 905-06.

¹¹² *Id.* at 906.

ence, or presumption.¹¹³ The legislatures that have enacted these statutes did so in part to promote a gender-neutral custody analysis.¹¹⁴ New presumptions, however, are not without problems. As one scholar notes, forcing joint custody may actually negate the child's best interests by failing to consider the specific facts of a dispute.¹¹⁵ The ongoing debate regarding joint custody presumptions, that pin goals of equal custodial rights for men and women versus the condemnation for the disregard of children who may not be better off split down the middle, further emphasizes the point that that the family unit is a recipe with three different ingredients. Although the ingredients need not play a proportional role, each one is essential and deserves careful balancing with the others.

Moreover, progress towards equal parenting rights has not stopped with opposite-sex parents. Same-sex adoptions are a perfect example of the same gender-neutral stance on parental rights taken one step further. The fight for same-sex parenting similarly shows that custodial rights are actually not only about men and women, but also about what is best for the child. Focusing on the child's well-being has helped broaden the categories of people that may share the legal status of "parent" or "custodian." Those who argue that the law has done children a disservice by being less discriminating in its parenting decisions have misunderstood the effects of the best interests standard or same-sex adoption laws. By being more inclusive, custodial law has become more protective of children.

Same-sex parenting adoption situations occur where the partner's jointly adopt, where a single, homosexual parent adopts, or where there is a "second-parent adoption." In a same-sex, second-parent adoption, a child is adopted by the legal parent's unmarried partner without requiring the former to give up any parental rights.¹¹⁶ Only Utah and Mississippi still explicitly

¹¹³ Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM.L.Q. 201, 203 (1998).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 206.

¹¹⁶ Eleanor Michael, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the "Best Interests of the Same-Sex Family,"* 36 CONN. L. REV. 1439, 1446 (2004).

prohibit same-sex couple adoptions.¹¹⁷ Two recent victories for the gay rights community occurred in Florida last year and Arkansas this past spring where courts overturned similar statutes.¹¹⁸ Gay singles are also able to adopt in most states. However, the status of second-parent adoptions throughout the states remains unclear.¹¹⁹ Whether a state gives a gay individual standing to participate in a second-parent adoption depends on the courts' interpretations of their state adoption statute.¹²⁰ Many states have not yet expressed a strict stance on this matter.

The same best interests standard used to expand fathers' rights to custody of their children is also used to justify permission of same-sex couples adoptions in nearly all states.¹²¹ However, some jurisdictions, like Arizona, have decided that whether a parent is homosexual to be an appropriate part of the best interest inquiry, though not a dispositive one.¹²² Consideration of a potential parent's sexual orientation is just as inappropriate as consideration of the parent's sex in that it probably will lead to the same assumptions of a person's ability to parent based on their likelihood of fitting "typical" parental roles. Such precedent is an insidious step backwards from the goals of gender-free family laws which appreciate the individual interests of the family unit. It provides a cautionary tale about monitoring the practice

¹¹⁷ Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. TIMES, June 13, 2011, available at <http://www.nytimes.com/2011/06/14/us/14adoption.html?pagewanted=all=1&>.

¹¹⁸ *Id.*

¹¹⁹ Jason N.W. Plowman, *When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Options for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 57 (2008) (arguing that "[u]ntil marriage equality is secured for same-sex couples, the struggle for second-parent adoptions will remain a critical consideration for gays and lesbians attempting to conform to the family law structure currently in place.").

¹²⁰ ABRAMS ET AL., *supra* note 47, at 1071; Plowman, *supra* note 119, at 1446 (explaining that it is often easier for a gay individual to successfully adopt than a same-sex couple through a second-parent adoption because not only must the statute permit the couple's adoption, but the adoption must also be "in 'the best interests of the child', as calculated by judges and social services personnel.").

¹²¹ Plowman, *supra* note 119, at 1447.

¹²² *Id.* at 1448.

of the best interest standard so that it is not interpreted to defeat the achievements that it has made.

As with the abolition of the tender years doctrine, same-sex adoption schemes emphasize the child's interest in parenting options, while extending and equalizing the right and opportunity to parent. More often than not, it seems that these interests go hand in hand in with the idea that the child's well-being is best secured by increasing the rights of those who are best suited to parent him/her. Perhaps even more noteworthy is the increased interest in equal custodial and parenting laws for males, females and homosexuals, which show that formal familial institutions are more important than ever. The status of "parent" is both a legal, safeguarding mechanism as well as an accomplished societal position. It is not all about the law. For some it is simply about taking part in traditional roles, even if the manners in which they are taken are entirely untraditional. Parental laws have changed and continue to change, but the fundamental relationship of parent and child has never been more secure.

D. The Genderless American Family as a Three-Part Unit

Eliminating the legal construct of women and children as property has also meant an evolution in the meaning of "spouse" and "parent." However, evolution does not mean redefinition. Interests have shifted from property rights to individual needs for all members of the family, but the law has not diminished the foundations of its domestic institutions. Instead, states have widened the scope of family-creating laws because people continue to seek their protections and stability. Instead of giving up, the law has given in to society's needs. Those needs include freedom of choice and the necessary protections of those choices. The result is that positive ideals associated with marriage and parenting have been reinforced, making these rights sought out for their legal and social strengths.

Same-sex familial structures are both the natural result and best offspring of the gender neutralization process, which began when heart balm doctrines and the tender years presumption fell under attack. Opponents of these changes, in particular of same-sex marriage and adoption, insist that the destructive road to a deinstitutionalized family has been paved through legal trends recognizing "non-traditional" family structures. One legal

scholar, Andrew Cherlin, describes deinstitutionalization as a “weakening of social norms.”¹²³ Undoubtedly, social norms have undergone change in the last several decades, but the demise of gendered family roles does not mean the end of traditional family institutions. In fact, only the superficial shell of these institutions has been cracked by deinstitutionalization, leaving the true substance of family ideals intact and more visible than ever.

In the ongoing California dispute over Proposition 8 in *Perry v. Schwarzenegger*, the plaintiffs-appellees take a similar position in defending the right to marry as fundamental.¹²⁴ Their brief refers to trial evidence showing that “over time, marriage has ‘shed its attributes of inequality’ – including race-based restrictions and gender-based distinctions such as coverture – and ‘has been altered to adjust to changing circumstances so that it remains a very alive and vigorous institution today.’”¹²⁵ Their argument points out that Proposition 8 proponents’ fear that same-sex marriage threatens to result in normative changes to the institution of marriage has no factual basis whatsoever.¹²⁶ Moreover, appellees refer to testimony admitting that any deinstitutionalization that has occurred can be blamed on heterosexuals rather than homosexuals.¹²⁷

The appellees also argue that Proposition 8 depends on stereotypes of gender roles that have been completely eliminated from California law, all except for the Proposition’s “one man, one woman” prescription.¹²⁸ Meanwhile, proponents insist upon this standard under the position that gays have no right to redefine marriage for everyone else.¹²⁹ However, the word “marriage” has its own history and symbolism that transcends such a simple definition.¹³⁰ Although proponents insist that the sex-

¹²³ See Cherlin, *supra* note 72, at 848.

¹²⁴ Brief for Appellees at 46-50, *Kristen M. Perry, et al. v. Arnold Schwarzenegger, et al.*, No. 10-16696 (9th Cir. Oct. 18, 2010).

¹²⁵ *Id.* at 47 (quoting trial testimony from appellee’s expert witness Dr. Coff).

¹²⁶ *Id.* at 91-92.

¹²⁷ *Id.* at 18 (quoting appellant’s expert, Mr. David Blankenhorn).

¹²⁸ *Id.* at 72.

¹²⁹ Brief for Appellees, *supra* note 124, at 8.

¹³⁰ Richard Salas, *In Re Marriage Cases: The Fundamental Right to Marry and Equal Protection Under the California Constitution and Effects of Proposition 8*, 36 HASTINGS CONST. L.Q. 545, 553-54 (2009).

based definition is meant to protect marriage and children,¹³¹ the California Supreme Court has indicated that “marriage” also protects the choice of the individual, describing it as “the center of personal affections that enoble and enrich human life” and “the most socially productive and individually fulfilling relationship that one can enjoy in the course of the lifetime.”¹³² In other words, the law cares about providing individuals with the legal benefits of marital status as well as with the right to express and celebrate their choice in whom to share that status. What is certain from listening to the Proposition 8 arguments on both sides is that marriage is a complex structure that is worthy of preservation.

Same-sex adoption seems much farther ahead in the race for equality than same-sex marriage, but still lags behind the ultimate goal. Nevertheless, the same best interests standard that has been used to justify same-sex adoptions law may be applicable to same-sex marriage for couples who are raising children.¹³³ Similarly, some scholars argue that the general rule that parents are competent to decide what is good for their children means same-sex couples raising children deserve consideration when they say that they need marriage.¹³⁴ Meanwhile, the “responsible procreation” argument advanced by Proposition 8¹³⁵ and opposite-sex proponents, which claims that an essential purpose of marriage between a man and a woman is to rear children in a stable environment,¹³⁶ falls flat in the face of the numerous jurisdictions (including California) that already permit same-sex couple adoptions.

Parenting and marriage are intertwined, though not interdependent, but the justification for same-sex rights is the same for both. Family formation has become the ultimate form of personal expression. If a state removes that choice from many people, those with marriage and parental rights become an elevated

¹³¹ Brief for Appellees *supra* note 124 at 107.

¹³² *Salas, supra* note 130, at 549.

¹³³ Michael, *supra* note 116, at 1465-66.

¹³⁴ William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 MARRIAGE & CHILD WELLBEING 97, 110 (2005).

¹³⁵ Brief for Appellees *supra* 124 at 23.

¹³⁶ *Id.* at 50.

class whose status is dependent upon excluding from others the right to choose. The concern is that should many jurisdictions' family laws continue to omit rights for same-sex couples, they will eventually destroy the traditions that domestic institutions claim to represent. The genderless path that has already been formed is dependent upon continued growth to reinforce both what has recently been achieved as well as the traditional family ideals that these achievements support.

In reality, new family laws widen the door for preserving traditional familial functions by expanding them to fit an androgynous practice of family law. They let people choose for themselves while still maintaining traditional guidelines and social expectations. Just as with the extinction of sexist common law doctrines, modern changes are expanding the breadth of already existing rules as a result of disintegrating gender norms. If these changes alter the meaning of what it is to be a spouse or a parent, such result deserves to be welcomed in the name of the familial traditions that made those rights worth preserving in the first place.