New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

Appellate Division
No. 98084

SYLVIA SAMUELS AND DIANE GALLAGHER, HEATHER MCDONNELL AND CAROL SNYDER, AMY TRIPI AND JEANNE VITALE, WADE NICHOLS AND HARING SHEN, MICHAEL HAHN AND PAUL MUHONON, DANIEL J. O'DONNELL AND JOHN BANTA, CYNTHIA BINK AND ANN PACHNER, KATHLEEN TUGGLE AND TONJA ALVIS, REGINA CICCHETTI AND SUSAN ZIMMER, ALICA J. MUNIZ, AND ONEIDA GARCIA, ELLEN DREHER AND LAURA COLLINS, JOHN WESSEL AND WILLIAM O'CONNOR, AND MICHELLE CHERRY-SLACK AND MONTEL CHERRY-SLACK

Plaintiffs-Appellants,

-against-

THE NEW YORK STATE DEPARTMENT OF HEALTH AND THE STATE OF NEW YORK

Defendants-Respondents.

BRIEF OF PROFESSORS OF HISTORY AND FAMILY LAW AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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We are professors of history and family law specializing in the history of marriage, families, and the law, at universities throughout the United States. We have written leading books and articles uncovering and analyzing the history of marriage and marriage law in the United States. This brief is submitted to assist the Court's deliberations by offering an analysis of the history of marriage law and practice based on our scholarship. Our names, institutional affiliations, and brief biographies are set out in Exhibit D to Affirmation of Suzanne B. Goldberg in Support of Permission to File a Brief as Amici Curiae (May 17, 2005).

We adopt the Statement of the Case and Statement of Facts in the brief of the Plaintiffs-Appellants.

SUMMARY OF ARGUMENT

The history of marriage in New York is a history of change. Since the State's earliest days, marriage has undergone continuous reexamination and revision. Indeed, marriage today – a partnership between two adults who are equal in the eyes of the law – bears little resemblance to marriage as it existed at the State's founding or even a few decades ago.

To claim that history or tradition compels the continuation today of a different-sex eligibility rule in marriage is thus to misunderstand and misuse the history of marriage. The relevant history demonstrates that all marriage rules remain subject to meaningful judicial review and that a rule's vintage is not, by itself, sufficient justification for its retention. Indeed, the historical record specifically documents the transformation or invalidation of many traditional

features of marriage. It shows as well that New York has not maintained uniformity between its marriage rules and those of other states. In short, the history of marriage in New York does not validate the rule excluding same-sex couples from marriage that is challenged in this case.

Further, the ongoing evolution of marriage throughout New York's history renders implausible the suggestion that marriage, which has survived so many changes, is too frail to endure the constitutionally compelled revision of the anachronistic different-sex eligibility rule. To the contrary, the State continues to recognize a substantial set of rights and responsibilities of couples as "marriage," even as that set possesses few of the elements considered fundamental to marriage earlier in our history. Nor have the changes to marriage deterred New Yorkers, who continue to embrace marriage overwhelmingly as the mechanism for achieving state recognition of their relationships. Even in the wake of significant transformation, marriage has survived, all the while remaining true to its core purpose of recognizing committed, interdependent partnerships between consenting adults.

ARGUMENT

I. The Legal Definition of Marriage in New York Has Never Been Static; Features of Marriage Once Thought Essential Have Been Revisited and Rejected Consistently Over Time.

By resting its analysis on a specific "historical, legal, and cultural understanding of marriage," the court below assumed that marriage is a fixed status with certain foundational elements that cannot be changed except, perhaps, by the

Legislature.[1] Samuels v. New York State Dep't of Health, No. 1967-04, at 7 (Albany Cty., Dec. 7, 2004). But legal developments throughout New York's history belie this view of marriage as historically static. Instead, through a steady stream of decisions and statutory amendments, New York's courts and legislature have continuously adjusted and abandoned elements once thought to represent the foundations of marriage.

A. The Shift Away From the Common Law Coverture Regime Transformed the Meaning of Marriage in New York in the 19th and Early 20th Centuries.

Until well into the 19th century, marriage in New York meant the complete merger of a woman's legal identity into that of her husband. Indeed, for most people, marriage was unimaginable in any other way.[2] As the Court for Correction of Errors put it in 1830,[3] "the wife . . . and her husband constitute but one person."

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[1] See also Shields v. Madigan, 5 Misc. 901, 907 (Rockland Cty. 2004) (holding that the exclusion of same-sex couples from marriage "serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman"). But see Hernandez v. Robles, No. 103434, 2005 WL 363778, at *16, *19 (N.Y. Cty., Feb. 4, 2005) ("[T]he concept of marriage has steadily evolved beyond a rigid static 'historical' definition . . . . [H]istory demonstrates that marriage is not a stagnant institution.").

The State likewise treated marriage as having a fixed historical meaning in its arguments below. See, e.g., Mem. of Law in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Defs.' Cross Mot. for Summ. J. at 17 (filed July 23, 2005) (hereinafter "Defs.' Br.") (contending that "the State has legitimate interests in preserving the historic legal and cultural understanding of marriage" as limited to different-sex partners).

[2] Religious tradition and civil law both shaped early models of marriage. See Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 65-66 (1985) (observing shifts in the treatment of marriage as a sacrament). However, New York's government, since colonial times, has overseen marriage as a civil institution rather than a religious contract. See Maynard v. Hill, 125 U.S. 190, 212 (1888), citing Wade v. Kalbfleisch, 58 N.Y. 282 (1874) ("The general statute . . . declares [marriage] a civil contract, as distinguished from a religious sacrament.").

[3] As this Court is aware, from early statehood through 1847, the State had two high courts: the Court for the Correction of Errors (N.Y.) and the Court of Chancery (N.Y. Ch.). William H. Manz, Gibson's New York Legal Research Guide 116-17 (3d ed. 2004). The Supreme Court of Judicature (N.Y. Sup. Ct.) functioned as an intermediate appellate court from 1821-1847. Id.

Martin v. Dwelly, 6 Wend. 9 (N.Y. 1830). See also People ex rel. Barry v. Mercein, 3 Hill 399, 407 (N.Y. Sup. Ct. 1842) (citation omitted) ("The very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband."); Nancy F. Cott, Public Vows: A History of Marriage and the Nation 11-12 (2000) (describing the sudden change in a woman's rights upon marriage under the coverture regime).

For both men and women, negating a married woman's independent legal capacity, including her capacity to own property in her own right, was understood as one of marriage's indispensable elements. As the Supreme Court of Judicature wrote in 1824, "a husband, in virtue of his marriage, becomes absolute owner of the goods and chattels of his wife." Udall v. Kenney, 3 Cow. 590 (N.Y. Sup. Ct. 1824). See also Barber v. Harris, 15 Wend. 615 (N.Y. Sup. Ct. 1836) ("[D]uring the life of the husband, he undoubtedly has the absolute control of the estate of the wife, and can convey or mortgage it for that period.").

The collapse of women's legal identity upon marriage extended to wives' ability to contract as well. As the Supreme Court of Judicature observed in 1819, "[i]t is a settled principle of the common law, that coverture disqualifies a *feme* from entering into a contract or covenant, personally binding upon her." Jackson ex dem. Clowes v. Vanderheyden, 17 Johns. 167 (N.Y. Sup. Ct. 1819). See also Wood v. Genet, 8 Paige Ch. 137 (N.Y. Ch. 1840) ("[I]t is perfectly well settled that a *feme covert* cannot bind herself, personally, by any contract or agreement. . . .").

Husbands' control over their wives meant, too, that women had limited recourse in response to "restraint" by their husbands. Mercein, 3 Hill at 408

("[T]he courts of law will still permit the husband to restrain the wife of her liberty in case of any gross misbehavior."). See also Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2123 (1996) (explaining the common law view that since a husband was legally liable for his wife's misbehavior, he also possessed the power to "restrain" her).

This gendered concept of marriage reflected in coverture emerged from the view that the colonial family was a "little commonwealth" whose members were bound together by a well-defined set of reciprocal duties and the shared aims of domestic tranquility. Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 5 (1985) (citation omitted). The husband was, by legal entitlement and informal social code, the "governor" of this colonial household. Id. The wife and children, in turn, were dependents within the husband's domain. See Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 6-14 (1994) (discussing colonial parents' rights and responsibilities).

Against this background, a woman's "civil death" upon marriage was seen as both natural and essential to the healthy continuation of marriage and the broader society. See Peggy A. Rabkin, Fathers to Daughters: The Legal Foundations of Female Emancipation 19 (1980) (discussing married women's legal status in New York prior to 1848). According to the Supreme Court of Judicature, "no man of wisdom and reflection can doubt the propriety of the rule, which gives to the husband the control and custody of the wife." Jaques v. Methodist Episcopal Church, 17 Johns. 548, 584 (N.Y. Sup. Ct. 1820). "[T]his socially constructed rule

[of unity] was identified as part of 'the natural order of things.'" Isabel Marcus, Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State, 37 Buff. L. Rev. 375, 392 (1988). See also Hendrik Hartog, Man & Wife in America: A History 102-03 (2000) (describing the 19th century's perception of coverture "as a simple and sincere expression of human natures," and "based on unchanging scriptural truth"). Consequently, coverture was also seen as necessary "to preserve the harmony of the marriage relationship." Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 996 (2002).

But by the middle 19th century, the institution of marriage had changed considerably. Marriage no longer meant the absolute legal subordination of women to their husbands. In 1848, New York became one of the first states in the country to authorize married women to own property as independent individuals. Doris Jonas Freed et al., Married Women's Rights, N.Y.L.J., Feb. 26, 1991, at 3, col. 1. The Act provided in part:

> The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

Act of April 7, 1848, ch. 200 § 1, 1848 N.Y. Laws 307. The following year, the Act was amended to provide married women with the power to contract as well. Act of April 11, 1849, ch. 375 §§ 3-4, 1849 N.Y. Laws 528 (authorizing a married

woman "to convey and devise real and personal property . . . as if she were unmarried").

Not surprisingly, the opponents of these changes proclaimed that removing the husband from his role as the "ultimate locus of power within the home" would lead to domestic chaos and the destruction of the nation. Grossberg, supra, at 282. In 1844, for example, a New York State legislative committee observed "that allowing married women to control their own property would lead 'to infidelity in the marriage bed, a high rate of divorce, and increased female criminality,' while turning marriage from 'its high and holy purposes' into something arranged for 'convenience and sensuality.'" E.J. Graff, What is Marriage For? The Strange Social History of Our Most Intimate Institution 30-31 (1999). A prominent New York lawyer opposed the Act out of similar fears that women's independent property ownership would lead "husband and wife [to] become armed against each other to the utter destruction of the sentiments which they should entertain towards each other, and to the utter subversion of true felicity in married life." Rabkin, supra, at 95 (quoting G. Bishop & W. Attree, Report of the Debates and Procedures of the Convention for the Revision of the Constitution of the State of New York 1846 1057 (1846)).

Despite these concerns, the element of legal unity of spouses, which had been thought of as essential to marriage since statehood, continued to change throughout the 1850s and 1860s through a stream of legislative acts and judicial decisions. These changes included statutes protecting married women's savings deposits (Act of March 25, 1850, ch. 91, 1850 N.Y. Laws 142), ensuring married

women the right to vote as stockholders in elections (Law of June 30, 1851, ch. 321, 1851 N.Y. Laws 616), and protecting a woman's right to sue and be sued[4] and to keep her earnings during marriage (Act of March 20, 1860, ch. 90, 1860 N.Y. Laws 157 (the "Earnings Act")). Reflecting New York's leadership role in altering the meaning of marriage, the Earnings Act has been described as arguably the nation's "boldest" legislation on behalf of married women's legal rights. Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York 28 (1982).

Courts played a significant role in determining the elements of marriage. At first, for example, they adhered to the previously settled view that married women were limited in their ability to contract. See, e.g., Bertles v. Nunan, 92 N.Y. 152, 160 (1883) (holding that "[t]he ability of the wife to make contracts is limited"). By 1908, however, the Court of Appeals rejected that position: "Courts of law now recognize the separate existence of a husband and his wife the same as courts of equity and give to each the same rights and remedies." Winter v. Winter, 191 N.Y. 462, 475 (1908).

New York's courts likewise eroded earlier rules limiting wives' ability to sue in tort. Traditional requirements that a husband be joined to any tort action against a married woman were rejected. Compare Bertles, 92 N.Y. at 161 ("the common-law rule as to the liability of the husband for the torts and crimes of his

[4] The provisions of the Earnings Act allowing women to sue and be sued were repealed in 1880 and then reinstated a decade later. Joseph A. Ranney, Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin, 6 Wm. & Mary J. Women & L. 493, 528-29 (2000).

wife are still substantially in force"), with Quilty v. Battie, 135 N.Y. 201, 209 (1892) (finding that a husband was "not a proper party defendant" in a case against the wife for "a trespass committed by her in the care and management of her separate estate"). Similarly, the State's high court recognized a married woman's right to sue third parties for personal torts. See Bennett v. Bennett, 116 N.Y. 584, 590 (1889) (holding that a married woman had the same legal capacity as her husband to bring suit at common law for alienation of affections).

By 1923, New York courts not only had rejected the traditional understanding of marriage as coverture but also had characterized as "archaic" the common law understanding that a husband "had a property interest in [his wife's] body and a right to the personal enjoyment of his wife." Oppenheim v. Kridel, 236 N.Y. 156, 161 (1923). In setting aside the different rules for husbands and wives regarding claims of criminal conversation, the Court pointedly observed that the only objection to the wife's claim had been "the plea that the ancient law did not give it to her." Id. at 165. "Reverence for antiquity," however, "demands no such denial," the Court wrote. Id. Instead, "[c]ourts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights." Id.

B. Since the Mid-Twentieth Century, New York Has Continued To Change Elements of Marriage Once Considered Unalterable.

Having endured the transformations just described, marriage neither collapsed as a legal or social entity nor became so immutably fixed as to ward off further evolution. To the contrary, changes to what once had been thought of as

"core" elements of marriage continued. These changes reshaped, inter alia, rules regarding interspousal immunity, spousal testimonial privilege, the doctrine of necessaries, loss of consortium, and sexual relations between spouses. Both individually and together, these shifts demonstrate, again, that the law governing marriage has been and continues to be in a constant state of change, reflecting the imperatives of a changing social order.[5]

1. Interspousal Immunity and Spousal Testimonial Privilege

The doctrine of interspousal immunity was long understood as fundamental to marriage. Traditionally, "neither spouse could sue the other civilly for personal injuries wrongfully inflicted upon the other." People v. Morton, 284 A.D. 413, 416 (2d Dep't), aff'd, 308 N.Y. 96 (1954). Conferring such a right, it was feared, would be "destructive of that conjugal union and tranquility." Longendyke v. Longendyke, 44 Barb. 366 (N.Y. Cty. 1863).

This immunity had widespread repercussions. For example, married women could not sue their husbands for assault and battery (see id.; Schultz v. Schultz, 89 N.Y. 644, rev'g 63 How. Pr. 181 (N.Y. Cty. 1882); Abbe v. Abbe, 22 A.D. 483 (2d

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[5] Recent international developments show, too, that marriage continues to evolve without harm to the institution. Belgium, the Netherlands, and most of Canada now recognize marriages of same-sex couples on the same basis as marriages of different-sex couples. See ABA Section of Family Law, A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships, 38 Fam. L. Q. 339, 407-08 (2004); Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 33, 42 (Can. 2004) (finding marriage rights for same-sex couples to be consistent with Canadian Charter and noting decisions from provincial courts mandating recognition of same-sex couples' marriages). Also in 2004, the Supreme Court of Appeals of South Africa found that exclusion of same-sex couples from common law marriage rights violated South Africa's Constitution. Fourie v. Minister of Home Affairs, Case No. 232/2003 (South Africa Supreme Court of Appeals, Nov. 30, 2004). See also White Paper, supra, at 410 (discussing 1995 ruling by Hungary's Constitutional Court recognizing common-law marriages of same-sex couples).

Dep't 1897)), trespass upon their person (Caplan v. Caplan, 268 N.Y. 445 (1935)), malicious prosecution (Allen v. Allen, 246 N.Y. 571 (1927)), or slander (Freethy v. Freethy, 42 Barb. 641 (N.Y. Cty. 1865)).

Eventually, however, this element of marriage that was once thought unalterable was written out of existence. See Laws of 1937, ch. 669 § 1 (providing that spouses could sue each other for wrongful personal injuries); see also State Farm Mut. Auto. Ins. Co. v. Westlake, 35 N.Y.2d 587, 591 (1974) ("No longer is it considered contrary to public policy for one spouse to sue another for damages for personal injuries.").

In 1954, the Court of Appeals went further, extending the abrogation of interspousal immunity to include criminal cases so that a husband could be convicted of larceny for theft of his wife's property. See People v. Morton, 308 N.Y. 96, 99 (1954) ("We are not fearful, as was the court in 1863 . . . that this will 'involve the husband and wife in perpetual controversy and litigation' or 'sow the seeds of perpetual discord and broil[.]'"). In the Second Department's ruling in the same case, the Court observed that "[i]t would not be consonant with our present social concepts of husband and wife to say that one is not a person separate from the other." Morton, 284 A.D. at 418.

New York courts similarly cast aside the longstanding rule that spouses could not be compelled to testify against each other in court. See, e.g., People v. Watkins, 63 A.D.2d 1033, 1034 (2d Dep't 1978) (holding that the traditional privilege protecting spouses from testifying against each other "does not extend to communications between spouses" in connection with a criminal conspiracy)

(citations omitted). Under the traditional rule, husbands, but not wives, were obligated to support the family. See Garlock v. Garlock, 279 N.Y. 337, 340 (1939) ("[T]he duty rests upon the husband to support his wife and his family, not merely to keep them from the poorhouse, but to support them in accordance with his station and position in life."). Cf. Med. Bus. Assoc., Inc., 183 A.D.2d at 91 (describing "[t]he obligation of a husband to support his wife" as "comport[ing] with the traditional family structure of the husband as sole breadwinner and the wife as full-time homemaker").

In 1989, the Third Department recognized the outmoded nature of this common law rule, holding that spouses had reciprocal, rather than sex-based, duties to pay for each other's necessaries. Our Lady of Lourdes Mem. Hosp., Inc. v. Frey, 152 A.D.2d 73 (3d Dep't 1989). In 1992, the Second Department agreed, holding that the gendered doctrine of necessaries violated the State's equal protection guarantee. See Med. Bus. Assoc., Inc., 183 A.D.2d at 91 (describing the traditional rule as "an anachronism that no longer fits contemporary society") (citations omitted).

4. Sexual Relations

Finally, the treatment of sexual relations between spouses as an element of marriage has also undergone significant change. For over 150 years, the law was clear: a man could have sexual relations with his wife any time he so chose. People v. Liberta, 64 N.Y.2d 152, 162 (1984) (citing an 1852 New York treatise on this point). Indeed, a wife's presumptive consent to sexual relations with her husband had long been considered fundamental to the marriage right. Id. Yet in

1984, the Court of Appeals rejected this deep-rooted understanding of marriage. The traditional rationales for the marital rape exemption, it held, no longer withstood rational basis review. Id. at 163. See also People v. De Stefano, 121 Misc. 2d 113 (Suffolk Cty. 1983) (same).

As the history of marriage demonstrates, fears that the institution of marriage would be endangered accompanied each change to elements once thought of as essential to marriage. The Massachusetts Supreme Judicial Court observed, for example, that "[a]larms about the imminent erosion of the 'natural' order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of 'no-fault divorce.'" Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003). Yet, that court added, "[m]arriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution." Id. See also Hernandez v. Robles, No. 103434, 2005 WL 363778, at *20 (N.Y. Cty., Feb. 25, 2005) ("There has clearly been a *steady evolution* in the institution of marriage throughout history. . . .") (emphasis supplied).

The Court of Appeals made this same point regarding unfounded predictions of harm flowing from legal changes to familial relationships when it recognized tort liability between siblings in 1939. Rozell v. Rozell, 281 N.Y. 106 (1939). The Court observed that "[t]he modern family . . . is far different in structure, status and internal social and legal relationship than the family of ancient times." Id. at 109. It added: "Not withstanding such changes from tradition [to the rules governing

family relations], predictions of dire results to the continued peace and amity of the family relationship have not been sustained." Id. at 111.

The historical record demonstrates, in short, that marriage has remained both viable and desirable as the State's most comprehensive formal mechanism for recognizing adult partnerships, even as its familiar, longstanding rules have been rejected over time. Just as it has survived changes to so many anachronistic rules in the past, marriage will survive, too, the invalidation of the different-sex eligibility rule challenged here.

II. Spousal Interdependence Comprises the Essential Element of Marriage Today in New York; Neither the Sex of the Marriage Partners Nor Procreation Is Relevant To the State's Interests.

On numerous occasions, New York's courts have identified the essence of marriage today not in the separate, gendered roles of husbands and wives nor in the function of procreation, but instead in the interdependence of the marital partners. This interdependence is, in large part, economic. See Holterman v. Holterman, 781 3 N.Y.3d 1, 7 (2004) (stating that the Domestic Relations Law "recognize[s] marriage as an economic partnership"); DeLuca v. DeLuca, 97 N.Y.2d 139, 144 (2001) (describing the "contemporary view of marriage as an economic partnership") (citations omitted); Koehler v. Koehler, 182 Misc. 2d 436, 442 (Suffolk Cty. 1999) ("The underlying rationale of the reforms [to the Domestic Relations Law] of 1980 was the assumption that marriage was purely an economic partnership and should be treated as such.").

Beyond economics, New York's courts have also recognized emotional interdependency and sexual intimacy as important to marriage. In addressing the concept of loss of consortium, for example, the Court of Appeals explained that the loss comprised not only "support or services" but also "such elements as love, companionship, affection, society, sexual relations, solace and more." Millington, 22 N.Y.2d at 502. See also Hernandez, 2005 WL 363778, at *25 ("Marriage, as it is understood today, is both a partnership of two loving equals who choose to commit themselves to each other and a state institution designed to promote stability for the couple and their children.").

The statutes governing marriage implicitly have recognized this concern with mutual care through their focus on insuring the consent of the parties to the marriage and on promoting the partners' commitment to each other. See, e.g., N.Y. Dom. Rel. Law § 7(1)-(5) (McKinney's 2004) (providing for nullification when a party to the marriage was incapable of consent or consent arose from force, duress, or fraud); N.Y. Dom. Rel. Law § 236[B][6][a][5], [8] (McKinney's 2004) (setting out conditions for maintenance awards based on one party having foregone opportunities or provided homemaking or other services for the other).

The evolution of standards regarding care of children upon dissolution of a marriage reinforces that the sex of the marital partners has become legally irrelevant. The changes in this area – from a preference for fathers to a preference for mothers to a sex-neutral position – reveal the rule limiting marriage to male-female couples to be an outgrowth of an earlier view, since rejected, that marriage involved naturally and legally distinct roles for men and women.

Early on in custody disputes, New York courts embraced the common law rule that the father, not the mother, was entitled to custody of their children. "That the father has, by the common law, the paramount right to the custody and control of his minor children, and to superintend their education and nurture, is too well settled to admit of doubt." People ex rel. Olmstead v. Olmstead, 27 Barb. 9, 9 (N.Y. Cty. 1857). See also Linda R. v. Richard E., 162 A.D.2d 48, 54 n.3 (2d Dep't 1990) ("Gender had long been the primary factor in awarding custody, beginning with ancient and common-law doctrine of absolute patriarchal control . . . ."). Even after statutory changes in 1860 explicitly granted married women joint custody of their children, see 1860 N.Y. Laws ch. 90 § 9, courts continued to find that "the recognized paramount right of the father must prevail over the otherwise equal claims of the mother." People ex rel. Brooks v. Brooks, 35 Barb. 85, 92 (N.Y. Cty. 1861).

By the late 1800s, the absolute, seemingly "natural" rule favoring fathers gave way to a maternal presumption in child custody disputes, particularly when young children were involved. See Osterhoudt v. Osterhoudt, 28 Misc. 285, 285 (N.Y. Cty. 1899) (explaining that "the tender guidance of a mother is of incalculable advantage, and should only be lost to [young children] by her death or misconduct"). This maternal preference remained in force for much of the 20th century. See, e.g., People ex rel. Himber v. Himber, 136 N.Y.S.2d 456, 458 (N.Y. Cty. 1954) ("[W]hen it becomes necessary to make a choice between mother and father it is to the child's best interest and welfare to be brought up and reared by his mother . . . .").

More recently, though, the State's courts revisited this once-"normal" preference for maternal care and concluded that sex-based parenting rules are outdated and not essential to marriage (or marital dissolution) after all. As the Second Department observed, "[w]hile the role of gender in making custody determinations has had a lengthy social and legal history, it finds no place in our current law." Linda R., 162 A.D.2d at 53-54. See also Fountain v. Fountain, 83 A.D.2d 694, 694 (3d Dep't 1981) ("A presumption of 'maternal superiority' is now considered to be outdated."). Cf. Hernandez, 2005 WL 363778, at *22 (citing cases showing recognition by New York courts that "gay or lesbian sexual orientation does not bear on fitness to parent children").

New York's custody and child support statutes reflect the same gender-neutral position regarding the treatment of children upon marital dissolution. See N.Y. Dom. Rel. Law § 70 (McKinney's 2004) ("[i]n all cases there shall be no prima facie right to the custody of the child in either parent"); N.Y. Dom. Rel. Law § 240(1) (McKinney's 2004) (same). As a result, courts now regularly award custody to fathers, even when both parents are found to be fit. See, e.g., Bryant v. Nazario, 306 A.D.2d 529 (2d Dep't 2003).

These shifts in custody rules and in the doctrine and law that constitute marriage underscore that conventional understandings, while not to be denigrated, cannot alone justify the continued enforcement of an otherwise discriminatory law or doctrine. As Justice Holmes remarked, dissenting in Lochner v. New York, 198 U.S. 45 (1905), "the accident of our finding certain opinions natural and familiar . . . ought not to conclude our judgment upon the question whether statutes

embodying them conflict with the Constitution of the United States." Id. at 76 (Holmes, J., dissenting).[6] That is certainly the case here, where the different-sex eligibility requirement reflects the view of marriage as a gendered status that has long been rejected by both the courts and legislature. *The present focus of both the courts and the legislature is now trained instead on the spouses' commitment to each other, a factor that has no legitimate connection to the sex of the marital partners.*

The history of marriage in New York as well as contemporary state law also belie the suggestion that procreation has always been an essential element of marriage.[7] In fact, the spouses' sexual intimacy has been repeatedly deemed marriage's essential element while references to the importance of procreation appear only in dicta. For example, Mirizio v. Mirizio, 242 N.Y. 74 (1926), which offered as dicta that marriage is "for the purpose of begetting offspring," did not concern procreation at all. Id. at 81. Instead, the central question in the case was whether the refusal "to submit to ordinary marital physical relations" amounted to desertion or abandonment. Id. at 78. In 1960, the Court of Appeals reinforced that Mirizio concerned sexual intimacy rather than procreation: "That a refusal to have

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[6] The U.S. Supreme Court has taken this point to heart, affirming in numerous cases that while history is a useful starting point for analysis, the past alone cannot justify retention of a discriminatory, exclusionary rule. See, e.g., Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("'[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . .'") (alteration in original) (citation omitted); Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.").

[7] Defs.' Br. at 17-18 (advocating procreation as justification for maintaining "the tradition of heterosexual marriage").

marital sexual relations undermines the essential structure of a marriage is a proposition basic to this Court's decision in the Mirizio and as obvious as it is authoritative." Diemer v. Diemer, 8 N.Y.2d 206, 210 (1960).

Moreover, the State's annulment statutes and jurisprudence have long rejected procreation as a fundamental element of marriage even while recognizing the importance of sexual intimacy between marital partners. Over a century ago, the Second Department distinguished sexual relations from procreation, finding that the inability to "become a mother" did not make it "impossible for the defendant . . . to enter into the marriage state." Wendel v. Wendel, 30 A.D. 447, 448-49 (2d Dep't 1898) (citations omitted). "[I]t cannot be held, as a matter of law, that the possession of the organs necessary to conception are essential to entrance to the marriage state, so long as there is no impediment to the indulgence of the passions incident to this state." Id. at 449. Simply put, sexual relations, not procreation, was a foundation of marriage.

In Zagarow v. Zagarow, 105 Misc. 2d 1054 (Suffolk Cty. 1980), the court likewise held that a wife's refusal to procreate was not a ground for divorce. "Unlike marital sexual relations, which are, per se, part of the essential structure of marriage, the parties are free to decide when and if and how often they will have children," the court wrote. Id. at 1057. See also id. at 1059 ("It would be futile to rule that a woman must submit to a pregnancy and then hold that she may legally abort it."); De Stefano, 121 Misc. 2d at 123 (same).

Even the Domestic Relations Law provision that "physical cause" can render a marriage voidable, N.Y. Dom. Rel. Law § 7(3) (McKinney's 1909), relates not to

procreation but rather to the capacity for sexual intimacy. The Court of Appeals made this clear in 1930, when it distinguished the ability to bear children from the ability to "perform[] the functions of a wife or a husband." Lapides v. Lapides, 254 N.Y. 73, 80 (1930) (observing that "[t]he inability to bear children is not such a physical incapacity as justifies an annulment"); see also Goodridge, 798 N.E.2d at 961 ("While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."); William M. Hohengarten, Note, Same-Sex Marriage and the Right of Privacy, 103 Yale L.J. 1495, 1512 (1994) ("[L]aws governing domestic relations do not treat the ability to procreate as a precondition of marriage. The marital relationship is valued in its own right as a legal commitment between two intimately related adults, not because it is sometimes connected with procreation."). Cf. Lawrence v. Texas, 539 U.S. 558, 605 (2003) (stating that "encouragement of procreation" could not justify excluding same-sex couples from marriage) (Scalia, J., dissenting).

As the history and current law regarding the elements of marriage demonstrate, neither procreation nor gendered roles for the marital partners are essential to marriage today. Instead, taken together, they reveal the different-sex eligibility rule to be inconsistent with the standards of marriage as they have evolved.

III. New York Historically Has Not Maintained Uniformity With Other States in Its Definition of Marriage.

Throughout history, New York has always followed its own course in defining and transforming the elements of marriage in the ways discussed above. Although the State has traditionally recognized other states' marriages through liberal comity principles, it has not sought uniformity with those states' marriage rules. The State's history thus contradicts the Defendants' claim that the status of marriage in other states should govern New York law.[8]

New York's comity law, which recognizes virtually all marriages that are valid where they are celebrated, has led to recognition of marriages that the State's own law does not permit. See In re May's Estate, 305 N.Y. 486, 490 (1953) ("the legality of a marriage between persons . . . is to be determined by the law of the place where it is celebrated"). For example, New York's courts have recognized common law marriages, marriages between an uncle and a niece, and remarriage by an adulterer, among others. See, e.g., Mott v. Duncan Petroleum Trans., 51 N.Y.2d 289, 292 (1980) ("[I]t has long been settled law that although New York does not itself recognize common-law marriages . . . a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted."); In re May's Estate, 305 N.Y. 486 (recognizing the out-of-state marriage of an uncle and a niece, despite the State's prohibition of such marriages); Van Voorhis v. Brintnall, 86 N.Y. 18 (1881) (recognizing remarriage

[8] Defs.' Br. at 15 (suggesting that other states' exclusion of same-sex couples from marriage should justify New York's exclusionary rule).

of man who traveled out of state to evade New York's prohibition against remarriage).

The State's generous comity doctrine also has led New York to recognize same-sex couples' marriages and partnerships celebrated out of state. See, e.g., Langan v. St. Vincent's Hosp. of N.Y., 196 Misc. 2d 440 (Nassau Cty. 2003) (treating gay couple with Vermont civil union as spouses for purposes of wrongful death statute); 2004 N.Y. Op. Atty. Gen. No. 1 (2004) (stating that state comity law would require recognition of same-sex couples' out-of-state marriages).

The only exceptions that New York courts have suggested could prevent the recognition of a valid out-of-state marriage are "cases, first of incest or polygamy coming within the prohibitions of natural law . . .; second, of prohibition by positive law." Van Voorhis, 86 N.Y. at 26.[9] The Court of Appeals has stressed, further, that foreign-based rights should be enforced unless the transaction "is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." Intercontinental Hotels Corp. (Puerto Rico) v. Golden, 15 N.Y.2d 9, 13 (1964).

In contrast to New York's liberal treatment of out-of-state marriages, New York's divorce law is conservative relative to other states. In the 19th century, the State's divorce laws were "notorious for their rigidity and inflexibility." Hendrik Hartog, Marital Exits and Marital Expectations in Nineteenth Century America,

[9] With respect to consanguinity, New York remains in the minority of states that continue to recognize marriages between first cousins. See Judith C. Areen, Family Law: Cases and Materials 13 (4th ed. 1999).

80 Geo. L.J. 95, 116 (1991). As "the last state to move toward liberalizing its divorce laws," Marcus, supra, at 417 n.159, New York banned remarriage by the party liable for the divorce during much of the 19th century, Laws of 1879, ch. 321 § 49, and until 1966 had adultery as its only ground for divorce. N.Y. Dom. Rel. Law § 170 (McKinney's 1966) (amending state law to provide six grounds for divorce, including, inter alia, abandonment and separation pursuant to court order or written agreement). New York is now the only state in the country to "require[] the finding of fault or living apart pursuant to a legal document as a basis for divorce." S.C. v. A.C., 4 Misc. 3d 1014(A), Slip Copy (Queens Cty. 2004) (unpublished opinion).

Thus, neither historically nor today can New York's marriage law be characterized fairly as conforming with that of other states.

CONCLUSION

As illustrated above, the history of marriage has been one of evolution, not of static immutability, with marriage surviving innumerable changes to its core rules over the last two centuries. These changes to the institution of marriage over time have left the current rule excluding same-sex couples from marriage without any legitimate relationship to the concerns of fairness, equality and interdependence that are marriage's contemporary underpinnings. Likewise, the historical and ongoing absence of uniformity between marriage rules of New York and other states demonstrates that claims about uniformity cannot support the rule challenged here.

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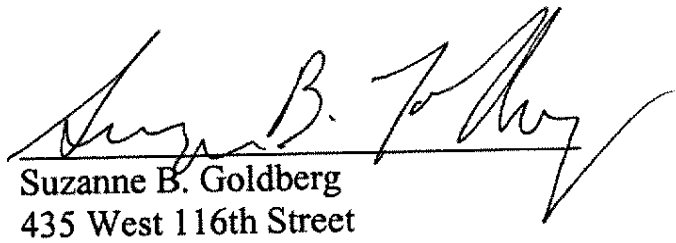
Respectfully submitted,



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