HETERONORMATIVITY: THE BIAS UNDERLYING MARRIAGE, GENDER ROLES, SEX DISCRIMINATION, AND CUSTODY DETERMINATIONS

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I. INTRODUCTION

> Watch your thoughts, they become your words; watch your words, they become your actions; watch your actions, they become your habits; watch your habits, they become your character; watch your character, it becomes your destiny.[1]

Although this quote is often used as a means of promoting mindfulness and self-help, the wisdom contained within it is applicable in far more than just the self-help realm. It is irrefutable that "[l]anguage and cognition are intertwined, with language impacting cognition and vice versa."[2] One area in which this is seen is the realm of family law – specifically relating to many of society's preconceived notions about the roles of members of the family.

> Humans develop schemas about how the world works which help them synthesize the thousands of pieces of information that they are bombarded with on a daily basis. These schemas are cognitive structures. . . .When people's behavior fails to fit our schemas, we are likely to attribute fault to something internal to the person.[3]

The legal field would be remiss to forget the connection between thoughts and actions and how the words lawyers and judges use affect perceptions, decisions, and ultimately, litigants' lives.

Society has a heteronormative bias that is both conscious and subconscious.[4] Heteronormative is described as being "of, relating to, or based on the attitude that

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1. *See Watch Your Thoughts, They Become Words; Watch Your Words, They Become Actions*, QUOTE INVESTIGATOR (Jan. 10, 2013), https://quoteinvestigator.com/2013/01/10/watch-your-thoughts/ (attributing quote to Frank Outlaw).

2. Lisa K. Horvath, et al., *Does Gender-Fair Language Pay Off? The Social Perception of Professions from a Cross-Linguistic Perspective*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (January 21, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4720790/.

3. Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 251 (1994).

4. Jojanneke van der Toorn, Ruthie Pliskin, and Thekla, Morgenroth, *Not Quite Over the Rainbow: The Unrelenting and Insidious Nature of Heteronormative Ideology*, 34 CURRENT OPINION

heterosexuality is the only normal and natural expression of sexuality."[5] Heteronormativity is understood to be "a hegemonic system of norms, discourse, and practices that constructs heterosexuality as natural and superior to all other expression of sexuality."[6] In essence, "[h]eteronormativity brands itself on . . . [society's] notions of morality and truth,"[7] positing that heterosexuality aligns with truth and morality, whereas being lesbian or gay[8] connotates falsity and deviance. Subsequently, these associations affect various facets of life, such as marriage, gender roles, sex discrimination, and custody determinations. However, these definitions do not encompass the pervasiveness of heteronormativity. A broader definition of heteronormativity expands on this idea:

> ranging from organizational to interpersonal spheres, the presumptions that there are only two sexes; that it is 'normal' or 'natural' for people of different sexes to be attracted to one another; that these attractions may be publicly displayed and celebrated; that social institutions such as marriage and the family are appropriately organized around different-sex pairings; that same-sex couples are (if not 'deviant') a 'variation on' or an 'alternative' to the heterosexual couple. Heteronormativity refers, in sum, to the myriad ways in which heterosexuality is produced as a natural, unproblematic, taken-for-granted, ordinary phenomenon.[9]

Such a broad definition of heteronormativity embodies the notion that heteronormativity is "the foundation upon which societies are built, thereby coloring all aspects of life."[10]

Although there is significant overlap among the concepts of sex, gender, gender roles, sex discrimination, and heteronormativity, as evidenced by the expanded definition above, it is important to note that despite the similarities, "heteronormativity" is not interchangeable with gender, gender roles, or sex

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IN BEHAVIORAL SCIENCES 160, 160-62 (2020), https://www.sciencedirect.com/science/article/pii/S2352154620300383.

5. *Heteronormative*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/heteronormative (last visited July 21, 2021).

6. Brandon Andrew Robinson, Heteronormativity and Homonormativity, WILEY ONLINE LIBR. 1 (2016), https://onlinelibrary.wiley.com/doi/epdf/10.1002/9781118663219.wbegss013?samlreferrer.

7. Diane S. Meier, Note, *Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 147, 148 (2008).

8. Since the term "homosexuality" has a negative connotation the author chose to use the terms "lesbian" and "gay." *See*, Avoiding Heterosexual Bias in Language, AM. PSYCH. ASSN., https://www.apa.org/pi/lgbt/resources/language (last visited Aug. 18, 2021) ("Lesbian and gay male are preferred to the word homosexual when used as an adjective referring to specific persons or groups, and the terms lesbians and gay men are preferred to homosexuals used as nouns when referring to specific persons or groups. The word homosexual has several problems of designation. First, it may perpetuate negative stereotypes because of its historical associations with pathology and criminal behavior. Second, it is ambiguous in reference because it is often assumed to refer exclusively to men and thus renders lesbians invisible. Third, it is often unclear.").

9. Krishen Samuel, Understanding Heteronormativity, THINK QUEERLY (July 19, 2018), https://thinkqueerly.com/understanding-heteronormativity-98f562a050b8.https.

10. *Id.*

discrimination. Understanding these concepts and their accompanying connotations is key to understanding their intricacies. Despite being interchangeable colloquially, sex and gender have different meanings. "Sex" refers to one's "anatomic/chromosomal sex or one's reproductive organs, [whereas] 'gender' denotes the social attributes that constitute a sexual identity and is culture-specific."[11] Stemming from that notion of gender, "gender roles" encompass "the behavioral, cultural, or psychological traits typically associated with one sex."[12] "Sex discrimination" is typically understood as discrimination based on one's anatomic sex: that is, for simply being male or female.[13] However, despite the technical differences in the definitions of sex and gender, the Supreme Court determined sex discrimination includes gender discrimination.[14]

The extensive case law analyzed and discussed within this Note demonstrates the subconscious bias towards heteronormativity. The corresponding discussion regarding the pragmatics of the language used, both by society and the legal field, further reveals a subconscious, heteronormative bias. Part II of this Note seeks to examine and understand the concept of heteronormativity in marriage by analyzing the significance and foundational role of marriage, the rights and benefits dependent upon its status, and why marriage is recognized as a fundamental right, subject to the highest scrutiny and protection.

Part III of this Note seeks to recognize the heteronormative basis underlying custody determinations by discussing parental rights, examining the history of custody terminations, and analyzing custody determinations when a same-sex couple is before the court. Finally, Part IV contemplates how to recognize and overcome heteronormativity by analyzing proposals presented in other Notes and suggests the field of psycholinguistics may provide a solution.

II. AN ANALYSIS OF HETERONORMATIVITY IN MARRIAGE

A. *Significance of Marriage*

Marriage, traditionally understood to be between a man and a woman, is one of the prevailing pillars of heteronormativity. Dating back to biblical and Roman times, the reverence and significance of marriage permeate throughout society.[15] The Supreme Court formally acknowledged the importance of marriage as early as 1888 when it described marriage as "the most important relation in life; the foundation of the family and of society, without which there would be neither civilization nor progress."[16] The Supreme Court also regarded marriage as having "more to do with the morals and civilization of a people than any other

11. Meier, *supra* note 7, at 161.

12. *Gender*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gender.com/dictionary/gender (last visited Aug. 18, 2021).

13. *Sex Discrimination,* MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/sex%20discrimination (last visited Aug. 8, 2021).

14. Meier, *supra* note 7, at 160 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)).

15. ROBERT E. OLIPHANT & NANCY VER STEEGH, WORK OF THE FAMILY LAWYER 4 (Wolters Kluwer, 5th ed. 2020).

16. Maynard v. Hill, 125 U.S. 190, 205, 211 (1888).

institution."[17] The Court highly valued marriage because marriage creates "a relation between the parties which they cannot change,"[18] which causes the law to "hold the parties to various obligations and liabilities."[19] Furthermore, the Court stated that "the public is deeply interested" in the purity and maintenance of the institution of marriage[20] because it "giv[es] character to our whole civil polity."[21]

Marriage greatly affects the rights and benefits an individual possesses. Approximately 1,400 benefits and privileges hinge on marriage,[22] including those concerning property division,[23] elective shares,[24] alimony awards,[25] marital presumption of paternity,[26] and marital privilege.[27] Additionally, many other benefits are dependent upon marriage; such as old-age and disability insurance benefits,[28] survivorship benefits,[29] benefits based on a divorced spouse's income,[30] surviving spouse pensions for federal and military employees,[31] and immigration rights.[32] Many opposite-sex couples seem to take these rights and benefits for granted, whereas prior to 2015, same-sex couples were denied the opportunity to receive these benefits and were forced to confront the inadequacies of their legal status.[33]

B. *History and Evolution of Marriage*

Stemming from English common law is the doctrine of coverture. Under this doctrine, to preserve their union as husband and wife, a husband would subsume his wife's legal identity upon marriage.[34] Consequently, under the doctrine of

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17. *Id.* at 205.
18. *Id.* at 211.
19. *Id.*
20. *Id.*
21. *Id.* at 213.
22. Anthony R. Reeves, Note, *Sexual Identity as a Fundamental Human* Right, 15 BUFF. HUM. RTS. L. REV. 215, 228 (2009); Ruthann Robson, *Compulsory Matrimony*, FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 315 (2009).
23. *See, e.g.*, MINN. STAT. ANN. § 518.58, sub div. 1 (West 2016).
24. *See, e.g.*, MINN. STAT. ANN. § 524.2-202(a) (West 2016).
25. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-82 (West 2013).
26. *See, e.g.*, WASH. REV. CODE ANN. § 26.26.116(1) (West 2011).
27. *See, e.g.*, United States v. Pensinger, 549 F.2d 1150, 1151 (8th Cir. 1977) ("It was clearly established that the statement was made prior to the marriage and thus was not within the scope of the marital privilege."); Wadlington v. Sextet Mining Co., 878 S.W.2d 814, 816 (Ky. Ct. App. 1994) ("The privilege as to 'confidential communications' is restricted to communications made during the existence of the marriage relation.").
28. 42 U.S.C. §§ 402(b), (c), 416(b), (f) (2012).
29. 42 U.S.C. §§ 402(e), (f), 416(c), (g).
30. 42 U.S.C. §§ 402(b), (c), 416(d).
31. 5 U.S.C. §§ 8341(a)(1)(A), (a)(2)(A) (2012); 5 C.F.R. § 843.303; 38 U.S.C. §§ 1102(a)(2), 1304, 1541(f) (2012).
32. 8 U.S.C. §§ 1154(g), 1186a(h)(1) (2012).
33. *See* Peter Nicolas, *Backdating Marriage*, 105 CAL. L. REV. 395, 397 (2017).
34. OLIPHANT & STEEGH, *supra* note 15, at 6; Palmer v. Turner, 43 S.W.2d 1017, 1017-1018 (Ky. 1931).

necessaries, a husband had a duty to provide for and support his wife.[35] These doctrines laid the foundation for the respective roles, duties, and perceived abilities of both men and women. Women were viewed as too timid, too delicate, and otherwise unfit for civil life.[36] Even the Supreme Court described a woman's "paramount destiny and mission" as being "to fulfill the noble and benign offices of wife and mother," as well as tend to domestic duties such as cooking and cleaning.[37] Consequently, the perceived fragility of women required men to be women's protectors and defenders.[38]

The preconceived notion of frail women persisted until around the end of the nineteenth century, when the 1970s reflected a shift in society's perception of gender and gender roles. Responding to the "climate of the era,"[39] the Supreme Court began to acknowledge sex discrimination. In the 1971 case of *Reed v. Reed*, where a mother challenged an Idaho statute that preferred to appoint a male as the administrator of a decedent's estate, the Supreme Court decided that giving "mandatory preference to members of either sex over members of the other" is arbitrary, violates the Equal Protection Clause of the Fourteenth Amendment, and is unconstitutional.[40]

Although the 1970s marked the beginning of judicial recognition of sex discrimination[41] and is primarily associated with the first feminist movement,[42] sex discrimination was framed as "'men not being able to get a benefit that women in comparable situations could get.'"[43] For example, in *Mortiz v. Commissioner,* a Tax Court denied a bachelor, Mr. Mortiz, a tax deduction for caretaker expenses he incurred for the care of his mother. At the time, section 214 of the Tax Code only applied to a widowed or divorced woman or a "husband whose wife [was] incapacitated or institutionalized."[44] Since Mr. Mortiz never married, the Tax Court held that he was not entitled to a deduction.[45] Mr. Mortiz appealed the

35. OLIPHANT & STEEGH, *supra* note 15, at 7; N.C. Baptist Hosps., Inc. v. Harris, 354 S.E.2d 471, 472 (N.C. 1987).

36. Bradwell v. Illinois, 83 U.S. 130, 141 (1872).

37. *Id.*

38. *Id.*

39. Marcia Coyle, "The Supreme Court and the 'Climate of the Era.'" CONSTITUTION DAILY. June 29, 2020. https://constitutioncenter.org/blog/the-supreme-court-and-the-climate-of-the-era ("One of the most respected constitutional law scholars of the 20th century, the late Paul Freund, once said the U.S. Supreme Court 'should never be influenced by the weather of the day but inevitably they will be influenced by the climate of the era.'").

40. Reed v. Reed, 404 U.S. 71, 76 (1971).

41. *See generally id.*

42. *See generally* Ryan Bergerson, *'The Seventies': Feminism Makes Waves*, CNN (Aug. 17, 2015), https://www.cnn.com/2015/07/22/living/the-seventies-feminism-womens-lib/index.html.

43. Lila Thulin, *The True Story of the Case Ruth Bader Ginsburg Argues in 'On the Basis of Sex'*, SMITHSONIAN MAG. (Dec. 24, 2018), https://www.smithsonianmag.com/history/true-story-case-center-basis-sex-180971110/.

44. Mortiz v. Comm'r., 469 F.2d 466, 467 (10th Cir. 1972) (referencing 26 U.S.C.A. § 214(a) (1967)).

45. *Id.* at 467.

decision, and the Tenth Circuit Court held "the classification [was] an invidious discrimination and invalid under due process principles."[46]

In the 1975 case of *Weinberger v. Wiesenfeld*, a male widower applied for and was denied Social Security survivor benefits.[47] When Congress passed the statute at issue in this case,[48] Congress intended "to permit women to elect not to work and to devote themselves to the care of children."[49] Despite the heteronormative basis for the statute, and although the Supreme Court in *Weinberger* briefly acknowledged the traditional heteronormative notion that "men are more likely than women to be the primary supporters of their spouses,"[50] the Court ultimately deviated from such heteronormative thinking. Instead, the Court recognized:

> Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent. Even in the typical family hypothesized by the Act, in which the husband is supporting the family and the mother is caring for the children . . . the fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female.[51]

The Supreme Court went on to emphasize that the statute, with its heteronormative gender-based assumption that "women as a group would choose to forgo work to care for the children while men would not," could and would cause men harm.[52] As written, the statute harmed men "who [conformed] to the presumed norm and [were] not hampered by their child-care responsibilities . . . because they [earned] too much."[53] The only men that benefited from the statute were men who were "similarly situated to the women the statute aids."[54] Furthermore, the Supreme Court recognized women's ability to work and provide for their families when it stated that "the Constitution also forbids the gender-based differentiation that results in the efforts of female workers . . . producing less protection for their families than is produced by the efforts of men."[55]

After *Weinberger*, the Supreme Court continued to diverge from heteronormative notions. In 1976, it held in *Crag v. Boren* that classifications on the basis of sex require intermediate scrutiny because "'statutory distinctions between the sexes often have the effect of invidiously regulating the entire class of

46. *Id*. at 470.
47. Weinberger v. Wiesenfeld, 420 U.S. 636, 637-41 (1975).
48. 42 U.S.C. § 402(g) (2015).
49. *Weinberger*, 420 U.S. at 648.
50. *Id.* at 645.
51. *Id.* at 651-52.
52. *Id.* at 652-53.
53. *Id.* at 653.
54. *Id.*
55. *Id.* at 645.

females to inferior legal status without regard to the actual capabilities of its individual members.'"[56] Consistent with this rationale and the newfound break from heteronormative thinking, the Supreme Court subsequently held in a separate 1979 case that either spouse can be ordered to pay spousal support[57] because "'no longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'"[58] In the 1980s, following the Supreme Court's deviation from heteronormative rationales, lower courts began to evaluate and adjust their applications of doctrines concerning gender, such as the doctrine of necessaries. In 1987, the Supreme Court of North Carolina recognized a "trend toward 'gender neutrality,'" and held that the "doctrine of necessaries applies equally to both spouses."[59]

Despite the improved perception of women in their roles and abilities, heteronormative gender roles nevertheless remain ingrained in today's society. For instance, many women still adopt their husband's last name when they get married,[60] an arguable remnant of the doctrine of coverture. However, the counterargument is that since women have a choice to adopt their husband's last name, the practice is viewed as a "harmless tradition."[61]

Additional evidence of lingering heteronormative gender roles is that married, full-time working mothers are still expected to be, and oftentimes are, the primary caretaker for their children. According to the *American Time Use Survey* focusing on the years 2015-2019 for married parents with children under the age of eighteen, married and working full-time mothers spent an average of almost seven hours a day completing domestic tasks such as housework, cooking, grocery shopping, and tending to members of the household.[62] Contrastingly, married and working full-time fathers spent just over four hours a day completing the same tasks.[63]

C. *Marriage and Procreation*

The right to marry is often conflated with the right to raise children. This societal expectation is a core component of heteronormativity which the Supreme Court propounded when it previously stated women should "fulfill the noble and

56. Craig v. Boren, 429 U.S. 190, 218 (1976) (citing Stanton v. Stanton, 421 U.S. 7, 14-15 (1975)).

57. Orr v. Orr, 440 U.S. 268, 282–83 (1979).

58. *Id.* at 280 (citing Stanton v. Stanton, 421 U.S. 7, 14-15 (1975)).

59. N.C. Baptist Hosp., Inc. v. Harris, 354 S.E.2d 471, 474 (N.C. 1987).

60. Maddy Savage, *Why Do Women Still Change Their Names?* BBC (Sept. 23, 2020), https://www.bbc.com/worklife/article/20200921-why-do-women-still-change-their-names.

61. *Id*.

62. *American Time Use Survey,* U.S. BUREAU OF LAB. STAT., https://www.bls.gov/tus/tables/a6-1519.htm (last visited Aug. 18, 2021) (The seven-hour average is rounded up from 6.76 hours based on the total amount of time calculated for the following categories: household activities, housework, food preparation and cleanup, grocery shopping, caring for and helping household members, caring for and helping household children, education-related activities, reading to/with children, and playing/doing hobbies with children.).

63. *Id.*

benign offices of wife and mother."[64] Furthermore, nearly all Supreme Court decisions that declared marriage as a fundamental right intertwine the right to marry with the rights of childbirth, procreation, and child-rearing.[65] In the 1923 case of *Meyer v. Nebraska*, while determining the scope of the Fourteenth Amendment in the context of a schoolteacher teaching German in violation of a Nebraska statute,[66] the Court recognized that the Fourteenth Amendment denoted the right of an individual to "marry, establish a home and bring up children."[67] In the 1942 case of *Skinner v. Oklahoma*, the Supreme Court said "[m]arriage and procreation are fundamental to the very existence and survival of the race,"[68] thereby explicitly equating marriage with the ability to procreate. Twenty-five years later, in *Loving v. Virginia*, the Supreme Court reiterated the significance of marriage when it struck down a Virginia statute that prohibited marriage on the basis of racial classifications and held that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[69]

Although the Court in *Loving* did not explicitly discuss procreation and associate it with the right to marry, given the context of *Skinner*, which the Court in *Loving* referenced and relied on, the Court implicitly maintained the association between the right to marry and the right to procreate. Approximately one decade later, in *Zablocki v. Redhail*, the court evaluated the constitutionality of a Wisconsin statute that prohibited child support obligors from marrying unless they were current in their child support payments.[70] There, the Supreme Court explicitly acknowledged an association between marriage and procreation. It stated "[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."[71] The Court acknowledged "the decision to marry [is] among the personal decisions protected by the right of privacy,"[72] and therefore, "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[73] The Court again noted the relationship between marriage and child rearing in the 1996 case of *M.L.B. v. S.L.J.*, stating that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society.'"[74]

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64. Bradwell v. Illinois, 83 U.S. 130, 141 (1872).

65. Andersen v. King County, 138 P.3d 963, 978 (Wash. 2006).

66. Meyer v. Nebraska, 262 U.S. 390, 396 (1923).

67. *Id.* at 399.

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

69. Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing *Skinner*, 316 U.S. at 541; Maynard v. Hill, 125 U.S. 190 (1888)).

70. Zablocki v. Redhail, 434 U.S. 374, 387 (1978).

71. *Id.* at 386.

72. *Id.* at 384.

73. *Id.* at 386.

74. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (citing Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

Although the right to marry and the right to procreate are often conflated,[75] and the ability to procreate was traditionally used to justify denying same-sex couples the right to marry, the two rights are not mutually exclusive.[76] The 1987 case *Turner v. Safley*, addressed the legitimacy of unconsummated inmate marriages. In *Turner*, the Supreme Court recognized that "marriages . . . are expressions of emotional support and public commitment,"[77] and may for some individuals "be an exercise of religious faith as well as an expression of personal dedication."[78] In *Anderson v. King County*, a Washington state court held that *Turner* demonstrated that *"*the fundamental right to marry is not linked to procreation."[79] Nevertheless, the Washington Supreme Court was unwilling to recognize same-sex marriage, opining that *Turner* was not intended to mean that "marriage as a fundamental right is no longer anchored in the tradition of marriage as between a man and a woman."[80] According to the Court, "while same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because five members of this court have dictated it."[81]

Although both *Turner* and *Anderson* acknowledged that the right to marry and the right to procreate are separate and distinct rights, the heteronormative notion that the rights are intertwined persisted. In a 2007 Maryland case, *Conaway v. Deane*, plaintiffs filed suit alleging discrimination on the basis of sex and violation of their fundamental right to marry because the circuit court clerks denied the same-sex couples' marriage license.[82] It was "undisputed that [plaintiffs] were denied marriage licenses by the Clerks solely because they [were] same-sex couples,"[83] and the statute, Family Law § 2-201, did not permit marriage licenses for same-sex couples.[84] Therefore, the Maryland Court of Appeals held the statute did "not abridge the fundamental right to marriage" or "discriminate on the basis of sex" because the state had a legitimate interest "in fostering procreation and encouraging the traditional family structure in which children are born."[85] Over time, the emphasis on the ability to procreate diminished. In the 2015 case of *Obergefell v. Hodges,* the Supreme Court explicitly stated "[a]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State . . . . The constitutional marriage right has many aspects, of which childbearing is only one."[86]

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75. Andersen v. King County, 138 P.3d 963, 978 (Wash. 2006); *see also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Loving v. Virginia, 388 U.S. 1, 12 (1967); *Zablocki*, 434 U.S. at 386.

76. *See generally* Conaway v. Deane, 932 A.2d 571 (Md. 2007).

77. Turner v. Safley, 482 U.S. 78, 95 (1987).

78. *Id.*

79. *Anderson*, 138 P.3d at 978.

80. *Id.* at 979.

81. *Id.* at 969.

82. Conaway v. Deane, 932 A.2d 571, 582-83 (Md. 2007).

83. *Id.* at 583.

84. *See* MD. CODE ANN., FAM. Law § 2-201 (West 2006) (amended 2012) (providing that "[o]nly a marriage between a man and a woman is valid in this State.").

85. *Conaway*, 932 A.2d at 635.

86. Obergefell v. Hodges, 576 U.S. 644, 669 (2015).

D. *Road to Same-Sex Marriage*

Despite the improvements of de-gendering the law in various legal contexts,[87] and the deviation from heteronormative thinking, courts struggled to apply such notions to all aspects of family law—particularly to marriage. In the marital context, courts refused to de-gender the institution, the laws applicable to marriage, and the laws stemming from marriage. Instead, marriage maintained its status as a prevalent heteronormative symbol. In what can now be described as a pithy summary, in the 1971 case *Baker v. Nelson*, when a gay couple petitioned for a marriage license, the Supreme Court of Minnesota held the statutory meaning of marriage was "the state of union between persons of the opposite sex,"[88] and "[i]t is unrealistic to think the original draftsmen . . . would have used the term in any different sense."[89] This heteronormative notion of marriage prevailed for decades as it was generally understood that "there really is no serious claim that the early statutes defined anything but opposite-sex marriage."[90]

In the 1986 case of *Bowers v. Hardwick,* Bowers alleged that a Georgia statute, which criminalized sodomy, violated his fundamental rights because "his homosexual activity is a private and intimate association that is beyond the reach of [the] state . . . ."[91] When presented with this case, the Court characterized the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[92] The Court reinforced the notion that marriage is between a man and a woman, stating that there was "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other . . . ."[93] Moreover, the Court concluded any proposition suggesting that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable,"[94] and refused to "announce . . . a fundamental right to engage in homosexual sodomy."[95]

The Court explained that only some rights qualify for "heightened judicial protection," and attempted to "assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves more than the imposition of the Justices' own choice of values."[96] According to the Court, the rights afforded "heightened judicial protection"[97] are those fundamental liberties that are "'deeply

87. *See generally* Reed v. Reed, 404 U.S. 71 (1971); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, 429 U.S. 190 (1976); Orr v. Orr, 440 U.S. 268 (1979); N.C. Baptist Hosp., Inc. v. Harris, 354 S.E.2d 471 (N.C. 1987). *See also* Donald L. Revell & Jessica Vapnek, *Gender-Silent Legislative Drafting in a Non-Binary World*, 48 CAP. U. L. REV. 103, 106 (2020).

88. Baker v. Nelson, 191 N.W.2d 185, 185–86 (Minn. 1971).

89. *Id.*

90. Andersen v. King County, 138 P.3d 963, 978 (Wash. 2006).

91. Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

92. *Id.* at 191.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

rooted in this Nation's history and tradition'"[98] and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[99] Although the Court continued its analysis, ultimately the Court maintained the heteronormative status quo and concluded there is not "a fundamental right to homosexuals to engage in acts of consensual sodomy,"[100] even if performed in the privacy of one's home.[101]

Despite the Supreme Court's persistence in maintaining heteronormativity, the first judicial indication that same-sex marriage may one day be recognized as a fundamental right came in the 1993 Hawai'i case of *Baehr v. Lewin.* After being denied marriage licenses under the Hawai'i marriage statute, several same-sex couples challenged the statute as violating equal protection rights under the Hawai'i Constitution.[102] Although the Hawai'i Supreme Court adhered to the heteronormative rationale and precedent set by the United States Supreme Court that same-sex couples do not have a right to same-sex marriage,[103] it nevertheless held same-sex couples were entitled to an evidentiary hearing.[104]

In response to *Baehr*, under the pretext of attempting to preserve the sanctity of marriage, Congress passed the Federal Defense of Marriage Act (DOMA).[105] Although it was not explicitly stated as such, the passage of DOMA was fundamentally an attempt to maintain heteronormativity. Section three of DOMA defined marriage as "only a legal union between one man and one woman as husband and wife."[106] Despite the passage of DOMA, the progress made in *Baehr* lingered and likely contributed to the outcome of the 1999 Vermont case *Baker v. State*.[107]

In *Baker,* the Supreme Court of Vermont evaluated a statute which denied same-sex couples the same benefits and protections that were available to opposite-sex married couples. In what was a shocking decision at the time, the Vermont Supreme Court held that same-sex couples "may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry," and that the "[s]tate is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law." [108] Although the Vermont Supreme Court did not permit same-sex marriage,[109] it recognized:

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98. *Id.* at 192 (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

99. *Id.* at 191-92 (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

100. *Id.* at 192.

101. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

102. Baehr v. Lewin, 852 P.2d 44, 48-50 (Haw. 1993).

103. *Id.* at 57.

104. *Id.* at 54.

105. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C).

106. *Id.*

107. *See generally* Baker v. State, 744 A.2d 864 (Vt. 1999).

108. *Id.* at 867.

109. *Id.* at 886.

> [t]he laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts.[110]

Although the Vermont Court ultimately remained enshrouded in heteronormativity due to its unwillingness to approve of and recognize same-sex marriage,[111] the Court carefully framed and analyzed the issue in a way that provides relief and protection to families with same-sex parents. Instead of framing the issue as one regarding the right of same-sex couples to marry, the Court rightly focused on an idea underlying marriage: a "professed commitment of two individuals to a lasting relationship of mutual affection,"[112] which is recognized, supported, and protected by the state.[113] Following this characterization, the Court regarded plaintiffs' "interest in seeking state recognition and protection of their mutual commitment" as "simply and fundamentally" a request to have their families included in "state-sanctioned human relations." [114] In the court's view, the plaintiffs "seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship. . . [and] recognition of our common humanity."[115]

Although the decisions in *Baehr* and *Baker* evidenced that some courts were willing to improve the status of same-sex couples by extending to them the rights, benefits, and protections afforded to opposite-sex married couples, the inclination to maintain marriage as a heteronormative institution remained. The 2003 cases of *Lawrence v. Texas*[116] and *Goodridge v. Department of Public Health* [117] indicated additional progress. Confronted with the same issue as presented in *Bowers,* the Supreme Court in *Lawrence* rebuked the Court's previous characterization. In *Bowers*, the Supreme Court characterized the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ."[118] The 2003 Supreme Court disavowed this characterization, stating "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward."[119] The Supreme Court recognized that the laws involved in both *Bowers* and *Lawrence* had "far-reaching consequences [because they touched] upon the most private human conduct, sexual behavior, and in the most private of places, the home."[120] Furthermore, the Court said the statutes attempted to "control a personal relationship that, whether or not

110. *Id.* at 884 (emphasis of "this goal" omitted).
111. *Id.* at 886.
112. *Id.* at 889.
113. *Id*.
114. *Id.*
115. *Id.*
116. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).
117. *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
118. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).
119. *Lawrence*, 539 U.S. at 567.
120. *Id.*

entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[121] Consequently, the Supreme Court declared the statute unconstitutional and overruled *Bowers.*[122]

In *Goodridge v. Department of Public Health*,[123] plaintiffs had their marriage licenses denied because Massachusetts law did not recognize same-sex couples.[124] To reach a decision, the Court analyzed the institution of marriage. The Court acknowledged the historic notions surrounding marriage, including the understanding that marriage was between a man and a woman,[125] the benefits stemming from marital status,[126] and the overlap of the constitutional rights to marry and raise children.[127] The court also acknowledged marriage is part of individual autonomy and "fulfills yearnings for security, safe haven, and connection that express our common humanity . . . ."[128] Furthermore, the court recognized marriage was "a wholly secular institution,"[129] and that "[n]o religious ceremony has ever been required to validate a Massachusetts marriage."[130] After considering these aspects of marriage, the Massachusetts Supreme Court declared same-sex couples have the right to marry, thereby becoming the first state to permit same-sex marriage.[131]

After *Goodridge,* some states recognized and permitted same-sex marriage while other states and the federal government continued to not recognize it. In the 2013 case of *United States v. Windsor*, the fact that the federal government did not recognize same-sex marriage was at issue. After Edith Windsor's wife, whom she legally married in Canada, passed away in 2009, Windsor sought a tax exemption for surviving spouses.[132] However, the IRS denied Windsor the tax exemption because DOMA did not recognize same-sex couples[133] and defined marriage as "only a legal union between one man and one woman as husband and wife."[134] Characterizing the issue as a constitutional violation of Due Process and Equal Protection,[135] the Supreme Court declared section three of DOMA unconstitutional.[136]

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121. *Id.*
122. *Id.* at 578-79.
123. *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
124. *Id.* at 949-50.
125. *Id.* at 952.
126. *Id.* at 955-56.
127. *Id.* at 953.
128. *Id.* at 955.
129. *Id.* at 954.
130. *Id.*
131. *Id.* at 969.
132. United States v. Windsor, 570 U.S. 744, 750 (2013).
133. *Id.* at 750-51.
134. Defense of Marriage Act (DOMA) of 1996 § 3, 24191 U.S.C. § 7 (2019), *invalidated by* United States v. Windsor, 570 U.S. 744 (1996).
135. *See Windsor*, 570 U.S. at 778 (Scalia, J., dissenting) (characterizing the case as a federalism issue rather than a due process or equal protection issue).
136. *Id.* at 774.

By 2015, several states, including Michigan, Kentucky, Ohio, and Tennessee, maintained the status of marriage as between one man and one woman and prohibited same-sex marriage.[137] Each state had its marriage statutes challenged as unconstitutional, and upon appeal, the Sixth Circuit consolidated the cases.[138] In the formative case of *Obergefell v. Hodges*, the Supreme Court of the United States legalized same-sex marriage.[139] In its declaration, the Supreme Court articulated four "principles and traditions [that demonstrate] the reasons marriage is fundamental under the Constitution [and apply] with equal force to same-sex couples."[140]

First, the Court recognized "the right to personal choice regarding marriage is inherent in the concept of individual autonomy,"[141] and that "[t]here is dignity in the bond between two men or two women who seek to marry. . . ."[142] Second, the Supreme Court acknowledged "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[143] The Supreme Court characterized marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[144] Furthermore, the Court romanticized the institution of marriage when it described marriage as "[responding] to the universal fear that a lonely person might call out only to find no one there. [Marriage] offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[145]

Third, the Supreme Court held that the legalization of same-sex marriage "safeguards children and families,"[146] because marriage "affords the permanency and stability important to children's best interests"[147] and legal recognition of marriage "allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives.'"[148] However, the Supreme Court also very pointedly noted:

> [a]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.[149]

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137. Obergefell v. Hodges, 576 U.S. 644, 653-56 (2015).
138. *Id.*
139. *Id.* at 681.
140. *Id.* at 665.
141. *Id.*
142. *Id.* at 666.
143. *Id.*
144. *Id.* at 667 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).
145. *Id.* at 667.
146. *Id.* at 667.
147. Obergefell v. Hodges, 576 U.S. 644, 668 (2015).
148. *Id.* (quoting United States v. Windsor, 570 U.S. 744, 772 (2013)).
149. *Id.* at 669.

Fourth, the Supreme Court recognized that "marriage is a keystone of our social order," and many states "made marriage the basis for expanding governmental rights."[150] Denying same-sex couples the ability to marry harmed them in a way "opposite-sex couples would deem intolerable in their own lives."[151] Therefore, the Supreme Court reasoned, what once "seemed natural and just [is inconsistent] with the central meaning on the fundamental right to marry,"[152] and those "who deem same-sex marriage to be wrong . . . based on decent and honorable religious or philosophical premises," cannot use their "personal opposition" to demean, stigmatize, or deny the liberties of others[153] because "excluding same-sex couples from [marriage imposes] stigma and injury of the kind prohibited by our basic charter."[154]

Furthermore, the Supreme Court held that denying same-sex marriages violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[155] The Supreme Court recognized that "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions . . . ."[156] After significant contemplation, the Supreme Court held "the right to marry is a fundamental right inherent in the liberty of the person . . . and [same-sex couples] may not be deprived of that right and that liberty."[157]

Five years after *Obergefell*'s nationwide legalization of same-sex marriage, many state statutes still contain gendered, heteronormative language. Ohio recently revised several of its statutory provisions, including its marriage statute.[158] However, instead of modifying the statutory language of its marriage statute to be gender-neutral in recognition of the *Obergefell* decision, Ohio kept its gender-specific, heteronormative language. Prior to the *Obergefell* decision in 2015, the Ohio marriage statute read in part, "[m]ale persons of the age of eighteen years, and female persons of the age of sixteen years . . . may be joined in marriage."[159] Today, that part of the statute reads as "only male persons of the age of eighteen years, and only female persons of the age of eighteen years. . . may be joined in marriage."[160] The fact that Ohio legislators revised the statute but kept the gendered, heteronormative language exemplifies their unwillingness to accept same-sex couples and their desire to maintain heteronormativity.

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150. *Id.* at 669-70.

151. *Id.* at 670.

152. *Id.*

153. *Id.* at 672.

154. *Id.* at 671.

155. *Id.* at 672.

156. *Id.* at 673-75 (discussing cases dealing with sex-based inequality such as Reed v. Reed, 404 U.S. 71 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978); M.L.B. v. S.L.J., 519 U.S 102 (1996); and Lawrence v. Texas, 539 U.S. 558 (2003)).

157. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

158. OHIO REV. CODE ANN. § 3101.01 (West 2014). *Cf.* OHIO REV. CODE ANN. § 3101.01 (West 2021).

159. OHIO REV. CODE ANN. § 3101.01 (West 2014) (held unconstitutional by Obergefell v. Hodges, 576 U.S. 644 (2015)).

160. OHIO REV. CODE ANN. § 3101.01 (West 2021).

III. EXPLORATION OF HETERONORMATIVITY IN CUSTODY DETERMINATIONS

A. *Divorce Background*

Heteronormativity's influence is not limited to the context of marriage – it also permeates divorces and particularly custody determinations. Historically, courts prohibited divorces except for limited circumstances, such as a divorce *a mensa et thoro* or divorce *a vinculo*.[161] Divorce *a mensa et thoro* permitted a divorce for adultery or acts of cruelty and divorce *a vinculo* permitted an annulment of the relationship if entered into by force, fear, fraud, or inducement.[162] However, women were often unable to obtain divorces, even if their husbands were abusive because women were expected to accept their husbands' infidelities.[163] Furthermore, women were unable to obtain divorces because they lacked a legal identity, the ability to contract, and the means to provide for themselves.[164]

Divorces altered the esteemed heteronormative symbol of marriage and were accordingly stigmatized. Fault-based divorces permitted couples to divorce for reasons such as adultery, desertion, and cruelty,[165] and enhanced the stigma surrounding divorce because they often created more acrimony and hostility between the parties as they each attempted to prove fault.[166] Furthermore, if a petitioner entered the court with "unclean hands" or was guilty of an offense that would justify the defendant in obtaining a divorce, that petitioner forfeited the ability to divorce.[167] Contrastingly, no-fault divorces sought to diminish the stigma and promote an amicable process.[168] However, the ease of obtaining a no-fault divorce led critics to claim that no-fault divorces leave "no incentive other than a moral obligation or a feeling of affection,"[169] to honor a marriage and the challenges that accompany it. Critics also claimed the availability and ease of obtaining a divorce harms children, seemingly disregarding the fact that unhappily married parents also harm children.[170]

B. *Constitutional Right to Raise Children*

The right to raise children is rooted in the Constitution.[171] The Supreme Court repeatedly recognized the right to raise and bear children, though it often conflated

161. OLIPHANT & STEEGH, *supra* note 15, at 100-101.
162. *Id*.
163. *Id.* at 101.
164. *Id.* at 6.
165. *Id.* at 104.
166. *Id.* at 103-104.
167. *Id.* at 105.
168. *Id.* at 106-107, 110-11.
169. Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 879 (June 1994).
170. *See* Robert M. Gordon, *The Limits on Divorce*, 107 YALE L. J. 1435, 1436 (1998).
171. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

that right with the right to marry. In *Meyer*, the Supreme Court determined the Fourteenth Amendment provides the right of an individual to "bring up children."[172] In *Skinner*, the Supreme Court acknowledged that the right to conceive and the right to raise one's children are "of the basic civil rights of man."[173] In *Price v. Massachusetts*, the Supreme Court also recognized that "the custody, care and nurture of the child reside first in the parents."[174] In a 1996 case regarding the termination of parental rights, the Supreme Court confirmed that choices regarding "the upbringing of children are among constitutional rights [that are] 'of basic importance in our society,'" and therefore the termination of parental rights require close consideration.[175]

The fact that the right to raise children is rooted in the Constitution signifies its importance. Custody determinations, often fraught with frustration, include two closely connected but distinct concepts with similar terms: physical custody and legal custody. "Physical custody involves the time that a child physically spends in the care of a parent,"[176] whereas legal custody entails the "basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing."[177] States vary in their approaches and preferences regarding joint physical and joint legal custody. Some states established "presumptions that joint legal custody, and/or . . . joint physical custody is in the best interests of the children,"[178] and, consequently, adopted statutory presences for joint legal and/or physical custody.[179] Other states presume that joint physical and/or joint legal custody "are in the best interests of children [only] when specifically requested by parents."[180] However, "other states have no expressed preference"[181] regarding joint physical and/or joint legal custody.[182]

C. *Custody Preferences and Presumptions*

Regardless of a state's approach or preferences, today there is an axiom that women almost always receive custody, both legal and physical, of children.[183] This

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172. *Meyer*, 262 U.S. at 399.

173. *Skinner*, 316 U.S. at 541.

174. *Prince*, 321 U.S. at 166.

175. M.L.B. v. S.L.J., 519 U.S 102, 116 (1996) (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

176. Rivero v. Rivero, 216 P.3d 213, 222 (Nev. 2009).

177. *Id.* at 221 (citing Mack v. Ashlock, 921 P.2d 1258, 1262 (Nev. 1996)).

178. OLIPHANT & STEEGH, *supra* note 15, at 184. *See also* Robert F. Cochran Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 3 (1985) [hereinafter *The Search for Guidance*].

179. *See, e.g.*, OHIO REV. CODE ANN. § 3109.04 (West 2011).

180. OLIPHANT & STEEGH, *supra* note 15, at 184.

181. *Id.*

182. For additional discussion, see David J. Herring, *Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes*, 5 S. CAL. INTERDISC. L. J. 205 (1997); Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167 (1990).

183. According to the U.S. Department of Commerce, in spring 1992, eighty-six percent of custodial parents were women and fourteen percent were men. *See* Lyida Scoon-Rogers & Gordon

is a remnant of the heteronormative notion that a woman's "paramount destiny and mission [is] to fulfill the noble and benign offices of wife and mother."[184] Despite the current narrative, historically, under English common law, fathers were the presumptive custodians and received both physical and legal custody of children.[185] In the 1830s, the development of the tender years doctrine shifted the paternal custody presumption.[186] Instead of fathers being the presumed custodial parent, the doctrine dictated that "it would violate the laws of nature to 'snatch' an infant from the care of its mother," because "[t]he mother is the softest and safest nurse of infancy" and infants belong in the "bosom of an affectionate mother."[187]

This late nineteenth and early twentieth century judicial pendulum swing away from awarding custody to fathers was due to a cultural reverence for motherhood that trickled into the judicial atmosphere.[188] While reinforcing the heteronormative idea of frail women, courts across the nation began to echo the cultural reverence for motherhood in their custody determinations.[189] In 1916, the Washington Supreme Court wrote "[m]other love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and moreover, a child needs a mother's care even more than a father's."[190] The North Dakota Supreme Court in 1918 found motherhood to be "the most sacred ties of nature" and declined to disrupt those ties by awarding a father custody except "in extreme cases."[191] By 1919, maternal award of custody was so expected that when the father in *Duncan v. Duncan* received custody, a dissenting Justice wrote:

> The natural mother love of a mother for a child is such . . . that no other person on earth can administer to the care and welfare of her child the same as she can and would . . . It is harsh and cruel to forcibly separate a mother from her child, and it should not be done . . . except in certain cases, where there can be no reasonable doubt that the welfare of the child requires such separation.[192]

H. Lester, *Child Support for Custodial Mothers and Fathers: 1991*, U.S. DEP'T OF COM. (1995), https://www2.census.gov/library/publications/1995/demographics/p60-187.pdf 187.pdf. Also, a report published in 2020, regarding fiscal year 2017, indicated the percentage of custodial parent fathers increased to about twenty percent. *See* Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2017, Current Population Reports*, U.S. DEP'T OF COM. (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf.

184. Bradwell v. Illinois, 83 U.S. 130, 141 (1873).

185. OLIPHANT & STEEGH, *supra* note 15, at 149.

186. *Ex parte* Devine, 398 So. 2d 686, 689 (1981).

187. *Id.* (citing Helms v. Franciscus, 2 Md. 544 (1830)).

188. *See* Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court,* 25 FL. L. REV. 891, 899 (1998) [hereinafter *Lagging Behind the Times*] (citing Richard A. Warshak, *The Custody Revolution: The Father Factor and the Motherhood Mystique*, 29 (1992)). *See also The Search for Guidance*, *supra* note 180, at 2.

189. *See* Bradwell, 83 U.S. at 141.

190. Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916).

191. Random v. Random, 170 N.W. 313, 314 (N.D. 1918).

192. Duncan v. Duncan, 80 So. 697, 703 (Miss. 1919) (Holden, J., dissenting).

Despite the promulgation of de-gendered laws in the 1970s, as courts across the nation supported the axiom that mothers were the best caregivers for children, gendered and sex-based notions and presumptions persisted, often harming unwed fathers. It was not until the 1972 case *Stanley v. Illinois* that the Supreme Court declared the presumption that an unwed father is an unfit parent was unsubstantiated, and held unwed fathers were entitled to a parental fitness hearing.[193] In the 1978 case of *Quilloin v. Walcott*, when an unwed, biological father tried to prevent his child's adoption and argued parental rights could not be terminated without an adjudication of unfitness or abandonment, the Supreme Court held unwed fathers were not entitled to a parental fitness hearing.[194] However, the following year in *Caban v. Mohammed,* the Supreme Court held biological, unwed fathers who provide financial support and partake in child-raising may prevent their children from being adopted.[195]

The de-gendering of custody determinations began in the 1981 case *Ex parte Devine*. Although other courts found that the "tender years presumption [was] 'not a classification based upon gender, but merely a factual presumption based upon the historic role of the mother,'"[196] the Alabama Supreme Court was the second court to decide the tender years doctrine violated Equal Protection rights.[197] In its decision, the Alabama Supreme Court paralleled the Supreme Court's rationale from the 1979 *Orr* case. In *Orr*, the Supreme Court acknowledged "legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women."[198] Cognizant of this risk, the Alabama Supreme Court in *Ex Parte Devine* recognized that if a statutory scheme "establishes a classification based upon sex which is subject to scrutiny under the Fourteenth Amendment," the same principle must apply to legal presumptions such as the tender years doctrine.[199]

Examining the history of the doctrine, the Alabama Supreme Court recognized that under the tender years doctrine:

> [a]ll things being equal, the mother is presumed to be best fitted to guide and care for children of tender years . . . Thus, the tender years presumption . . . requires the court to award custody of young children to the mother when the parties . . . are equally fit parents, [and] imposes as an evidentiary burden on the father to prove the positive unfitness of the mother.[200]

Therefore, the Alabama Supreme Court held "the tender years presumption represents an unconstitutional gender-based classification which discriminates

193. Stanley v. Illinois, 405. U.S. 645, 649–51 (1972).

194. Quilloin v. Walcott, 434 U.S. 246, 251–253 (1978).

195. Caban v. Mohammed, 441 U.S. 380, 391–393 (1979).

196. *Ex parte* Devine, 398 So. 2d 686, 692 (1981) (citing Hammac v. Hammac, 19 So. 2d 392 (1944)).

197. *Id.* at 695–96. The first court to declare the tender years doctrine unconstitutional was New York in State *ex rel*. Watts v. Watts, 350 N.Y.S.2d 285 (1973).

198. Orr v. Orr, 440 U.S. 268, 283 (1979).

199. *Ex parte* Devine, 398 So. 2d at 692.

200. *Id.* at 691.

between fathers and mothers in child custody proceedings solely on the basis of sex."[201] In its analysis, the Alabama Supreme Court noted "the tender years doctrine creates a presumption of fitness and suitability of one parent without any consideration of the actual capabilities of the parties."[202] The court also surmised that the tender years doctrine limited the effective use of the best interests of the child standard in custody determinations because "the tender years presumption rejects the fundamental proposition . . . that 'maternal and parental roles are not invariably different in importance.'"[203] Furthermore, the court postulated that the doctrine acted "as a substitute for a searching factual analysis of the relative parental capabilities of the parties, and the psychological and physical necessities of the children."[204]

Proponents of the tender years doctrine, including Justice Torbert, as seen in his dissent in *Ex parte Devine*, contended that the tender years doctrine was merely a factor, not a presumption, to be used in custody determinations because "[t]he well-being of the child is paramount in determining its custody . . . not on the parents or their personal rights."[205] Although the tender years doctrine was not meant to be a presumption regarding parental fitness, it functionally was and led to a disproportionate amount of fathers being denied custody of their young children.[206] Notwithstanding the disproportionate effect it had on fathers of young children, supporters of the tender years doctrine also subconsciously reinforced the heteronormative idea that men are the breadwinners while women are the caretakers.[207]

Although rooted in heteronormativity, there was merit in the idea of keeping a young child with his or her primary caretaker. Aligned with this notion, and with the goal of moving away from gendered stereotypes, a few states briefly adopted the primary caretaker presumption alongside the best interests standard.[208] Allegedly, the primary caretaker presumption was gender-neutral but achieved the same goals and interests as the tender years doctrine, such as fostering stability for young children.[209] Paralleling the rationale from the tender years doctrine, the primary caretaker presumption provided "when both parents seek custody of a child too young to express a preference, and one parent has been the primary caretaker of the child, custody should be awarded to the primary caretaker absent a showing that parent is unfit to be the custodian."[210]

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201. *Id.* at 695.

202. *Id.* at 695–96.

203. *Id.* at 696.

204. *Id.*

205. *Id.* at 697 (Torbert, J., dissenting).

206. *Lagging Behind the Times, supra* note 190, at 916; *see also The Search for Guidance, supra* note 180, at 12 ("Under the maternal preference, ninety percent of the children of divorced parents went into the custody of their mothers.").

207. *Lagging Behind the Times, supra* note 190 at 917.

208. OLIPHANT & STEEGH, *supra* note 15, at 149.

209. Pikula v. Pikula, 374 N.W.2d 705 (1985).

210. *Id.* at 712.

In 1985, after recognizing a "lack of objective standards,"[211] the Minnesota Supreme Court implemented the primary caretaker presumption in custody determinations of young children. Partly motivating the Minnesota Supreme Court to implement the primary caretaker presumption was the determination that the "[l]egal rules governing custody awards have generally incorporated evaluations of parental fitness replete with ad hoc judgments on the beliefs, lifestyles, and perceived credibility of the proposed custodian."[212] Furthermore, maintaining the child's "[c]ontinuity of care with the primary caretaker is not only central and crucial to the best interest of the child, but is perhaps the single predicator of a child's well-being . . . which can be competently evaluated by judges."[213] Attempting to provide objective standards for the lower courts to determine the primary caretaker in custody determinations, the Minnesota Supreme Court listed a few factors indicative of which parent was the primary caretaker. These factors included considerations such as which parent was primarily responsible for meal planning, medical care, discipline, and education.[214]

Although the primary caretaker standard presumed to be gender-neutral, the Supreme Court of Minnesota subtly recognized the standard may not always be true when it conceded "a parent who has performed the traditional role of homemaker will ordinarily be able to establish primary parent status in a custody proceeding involved young children."[215] However, the court claimed that such a concession does not mean that parents who "fashion less traditional divisions of labor within a family" are deemed by the court to be incompetent or unfit.[216] Instead, the recognition was meant to "[encompass the court's] understanding of the traumatic impact on children [if separated] from the primary caretaker parent."[217]

While the premise that separating children from a primary caretaker can be detrimental to the child is true, underlying the court's thought process is years of engrained heteronormativity. Despite presuming to be gender-neutral and allowing men to take on and be recognized for assuming the "non-traditional" role of being the primary caretaker, the primary caretaker presumption is nevertheless premised on the assumptions that the woman will attain her "paramount destiny [of fulfilling] the noble and benign offices of wife and mother,"[218] and that a mother's love is superior to a father's.[219] Consequently, if a woman fulfills her "paramount destiny," she will always be the primary caretaker and, under the primary caretaker presumption, more likely to receive custody of any young children.[220] That is not

211. *Id.*
212. *Id.* at 713.
213. *Id.* at 712.
214. *Id.* at 713.
215. *Id.* at 714.
216. *Id.*
217. *Id.*
218. Bradwell v. Illinois, 83 U.S. 130, 141 (1873).
219. *See* Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916); Duncan v. Duncan, 80 So. 697, 703 (Miss. 1919) (Holden, J., dissenting).
220. *Lagging Behind the Times, supra* note 190, at 912 (beginning the discussion of discrimination against fathers as men).

to say that keeping a young child with his or her primary caretaker is inherently wrong; often keeping a young child with his or her primary caretaker promotes stability and is in the child's best interest.[221]

With the decline in the use of the tender years doctrine and the questionability surrounding the primary caretaker presumption, the best interests of the child (BIC) standard emerged.[222] Derived from the Uniform Marriage and Divorce Act (UMDA) § 402, state statutes adopting the BIC standard provided various factors for courts and parties to consider when making custody decisions.[223] Although intended to guide judicial discretion, application of the factors remains challenging for judges and generates many discussions regarding its effectiveness.[224]

An example of a court attempting to apply the BIC standard is the 2009 case of *McIntosh v. McIntosh*, where a Michigan court considered a father's contention that the trial court erred in its decision to award legal and physical custody to the mother when an expert psychologist recommended joint legal and physical custody.[225] Although courts may consider psychological evaluations when making custody determinations, they are not required to adhere to the recommendations because "[t]he overriding concern is the child's best interests."[226] When considering the child's best interests, there are several factors a court considers, as detailed in the state's statutes. In *McIntosh,* some of the factors the court considered were

> [t]he love, affection, and other emotional ties existing between the parties involved and the child . . . [t]he capacity and disposition of the parties to give the child love, affection, and guidance, . . . [t]he capacity and disposition of the parties involved to provide the child with food, clothing, and medical care . . . [and] the moral fitness of the parties involved.[227]

The father in *McIntosh* contested specific factors, including "[t]he moral fitness of the parties involved,"[228] and "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship" with the other parent.[229] The trial court found that the father was an alcoholic,[230] would intentionally sabotage the child's relationship with the mother,[231] and that

221. Pikula v. Pikula, 374 N.W.2d 705, 712-13 (1985).

222. OLIPHANT & STEEGH, *supra* note 15, at 162.

223. *Id.* at 162–63; *The Search for Guidance, supra* note 180, at 3. *See, e.g.*, OHIO REV. CODE ANN. § 3109.04(F) (West 2011).

224. OLIPHANT & STEEGH, *supra* note 15, at 163.

225. McIntosh v. McIntosh, 768 N.W.2d 325, 327 (2009).

226. *Id.* at 329.

227. *Id.* at 331; MICH. COMP. LAWS. § 722.23 (2016).

228. *McIntosh*, 768 N.W.2d at 331; MICH. COMP. LAWS § 722.23(f) (2016).

229. *McIntosh*, 768 N.W.2d at 331; MICH. COMP. LAWS § 722.23(j) (2016).

230. *McIntosh*, 768 N.W.2d at 331.

231. *Id.* at 332.

there was evidence of domestic violence.[232] Therefore, the court awarded legal and physical custody to the mother.[233]

Although courts use the BIC standard to make custody determinations and only "[examine] the sexual conduct of a parent to determine whether it has had any adverse impact on the child,"[234] since heteronormativity is engrained in our society and dictates that heterosexuality is moral and any other sexual orientation is immoral,[235] if a gay or lesbian individual is before the Court, there is concern regarding the judge's perception and bias towards the gay or lesbian parent. Often, judges have a "narrow [view] of 'mothering,'"[236] which is rooted in heteronormative gender norms.[237] Furthermore, "if the litigant's choices and preferences are dissimilar to the experiences of the judge, or counter to the dominant society's stock stories, the courtroom is a breeding ground for bias."[238] In some custody determinations, particularly ones involving children with a gay or lesbian parent or children of same-sex couples, judges may occasionally offer pretextual reasons for their custody awards, when their true rationale is rooted in heteronormativity.[239] While most custody determinations reinforce or otherwise adhere to heteronormative gender norms, recognizing that heteronormativity is simultaneously conscious, subconscious, and subliminal, such reinforcement may be subconscious and unintentional.[240]

In the 1998 Virginia case of *Piatt v. Piatt*, the wife, the non-heterosexual parent, contended the court erroneously considered her post-separation sexual conduct in a way it did not consider her ex-husband's.[241] The wife admitted she was "'experimenting' and still dealing with the issue of her sexual orientation,"[242] which the trial court characterized as evidence of the wife being in "turmoil," and awarded joint legal custody of the child, giving the husband physical custody.[243] When the Virginia Court of Appeals reviewed the case, it agreed with the trial court that while the wife's "'experimentation'[did not have] a direct negative impact on the child," it evidenced her "inner 'turmoil' and 'lack of control,'" which

232. *Id.*

233. *Id.* at 327.

234. Piatt v. Piatt, 499 S.E.2d 567, 570 (Va. Ct. App. 1998).

235. Diane S. Meier, *Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 147, 148 (2008).

236. Claire P. Donohue, *General Issue of Gender and the Law: The Unexamined Life: A Framework to Address Judicial Bias in Custody Determinations & Beyond*, 21 GEO. J. GENDER & L. 557, 561 (2020) [hereinafter *General Issue of Gender and the Law*].

237. *Id.* at 561*; see also* Azar *supra* note 3.

238. *Id.*

239. *See* Elizabeth Trainor, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 62 A.L.R.5th 591 (1998) (discussing how courts "frequently determined that awarding initial child custody to a homosexual or lesbian parent would not be in the best interests of, or would adversely affect, the child or children involved" and considered "homosexual or lesbian behavior as immoral and illicit . . . and concluded that this lifestyle inevitably would have a negative effect on the children.").

240. Part IV of this Note discusses methods of recognizing and counteracting heteronormativity.

241. *Piatt*, 499 S.E.2d at 569.

242. *Id.*

243. *Id.* at 569-70.

supported the conclusion that that the wife's home environment was less stable than the husband's.[244] While the majority of the court did not think there was improper characterization or consideration of the wife's post-separation sexual conduct, the dissent thought otherwise.[245] Analyzing the trial judge's decision, Justice Annunziata asserted that the trial judge relied on the promiscuity of each of the parties, treated the wife's sexual conduct differently than that of the husband, and improperly considered the parties' post-separation sexual behavior as evidence that the husband had a more stable home environment.[246]

D. *Custody Determinations, Adoptions, and Same-Sex Couples*

Marriage is viewed as the foundation of both society and families, and historically included a great emphasis on procreation.[247] Since the purpose of marriage was procreation, a same-sex couples' inability to naturally reproduce was often used as a reason to justify denying the couple the right to marry.[248] However, this heteronormative focus on marriage and procreation within the confines of marriage meant children born out of wedlock were "illegitimate," and "*filius nullis* – 'the child of no one.'"[249] Consequently, these children could not receive child support or inherit from their parents.[250]

Beginning in the 1960s, the Supreme Court took efforts to destigmatize the status of "illegitimate" children. In the 1968 case of *Levy v. Louisiana*, the Supreme Court struck down a statute that denied nonmarital children a legally cognizable interest in a parent's death, declaring it was "invidious to discriminate against [children] when no action, conduct, or demeanor of theirs [was] possibly relevant to the harm that was done the mother."[251] In 1977, the Supreme Court held in *Trimble v. Gordon* that a provision of the Illinois Probate Act, which prohibited "illegitimate" children form inheriting from their intestate fathers but allowed marital children to inherit by intestate succession from both parents, was unconstitutional.[252] However, in the 1978 case of *Lalli v. Lalli*, the Supreme Court upheld a New York provision requiring non-marital children to obtain an order of filiation before their intestate father's death to inherit from him.[253]

While the Supreme Court sought to advocate for "illegitimate" children's best interests by "legitimatizing" them, both in the eyes of the law and society, there was an underlying heteronormative narrative dictating a "traditional" family

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244. *Id.*

245. *Id.* at 572 (Annunziata, J., dissenting).

246. *Id.* at 572-74 (Annunziata, J., dissenting).

247. Maynard v. Hill, 124 U.S. 190, 211 (1888). *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942), Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978); Chavias v. Chavias, 184 N.Y.S. 761 (N.Y. 1920) (Blackmar, J. dissenting); OLIPHANT & STEEGH, *supra* note 15.

248. Conaway v. Deane, 932 A.2d 571, 583, 635 (Md. 2007).

249. OLIPHANT & STEEGH, *supra* note 15, at 707.

250. *Id*. at 708.

251. Levy v. Louisiana, 391 U.S. 68, 72 (1968).

252. Trimble v. Gordon, 430 U.S. 762, 776 (1977).

253. Lalli v. Lalli, 439 U.S. 259, 275-76 (1978).

of a married man and woman and their children. Although the Supreme Court's decisions in *Levy, Trimble,* and *Lalli* shifted society and courts' focus from parents' marital status to the well-being of children greatly affected by their status as "illegitimate" children, the Supreme Court nevertheless neglected to acknowledge and legitimize the children of same-sex couples, whose parents could not marry, and continued to disprove of non-married parents.[254] Such refusal suggests while the Supreme Court thought children should not be punished for their parents' "bad actions," i.e. failure to marry, the Supreme Court would not condone same-sex couples or non-married parents.

Prior to the Supreme Court's 2015 decision in *Obergefell*, separated and unmarried same-sex couples faced unique custody challenges because often only one of the parents was deemed the "'legal' parent."[255] This left the other parent with little to no recourse; having to rely on de facto parent status or a third-party visitation statute. In the 2005 case of *In Re Parentage of L.B.*, the Washington Supreme Court found the non-biological, non-adoptive parent had standing to petition for recognition of de facto parent status,[256] which would permit the court to consider awarding her custody or visitation.[257] However, in the event she was not considered a de facto parent, the court noted she did not have a valid, separate visitation claim because Washington's third-party visitation statutes were deemed unconstitutional.[258]

In the 2007 Minnesota case of *SooHoo v. Johnson*, two women, Johnson and SooHoo, raised two children together and held themselves out as the children's mothers, although only Johnson adopted the children.[259] Upon the deterioration of Johnson and SooHoo's relationship, a custody battle ensued.[260] During the custody battle, Johnson relied on the Supreme Court's decision seven years prior in *Troxel v. Granville*, which held a fit parent is presumed to act in the child[ren]'s best interest and a fit parent's decisions should receive some deference.[261] Therefore, Johnson claimed allowing SooHoo visitation with the children "violat[ed] [Johnson's] due process rights as a fit parent."[262] Although the Court considered Johnson's wishes regarding visitation, it nevertheless determined that allowing SooHoo visitation was in the children's best interests.[263]

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254. *See generally* Levy v. Louisiana, 391 U.S. 68 (1968); Trimble v. Gordon, 430 U.S. 762 (1977); Lalli v. Lalli, 439 U.S. 259 (1978).

255. Many states used to statutorily ban LGBTQ parents from adopting. *See Same-Sex Parenting and Adoption,* JUSTIA, https://www.justia.com/lgbtq/family-law-divorce/same-sex-parenting-adoption (July 2018); *see also LGBTQ Adoption: Can Same-Sex Couples Adopt?* AM. ADOPTIONS, https://www.americanadoptions.com/adopt/LGBT_adoption (last visited Aug. 8, 2021).

256. *In re* Parentage of L.B., 122 P.3d 161, 163 (Wash. 2005).

257. *Id.* at 179 (Washington Supreme Court remanded to the trial court to determine if the non-biological mom met the de facto parent criteria).

258. *Id.* at 179–81.

259. SooHoo v. Johnson, 731 N.W.2d 815, 818 (Minn. 2007).

260. *Id.* at 819.

261. *Id.* at 824 (quoting Troxel v. Granville, 530 U.S. 57, 80 (2000)).

262. *SooHoo*, 731 N.W.2d at 819.

263. *Id.* at 825–26.

Even after the 2015 landmark decision in *Obergefell*, many aspects of family law retained their heteronormative basis and separated, unmarried same-sex couples continued to encounter challenges. It was only after the 2016 case of *Campaign v. Mississippi Department of Human Services*[264] that all fifty states finally overturned laws banning LGBTQ adoption.[265] In the 2016 case of *Matter of Brooke S.B. v. Elizabeth A.C.C.*, the New York Court of Appeals reexamined a previous rule that "in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child's 'parent' for purposes of standing to seek custody or visitation."[266] In *Brooke*, a lesbian couple was symbolically engaged in 2007 and the following year conceived a child via artificial insemination.[267] Later, the women terminated their relationship. Three years later, the biological mother, Elizabeth, prevented the non-biological mother, Brooke, from contacting the child, prompting Brooke to petition for joint custody and visitation.[268] Elizabeth asserted that Brooke did not have standing to petition for custody or visitation because Brooke did not have either a biological or adoptive connection to the child as required under the statute, and the trial court agreed.[269]

In light of *Obergefell*, the New York Court of Appeals held that a non-biological, non-adoptive parent can seek custody or visitation when he or she "proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents. . . ."[270] This decision was premised on the disparaging effect of a "non-biological, non-adoptive 'parent' [being] estopped from disclaiming parentage and [yet] made to pay child support," while simultaneously prohibited from obtaining custody or visitation.[271] In a similar 2018 case, *Matter of K.G. v. C.H.*, the New York Court of Appeals held the rule announced in *Brooke* applies to adoptions so long as a child is identified prior to termination of the relationship.[272]

The marital presumption, a legal doctrine dictated by state statutes and often understood to mean children born during a marriage are biologically the husband's children,[273] remains a post-*Obergefell* heteronormative presumption as it still only applies to opposite-sex couples. When the presumption originally arose in the eighteenth century, its purpose was to maintain the family integrity and children's

264. *See generally* Campaign v. Mississippi Dep't of Hum. Servs., 175. F. Supp. 3d 691 (S.D. Miss. 2016).

265. LGBTQ *Adoption: Can Same-Sex Couples Adopt?*, AMERICAN ADOPTIONS, https://www.americanadoptions.com/adopt/LGBT_adoption (last visited Aug. 19, 2021).

266. Matter of Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016).

267. *Id*. at 490–91.

268. *Id*. at 491.

269. *Id*.

270. *Id*. at 501.

271. *Matter of Brooke S.B.*, 61 N.E.3d at 498 (N.Y. 2016). For a more thorough analysis on Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016) and the challenges same-sex couple face regarding parental rights, see Samantha Bei-wen Lee, *The Equal Right to Parent: Protecting the Rights of Gay and Lesbian, Poor, and Unmarried Parents*, 41 N.Y.U. L. REV. & SOC. CHANGE 631 (2017).

272. Matter of K.G. v. C.H., 79 N.Y.S.3d 166, 170, 174 (2018).

273. OLIPHANT & STEEGH, *supra* note 15, at 720.

legitimacy by prohibiting evidence that the child was not related to the husband.[274] Gradually, the presumption that a "legitimate" child is one born within a marriage and biologically related to both parents diminished. Instead, the marital presumption evolved to protect the family unit, implicitly reinforce the heteronormative status of marriage, and maintain a child's legitimacy by virtue of being born to married parents, even if not biologically the husband's child.[275]

Furthermore, the technological advancement of artificial insemination required broadening the marital presumption. In an opposite-sex couple, the use of artificial insemination suggests that the husband is not the biological father of the child. Therefore, the marital presumption, instead of presuming that a child born in a marriage is biologically related to both parents, deemphasizes a biological connection between parent and child by recognizing that a child conceived via artificial insemination, and born to an opposite-sex couple, is a "legitimate" child of the marriage and that the husband is a legal parent to the child.[276] Whether or not the husband was the child's biological father, such recognition allowed husbands to be listed on the child's birth certificate and recognized as one of the child's legal parents.[277]

However, a spouse's ability to be recognized as a valid, legal parent only extended to male spouses in opposite-sex couples. Even after *Obergefell*, many state statutes required a married woman's male spouse to be listed on the birth certificate, but did not extend such a rule to same-sex couples – neither a married woman's female spouse nor a married man's male spouse could be listed on a child's birth certificate.[278] The Supreme Court helped rectify this rule by reminding lower courts that post-*Obergefell*, benefits and rights bestowed upon opposite-sex couples at their marriage necessarily apply to married same-sex couples as well. In the 2017 case *Pavan v. Smith,* where an Arkansas statute treated same-sex couples differently with respect to which spouses may be listed on the birth certificate, the Arkansas Supreme Court held that when a state uses a document, such as a birth certificate, to confer "legal recognition" of a right to married opposite-sex couples, a state may not "deny married same-sex couples that [same] recognition."[279]

Relying on the rationale provided in *Pavan*, the Supreme Court of Arizona addressed the question of whether the marital presumption should expand to apply to same-sex couples.[280] In *McLaughlin*, a same-sex female couple, Kimberly and Suzan, legally married in 2008 and welcomed the birth of their son in 2011.[281] Approximately two years later, when their relationship ended, Kimberly prevented Suzan from having contact with their son, which prompted Suzan to request the

274. *Id*. at 720-21.
275. Michael H. v. Gerald D., 491 U.S. 110, 124–28 (1989).
276. Pavan v. Smith, 137 S. Ct. 2075, 2077–78 (2017).
277. *Id.* at 2078.
278. *Id.* at 2077-78.
279. *Id.* at 2079.
280. *See generally* McLaughlin v. Jones, 401 P.3d 492 (2017).
281. McLaughlin v. Jones, 401 P.3d 492, 494 (Ariz. 2017).

court consider her a presumptive parent.[282] The court reasoned, that "not [affording Suzan] the same presumption of paternity" that it affords a "similarly situated man in an opposite-sex marriage[,]" violates the Fourteenth Amendment.[283] Furthermore, the court justified the expansion of the marital presumption, echoing the sentiment in *Brooke* that if the marital presumption did not apply, "a biological [parent could] use the undisputed fact of a consensual, artificial insemination to force the non-biological parent to pay child support. . . while denying that same non-biological parent any parental rights."[284]

IV. RECOGNIZING AND OVERCOMING HETERONORMATIVITY

A. *Heteronormativity's Prevalence Today*

Just as the Supreme Court in the 1970s responded to the "climate of the era"[285] it is time for the Supreme Court and lower courts to do the same in the modern day. Heteronormativity is "the myriad ways in which heterosexuality is produced as a natural, unproblematic, taken-for-granted, ordinary phenomenon"[286] that influences our concepts of truth and morality[287] and is "the foundation upon which societies are built, thereby coloring all aspects of life."[288] As exemplified throughout this Note, heteronormativity subliminally influenced much of the Court's history and reinforced the ideas of gender roles, sex discrimination, and bans against same-sex marriage. Although society and the legal system seemingly departed from heteronormative thinking, it nevertheless continues to influence our perceptions because "heteronormative assumptions lurk deep within our subconscious."[289]

A recent indicator that the Supreme Court might be aware of its historically heteronormative conceptualization of sexual orientation is the employment discrimination case *Bostock v. Clayton.* Until this recent 2020 case, the courts distinguished between sex discrimination and sexual orientation discrimination.[290] Despite similarities to *Bostock*, the United States Supreme Court and Second Circuit Court reached different conclusions in the 1989 case of *Price Waterhouse v. Hopkins* and the 2005 case of *Dawson v. Bumble & Bumble*.

In *Price Waterhouse v. Hopkins*, the Supreme Court held Title VII protected against discrimination on the basis of gender as part of its protection against sex

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282. *Id.* at 495.

283. *Id.*

284. *Id.*; *see also* Matter of Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d. 488, 498 (N.Y. 2016).

285. Coyle, *supra* note 39.

286. Samuel, *supra* note 9.

287. Diane S. Meier, *Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law*, 15 WASH. & LEE J. C. R. & SOC. JUST. 147, 148 (2008).

288. Samuel, *supra* note 9.

289. *Id.*

290. *See* Meier, *supra* note 7, at 160-62, 172, 174-75 (discussing the differences between seemingly identical discrimination cases Price Waterhouse v. Hopkins, 490 U.S. 228 (1998) and Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005)).

discrimination.[291] However, in *Dawson v. Bumble & Bumble*, the Second Circuit held claims of sexual orientation discrimination and gender stereotyping should not be used to "bootstrap protection for sexual orientation into Title VII."[292] However, in *Bostock v. Clayton*, conservative Justice Gorsuch recognized, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[293] Although the Court may be conflating sexual orientation with gender,[294] such an acknowledgement is a welcome departure from the Supreme Court's previous treatment of sexual orientation discrimination, which traditionally held sexual orientation fell outside the realm of gender.[295]

There are several ways to recognize and analyze engrained heteronormativity. Some proposals include passage of an "Equality Act" to lessen the burdens of the LGBTQ community[296] or "a new framework of 'Transitional Equality' to address vulnerabilities that may arise during the process" of shifting legal relational status.[297] An alternative view focuses on marriage and how the legalization of same-sex marriage seems like a perfect in-road to reconstruct marriage as a less heteronormative institution.[298] Another alternative might include recognizing non-traditional families, particularly ones the law still considers taboo, such as nonmarital parents and three parent families.[299] Although not overtly discussing heteronormativity, there is additional scholarship written to address the unique challenges facing nonconforming individuals[300] and improving the legal field. The scholarship suggests courts should focus on neutrality rather than relying on binaries,[301] promulgating legislation that prohibits discrimination based on gender identity or sexual orientation and legislation that expands federal hate

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291. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (referring to sex discrimination and gender discrimination as if they were the same term).

292. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005).

293. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020).

294. *See supra* text accompanying notes 11-14.

295. *Bostock*, 140 S. Ct. at 1741.

296. *See generally* Matt J. Barnett, *Queering the Welfare State: Paradigmatic Heteronormativity After Obergefell*, 93 N.Y.U. L. REV. 1633 (2018).

297. *See* Suzanne A. Kim, *Transitional Equality*, 53 U. RICH. L. REV. 1149, 1154–56 (2019) (proposing a "framework of 'transitional equality' to address vulnerabilities that may arise during the process of transition itself," of same-sex couples moving from unmarried to married status).

298. *See generally* Robson, *supra* note 22.

299. *See generally* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015); *see generally* Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215 (2016)*; see also Three (Parents) Can Be A Crowd, But For Some It's A Family*, NPR (March 30, 2014, 6:08 PM), https://www.npr.org/2014/03/30/296851662/three-parents-can-be-a-crowd-but-for-some-its-a-family.

300. "Nonconforming" often encompasses individuals in LGBTQ community who go against heteronormativity.

301. Meier, *supra* note 7, at 188.

crimes to include those categories,[302] and postulates that suppressing gender nonconformity violates the doctrine of Freedom of Speech.[303]

B. *Language Matters*

Although these proposals and suggestions provide a framework for lawyers and judges to consider and utilize, they are outside the scope of this note, which primarily employs both normative jurisprudence and pragmatics to address heteronormativity. Contained herein are proposals for gender-silent legislative drafting[304] and incorporation of psychological principles[305] to help remove both the overt and subtle heteronormative bias. The case history demonstrates the courts' seemingly subconscious bias towards heteronormativity and society's use of language and understanding of gender roles both reveals and reinforces our subconscious biases. One way to curtail this effect is for lawyers, judges, and even legislators to be even more conscious and deliberate with their words.

The American Psychological Association provides advice on how to avoid heterosexual bias in language such as using "lesbian" or "gay" instead of "homosexual" and disciplined use of the words "sex" and "gender."[306] Although deliberate use of language seems at best a tedious, if not completely ineffective, attempt to recognize and avoid a heteronormative bias, an undeniable truth is that "language impact[s] cognition and vice versa."[307] The language people use "has the power to . . . make someone feel like their identity is not okay."[308] Therefore, "when we use heteronormative language, we reinforce the social belief that there are two sexes . . . that sex is the same as gender."[309] Such heteronormative language is harmful because "it excludes the many other ways in which people identify and love . . . and actively works against inclusion."[310]

Furthermore, some linguistic studies revealed that "conventional use of masculine forms [of words] as generics causes a male bias in mental representations,"[311] and that the use of gender-fair language can be beneficial.[312] Although the studies focused on the effects of gender-fair language on the social perceptions of professions, the findings provide insight on how using gender-fair language may be beneficial and it supports the proposition of using gender-neutral, and even gender-silent terms.[313]

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302. Reeves, *supra* note 22, at 279.

303. Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 193 (2013).

304. *See* Revell & Vapnek, *supra* note 88.

305. *See* Donohue, *supra* note 238.

306. Avoiding Heterosexual Bias in Language, *supra* note 7.

307. Horvath, *supra* note 2.

308. *Pride 2020: Inclusive Language is Key*, ISLAND HEALTH (June 11, 2020), https://www.islandhealth.ca/news/stories/pride-2020-inclusive-language-key.

309. *Id.*

310. *Id.*

311. Horvath, *supra* note 2.

312. *Id.*

313. *See id.; see also* Revell & Vapnek, *supra* note 88.

Since language heavily influences our thoughts and perceptions, and often perpetuates discrimination, revising policies, procedures, and statutes to remove the subtle underlying heteronormative basis is crucial.[314] Furthermore, revised language and the incorporation of interdisciplinary scholarship[315] can enable the legal field to reinvent itself into a fairer, more just, and humanitarian system.

V. CONCLUSION

Society has a heteronormative bias that is both conscious and subconscious and permeates throughout society, including the legal field and linguistics. From marriage, gender roles, sex discrimination, and custody determinations, heteronormativity underlies and works against men, women, and particularly the LGBTQ community. As society and the legal field progresses, some biases and perceptions shift, but more change lies ahead. One tedious but influential change is to evaluate and revise society's heteronormative language. Since language informs thoughts, and thoughts inform perceptions, which in turn create action, removing such language, and consequently its underlying bias, will enable courts, judges, lawyers, and legislators to shift their biases and perceptions and achieve a more just and fair system.

314. *See* Revell & Vapnek, *supra* note 88, at 105 (One proposal for doing so is promulgation of gender-silent legislation).

315. *See* Donohue, *supra* note 238.