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## INTIMATE LIBERTIES AND ANTIDISCRIMINATION LAW

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*In assessing laws that regulate marriage, procreation, and sexual intimacy, the Supreme Court has recognized a “synergy” between guaranteeing personal liberties and advancing equality. Courts interpreting the antidiscrimination*

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*laws that govern the private sector, however, often draw artificial and untenable lines between “conduct” and “status” to preclude protections for individuals or couples who face censure because of their intimate choices. This Article exposes how these arguments have been used to justify not only discrimination against the lesbian and gay community, but also discrimination against heterosexual couples who engage in non-marital intimacy or non-marital childrearing.*

*During the 1980s and 1990s, several state supreme courts held that landlords who refused to rent to unmarried couples were responding to unprotected conduct (i.e., non-marital intimacy) rather than engaging in impermissible discrimination on the basis of marital status. Similar arguments are made today in cases concerning same-sex couples who are denied wedding-related services or unmarried pregnant women who are fired. This Article argues such decisions misconstrue the relevant statutory language, and it shows how modern constitutional doctrine should inform the interpretation of private antidiscrimination law to offer more robust protections for intimate liberties.*

*This Article also addresses whether antidiscrimination protections related to intimacy can be enforced despite objections premised on religious beliefs. Some courts, as well as the Trump Administration, have suggested that statutes prohibiting discrimination on the basis of marital status or sexual orientation serve less “compelling” interests than provisions prohibiting race discrimination. This argument is deeply flawed. Courts have long recognized that statutes intended to eliminate discrimination serve compelling purposes, even when they address factors that do not trigger strict scrutiny under the Equal Protection Clause. The compelling nature of antidiscrimination laws related to intimate liberties should be especially obvious: They protect individuals’ freedom to make fundamentally important choices that are central to personal dignity and autonomy.*

#### INTRODUCTION

Individual choices regarding marriage, procreation, and sexual intimacy are, in the words of the Supreme Court, “central to personal dignity and autonomy.”<sup>1</sup> In striking down bans on same-sex marriage and same-sex sodomy, the Court relied primarily on substantive due process doctrine, but it recognized a “synergy” between guaranteeing personal liberties and advancing equality norms under the Equal Protection Clause.<sup>2</sup> Leading constitutional law scholars

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<sup>1</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citing and quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)); *see generally* Kenneth Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624 (1980) (arguing that Constitution protects rights to intimate associations).

<sup>2</sup> *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015); *Lawrence*, 539 U.S. at 575 (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”).

have likewise long recognized the interplay between these doctrines.<sup>3</sup> But, in interpreting the antidiscrimination laws that govern the *private* sector, courts often draw artificial and untenable lines between “conduct” and “status” to preclude protections for individuals or couples who face censure because of their intimate choices. This Article exposes this phenomenon as a problem that recurs in multiple contexts. It argues that such decisions misconstrue the relevant statutory provisions, and it shows how modern constitutional doctrine should inform the interpretation of private antidiscrimination law to offer more robust protection for intimate liberties. This is essential for both the threshold question of whether antidiscrimination protections apply and the secondary question of how to balance the interests served by such protections against religious liberty claims.

The stakes in addressing this issue are high. The right to marry a same-sex partner is rather hollow if the marriage itself is then used as grounds to be penalized at work.<sup>4</sup> So too is a right to engage in sexual intimacy outside of marriage or to make other choices around family formation. This Article analyzes three contexts in which intimate choices are made publicly visible: unmarried couples who seek to rent apartments together, same-sex couples who seek goods or services connected with a wedding, and unmarried women who are pregnant. In all three contexts, individuals and couples routinely face discrimination for their intimate choices. And when they do, they often have no legal rights. Shortly after this Article is published, the Supreme Court will decide *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>5</sup> a case brought by a bakery that was fined for discriminating on the basis of sexual orientation because it refused to make a wedding cake for a gay couple.<sup>6</sup> The bakery alleges its rights to free speech and freedom of religion were violated.<sup>7</sup> Commentary on this case typically presents it as an example of a “clash” between religious rights and gay rights.<sup>8</sup> This framing obscures a key issue. In

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<sup>3</sup> Leading explorations include Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491 (2002); Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447 (2004); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011). Some of these authors applaud the Court’s shift towards emphasizing the liberty aspects of these claims, while others critique the change.

<sup>4</sup> See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 714 (7th Cir. 2016), *rev’d on other grounds*, 853 F.3d 339 (7th Cir. 2017) (en banc).

<sup>5</sup> 137 S. Ct. 2290 (2017) (granting petition for writ of certiorari).

<sup>6</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 3, 370 P.3d 272, 276, *cert. granted*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Adam Liptak, *Cake Case Takes Court Back to the Culture Wars*, N.Y. TIMES, June 27, 2017, at A1 (describing *Masterpiece Cakeshop* as “clash” between antidiscrimination laws and religious freedom claims).

many states, a gay couple denied services would have no recourse in the first place; the “gay rights” side of the “clash” would be non-existent. A ruling in favor of the bakery will make this problem worse—but even if the Supreme Court rules in favor of the Colorado Civil Rights Commission, the problem will persist.

As a threshold matter, plaintiffs who face discrimination because of their choices regarding intimacy must identify an antidiscrimination law that applies. The federal laws that prohibit discrimination by employers, landlords, and businesses serving the public do not explicitly address discrimination on the basis of marital status or sexual orientation.<sup>9</sup> That is also the case in approximately half of the states.<sup>10</sup> Thus, in these jurisdictions, plaintiffs generally can proceed only if they can show that the action violates a prohibition on sex discrimination.<sup>11</sup> This problem is relatively straightforward, though crucially important, and it obviously supports enacting explicit protections or clarifying that such discrimination is actionable under existing discrimination laws.<sup>12</sup>

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<sup>9</sup> See 42 U.S.C. § 2000e-2 (2012) (employment); *id.* § 3604 (housing); *id.* § 2000a(a) (public accommodations). *But cf.* 15 U.S.C. § 1691(a)(1) (2012) (making it illegal to discriminate on basis of marital status in providing access to credit).

<sup>10</sup> See *Maps of State Laws and Policies*, HUMAN RIGHTS CAMPAIGN [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (last visited Nov. 17, 2017) (identifying state laws prohibiting discrimination on basis of sexual orientation in various contexts, including housing, employment, and public accommodations); sources cited *infra* note 56 (identifying states that prohibit discrimination on basis of marital status in housing, employment, and public accommodations).

<sup>11</sup> At the time of publication, the law is unsettled as to whether discrimination on the basis of sexual orientation is inherently a form of sex discrimination. See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1248 (11th Cir. 2017) (holding no), *petition for certiorari pending*; *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 77 (2d Cir.) (holding no), *reh'g granted*, No. 15-03775, 2017 U.S. App. LEXIS 13127 (2d Cir. May 25, 2017); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (holding yes, at least under Title VII). Explicitly prohibiting discrimination on the basis of sexual orientation would clarify the legal rule and serve the important expressive purpose of indicating such discrimination is unlawful and improper; on the other hand, many of the proposed bills providing such explicit protections include exceptions that are not found in Title VII. See generally *Mary Anne Case, Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333 (2014) (arguing sexual-orientation specific legislation might undercut existing protections for gays and lesbians and for others who depart from gender norms).

<sup>12</sup> I also support explicit protections from discrimination on the basis of gender identity, to the extent that such discrimination is not already prohibited by existing laws. *Cf.* *Mia Macy v. Eric Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*10 (Apr. 20, 2012) (concluding discrimination on basis of gender identity is form of sex discrimination). However, such discrimination is generally not triggered by choices regarding personal intimacy with another person and thus is somewhat distinct from the issues that are my primary focus in this Article.

My focus in this Article, however, is on a subtler, but equally dangerous, problem that has been largely overlooked. Even where there *are* statutory protections addressing intimate liberties—such as prohibitions on discrimination on the basis of marital status, sexual orientation, or pregnancy—courts often draw untenable distinctions between “status” and “conduct” that severely curtail the efficacy of such provisions.<sup>13</sup> For example, during the 1980s and 1990s, several state supreme courts held that landlords could refuse to rent to cohabiting couples because that decision simply reflected disapproval of “conduct” (i.e., non-marital intimacy), rather than impermissible marital status discrimination.<sup>14</sup> In more recent years, courts have similarly reasoned that discrimination on the basis of pregnancy is illegal sex discrimination, but discrimination against a pregnant woman premised on her having engaged in non-marital sex is permissible.<sup>15</sup> And in the *Masterpiece Cakeshop* case and similar cases, businesses have argued that their refusal to provide wedding-related services to same-sex couples is not a form of unlawful discrimination on the basis of sexual orientation, but rather simply disapproval of same-sex marriage; they routinely cite the earlier housing cases in support of these arguments.<sup>16</sup> In this last context these claims have been largely unsuccessful, and this precise issue will not be before the Supreme Court.<sup>17</sup> However, the argument might well find purchase as other lower courts in more conservative regions weigh in.

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<sup>13</sup> This Article is the first to demonstrate how courts have relied on untenable distinctions between status and conduct in multiple contexts concerning the application of antidiscrimination law to intimate liberties. My analysis builds on earlier scholarship that looks at discrete aspects of this case law. *See generally, e.g.*, Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 808-10 (2014) (critiquing restrictive reasoning employed in housing discrimination cases concerning cohabiting couples as part of argument for more robust protections against discrimination for non-marital families); Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 38-44 (2000) (arguing for more robust protections against marital status discrimination in employment); Jessica Clarke, *Marriage at Work* (Oct. 24, 2017) (unpublished manuscript) (on file with author) (critiquing ways in which employment law privileges marriage, including court decisions that permit employers to fire unwed pregnant employees). A recent essay by Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016), discusses and critiques public employers’ discrimination against their employees on the basis of intimate choices, arguing that it is in tension with modern constitutional doctrine. Professor Murray’s essay does not address the extent to which private employees are far more vulnerable than public employees to such discrimination because the Constitution does not apply at all.

<sup>14</sup> *See infra* Section III.A.

<sup>15</sup> *See infra* Section III.C.

<sup>16</sup> *See infra* Section III.B.

<sup>17</sup> *See infra* text accompanying note 259 (explaining that Supreme Court has no authority to review Colorado courts’ interpretation of Colorado statutory law).

I show that these arguments rest on an artificial distinction between “status” and “conduct” that should be rejected. Sexual orientation is defined by actual or desired partners for sexual intimacy. Marital status is defined by choices regarding whether and when to marry. And pregnancy, including non-marital pregnancy, is the physical manifestation of sexual intimacy and choices regarding procreation and contraception. In other words, antidiscrimination provisions that reference these “statuses” should be understood to necessarily incorporate protection for “conduct.” When the first wave of housing cases concerning cohabiting couples were decided, courts often justified their cramped interpretation of the antidiscrimination protections as a means of harmonizing the statutes with other state laws that criminalized non-marital intimacy.<sup>18</sup> But now, it is clear that these anti-fornication and anti-cohabitation statutes are unconstitutional.<sup>19</sup> These earlier precedents should be repudiated so that their unduly constrained reasoning is not exported into cases emerging today regarding same-sex marriage and unmarried pregnancy.

This Article also makes an important contribution to the other pressing question currently being litigated in courts at all levels: how antidiscrimination provisions that address intimate liberties should be balanced against claims for religious exemptions. In some of the early housing discrimination cases, courts suggested that statutory provisions prohibiting discrimination on the basis of marital status were less “compelling” than antidiscrimination prohibitions related to race, and thus that they should not be enforced against landlords who claimed religious objections.<sup>20</sup> The Supreme Court recently intimated a similar hierarchy,<sup>21</sup> as did the Department of Justice on behalf of the United States in an amicus brief submitted in the currently pending *Masterpiece Cakeshop* case.<sup>22</sup> Attorney General Jeff Sessions distributed a memorandum to all executive departments and agencies which similarly suggests religious freedom should be prioritized above almost any other governmental interest.<sup>23</sup> These arguments are

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<sup>18</sup> See, e.g., *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, ¶ 37, 625 N.W.2d 551, 562 (“The cohabitation statute and the discriminatory housing provision are harmonized by recognizing that the cohabitation statute regulates conduct, not status.”).

<sup>19</sup> See, e.g., *Hobbs v. Smith*, No. 05-CVS-267, 2006 WL 3103008, at \*1 (N.C. Super. Ct. Aug. 25, 2006) (holding state’s anti-cohabitation law unconstitutional under *Lawrence*); *Martin v. Zihel*, 607 S.E.2d 367, 371 (Va. 2015) (holding state’s anti-fornication law unconstitutional under *Lawrence*).

<sup>20</sup> See *infra* Section III.A.2.

<sup>21</sup> See *infra* text accompanying note 125 (discussing Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

<sup>22</sup> See Brief for the United States as Amicus Curiae Supporting Petitioners at 32-33, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111) (arguing laws targeting “race-based discrimination” are sufficiently compelling to survive heightened First Amendment scrutiny but that laws targeting discrimination on basis of sexual orientation are not). Leading civil rights organizations submitted amicus briefs that vigorously disputed this claim. See sources cited *infra* note 284.

<sup>23</sup> See *infra* note 138 and accompanying text.

deeply flawed. Courts have long recognized that statutes intended to eliminate discrimination serve compelling purposes, even when they address factors that do not receive strict scrutiny under constitutional law. The importance of enforcing antidiscrimination laws related to intimate liberties should be especially apparent. The Supreme Court has made clear that individual choices regarding marriage, procreation, and sexual intimacy are “fundamental” liberties protected by the Due Process and Equal Protection Clauses.<sup>24</sup> These liberties are significantly curtailed if individuals face the loss of jobs, housing, or other services on the basis of their intimate choices.

This Article proceeds as follows. Part I describes the evolution of constitutional doctrine over the past fifty years and how it now protects individuals’ autonomy to make choices regarding sexual intimacy, procreation, and marriage without the threat of state-based sanction. Rates of non-marital childrearing have risen dramatically, particularly for racial minorities and those with relatively low levels of education. Part II sketches the way in which status and conduct arguments have been deployed in earlier constitutional and statutory contexts, with a particular focus on gay rights cases. Part III describes and critiques courts’ interpretation of antidiscrimination protections in the context of cohabiting couples seeking housing, same-sex couples seeking services, and unmarried pregnant women facing adverse employment actions.

Part IV begins to develop the normative case for expanding antidiscrimination protections for intimate liberties. Constitutional doctrine emphasizes that criminalizing intimate choices invites private discrimination. The opposite is equally true: permitting private discrimination can undermine individuals’ freedom to exercise fundamental liberties. The pregnancy discrimination cases are particularly shocking in this respect; supervisors apparently felt no compunction in demanding that employees marry partners or end long-term relationships to maintain their jobs. Even in cases concerning denial of services or housing, where presumably it is easier for individuals to find alternative providers, being rejected on the basis of choices that are so integral to personal identity causes significant injury that antidiscrimination law should address. These cases make it abundantly clear that when businesses are empowered to exclude, that liberty comes at the expense of the dignity and autonomy of others—their employees, tenants, and the public at large.

## I. SEXUAL INTIMACY, PROCREATION, AND MARRIAGE

### A. “Fundamental” Liberties

Until the middle of the twentieth century, American criminal and family law enforced strict rules on sexual intimacy.<sup>25</sup> Sexual intercourse could only occur

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<sup>24</sup> See *infra* Section I.A.

<sup>25</sup> Rules at common law were somewhat more flexible, but the early American colonies and later states all prohibited non-marital sexual intimacy. See CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* 12 (2010) (discussing colonial laws

lawfully within marriage; such sex, and any children that resulted from such sex, were “legitimate.”<sup>26</sup> This was a legal term of art with specific consequences under a web of family and inheritance laws, and it was also a normative assessment of propriety.<sup>27</sup> Sexual intimacy outside of legal marriage, even sexual intimacy between consenting adults, was criminalized as illegal fornication (sexual intercourse between unmarried persons), adultery, cohabitation (couples living together as if married),<sup>28</sup> and the sex-specific crime of seduction (seducing unmarried women, of a previously “chaste character,” under the promise of marriage).<sup>29</sup> Parentage law followed and enforced the expectation that “proper” procreative sex was, by definition, marital sex. Children born to unmarried parents were stigmatized as “bastards,” and, until the late 1800s, they were not considered children or heirs of anyone.<sup>30</sup> Subsequently, women who gave birth to children outside of marriage were recognized as legal mothers of their children, but non-marital fathers still had no claim to parental rights.<sup>31</sup>

Criminal law enforced the expectation that sex was at least potentially procreative by criminalizing the use of contraception,<sup>32</sup> abortion,<sup>33</sup> and non-

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criminalizing adultery and fornication).

<sup>26</sup> See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2272-73 (2017) (describing how Anglo-American legal system historically understood “parentage as a relationship defined through marriage” and that any child born to married woman was presumptively “legitimate”).

<sup>27</sup> See *id.* at 2273-75 (discussing custody and property rights that flowed from legitimacy under common law and explaining that illegitimate children did not have recognized legal relations with either parent).

<sup>28</sup> See, e.g., BOWMAN, *supra* note 25, at 12-18. Additionally, common law marriage was used to transform such illicit activity into a “legal” marriage, with all its concomitant responsibilities. See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 969 (2000).

<sup>29</sup> See, e.g., Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 5 (2012).

<sup>30</sup> See, e.g., MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 197, 218 (1985); NeJaime, *supra* note 26, at 2272-73.

<sup>31</sup> NeJaime, *supra* note 26, at 2280; see also *In re Stanley*, 256 N.E.2d 814, 815 (Ill. 1970) (explaining that non-marital fathers had no rights unless they went through legal proceeding similar to that used in adoption or guardianship proceeding).

<sup>32</sup> Birth control was legal through much of the nineteenth century, but beginning in 1873, Anthony Comstock successfully led a broad-based crusade against birth control as a means of enforcing Victorian ideals of moral purity. See NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 78 (2010). Some laws distinguished between contraception for birth control purposes and contraception for limiting the spread of disease. In practice, this meant that men could use condoms but women did not have access to a legal form of contraception.

<sup>33</sup> At common law abortion was legal until “quickening,” but abortion became more generally criminalized by 1880. See, e.g., LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973*, at 14 (1997).



procreative forms of sexual intimacy between men and women.<sup>34</sup> And criminal law prohibited non-heterosexual intimacy, both as a derivative consequence of limiting sex to marriage and limiting marriage to the union of one man and one woman, and more directly through anti-sodomy laws. This framework established what Professor Melissa Murray has called the “criminal-marriage” binary, under which there was—literally—no legal space in which non-marital sex could occur.<sup>35</sup> Notwithstanding the criminal prohibitions, couples still had sex outside of marriage.<sup>36</sup> But couples making the choice to engage in non-marital intimacy, or to take steps to ensure that sexual intimacy did not result in procreation, faced at least a nominal risk of criminal prosecution, medical harm to themselves in the case of illegal abortions, and, for some at least, shame inspired by a legal regime that characterized their intimate choices as improper and immoral.

In the past fifty years, this legal landscape has been completely remade. Under modern constitutional jurisprudence, procreation, sexual intimacy, and marriage are each recognized as “fundamental” liberties, and state efforts to regulate individual choices in these spheres are carefully scrutinized.<sup>37</sup> This constitutional revolution began with *Griswold v. Connecticut*,<sup>38</sup> which held that married couples had a constitutionally protected right to access contraception,<sup>39</sup> and *Loving v. Virginia*,<sup>40</sup> which struck down bans on interracial marriage.<sup>41</sup>

The Court quickly expanded this doctrine to protect aspects of non-marital intimacy. The first wave of decisions did not directly address the constitutionality of criminal laws that proscribed non-marital intimacy itself;

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<sup>34</sup> Anti-sodomy laws in many states prohibited both same-sex and different-sex couples from engaging in oral or anal sex; in some states, the laws only addressed same-sex couples. See *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003).

<sup>35</sup> Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1292-93 (2009) (arguing that historically all sexual expression was forced into one of two categories: “acceptable sexual behavior, entitled to the protection, privacy, and recognition offered by family law (marriage)” or “unacceptable criminality suitable for prosecution and punishment (crime)”).

<sup>36</sup> See, e.g., CAHN & CARBONE, *supra* note 32, at 65 (reporting that between 1947 and 1957, thirty percent of brides gave birth within eight months of wedding, and adoption rate doubled from what it had been in earlier decades).

<sup>37</sup> See, e.g., *Lawrence*, 539 U.S. at 574 (“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”). There is some variation in the particular words with which the Court describes the level of scrutiny required, but generally a state must prove that the regulation at issue furthers a compelling government interest and is narrowly tailored to achieve that objective.

<sup>38</sup> 381 U.S. 479 (1965).

<sup>39</sup> *Id.* at 485-86.

<sup>40</sup> 388 U.S. 1 (1967).

<sup>41</sup> *Id.* at 12.

they simply mitigated the collateral consequences of the conduct.<sup>42</sup> The Court expanded the concept of privacy first announced in *Griswold* to hold that unmarried individuals could not be denied access to contraception<sup>43</sup> or abortions.<sup>44</sup> The Court also held that the benefits that flow from the child-parent relationship cannot be categorically denied to non-marital families,<sup>45</sup> that non-marital children were owed child support,<sup>46</sup> and that they had the right to inherit from their natural parents under intestacy laws.<sup>47</sup> The Court also recognized the corollary concept that men who father a child outside of wedlock have, in at least some circumstances, a constitutionally protected interest in being recognized as legal fathers.<sup>48</sup> Many of these cases rested on Equal Protection Clause grounds, with the Court reasoning that even if states could criminalize non-marital intimacy, these other legal rules, and their often harshly punitive effects, were

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<sup>42</sup> See generally, e.g., Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015) (describing this body of constitutional law).

<sup>43</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding right of privacy protects right of “individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” (emphasis added)). For an insightful exploration of *Eisenstadt*’s impact, as well as its unrealized potential, see Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 YALE J.L. & FEMINISM 1, 3-4 (2016) (arguing that *Eisenstadt* “heralded a new family law that would be more inclusive, liberatory, sex-positive, and feminist than its predecessors”).

<sup>44</sup> See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (holding parents generally could not absolutely veto minor’s choice to obtain abortion because “[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights”).

<sup>45</sup> See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972) (holding denial of wrongful death benefits to non-marital children after death of their father unconstitutional); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968) (holding denial of benefits to mother after death of her non-marital child unconstitutional); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding denial of wrongful death benefits to non-marital children after death of their mother unconstitutional).

<sup>46</sup> *Gomez v. Perry*, 409 U.S. 535, 538 (1973) (holding state law that granted legitimate children right to claim child support but categorically denied that right to illegitimate children unconstitutional).

<sup>47</sup> See *Trimble v. Gordon*, 430 U.S. 762, 775 (1977) (holding state law that permitted illegitimate children to inherit only from their mothers but permitted legitimate children to inherit from both parents unconstitutional); cf. *Lalli v. Lalli*, 439 U.S. 259, 275-76 (1978) (upholding statute that included specific proof standards for non-marital children to inherit from their fathers).

<sup>48</sup> See *Caban v. Mohammed*, 441 U.S. 380, 391-92 (1979) (holding statute allowing unmarried mothers, but not unmarried fathers, to withhold their consent to adoption unconstitutional); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that denying unmarried fathers hearing on parental fitness in child custody cases, while granting hearing to all other parents, violates equal protection rights).

not sufficiently rationally related to the states' claimed objective of reducing non-marital sex.<sup>49</sup>

At the same time as this constitutional doctrine was developing, state legislatures substantially revised the criminal and family law codes to likewise provide more robust support for individual choices around intimacy. The influential Model Penal Code, first promulgated in 1955, recommended that criminal law not be used to punish "morality-based offenses or victimless crimes," such as the criminal prohibitions on consensual non-marital sex.<sup>50</sup> By 1978, only fifteen states still criminalized fornication and only sixteen states still criminalized cohabitation, and prosecutions under these laws were extremely rare.<sup>51</sup> Parentage law was likewise substantially reformed to affirm and recognize rights of non-marital parents, often going beyond the constitutional minimums announced by the Supreme Court.<sup>52</sup> Divorce law was liberalized to permit no-fault divorce,<sup>53</sup> and states and the federal government directed new energy to enforcing child support obligations on non-marital and divorced parents.<sup>54</sup> And finally, as discussed more fully in Parts II and III, legislatures amended antidiscrimination laws to preclude some discrimination related to decisions around intimacy, procreation, and marriage. In 1978, Congress explicitly prohibited pregnancy discrimination in employment,<sup>55</sup> and during the 1970s and 1980s, about half of the states amended their antidiscrimination laws

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<sup>49</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) ("It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under [the state's laws]."); *Weber*, 406 U.S. at 173 (rejecting state's claim that its interest in protecting "legitimate family relationships" justified limiting wrongful death benefits to marital families on grounds that "it [cannot] be thought . . . that persons will shun illicit relations" because their children might one day be denied benefits).

<sup>50</sup> *BOWMAN*, *supra* note 25, at 15; see also *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

<sup>51</sup> *BOWMAN*, *supra* note 25, at 15; see generally JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 *LOY. U. CHI. L.J.* 127 (2014) (tracing progression of adultery and fornication laws and lack of enforcement over time). Such statutes were sometimes invoked in other proceedings, such as alleged welfare fraud cases, divorce and custody proceedings, or efforts to establish paternity to facilitate collecting child support. See generally Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 *WIS. L. REV.* 275 (1981).

<sup>52</sup> See, e.g., NeJaime, *supra* note 26, at 2285-2316.

<sup>53</sup> See, e.g., Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 *CIN. L. REV.* 1, 4-14 (1987) (discussing rapid spread of no-fault divorce laws between 1969 and 1987).

<sup>54</sup> See generally, e.g., Maureen A. Pirog & Kathleen M. Ziolo-Guest, *Child Support Enforcement: Programs and Policies, Impacts and Questions*, 25 *J. POL'Y ANALYSIS & MGMT.* 943 (2006) (discussing history of child support enforcement from 1979-2004).

<sup>55</sup> Pregnancy Discrimination Act, *codified at* 42 U.S.C. § 2000(e)(k) (2012).

to explicitly prohibit discrimination in the private sector based on an individual's marital status.<sup>56</sup>

In the 2003 case *Lawrence v. Texas*,<sup>57</sup> the Court squarely addressed the constitutional limits on the state's ability to proscribe intimacy.<sup>58</sup> As will be familiar to many readers, the case was a constitutional challenge to a Texas law that criminalized same-sex sodomy.<sup>59</sup> The majority opinion, authored by Justice Kennedy, struck down the law, holding it was an unconstitutional infringement on the "autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>60</sup>

Two aspects of the Court's reasoning are important to the argument that follows. First, the Court was quite clear that it was interpreting the Constitution to offer robust protection for both homosexual and heterosexual individuals' intimate choices, including the choice to engage in non-marital intimacy.<sup>61</sup> The Court rested this conclusion on the constitutional developments discussed above, characterizing the early decisions concerning unmarried individuals' access to contraception and abortion as establishing that "the reasoning of *Griswold* could not be confined to the protection of rights of married adults."<sup>62</sup> It emphasized that the constitutional infirmity was not simply a matter of fit between the statute and the stated or presumed objectives of a law. Rather, quoting from a more recent abortion decision, the Court characterized "*personal* decisions relating to marriage, procreation, contraception, [and] family relationships" as "choices central to personal dignity and autonomy" and accordingly choices that are "central to the liberty protected by the Fourteenth

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<sup>56</sup> See Nancy Leung, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1406-07 (2015) (reporting that twenty-two states and District of Columbia prohibit discrimination on basis of marital status in employment, and twenty-four states prohibit discrimination on basis of marital status in housing); Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 638 (2017) (reporting that seventeen states and District of Columbia prohibit discrimination on basis of marital status in public accommodations); see also Robert Mueller, *Donahue v. Fair Employment and Housing Commission: A Free Exercise Defense to Marital Status Discrimination*, 74 B.U. L. REV. 145, 145 n.2 (1994) (identifying and discussing state housing laws); Porter, *supra* note 13, at 15-16 (identifying and discussing state employment laws). These lists are largely consistent, but there are a few states that prohibit discrimination on the basis of marital status in one or two of these contexts but not all three. Additionally, there are errors in at least some of these lists. For example, some of the "housing" discrimination statutes referenced (e.g., Florida and Nebraska) in Leung are actually employment discrimination statutes. Leung, *supra* note 56, at 1407 n.308. Nonetheless, I include all of these references so that researchers have access to the most comprehensive lists I was able to locate.

<sup>57</sup> 539 U.S. 558 (2003).

<sup>58</sup> *Id.* at 564.

<sup>59</sup> *Id.* at 562.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 567.

<sup>62</sup> *Id.* at 566.

Amendment.”<sup>63</sup> Thus, the Court deemed it essential to address the due process argument directly (and overrule its prior precedent holding a ban on sodomy permissible) to foreclose any “question[ing]” about whether the prohibition could be valid if it addressed conduct of both same-sex and different-sex participants.<sup>64</sup>

The Court’s emphasis that decisions around consensual intimacy were constitutionally protected was significant not only for gays and lesbians, but also for different-sex couples who likewise challenged traditional community norms around intimacy, most typically by engaging in non-marital sex or non-marital childbearing. This conduct, like same-sex intimacy, remained criminal in some states, and it likewise was the basis for collateral consequences under civil laws, even though it was rarely the grounds of criminal prosecutions.<sup>65</sup> *Lawrence* thus changed the marriage-crime binary more generally by creating a “space” for sexual intimacy that was neither regulated by marriage nor by criminal law.<sup>66</sup> Lower courts relied on *Lawrence* to strike down lingering bans on fornication and cohabitation.<sup>67</sup>

The second aspect of the *Lawrence* decision that is particularly important to the analysis that follows is the interaction the Court identified between liberty and equality claims. Although the Court declined to formally rest its decision on the Equal Protection Clause, the Court emphasized that principles of equality and the substantive guarantees of liberty protected by the Due Process Clause are “linked in important respects,” such that its decision on the “latter point advances both interests.”<sup>68</sup> *Lawrence*, which explicitly and affirmatively protected the liberty to engage in same-sex intimacy, thus served to delegitimize discrimination on the basis of sexual orientation and on the basis of formerly stigmatized forms of sexual intimacy more generally.

Viewed through this lens, *Obergefell*, the case in which the Supreme Court held bans on same-sex marriage to be unconstitutional, is both a step forward and a step backward. Like *Lawrence*, *Obergefell* asserts—and indeed

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<sup>63</sup> *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>64</sup> *Id.* at 574-75. Justice O’Connor concurred on equal protection grounds, reasoning that there was not a sufficiently rational basis for prohibiting *only* same-sex sodomy, but she would not have held that the statute violated due process. *Id.* at 579 (O’Connor, J., concurring in judgment).

<sup>65</sup> See BOWMAN, *supra* note 25, at 15-16.

<sup>66</sup> See, e.g., Murray, *supra* note 13, at 578-84.

<sup>67</sup> See BOWMAN, *supra* note 25, at 18-20.

<sup>68</sup> *Lawrence*, 539 U.S. at 575. Commentators have examined this interplay between equality and liberty claims both before and after *Lawrence*. See sources cited *supra* note 3. I have previously written of the interplay specifically in the context of marriage. See generally Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010) (arguing that access to marriage implicates fundamental rights branch of equal protection jurisprudence which incorporates liberty interests typically protected under Due Process Clause).

develops—the idea of a “synergy” between liberty and equality.<sup>69</sup> The opinion demonstrates that many of the Court’s prior decisions relating to marriage, procreation, and contraception invoked both due process and equal protection principles.<sup>70</sup> It observes further that denying same-sex couples the right to marry worked a particularly “grave and continuing harm” *because* of the “long history of disapproval” of gay and lesbian relationships.<sup>71</sup> Permitting same-sex couples to marry helps discredit the ongoing disapproval of same-sex intimacy.

But in addressing this harm, *Obergefell* reaffirms the equally longstanding disapproval of non-marital families. The substantive analysis opens with the confident proclamation that “[f]rom their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage,” and that “[t]he lifelong union of a man and a woman always has promised nobility and dignity to all persons.”<sup>72</sup> The Court asserts that marriage protects children of same-sex couples from the “stigma”<sup>73</sup> and “humiliat[ion]”<sup>74</sup> of being raised by parents who are not married, and it suggests that the panoply of state benefits enjoyed by married couples is appropriate because marriage is the “keystone of our social order.”<sup>75</sup> The Court makes clear that it believes that the choice to engage in marital intimacy merits far more protection and respect than the choice to engage in non-marital intimacy.<sup>76</sup>

I believe that same-sex couples who choose to marry have a constitutionally protected right to do so.<sup>77</sup> However, like many other commentators, I am concerned by *Obergefell*’s implicit denigration of couples (same-sex and different-sex) who choose *not* to marry.<sup>78</sup> In *Lawrence*, the individual autonomy

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<sup>69</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (describing “synergy” between two protections).

<sup>70</sup> See *id.* at 2603-04.

<sup>71</sup> *Id.* at 2604.

<sup>72</sup> *Id.* at 2593-94.

<sup>73</sup> *Id.* at 2602.

<sup>74</sup> *Id.* at 2601.

<sup>75</sup> See *id.*

<sup>76</sup> *Id.* (suggesting approval for extent to which society supports marriage by offering married couples recognition, rights, and benefits and concluding same-sex couples should enjoy these same advantages).

<sup>77</sup> See generally Tebbe & Widiss, *supra* note 68 (arguing that denying same-sex couples equal access to civil marriage violates Equal Protection Clause); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007) (arguing justifications for same-sex marriage rest on sex-based stereotypes that violate constitutional guarantees against sex discrimination).

<sup>78</sup> I previously critiqued the way in which the Court similarly denigrated non-marital families in *United States v. Windsor*. See generally Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547 (2015). Other scholars have made similar observations. See generally, e.g., Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23 (2015); Melissa Murray,

to make intimate choices on one's own terms was celebrated as "transcendent" in and of itself.<sup>79</sup> But in *Obergefell*, the Court dramatically re-characterized this shift as merely moving an individual from "outlaw" to "outcast."<sup>80</sup> To be truly respected, *Obergefell* suggests, personal intimacy should be expressed within marriage. This assertion is deeply out-of-step with the modern American life—and by suggesting that those who engage in non-marital intimacy and non-marital procreation may be appropriately scorned as "outcasts," even if not criminalized as "outlaws," the Court's rhetoric may have far-reaching harms.

### B. *Changing Demographics*

During the period of transformative constitutional and statutory developments detailed above, the lived experience of American families likewise experienced seismic shifts. In 1960, seventy-two percent of adults were married, and eighty-five percent of adults had been married at some point.<sup>81</sup> Importantly, at this time, marriage rates were also relatively consistent across race and class; for example, black men and women were almost as likely as white men and women to be married.<sup>82</sup> Couples sometimes engaged in pre-marital sex, but when an unplanned pregnancy occurred, the most common response was a "shotgun" marriage prior to the baby's birth;<sup>83</sup> less common options included abortion or

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*Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016); Douglas NeJaime & Reva Siegel, *What Obergefell v. Hodges Should Have Said*, in *What Obergefell v. Hodges Should Have Said* (Jack Balkin ed., 2017 forthcoming), available at <https://ssrn.com/abstract=2849644> [<https://perma.cc/DLV4-Y5AY>]; cf. K.T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1512-13 (2016) (arguing liberty interests identified in *Obergefell* should support right not to marry, including right to maintain non-marital statuses that include some benefits and responsibilities of marriage). *Obergefell*'s denigration of non-marital families arguably confirms claims that LGBT advocates' focus on achieving marriage equality would undermine the advocacy for more robust support for non-marital families generally. See, e.g., NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 9-10 (2008).

<sup>79</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>80</sup> *Obergefell*, 135 S. Ct. at 2600 ("Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.").

<sup>81</sup> D'VERA COHN ET AL., PEW RESEARCH CTR., *BARELY HALF OF U.S. ADULTS ARE MARRIED—A RECORD LOW* 1-2 (2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/> [<https://perma.cc/Y846-GFKD>] (providing demographic data on how marriage changed from 1960 to 2010).

<sup>82</sup> See R. Kelly Raley, Megan M. Sweeney & Danielle Wondra, *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, FUTURE OF CHILDREN 89, 93-95 (2015).

<sup>83</sup> See Stephanie Ventura & Christine A. Bachrach, *Non-Marital Childbearing in the United States, 1940-99*, Oct. 18, 2000, NAT'L VITAL STATS. REPS., at 10, [https://www.cdc.gov/nchs/data/nvsr/nvsr48/nvsr48\\_16.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr48/nvsr48_16.pdf) [<https://perma.cc/M5QZ-TZAA>] (reporting that in 1960, sixty percent of unmarried women who became pregnant were married before giving birth).

adoption.<sup>84</sup> In 1960, only five percent of all children were born outside of marriage.<sup>85</sup>

All of that looks very different today. Barely half of adults are currently married,<sup>86</sup> and roughly half of all marriages end in divorce.<sup>87</sup> Non-marital sex is entirely commonplace; almost all adult Americans—ninety-five percent—have exercised this liberty.<sup>88</sup> Nearly half of all adults in their thirties and forties have lived with a partner (without being married) for at least a portion of their lives.<sup>89</sup> Few non-marital couples faced with an unplanned pregnancy now rush to marry; rather, most couples either have the child without marrying or choose to abort.<sup>90</sup> Forty percent of all births in the United States are now to unmarried women,<sup>91</sup> about half of whom are living with their partner at the time of the birth.<sup>92</sup> It is increasingly common to have children with multiple partners, resulting in

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<sup>84</sup> See *id.* at 12 (reporting that before 1973, 8.7% of children born to unmarried women were relinquished for adoption).

<sup>85</sup> CHILD TRENDS DATABANK, BIRTHS TO UNMARRIED WOMEN: INDICATORS ON CHILDREN AND YOUTH 3 (2016), [https://www.childtrends.org/wp-content/uploads/2015/12/75\\_Births\\_to\\_Unmarried\\_Women.pdf](https://www.childtrends.org/wp-content/uploads/2015/12/75_Births_to_Unmarried_Women.pdf) [<https://perma.cc/V2TL-KMMP>].

<sup>86</sup> COHN ET AL., *supra* note 81, at 1.

<sup>87</sup> See Andrew J. Cherlin, *Demographic Trends in the United States: A Review of the Research in the 2000s*, 72 J. MARRIAGE & FAM. 403, 405 (2010) (collecting studies suggesting that nearly forty to fifty percent of marriages end in divorce).

<sup>88</sup> Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954-2003*, 122 PUB. HEALTH REPS. 73, 75 (2007) (finding that as of 2002, ninety-five percent of Americans had premarital sex by age forty-four).

<sup>89</sup> See PAUL TAYLOR, CARY FUNK & APRIL CLARK, PEW RESEARCH CTR., AS MARRIAGE AND PARENTHOOD DRIFT APART, PUBLIC IS CONCERNED ABOUT SOCIAL IMPACT 1 (2007), <http://www.pewsocialtrends.org/2007/07/01/as-marriage-and-parenthood-drift-apart-public-is-concerned-about-social-impact/> [<https://perma.cc/67W3-WBFS>]; see also CASEY E. COPEN, KIMBERLY DANIELS & WILLIAM D. MOSHER, NAT'L HEALTH STATISTICS REPORTS, FIRST PREMARITAL COHABITATION IN THE UNITED STATES: 2006-2010 NATIONAL SURVEY OF FAMILY GROWTH 1 (2013), <https://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf> [<https://perma.cc/RV9W-5ACE>].

<sup>90</sup> Approximately forty-two percent of women with unintended pregnancies choose to terminate the pregnancies through abortion. GUTTMACHER INST., UNINTENDED PREGNANCY IN THE UNITED STATES (2016), [https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us\\_0.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us_0.pdf) [<https://perma.cc/5U77-5QXT>]. About fourteen percent of women who obtained abortions were married, and thirty-one percent were cohabitating. JENNA JERMAN, RACHEL K JONES & TSUYBOSHI ONDA, GUTTMACHER INST., CHARACTERISTICS OF U.S. PATIENTS IN 2014 AND CHANGES SINCE 5 (2016), [https://www.guttmacher.org/sites/default/files/report\\_pdf/characteristics-us-abortion-patients-2014.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf) [<https://perma.cc/KB2H-E5KL>].

<sup>91</sup> CHILD TRENDS DATABANK, *supra* note 85, at 3. This rise in part reflects a decrease in marital births during this time period. Ventura & Bachrach, *supra* note 83, at 3.

<sup>92</sup> Sheela Kennedy & Larry L. Bumpass, *Cohabitation and Children's Living Arrangements: New Estimates from the United States*, 19 DEMOGRAPHIC RES. 1663, 1676 (2008).



blended—and frequently shifting—family configurations that depart dramatically from the “traditional” nuclear family of a married couple living together with their shared biological children.<sup>93</sup> And, of course, gay men and women no longer need to fear criminal prosecution if they engage in sexual intimacy.<sup>94</sup> They can, since *Obergefell*, legally marry in any state, and demographers estimate that approximately one half of all same-sex couples in the United States are currently married.<sup>95</sup>

These averages mask significant divergence by race, class, and education level. Marriage rates rise dramatically as household income and education level rise,<sup>96</sup> and non-Hispanic white women are much more likely than black or Hispanic women to get married.<sup>97</sup> The non-marital birth rate slopes in the opposite direction.<sup>98</sup> Currently, seventy-one percent of black women and fifty-three percent of Hispanic women who give birth are unmarried; the birth rate for non-Hispanic whites, by contrast, is twenty-nine percent.<sup>99</sup> A pioneering qualitative study by Katheryn Edin and Maria Kefalas of poor and working class unmarried mothers (including black, white, and Hispanic women) living around Philadelphia, and a follow up study by Edin and Timothy Nelson of unmarried fathers in the same area, help explain the individual choices behind the

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<sup>93</sup> See Cherlin, *supra* note 87, at 406-08 (reviewing research showing increased rates of “multipartnered fertility” and high rate of dissolution of both married and unmarried cohabiting U.S. couples).

<sup>94</sup> See *Lawrence v. Texas*, 529 U.S. 558, 578 (2003) (voiding laws that prohibit same-sex sexual conduct).

<sup>95</sup> CHRISTY MALLORY & BRAD SEARS, THE WILLIAMS INST., ESTIMATING THE ECONOMIC IMPACT OF MARRIAGE FOR SAME-SEX COUPLES ONE YEAR AFTER OBERGEFELL 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Estimating-the-Economic-Impact-of-Marriage-for-Same-Sex-Couples-One-Year-after-Obergefell-5.pdf> [<https://perma.cc/B6HJ-XC72>]. Twenty-five percent of these marriages took place in the year following the *Obergefell* decision. *Id.*

<sup>96</sup> See generally, e.g., JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014) (discussing studies showing correlation between education levels and marital rates as part of larger argument about how economic inequality affects marriage).

<sup>97</sup> Raley, Sweeney & Wondra, *supra* note 82, at 17.

<sup>98</sup> RACHEL M. SHATTUCK & ROSE M. KREIDER, AMERICAN COMMUNITY SURVEY REPORTS, SOCIAL AND ECONOMIC CHARACTERISTICS OF CURRENTLY UNMARRIED WOMEN WITH A RECENT BIRTH: 2011, at 4-5 (2013), <https://www.census.gov/prod/2013pubs/acs-21.pdf> [<https://perma.cc/BZY6-2YBS>] (showing steady decline in rate of non-marital births as household income and educational levels increase); see also CARBONE & CAHN, *supra* note 96, at 13-20 (discussing disparities in educational attainment and class); Clare Huntington, *Postmarital Family Law: A Legal Structure for Non-Marital Families*, 67 STAN. L. REV. 167, 185-91 (2015) (discussing studies showing these disparities in more detail).

<sup>99</sup> See CHILD TRENDS DATABANK, *supra* note 85, at 3.

statistics.<sup>100</sup> Edin and Kefalas found that many of the women they interviewed had made a reasonable assessment that the men with whom they interact—intimately and non-intimately—would not meet the responsibilities imposed by marriage.<sup>101</sup> Nonetheless, the women were unwilling to forego sexual intimacy or motherhood.<sup>102</sup>

These changes in family form, and changes in the norms around sexual activity, abortion, contraception, and parenting outside of marriage—as well as the Supreme Court decisions that protected these choices as fundamental liberties—are highly controversial. A 2011 Pew Research Report assesses public acceptance of seven areas in which family structure and practice has changed markedly in the past half century.<sup>103</sup> The subjects studied include the number of single women having children, the number of unmarried couples raising children, and the number of gay and lesbian couples raising children.<sup>104</sup> The report found sharp divisions of opinion as to the merits of these changes. Approximately a third of all Americans accept each of these changes as either good for society or making no difference, a third of all Americans reject each of these changes, and a third of all Americans are classified as “skeptical”—a group who accepts each of these changes *except* single motherhood.<sup>105</sup> The divisions are very stark and they make clear why this latest phase in the culture wars has been so divisive.

Not surprisingly, there are clear patterns in terms of who falls into which of these three groups. Religious observance, as measured by attendance at religious service, has the largest effect, with more than half of those who attend service weekly or more classified as “rejecters,” meaning they characterize all of these changes as bad for society.<sup>106</sup> Among “rejecters,” opposition is strongest among those who identify as white evangelicals.<sup>107</sup> This finding accords with a 2007

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<sup>100</sup> See KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 24-27 (2013); KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 5-6 (2005).

<sup>101</sup> EDIN & KEFALAS, *supra* note 100, at 196-210; *see also* TAYLOR, FUNK & CLARK, *supra* note 89, at 4 (reporting that for never-married parents and cohabitators, “marriage appears to represent an ideal—albeit an elusive, unrealized one”).

<sup>102</sup> See EDIN & KEFALAS, *supra* note 100, at 130-31, 202-03, 208-10.

<sup>103</sup> PAUL TAYLOR, RICH MORIN & WENDY WANG, PEW RESEARCH CTR., *THE PUBLIC RENDERS A SPLIT VERDICT ON CHANGES IN FAMILY STRUCTURE 1* (2011), <http://www.pewsocialtrends.org/files/2011/02/Pew-Social-Trends-Changes-In-Family-Structure.pdf> [<https://perma.cc/83UU-L233>].

<sup>104</sup> *Id.* (reporting other trends studied were people living together without getting married, mothers of young children working outside home, interracial marriages, and more women never having children).

<sup>105</sup> *Id.* at 1-2.

<sup>106</sup> *Id.* at 1.

<sup>107</sup> *Id.* at 6 (noting that sixty-two percent of socially conservative white Evangelicals and more than forty percent of Protestants were rejecters).

study, which similarly found a wide divergence based on religiosity on moral disapproval of pre-marital sex and non-marital parenting.<sup>108</sup> There are also, again not surprisingly, strong differences based on party affiliation, with Republicans far more likely than Democrats or independents to characterize these changes as bad for society<sup>109</sup> and to believe that premarital sex and non-marital child bearing is morally wrong.<sup>110</sup>

Finally, the Pew Report found that respondents classified as “rejecters” expressed (slightly) higher levels of opposition to the rise in single motherhood, unmarried couples raising children, and unmarried people living together, than to gay and lesbian couples raising children.<sup>111</sup> This accords with commentators who have suggested that the rapid growth in non-marital childrearing may be more threatening to many religious understandings of marriage than same-sex marriage.<sup>112</sup> As the so-called “conservative” argument for marriage equality framed it, gay and lesbian couples simply sought access to the venerable institution of marriage; other than the sex of the parents, the model of family presented was quite traditional.<sup>113</sup> Non-marital and blended families are, in some ways, far more disruptive to traditional norms. As discussed above, this tension was at the heart of the Court’s reasoning in *Obergefell* where the Court held that bans on same-sex marriage were unconstitutional in part because otherwise

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<sup>108</sup> TAYLOR, FUNK & CLARK, *supra* note 89, at 55-56 (reporting that approximately seventy percent of Protestant white evangelicals believed that it was always or almost always wrong to engage in pre-marital sex or bear children outside of marriage).

<sup>109</sup> TAYLOR, MORIN & WANG, *supra* note 103, at 7 (finding that fifty-four percent of Republicans, seventeen percent of Democrats, and thirty-one percent of political independents were rejecters).

<sup>110</sup> TAYLOR, FUNK & CLARK, *supra* note 89, at 55-56 (finding disparity of approximately twenty percent between Republicans and Democrats on opinions regarding both premarital sex and having children outside of marriage).

<sup>111</sup> TAYLOR, MORIN & WANG, *supra* note 103, at 4-5 (reporting that eighty-seven percent of rejecters viewed gay and lesbian couples raising children as bad for society, compared to ninety percent or higher in other categories).

<sup>112</sup> See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 625 (2015); cf. PEW RESEARCH CTR., SUPPORT FOR SAME-SEX MARRIAGE GROWS, EVEN AMONG GROUPS THAT HAD BEEN SKEPTICAL 1-2 (2017), <http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/> [<https://perma.cc/ZT3K-NX7C>] (reporting June 2017 poll that found rapid growth in support for same-sex marriage among younger white evangelicals).

<sup>113</sup> See, e.g., JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 85, 105 (2004) (“America has a problem with too few marriages, not too many. One would think that encouraging a whole new population to tie the knot would be a step in the right direction.”); ANDREW SULLIVAN, VIRTUALLY NORMAL 111, 185 (1995) (“Why would accepting that such people [homosexuals] exist, encouraging them to live virtuous lives, incorporating their difference into society as a whole, necessarily devalue the traditional family?”).

children of gay and lesbian parents would be forced to bear the “stigma” of having unmarried parents.<sup>114</sup>

C. *Religious Objectors*

Expanding constitutional protections for intimate liberties relating to sexual intimacy, procreation, marriage, and related changes in family form has been sharply polarizing. In the wake of *Lawrence* (and shifting sentiment among the public as a whole), lawmakers can no longer simply rely on community morals as the basis for criminalizing such conduct. Instead, those who object to these changes now more typically frame their complaints in the language of religious liberty, and they have sought recourse under the First Amendment and statutes that protect religious freedom. To be clear, I believe most individuals and organizations advancing these claims do so in good faith, in the sense that they have a sincere religious belief that certain intimate choices are improper or immoral. The difficult question is how to balance their claims to religious freedom against the liberty and equality interests of those whose intimate choices depart from traditional norms. This Section discusses recent Supreme Court decisions that have dramatically expanded the scope of protections for religious objectors. The pending *Masterpiece Cakeshop* case may go even further. This Section also describes actions the Trump Administration has taken to likewise prioritize religious liberty claims over other interests, and proposed federal and state legislation that would provide even broader exemptions.<sup>115</sup>

The first significant change concerns the scope of the federal Religious Freedom Restoration Act (“RFRA”) and similar state laws.<sup>116</sup> This law permits “persons” to challenge generally applicable laws that interfere with their exercise of religion. The respondent then must make a showing that applying the law in this context serves a compelling interest and that it is narrowly tailored to

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<sup>114</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (arguing that children of same-sex couples “suffer the stigma of knowing their families are somehow lesser”).

<sup>115</sup> Although organized opposition, such as boycotts, has been an effective countermeasure to many such bills, one would expect that some would gain traction since Republicans have unified control of the federal government and twenty-five states. See *State Government Trifectas*, BALLOTPEdia, THE ENCYCLOPEDIA OF AMERICAN POLITICS, [https://ballotpedia.org/State\\_government\\_trifectas](https://ballotpedia.org/State_government_trifectas) [https://perma.cc/33VP-JZRF] (last visited Nov. 17, 2017); see generally John J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821 (1999) (discussing how unified control significantly increases likelihood of legislative enactments).

<sup>116</sup> See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2012); *State Religious Freedom Restoration Acts*, NAT’L CONFERENCE OF STATE LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [https://perma.cc/M5SD-XPAX] (identifying twenty-one states that have enacted state statutes similar to federal RFRA).

achieve that objective.<sup>117</sup> In 2014, in *Burwell v. Hobby Lobby Stores Inc.*,<sup>118</sup> the Supreme Court held for the first time that for-profit businesses could bring RFRA claims.<sup>119</sup> The majority opinion, authored by Justice Alito on behalf of five justices, concluded that Hobby Lobby, a large for-profit chain of craft stores, did not need to comply with the Affordable Care Act's requirements that employer-provided medical insurance fully cover the cost of all FDA-approved contraception methods.<sup>120</sup>

*Hobby Lobby* thus permits (at least) any closely held business to claim that a law substantially burdens its religious beliefs, and therefore that it should be excused from compliance.<sup>121</sup> The four dissenting Justices highlighted the risk this broad interpretation of RFRA posed to antidiscrimination protections, identifying past cases in which corporate defendants had cited religious beliefs as justifying discriminatory acts.<sup>122</sup> Notably, two of the three cases cited involved objections to intimate liberties: a health club that refused to hire gays and lesbians, as well as anyone who lived with a different-sex partner without being married; and a photography business that refused to photograph a lesbian couple's commitment ceremony.<sup>123</sup> The third case involved race discrimination.<sup>124</sup>

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<sup>117</sup> See 42 U.S.C. § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

<sup>118</sup> 134 S. Ct. 2751 (2014).

<sup>119</sup> *Id.* at 2794-96 (Ginsburg, J., dissenting) ("Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA."); see also, e.g., *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625-26 (6th Cir. 2013) (concluding for-profit secular corporation could not bring RFRA claim), *rev'd*, 134 S. Ct. 2751 (2014); *Congesta Wood Specialties v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013) (same), *rev'd*, 134 S. Ct. 2751 (2014).

<sup>120</sup> *Hobby Lobby*, 134 S. Ct. at 2775, 2782 (holding that providing contraception "substantially burden[s]" companies' exercise of religion and that it is not least restrictive means of achieving government's objectives).

<sup>121</sup> *Hobby Lobby* stated that its holding was limited to "closely held" companies, see *id.*, but the rationale supporting the interpretation the Court endorsed (looking to the U.S. Code's "dictionary" provisions which define "person" as including corporations), *id.* at 2768, makes no distinctions among different kinds of corporations, suggesting this limitation may be challenged in future litigation. That said, as a factual matter, it will most likely be difficult for publicly held corporations to demonstrate that they are governed by religious beliefs.

<sup>122</sup> *Id.* at 2804-05 (Ginsburg, J., dissenting).

<sup>123</sup> See *id.* at 2804-05 (citing *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn. 1985); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53).

<sup>124</sup> See *id.* at 2804 (citing *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1996)).

In response to the dissent's concerns, the majority opinion stated merely that that the government's interest in eradicating *race* discrimination was compelling and that prohibitions on race discrimination are narrowly tailored to achieve that objective; it did not make a comparable assertion about the importance of eradicating sex discrimination, let alone marital status discrimination or sexual orientation discrimination.<sup>125</sup> The particularity of this response arguably heightens, rather than mitigates, concerns that antidiscrimination protections related to sexual liberties might be vulnerable. Importantly, the Court characterized the least-restrictive means standard as "exceptionally demanding."<sup>126</sup> A federal court has already held that a funeral home—officially non-denominational, but owned by a man with strong conservative Christian beliefs—could use the RFRA as a defense in a case brought by a transwoman fired after she informed her boss she would be transitioning.<sup>127</sup> A wide variety of businesses, from small florists to large fast-food companies, embrace conservative Christian values in their management.<sup>128</sup> Accordingly, this is likely to be the first of many such cases.

The second recent Supreme Court case that expands religious exemptions from antidiscrimination laws is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>129</sup> In this case, the Court recognized, for the first time, a "ministerial" exception to employment discrimination laws, which precludes courts from addressing claims concerning the employment relationship between a "religious institution and its *ministers*."<sup>130</sup> This general concept had long been recognized in the lower courts, but a circuit split had developed as to how

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<sup>125</sup> *Id.* at 2783. The Court assumed without deciding that the government's interest in providing access to contraception was compelling, but indicated support for arguments pressed by Hobby Lobby and asserted the Affordable Care Act's mandate failed this standard. *Id.* at 2780.

<sup>126</sup> *Id.* at 2780.

<sup>127</sup> See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 856-57 (E.D. Mich. 2016) (holding that requiring funeral home to permit employee who was biologically male to follow female dress code would be "substantial burden" on funeral home's ability to conduct business in accordance with its sincerely held religious beliefs), *appeal pending*. In this case, the court assumed that the government interest in addressing sex discrimination is compelling but it held that the EEOC failed to show how enforcing antidiscrimination provisions was the least restrictive means of obtaining this objective. *Id.* at 859-60.

<sup>128</sup> See, e.g., Kim Bhasin & Melanie Hicken, *18 Big Companies that Are Intensely Religious*, BUSINESS INSIDER (Jan. 13, 2013), <http://www.businessinsider.com/17-big-companies-that-are-intensely-religious-2012-1> [<https://perma.cc/9SJK-EF6Y>]; *The Call of the ICCC: For a People in the Workplace*, INT'L CHRISTIAN CHAMBER OF COMMERCE, [iccc.net/about](http://iccc.net/about) [<https://perma.cc/JAQ5-VRA8>] (last visited Nov. 17, 2017) (describing international organization of Christian businesses that includes members in over seventy countries).

<sup>129</sup> 565 U.S. 171, 181 (2012).

<sup>130</sup> *Id.* (emphasis added).

broadly the concept of “ministers” should be understood.<sup>131</sup> In *Hosanna-Tabor*, the Court declined to adopt a “rigid formula for deciding when an employee qualifies as a minister,” but it made clear that it understood it to be a relatively expansive concept.<sup>132</sup>

The “ministerial” exception gives religious organizations an incentive to designate as many of their employees as “ministers” as possible, as this can create a shield against liability for race, sex, disability, or other forms of prohibited discrimination, as well as potentially against tort claims, breach of contract claims, or union grievances. In one recent case, a Catholic school argued that a non-Catholic technology coordinator, who had no religious training and no involvement in religious classes or services, should be deemed a “minister” simply because she served as a “role model” for students.<sup>133</sup> Although the district court rejected that argument, the diocese in question, and several other Catholic dioceses, have since designated *all* of their school teachers as “ministers.”<sup>134</sup> They have also begun requiring all employees to sign contracts with extensive “morals” clauses agreeing to conform to the Church’s rules on matters such as sexual intimacy and reproductive technology.<sup>135</sup> Thus, under this expanded doctrine, a wide range of employees for religious organizations who might be disciplined or fired for their intimate choices would lose the right to challenge such claims as violating antidiscrimination law.

The Trump Administration has (in its first ten months) taken several actions that further erode antidiscrimination protections and heighten the risk that individuals will face censure for exercising their intimate liberties. Most directly, President Trump issued an executive order committing to promote “free

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<sup>131</sup> *Id.* at 202-04 (Alito, J., concurring) (listing circuits and their various standards for defining “ministers”).

<sup>132</sup> *Id.* at 190.

<sup>133</sup> *Dias v. Archdiocese of Cincinnati*, No. 1:11-cv-00251, 2013 WL 360355, at \*4 (S.D. Ohio Mar. 29, 2012) (concluding that because plaintiff was not Catholic and accordingly not permitted to teach Catholic doctrine she “cannot genuinely be considered a minister”).

<sup>134</sup> Patrick J. Reilly, *Are Catholic Schoolteachers ‘Ministers’?*, NAT’L CATHOLIC REGISTER (Feb. 2, 2015), <http://www.ncregister.com/daily-news/are-catholic-schoolteachers-ministers> [<https://perma.cc/YUG6-BCYE>] (identifying new policies adopted by Cincinnati, Columbus (Ohio), Honolulu, Oakland, and San Francisco dioceses).

<sup>135</sup> Dennise Donohue & Dan Guernsey, *THE CARDINAL NEWMAN SOCIETY, FAITH AND MORALS LANGUAGE IN CATHOLIC SCHOOL TEACHER EMPLOYMENT DOCUMENTS: BEST PRACTICES BRIEF 21-23* (2015), <https://s3.amazonaws.com/cardinalnewmansociety/wp-content/uploads/Faith-and-Morals-Best-Practices.pdf> [<https://perma.cc/4CA8-Y25T>] (discussing expanded use of morals clauses as “best practices”). Indeed, at least one church official has taken the position that anyone in the building—even a cook—serves as a role model for students and therefore should not be retained if unmarried and pregnant. *See* Netta Barak-Corren, *Does Antidiscrimination Law Influence Religious Behavior? An Empirical Examination*, 67 HASTINGS L.J. 957, 983 (2016); *cf.* Complaint at 4, *Maudlin v. Inside Out, Inc.*, No. 13-cv-00975, 2014 WL 1342883 (S.D. Ohio Apr. 3, 2014) (alleging Christian community center fired cook because she became pregnant without being married).

speech and religious liberty.”<sup>136</sup> Although the order itself was rather vague in scope,<sup>137</sup> the memorandum issued by Attorney General Sessions to implement it is quite sweeping, prioritizing religious liberty over virtually every other governmental policy objective.<sup>138</sup> In many respects, the memorandum pushes the boundaries of typical understandings of federal law. For example, it articulates a very broad interpretation of what kind of organizations could qualify as “religious entities” permitted to discriminate on the basis of religion—such that they could choose to *only* hire co-religionists.<sup>139</sup> The memorandum also asserts that federal agencies generally may not condition receipt of a grant or a contract on relinquishing any protections for an organization’s religious beliefs.<sup>140</sup> This suggests that the Administration may well take the position that the government could not require social services agencies receiving government money to serve all families, including families—such as gay- or lesbian-headed

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<sup>136</sup> See generally Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 9, 2017).

<sup>137</sup> See *id.* at 21,675 (requiring executive departments and agencies “to the greatest extent practicable and to the extent permitted by law, [to] respect and protect the freedom of persons and organizations to engage in religious and political speech”). Originally, President Trump reportedly considered issuing a memorandum that explicitly included more controversial language modeled on the proposed First Amendment Defense Act. See, e.g., Sarah Posner, *Leaked Draft of Trump’s Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, THE NATION (Feb. 1, 2017), <https://www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination/> [<https://perma.cc/7G8Q-AYB3>].

<sup>138</sup> Memorandum from Jeff Sessions, Attorney Gen., Office of the Attorney Gen. 1 (Oct. 6, 2017) [hereinafter Sessions Memorandum], <https://www.justice.gov/opa/press-release/file/1001891/download> [<https://perma.cc/Y86Z-Q5F3>] (“In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right.”); *id.* at 2 (emphasizing that individuals and businesses “do not give up their freedom of religion by participating in the marketplace”); *id.* at 4 (asserting that any government action that “compels an act inconsistent with [religious] observance or practice . . . will qualify as a substantial burden on the exercise of religion” under RFRA).

<sup>139</sup> See *id.* at 12a (asserting religious entity exemptions apply to any for-profit or non-profit organization that is “organized for religious purposes and engages in activity consistent with, and in furtherance of, such purposes”). The memorandum’s sole support for this test is an amicus brief submitted by the United States in a Ninth Circuit case. See *id.* (citing Brief for the United States as Amicus Curiae Supporting Appellee, *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (No. 08-35532)). However, the court in that case rejected the government’s proposed test in favor of a more stringent standard. See *Spencer*, 633 F.3d at 724 (per curiam) (explaining that although judges failed to agree on single standard, they did agree that, at minimum, it includes requirement that it “does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts”); cf. *LeBoon v. Lancaster Jewish Comm. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (articulating nine factors to consider, including whether it operates for profit).

<sup>140</sup> Sessions Memorandum, *supra* note 138, at 8.



families or cohabiting couples—that do not match the organization’s religious beliefs.<sup>141</sup>

Other actions taken by the Administration that jeopardize intimate liberties include broadening considerably the range of businesses that may seek to be excused from providing contraception to their employees;<sup>142</sup> reversing the prior government position as to whether discrimination on the basis of sexual orientation is a form of sex discrimination;<sup>143</sup> and, as noted above, submitting an amicus brief on behalf of Masterpiece Cakeshop in the pending Supreme Court case, which contends that religious liberty claims necessarily supersede statutory prohibitions on sexual orientation discrimination.<sup>144</sup> The Administration has also backed away from transgender rights on several fronts.<sup>145</sup> Many of these actions will no doubt be challenged in court. Even if courts reject some, it seems apparent that the Trump Administration will continue to prioritize the claims of those who object on religious grounds to the intimate choices of others.

Proposed legislation could skew this balance even further in favor of religious objectors. The most prominent legislative response to *Obergefell* has been the First Amendment Defense Act (“FADA”).<sup>146</sup> In the 114th Congress (2015-2016), this bill was co-sponsored by almost seventy percent of the

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<sup>141</sup> Cf. *Catholic Charities of the Diocese of Springfield v. Illinois*, No. 2011-MR-254, 2011 WL 3655016, at \*1 (Ill. Cir. Ct. Aug. 18, 2011) (permitting state to refuse to renew government contract to provide adoption services on grounds that Catholic Charities refused to work with unmarried cohabiting couples).

<sup>142</sup> See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47792 n.1, 47835 (adding 45 C.F.R. § 147.132) (permitting any business or insurer to be excused from providing contraception “based on its sincerely held religious beliefs” or other “moral convictions”).

<sup>143</sup> See Alan Feuer, *Justice Department Claims Gay Workers Aren’t Protected by Major Civil Rights Law*, N.Y. TIMES, July 27, 2017, at A17 (describing brief submitted in pending Second Circuit case as “taking a stand against a decision reached under President Barack Obama”).

<sup>144</sup> See Brief for the United States, *supra* note 22, at 32-33 (arguing laws targeting discrimination on basis of sexual orientation are not compelling enough to justify infringement on religious liberty rights).

<sup>145</sup> See, e.g., Sari Horwitz & Spencer S. Hsu, *Sessions Ends Workplace Protections for Transgender People Under Civil Rights Act*, WASH. POST (Oct. 5, 2017), [https://www.washingtonpost.com/local/public-safety/trump-administration-asks-court-to-toss-out-challenge-to-military-transgender-ban/2017/10/05/3819aec4-a9d5-11e7-92d1-58c702d2d975\\_story.html](https://www.washingtonpost.com/local/public-safety/trump-administration-asks-court-to-toss-out-challenge-to-military-transgender-ban/2017/10/05/3819aec4-a9d5-11e7-92d1-58c702d2d975_story.html) [<https://perma.cc/VYL4-49KG>] (describing Trump Administration’s change in policy on whether Title VII protects individuals against discrimination on basis of gender identity and earlier ban on transgender people serving in military).

<sup>146</sup> First Amendment Defense Act, S. 1598, 114th Cong. (2015); First Amendment Defense Act, H.R. 2802, 114th Cong. (2015).

Republicans,<sup>147</sup> and supported by then-candidate Donald Trump.<sup>148</sup> FADA would prohibit the federal government from taking any “discriminatory action” against a person (defined to include both for-profit and non-profit businesses) for acting in “accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.”<sup>149</sup> “Discriminatory action,” in turn, is defined to include withholding, terminating, or denying federal grants, contracts, or licenses; imposing any kind of tax penalty; and revoking tax exempt status.<sup>150</sup>

Even though FADA has not been reintroduced in the current Congress, it has served as a template for numerous state bills, including a law enacted in Mississippi in spring 2016.<sup>151</sup> Additionally, the Sessions memorandum may achieve many of FADA’s objectives, in that it suggests that religious beliefs, including those related to family form, will generally be prioritized over other government policies or objectives. Most discussions of FADA focus on the harm it could inflict on the LGBT community;<sup>152</sup> this was also true of a challenge to

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<sup>147</sup> See generally S. 1598 (listing thirty-seven out of fifty-four Republican Senators as co-sponsors); H.R. 2802 (listing 171 out of 248 Republican House members as co-sponsors, as well as one Democratic House member as a co-sponsor).

<sup>148</sup> Mary O’Hara, *First Amendment Defense Act Would be ‘Devastating’ for LGBTQ Americans*, NBC NEWS (Dec. 21, 2016), <https://www.nbcnews.com/feature/nbc-out/first-amendment-defense-act-would-be-devastating-lgbtq-americans-n698416> [<https://perma.cc/T53Y-9JAJ>] (reporting on FADA including then President-elect Trump’s stated support for bill).

<sup>149</sup> S. 1598, § 3(a); H.R. 2802, § 3(a). Immediately before the House held a hearing on its bill, a representative offered an amendment to protect individuals who believe that marriage should be recognized only between “two individuals of the opposite sex” or between “two individuals of the same sex,” apparently in an effort to minimize potential Equal Protection Clause problems. This modified version of the bill still included the reference to non-marital sex by also protecting beliefs that “extramarital relations are improper.” AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2802, at 3 (on file with the author).

<sup>150</sup> S. 1598, § 3(b)(1), (3); H.R. 2802, § 3(b)(1), (3).

<sup>151</sup> Protecting Freedom of Conscience from Government Discrimination Act, 2016 Miss. Laws 427. At least six states considered FADAs in 2017; the precise language of these bills varied, with some broader than the federal FADA and others narrower. See Liz Hayes, *States of Emergency: Legislation that Threatens Church-State Separation Is Pending in Half the Country*, 70 CHURCH & STATE 1, 8 (2017) (reporting that Illinois, Minnesota, Oklahoma, Virginia, Washington, and Wyoming considered versions of FADA).

<sup>152</sup> See, e.g., O’Hara, *supra* note 148 (summarizing bill as one that would prohibit government from taking discriminatory acts “against any business or person that discriminates against LGBTQ people”); Matthew Rozsa, *GOP’s Next Battle Against Gay Rights: Proposed First Amendment Defense Act Will Use “Religious Freedom” to Legalize Discrimination*, SALON (Dec. 22, 2016), <http://www.salon.com/2016/12/22/gops-next-battle-against-gay-rights-proposed-first-amendment-defense-act-will-use-religious-freedom-to-legalize-discrimination/> [<https://perma.cc/GUU5-PXXU>] (summarizing bill as one that would “turn[] back the clock on gay rights”).

the constitutionality of the Mississippi law.<sup>153</sup> This myopia is troubling. While it is clear that the legalization of same-sex marriage provided the impetus for FADA, its drafters and supporters seek to insulate from government censure anyone who objects to a much broader range of intimate conduct. There are strong arguments that FADA is unconstitutional.<sup>154</sup> However, if enacted and enforced—at the federal level or by individual states—FADA could have consequences that reach far beyond the LGBT community.

In sum, recent Supreme Court decisions expanding the scope of entities that may bring RFRA claims and the scope of the “ministerial” exception dramatically increase the likelihood that religious organizations and for-profit businesses will seek exemptions from otherwise applicable non-discrimination laws. The Trump Administration has stated explicitly it will prioritize religious liberty claims over other competing governmental objectives. *Masterpiece Cakeshop* may go even further in this direction, and FADA and other proposed bills would create explicit carve-outs and exemptions. Opponents of these developments have rightly raised alarm about the dangers they pose to individuals’ freedom to make choices around family formation. But the often overlooked truth is that *even without these developments*, these intimate liberties are under- or unprotected by existing law.

## II. REGULATION OF “STATUS” AND “CONDUCT” GENERALLY

Part III examines how private antidiscrimination law protects (or often fails to protect) individuals’ choices regarding intimate conduct by examining case law regarding cohabiting couples denied rental apartments, same-sex couples denied marriage-related services, and unmarried pregnant women who are fired or subject to other adverse actions at work. In each context, courts struggle with what often serves as an outcome-derivative distinction: whether to characterize the situation as an example of unlawful discrimination on the basis of a protected “status” or a permissible response to unprotected “conduct.” Before looking at the specifics of case law, however, it is helpful to sketch the parameters of how courts assess distinctions between status and conduct more generally. This Part offers a relatively brief summary of several complicated principles, many of which have been underdeveloped in the literature. This is not intended to be a comprehensive discussion of the issue; indeed, it is not even intended to be a

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<sup>153</sup> See *Barber v. Bryant*, 193 F. Supp. 3d 677, 708-11 (S.D. Miss. 2016) (analyzing effect law would have on “LGBT Mississippians” and describing it as “vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity”). The narrow focus was clearly unwarranted because one of the named plaintiffs in the case was a woman in a long-term unmarried heterosexual relationship. See *id.* at 688-89.

<sup>154</sup> See generally *First Amendment Defense Act: Hearing on H.R. 2802 Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (2016) (statement of Katherine Franke, Professor, Columbia Law School) (arguing that FADA is unconstitutional); see also generally *Barber*, 193 F. Supp. 3d at 724 (granting preliminary injunction against Mississippi bill), *rev’d on other grounds*, 860 F.3d 345 (5th Cir. 2017) (holding plaintiffs lacked standing).

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definitive explication of my own views, which I hope to develop further in future work. Rather, I simply seek to identify some generally shared understandings of the subject and describe how the Supreme Court has approached the question in some recent decisions.

A. *Distinctions*

The Constitution constrains discrimination on the basis of key personal characteristics or statuses; laws or public actions that treat discrete classes of persons unequally on the basis of their race, national origin, alienage, sex, or legitimacy are carefully scrutinized, and most are disallowed.<sup>155</sup> As Part I discussed, modern constitutional law also protects individual choices around intimacy, procreation, and marriage from government control. The First Amendment likewise protects the freedom of speech, religion, and assembly.<sup>156</sup> Thus, it is well established that the Constitution can constrain the government's ability to regulate on the basis of conduct as well as status and that these issues can overlap.

Different questions arise when one considers the regulation of status and conduct by *private* actors.<sup>157</sup> Private actors are generally not constrained by the Constitution, and the default assumption in American law is that they have broad latitude to make choices regarding whom they hire, fire, rent to, and serve.<sup>158</sup> That said, this discretion is limited by relatively robust antidiscrimination protections that regulate private businesses or other entities that operate in a public or semi-public sphere.<sup>159</sup> Employers, housing providers, and public accommodations are prohibited from discriminating on the basis of (at least)

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<sup>155</sup> See Yoshino, *supra* note 3, at 755-57 & n.61 (listing classifications that receive strict scrutiny and observing that “[h]eighted scrutiny generally results in the invalidation of state action”).

<sup>156</sup> U.S. CONST. amend I.

<sup>157</sup> Indeed, even though public employees should enjoy protections for intimate liberties because the government is bound by the Constitution, courts have been quite deferential to public employers' claims that community morals or workplace discomfort can justify terminating employees. See generally, e.g., Murray, *supra* note 13. As Professor Murray argues, this seems an unreasonable narrowing of the concept of liberty endorsed by *Eisenstadt* and *Lawrence*. See Murray, *supra* note 13, at 593; see also Clarke, *supra* note 13 (making similar point).

<sup>158</sup> See, e.g., Pauline Kim, *Market Norms and Constitutional Values in the Workplace*, 94 N.C. L. REV. 601, 610 (2016) (explaining that generally constitutional protections have little direct application to private employers, except where challenged action can be attributed to government regulation or where government is entwined in management of employer).

<sup>159</sup> The size or reach of the business often serves as a proxy for whether or not an entity is “public” enough to be regulated. Thus, for example, federal employment discrimination laws typically do not apply to entities with fewer than fifteen employees, see, e.g., 42 U.S.C. § 2000e(b) (2012) (Title VII threshold), and the federal Fair Housing Act does not apply to owner-occupied buildings with fewer than four units, see *id.* § 3603(b)(2).

race, sex, religion, and national origin.<sup>160</sup> State and local laws frequently protect against discrimination on the basis of additional characteristics—including, most relevantly, protections against discrimination on the basis of marital status or sexual orientation.<sup>161</sup>

Antidiscrimination laws are described as justified because they protect individuals against discrimination based on immutable characteristics, expressing a consensus in modern American society that it is unfair to be excluded from opportunities simply because of who one *is*.<sup>162</sup> In recent years, courts and commentators have embraced a somewhat broader concept—sometimes dubbed the “new immutability”—that includes not only *actually* unchangeable traits, but also, in the words of one influential decision, “traits that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.”<sup>163</sup> This rationale has been offered not only to justify protections against religious discrimination, but also protections against discrimination on the basis of sexual orientation.<sup>164</sup> But even as reframed, this characterization focuses on protection for individual *traits*, not conduct.

By contrast, there are relatively few legislative limits on private actors’ abilities to regulate conduct of employees, renters, and customers. A handful of states have enacted laws that limit employers’ ability to penalize employees for lawful, out-of-work conduct.<sup>165</sup> Common law provides some weak limits on exceptional interference with the autonomy of third parties.<sup>166</sup> But in most

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<sup>160</sup> See 42 U.S.C. § 2000a(a) (prohibiting discrimination by public accommodations on basis of race, color, religion, or national origin); *id.* § 2000e-2 (prohibiting employment discrimination on basis of race, color, sex, religion, and national origin); *id.* § 3604 (prohibiting housing discrimination on basis of race, color, religion, sex, familial status, or national origin); Sepper, *supra* note 56, at 638 (stating that virtually all states prohibit public accommodations from discriminating based on sex, even though federal law does not).

<sup>161</sup> See *Maps of State Laws and Policies*, *supra* note 10; sources cited *supra* note 56.

<sup>162</sup> See, e.g., Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1514 (2011) (concluding that concept of immutability generally “provides a rationale for the protected classifications encompassed within the antidiscrimination statutes”); see generally Jessica A. Clark, *Against Immutability*, 125 YALE L.J. 2 (2015) (discussing and critiquing courts’ focus on immutability).

<sup>163</sup> *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1988) (Norris, J., concurring in judgment); see generally, e.g., Clarke, *supra* note 162 (discussing this case law); Hoffman, *supra* note 162 (discussing and generally supporting an expansive concept of immutability).

<sup>164</sup> See generally, e.g., *Watkins*, 875 F.2d 699 (discussing discrimination based on sexual orientation and what protection law should offer).

<sup>165</sup> See Marisa Anne Pagnattaro, *What Do You Do when You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 646-70 (2004) (discussing several states with relatively broad prohibitions on employers taking adverse actions against employees for off-duty lawful conduct).

<sup>166</sup> See generally, e.g., Terry Morehead Dworkin, *It’s My Life—Leave Me Alone: Off-the-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47 (1997) (discussing range of

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jurisdictions, an employer can fire an employee with impunity for engaging in conduct it finds distasteful.<sup>167</sup> This can include speech or actions that would merit protection under the First Amendment if the government engaged in comparable actions.<sup>168</sup> Likewise, landlords and public accommodations routinely put rules in place that constrain conduct. Most occasion little comment or dissension. To most observers, a sign on the door proclaiming “no shoes, no shirt, no service” is very different from a sign proclaiming “whites only.”

A business may find a rule prohibiting discrimination on the basis of sex, race, or sexual orientation just as antithetical to its preferences as a rule that limits its discretion to respond to employees’ speech or actions. And compliance with either kind of rule might impose indirect costs on the business, in that it might run counter to customer preferences. That said, the willingness of legislative bodies to enact the first kind of law—i.e., antidiscrimination laws—and the general reluctance to enact the second kind of law—i.e., regulations on responses to conduct—likely reflects two corollary assumptions. First, that the arguments made by private entities to justify excluding individuals solely on the basis of statuses like race or sex are generally considered less compelling or acceptable than the arguments made by private entities to justify regulating the conduct of employees, renters, or customers.<sup>169</sup> And, second, that the harm experienced by third parties who are excluded on the basis of their status is considered more significant than the harm caused by exclusion on the basis of their conduct. This second proposition gains even more salience from the assumption that status is immutable, whereas conduct is within one’s control.

#### B. *Connections*

The generalizations in Section II.A assume that a valid distinction can be made between “status” and “conduct.” Often, that is clearly correct. But in some instances, the line between status and conduct may be difficult to draw or wholly illusory. For example, the conduct at issue may be closely related to, or practiced

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common law and statutory provisions that can protect associational privacy). The recent *Restatement of Employment Law* identifies a more general right of employee “autonomy,” but states that employers can act on a “reasonable and good-faith belief that the employee’s exercise of an autonomy interest interfered with the employer’s legitimate business interests, including its orderly operations and reputation in the marketplace.” RESTATEMENT OF EMPLOYMENT LAW § 7.08(c) (AM. LAW INST. 2015). Even if courts adopted the concept of employee autonomy, this exception is so large that it could easily swallow up the rule.

<sup>167</sup> See generally, e.g., Pagnattaro, *supra* note 165 (discussing various scenarios in which employer may fire employee for conduct of which employer disapproves).

<sup>168</sup> See generally Kim, *supra* note 158.

<sup>169</sup> An exception to this general rule is status-based discrimination that is premised on religious belief; as described *supra* Section I.C, religious actors may be excused from compliance with antidiscrimination laws because the justification for such discrimination is deemed compelling or because enforcement of the laws would implicate constitutionally protected religious freedoms.

primarily by, a particular group. The Supreme Court provided a pithy example of this point, observing that “[a] tax on wearing yarmulkes is a tax on Jews.”<sup>170</sup> In such cases, enforcement of a conduct-based regulation will tend to disproportionately, or uniformly, regulate members of a particular group. This may be unintentional, or the conduct-based regulation may have been adopted purposefully as a method of disadvantaging the group, where explicit status-based discrimination would be unquestionably illegal. In such cases, conduct-based bans function as status exclusions. A second, distinct way in which the line between status and conduct may be illusory is when the “status” that is protected is itself defined by conduct.

In constitutional contexts where the line between status and conduct blurs, the Court has comfortably announced a “synergy” between various clauses, such as the Due Process and Equal Protection Clauses, so that a holding under one simultaneously advances the other.<sup>171</sup> Thus, although equal protection claims foreground the harm that comes from unfair exclusion based on (protected) status, and due process claims foreground the harm that comes from unfair exclusion based on (protected) conduct, the overlap between the two concepts is evident. Indeed, commentators have observed that in constitutional analysis, the Supreme Court has moved away from traditional antidiscrimination jurisprudence, rooted in the Equal Protection Clause, towards a more universal approach that emphasizes protecting individual autonomy and dignity, grounded in the Due Process Clause.<sup>172</sup> Professor Kenji Yoshino memorably described this transition as similar to “squeezing a balloon,” so that the “contents do not escape, but erupt” in another area of law.<sup>173</sup>

But in interpreting the statutory provisions that govern private actions related to discrimination, courts typically try to enforce more rigid distinctions between the “status” and “conduct.” For example, courts usually reject challenges to employer grooming codes that proscribe hairstyles, such as dreadlocks, associated with certain racial and ethnic groups, pointing to the immutable/mutable distinction and concluding that because it is possible for racial minorities to comply with the rule, it is not the same as a status-based exclusion.<sup>174</sup> Courts have similarly rejected claims that English-only policies

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<sup>170</sup> *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993).

<sup>171</sup> *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (describing “synergy” between two protections).

<sup>172</sup> *See, e.g., Yoshino, supra* note 3, at 802 (arguing that Supreme Court has shifted from its traditional equal protection jurisprudence toward liberty-based dignity jurisprudence,” which “synthesizes both equality and liberty claims, but leads with the latter”); *see also* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 169 (2011) (“[T]he Court’s reliance on dignity is increasing, and the Roberts Court is accelerating that trend.”).

<sup>173</sup> *Yoshino, supra* note 3, at 748.

<sup>174</sup> *See, e.g., EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (concluding that because “Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices[,]” requiring prospective

intentionally discriminate on the basis of national origin, at least where they are applied to employees who can speak English.<sup>175</sup> Even under disparate impact doctrine—which seems like it should be an effective vehicle for challenging rules regarding conduct that unevenly affect racial or ethnic minorities—courts sometimes point to the “voluntariness” of the relevant actions as a justification for denying the claim.<sup>176</sup> Additionally, courts often require plaintiffs bringing disparate impact claims to provide extensive statistical analysis at the level of the individual workplace, which can be expensive to produce.<sup>177</sup>

In some other contexts, however, courts—or Congress in response to unduly cramped decisions by courts—have signaled greater willingness to reject employers’ claims that challenged practices were permissible regulation of conduct. For example, in the 1970s, employers argued that pregnancy discrimination did not constitute sex discrimination, in part on the ground that the pregnancy was the result of (generally voluntary) conduct.<sup>178</sup> Congress disagreed, passing the Pregnancy Discrimination Act.<sup>179</sup> The line of cases beginning with *Price Waterhouse v. Hopkins*<sup>180</sup> recognizes that failure to conform to sex stereotypes is a cognizable claim; such cases often incorporate

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employee to cut off dreadlocks did not violate statute). *But see generally* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (arguing that Title VII should be interpreted more broadly to also protect against discrimination based on “performed” behaviors that communicate racial or ethnic identities).

<sup>175</sup> *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (holding English-only policy applied to individuals who could speak English did not violate Title VII). *But see Garcia v. Spun Steak Co.*, 13 F.3d 296, 298 (9th Cir. 1993) (denial to rehear case en banc) (Reinhardt, J., dissenting) (arguing that English-only policies constituted national origin discrimination because they “not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual’s personality”).

<sup>176</sup> *See, e.g., Catastrophe Mgmt. Sols.*, 852 F.3d at 1029-30 (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)) (“[T]here is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference . . .”).

<sup>177</sup> I have discussed these issues in the context of disparate impact challenges to criminal background checks. *See* Deborah A. Widiss, *Griggs at Midlife*, 113 MICH. L. REV. 993, 1014-15 (2015).

<sup>178</sup> The focus on voluntariness was partly due to the fact that early cases challenged the exclusion of pregnancy from otherwise comprehensive disability policies. *See, e.g., Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 375, 381-82 (E.D. Va. 1974) (discussing company’s claims that pregnancy should not be covered because it was “voluntary”), *rev’d on other grounds*, 429 U.S. 125 (1976).

<sup>179</sup> Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)) (stating that discrimination on basis of sex includes discrimination on basis of pregnancy, childbirth, or related medical conditions).

<sup>180</sup> 490 U.S. 228 (1989).



consideration of “conduct” explicitly.<sup>181</sup> Cases recognizing that discriminating against an individual because he or she is in an interracial relationship violates Title VII’s prohibition on race discrimination likewise blur the line between “status” and “conduct.”<sup>182</sup> More recently, the reasoning from both of these lines of cases has been applied by some courts to hold that discrimination on the basis of sexual orientation is a form of sex discrimination.<sup>183</sup> This is not a comprehensive survey; however, it is perhaps noteworthy that many of the contexts in which courts have interpreted antidiscrimination laws to reach at least some conduct concern intimate choices that are accorded special protection under the Constitution.

### C. A Case Study: Gay Rights

The difficulty of drawing a line between “status” and “conduct” has been discussed particularly fully in the gay rights context and—crucially important for my argument—in this context courts have comfortably imported constitutional doctrine regarding the blurring of status and conduct *into* analysis of private antidiscrimination law. Section III.B discusses this in detail. But before diving into that case law, it is helpful to sketch out the path that led to *Lawrence* and then to the later *Christian Legal Society v. Martinez*<sup>184</sup> decision that has been particularly important in that analysis. This review suggests that the Court’s explicit rejection of the distinction between status and conduct in this context is likely, in part at least, an accident of history. It reflects strategic choices made by gay rights litigators in response to constitutional decisions that expanded and contracted the understanding of the scope of the personal liberty protected by the Due Process Clause.<sup>185</sup>

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<sup>181</sup> See, e.g., *id.* at 250 (concluding that “employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender” and thus violated Title VII).

<sup>182</sup> See Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 213-34 (2012); see also, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 575 (1983) (approving IRS determination that ban on interracial dating constituted racial discrimination, and finding no First Amendment violation in denying religious school’s tax exempt status because of policy).

<sup>183</sup> See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346-49 (7th Cir. 2017) (en banc) (relying on *Hopkins* and other cases concerning sex stereotyping and cases concerning interracial couples to hold that discrimination on basis of sexual orientation is prohibited).

<sup>184</sup> 561 U.S. 661 (2010).

<sup>185</sup> Much of this history is drawn from Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1579 (1993) (characterizing gay and lesbian litigation in early 1990s as “dominate[d]” by “conduct/status distinction”). See generally, e.g., Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to the Military Anti-Gay Policy: A Legal Archaeology*, 3 GLQ 159 (1996) (discussing how military’s “don’t ask, don’t tell” policy grew out of earlier advocacy premised on distinctions between status and conduct).

When *Griswold* announced constitutional protections for private decisions about sexual intimacy, gay rights activists understood that comparable arguments could be deployed to challenge anti-sodomy laws and other laws that criminalized forms of sexual intimacy typically practiced by same-sex couples. However, the claims met with mixed results during the 1970s.<sup>186</sup> The 1986 decision *Bowers v. Hardwick*,<sup>187</sup> which held that there was “no fundamental right” for homosexuals to “engage in sodomy,” seemed to foreclose a due-process-based focus on the liberty interests at stake.<sup>188</sup>

Both before and after *Bowers*, some advocates simultaneously pushed for a sharp demarcation between status and conduct and advanced claims under the Equal Protection Clause.<sup>189</sup> They argued that discriminating against individuals because of their “status” as homosexuals—e.g., denying them public employment—violated equal protection principals, even if homosexual intimacy could be criminalized.<sup>190</sup> This was sometimes successful, particularly where there was no evidence of prohibited conduct.<sup>191</sup> The benefits of this approach are clear, in that it provided much-needed protection to individuals against job loss or other collateral consequences of being labeled “gay.” But a legal strategy that was premised on remaining in the closet, or foregoing any kind of sexual intimacy at all, obviously imposed real and significant harms as well.<sup>192</sup>

In *Lawrence*, the petitioners took on *Bowers* more directly.<sup>193</sup> The Court’s decision reversed *Bowers* and affirmed the constitutionally protected right to make individual choices around sexual intimacy, including sexual intimacy with persons of the same-sex.<sup>194</sup> This decision, which, as discussed above, rested on both due process and equal protection grounds, effectively ended the litigation-driven need to pretend that “status” and “conduct” could be divided in this context. But *Lawrence* went further in explicating the way in which the concepts are interrelated, observing correctly that criminalization of the conduct “in and

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<sup>186</sup> See Cain, *supra* note 185, at 1589-91.

<sup>187</sup> 478 U.S. 186 (1986).

<sup>188</sup> *Id.* at 186.

<sup>189</sup> See Cain, *supra* note 185, at 1598, 1617-27 (describing cases and academic commentary that attempted to bifurcate conflation of status and conduct and related conflation of due process and equal protection claims).

<sup>190</sup> See *id.* at 1572-79.

<sup>191</sup> See *id.* at 1572-79, 1595-1608. A few courts went further and held that even where conduct was admitted, it could not be the basis of adverse actions if there was not a reasonable nexus between the conduct and the asserted government interest. See, e.g., *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969) (holding that “unparticularized and unsubstantiated conclusion that such possible embarrassment threatens the quality of the agency’s performance is an arbitrary ground for dismissal”).

<sup>192</sup> The military’s now-roundly repudiated “Don’t Ask/Don’t Tell” policy was an extreme example of this. See generally Halley, *supra* note 185.

<sup>193</sup> *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

<sup>194</sup> *Id.* at 577-78 (explicitly overruling *Bowers*).

of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”<sup>195</sup> In other words, criminal prohibitions on “conduct” cause discrimination on the basis of “status.” Justice O’Connor’s concurrence made a similar point, concluding that because the conduct “is closely correlated with being homosexual,” the law is targeted at “more than conduct,” but also at “gay persons as a class.”<sup>196</sup>

This confluence was further developed in *Christian Legal Society*. The issue in *Christian Legal Society* was whether Hastings Law School could refuse to recognize student groups that did not open their membership to all students.<sup>197</sup> The applicable policy specifically precluded discrimination on the basis of sexual orientation, as well as religion.<sup>198</sup> The Christian Legal Society (“CLS”) required members to sign a “Statement of Faith,” which included a tenet that CLS interpreted to exclude anyone who engaged in “unrepentant homosexual conduct.”<sup>199</sup> Hastings refused to recognize CLS as a “registered student organization” and CLS sued, claiming that the denial violated its rights under the First Amendment. CLS argued that the group did not exclude individuals on the basis of their sexual orientation (which they admitted would violate the school’s nondiscrimination policy), but rather only excluded those who had engaged in the proscribed conduct and did so “unrepentantly.”<sup>200</sup>

The majority decision, authored by Justice Ginsburg, roundly rejected this proposition. The Court made a blanket statement that its “decisions have declined to distinguish between status and conduct in this context.”<sup>201</sup> This assertion was supported with citations to portions of the majority opinion and Justice O’Connor’s concurrence in *Lawrence v. Texas*,<sup>202</sup> the example in *Bray* concluding that a “tax on wearing yarmulkes is a tax on Jews,”<sup>203</sup> and an amicus

<sup>195</sup> *Id.* at 575.

<sup>196</sup> *Id.* at 583 (O’Connor, J., concurring in judgment).

<sup>197</sup> *Id.* at 668.

<sup>198</sup> *Id.* at 670.

<sup>199</sup> *Id.* at 672. The provision was actually a more general statement that “sexual activity should not occur outside of a marriage between a man and a woman,” meaning it would preclude membership by individuals who engaged in any form of non-marital sex. *Id.*

<sup>200</sup> See Brief for Petitioner at 35-36, *Christian Legal Soc’y*, 561 U.S. at 661 (No. 08-1371) (“[T]he CLS Statement of Faith excludes [homosexual individuals] on the basis of a conjunction of conduct and the belief that the conduct is not wrong.”).

<sup>201</sup> *Christian Legal Soc’y*, 561 U.S. at 689.

<sup>202</sup> *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.”); *Lawrence*, 539 at 583 (O’Connor, J., concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”).

<sup>203</sup> *Christian Legal Soc’y*, 561 U.S. at 689 (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993)).

brief submitted by the gay rights group Lambda Legal Defense and Education Fund.<sup>204</sup> Notably, the referenced pages in the Lambda brief highlighted not only the relevant portions of earlier gay rights cases, but also cases concerning adverse actions against individuals based on interracial affiliations, religious practices, pregnancy, failure to conform to sex-stereotypes, and membership or association with groups associated with specific national origins.<sup>205</sup> In other words, *Christian Legal Society* implicitly supports not only the contention that it is untenable to draw a line between status and conduct in the context of sexual orientation, but a more general proposition that “where certain conduct is closely correlated with status, the law often treats discrimination based on conduct as tantamount to discrimination based on status.”<sup>206</sup> As discussed in the next Part, that blurring occurs not only in gay rights cases, but in other cases concerning discrimination on the basis of intimate liberties.

### III. INTIMATE LIBERTY DISCRIMINATION

This Part explores three contexts of private discrimination against individuals for exercising their intimate liberties: landlords that refuse to rent to unmarried couples, businesses that refuse to provide wedding- or marriage-related services to same-sex couples, and employers that fire or otherwise discriminate against employees who are pregnant and unmarried.<sup>207</sup> Each of these contexts makes private intimate choices “visible” to the external world. Nonetheless, corporate

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<sup>204</sup> *Id.* (citing Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae Supporting Respondents at 7-20, *Christian Legal Soc’y*, 561 U.S. at 661 (No. 08-1371))

<sup>205</sup> *Id.* (citing Brief for Lambda Legal Defense and Education Fund, *supra* note 204, at 7-20.

<sup>206</sup> Brief for Lambda Legal Defense and Education Fund, *supra* note 204, at 13 n.5.

<sup>207</sup> There are, of course, many other scenarios that may lead to adverse actions against an individual for exercising intimate liberties. For example, anti-nepotism policies, under which marriage to a co-worker can become grounds for termination, have likewise been challenged as illegal marital status discrimination. *See* *Ross v. Stouffer Hotel Co.*, 816 P.2d 302, 303 (Haw. 1991) (collecting case law showing split among states as to whether such claims are cognizable); Porter, *supra* note 13, at 38-44 (discussing and critiquing anti-nepotism policies). These policies raise some similar concerns to the issues discussed in the text, but they might be more legitimately justified on the basis of true business interests, such as internal conflicts of interest that can arise. *See, e.g., Muller v. BP Expl. (Alaska) Inc.*, 923 P.2d 783, 792 (Alaska 1996) (distinguishing between state’s interest in protecting “person’s right to choose the form that his or her relationships will take,” which justifies prohibiting discrimination against unmarried couples, and interests addressed by anti-nepotism policies). There are also many cases in which employees allege they were fired for engaging in non-marital affairs. *See generally* Clarke, *supra* note 13 (collecting cases regarding discrimination based on adultery). Again, this raises similar issues to those of the employees who are fired for engaging in non-marital sex, but courts have been less clear that adultery is constitutionally protected, even after *Lawrence*. *See* DEBORAH L. RHODE, *ADULTERY* 67-72 (2016) (discussing failed constitutional challenges to adultery regulation).

defendants routinely argue that their actions are a permissible response to individuals' conduct (disapproved forms of sexual intimacy or family formation) rather than discrimination on the basis of individuals' statuses that may be addressed in antidiscrimination law (marital status, sexual orientation, or pregnancy).<sup>208</sup> This Part discusses and critiques this case law.

#### A. Cohabitation

As sexual mores around cohabitation and non-marital intimacy changed, increasing numbers of (mostly different-sex) unmarried couples sought to rent apartments or houses. During the 1980s and 1990s, there were numerous lawsuits brought across the country by couples who were refused tenancy by landlords who disapproved of their choice to live together without being married. Although most of these landlords were individuals or small businesses operating in the private marketplace, many cited religious beliefs as motivating their refusal to rent to unmarried couples.<sup>209</sup> Thus, these precedents are being invoked in the controversies unfolding today: first, as to whether discrimination against persons for their choices around sexual intimacy violates antidiscrimination law, and second, whether RFRA or constitutional protections for freedom of religion nonetheless excuse religious objectors from compliance. A handful of articles discussed some of these cases in detail at the time they were decided.<sup>210</sup> Recent commentary, however, has been quite limited, beyond a generalized assertion that there is little protection for unmarried couples who face discrimination.<sup>211</sup> There has been almost no consideration of how the

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<sup>208</sup> Although these cases advance under distinct provisions of antidiscrimination law (i.e., housing, public accommodations, and employment), courts typically interpret antidiscrimination mandates relatively consistently across statutes. It is possible that in interpreting claims for religious exemptions, the extent to which application of an antidiscrimination statute is "narrowly tailored" to advance a "compelling interest" might differ according to the context.

<sup>209</sup> See, e.g., *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 912 (Cal. 1996) ("Respondent believes that God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter."); *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 234-35 (Mass. 1994) (stating that landlord did not want to facilitate "sinful" conduct).

<sup>210</sup> See, e.g., Michael V. Hernandez, *The Right of Religious Landlords to Exclude Unmarried Cohabitants: Debunking the Myth of the Tenant's "New Clothes,"* 77 NEB. L. REV. 494, 506-10 (1998) (discussing cases in which landlords discriminated against their tenants based on unmarried cohabitation and/or intimacy); see generally, e.g., Rebecca A. Wistner, Note, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071 (1996) (examining then-recent cases regarding free exercise exemptions from fair housing statutes).

<sup>211</sup> The more comprehensive recent article is Joslin, *supra* note 13. This article does an excellent job of showing why more robust protections would serve the public interest and how changing demographics have made them increasingly important, but it only briefly discusses the cases themselves. See *id.* at 808-14 (analyzing relevant cases only in passing and focusing

dramatic changes in the constitutional landscape—which make clear that non-marital intimacy implicates fundamental rights—should affect the interpretation of these statutory provisions.<sup>212</sup>

I also seek to correct a misperception suggested by recent commentary that the vast majority of states with such statutes have held that they do not protect cohabiting couples.<sup>213</sup> As these sources explain, only a few states have definitively ruled that discrimination against cohabiting couples *is* prohibited by laws that bar marital status discrimination.<sup>214</sup> This is correct, but this summation fails to emphasize that only slightly more state supreme courts have ruled the other way.<sup>215</sup> In other states that have relevant statutory provisions on the books,

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in more detail on legislative materials). Two other recent discussions of these statutory provisions, which focus on their application to employment, make strong normative arguments for more robust protections, but they also include relatively little analysis of the cases themselves. *See* Clarke, *supra* note 13, at 31-33; Porter, *supra* note 13, at 17-22.

<sup>212</sup> Professor Joslin mentions this point in passing. *See* Joslin, *supra* note 13, at 815 (briefly noting that it “seems odd” that, even after *Lawrence*, employers can penalize employees for engaging in constitutionally-protected intimate conduct).

<sup>213</sup> *See id.* at 809 (concluding that “in most of these twenty-one states [with marital status discrimination provisions], it is not illegal to discriminate against a person because he or she is a member of an unmarried cohabiting couple”); *see also* Clarke, *supra* note 13, at 32 (quoting Joslin’s conclusion on this point). Similar claims are also common on the internet. *See, e.g.*, Frederick Hertz, *Housing Discrimination Against Unmarried Couples*, NOLO, <http://www.nolo.com/legal-encyclopedia/free-books/living-together-book/chapter5-2.html> [<https://perma.cc/TSSK-BZSS>] (last visited Nov. 17, 2017) (“While some 20 states ban discrimination on the basis of marital status, most of these states’ laws extend protection to married couples only . . .”).

<sup>214</sup> These states are Alaska, California, Massachusetts, and Michigan. *See* Swanner v. Anchorage Equal Rights Comm’n, 874 P.2d 274, 276 (Alaska 1994); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 929-31 (Cal. 1996); *Att’y Gen. v. Desilets*, 636 N.E.2d 233, 235 (Mass. 1994); *McCready v. Hoffius*, 586 N.W.2d 723, 729, *partially vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999). A later Michigan case, which held that an employer could refuse to renew the contract of an employee who had engaged in adultery and then cohabited with his mistress, may have retreated from the court’s holding in *McCready*, in that it emphasized that *McCready* did not create a “right to cohabit” and that disapproval of such conduct did not state an antidiscrimination claim. *See* Veenstra v. Washtenaw Country Club, 645 N.W.2d 643, 647 (Mich. 2002). However, the *Veenstra* court did not overrule *McCready*. In a case where the only conduct at issue is cohabitation of unmarried individuals (as opposed to *Veenstra*, where the employee had committed adultery), and where a landlord (or employer) would not have disapproved of the conduct if the couple who cohabited were married, it seems as though marital status *is* part of the basis for decision and thus actionable.

<sup>215</sup> These states are Maryland, Minnesota, North Dakota, Washington, and Wisconsin. *See* Comm’n on Human Relations v. Greenbelt Homes, 475 A.2d 1192, 1198 (Md. 1984); *Cooper v. French*, 460 N.W.2d 2, 7 (Minn. 1990); *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, ¶ 37, 625 N.W.2d 551, 562; *Waggoner v. Ace Hardware Corp.*, 953 P.2d 88, 89-92 (Wash. 1998) (holding in employment discrimination case that state’s marital discrimination law does not protect cohabiting couples and using reasoning that would likely apply in

my research suggests there simply is *no* authoritative interpretation. Recognizing that the numbers are relatively equal is important because it argues against claims that the interpretation of these statutes is “well settled.”

That said, it is true that several state supreme courts have concluded that the statutes do not protect cohabiting couples. Ultimately, I argue that these precedents should be reconsidered because they rely on criminal prohibitions on non-marital sex that are unconstitutional after *Lawrence*.<sup>216</sup> This would directly benefit unmarried couples, heterosexual and homosexual alike, who may still face discrimination when they try to rent apartments or homes.<sup>217</sup> It would also help ensure that the unduly constrained interpretations that characterized much of this first wave of litigation are not exported into the cases emerging today concerning same-sex marriage and unmarried pregnancy.

### 1. Discrimination

In many states, unmarried couples who face discrimination have no legal recourse. The federal Fair Housing Act prohibits discrimination on the basis of race, color, national origin, religion, sex, disability, and the presence of children, but it does not explicitly address marital status.<sup>218</sup> Thus, cohabiting couples who

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housing context); *Cty. of Dane v. Norman*, 497 N.W.2d 714, 714 (Wis. 1993). Connecticut’s statute specifically defines marital status not to cover such situations. *See* CONN. GEN. STAT. § 46a-64-c(b)(1) (2016) (stating provision “shall not be construed to prohibit the denial of a dwelling to a man or a woman who are both unrelated by blood and not married to each other”). Oregon’s statutory provision also may not apply in at least some such situations, in that the statute specifies that the section does not apply if it would “necessarily result in common use of bath or bedroom facilities by unrelated persons of opposite sex”; however, the specific reference in this section is to sex discrimination, not marital status discrimination, and the configuration of the housing involved might also affect the applicability of this section. *See* OR. REV. STAT. § 659A.421(6) (2017).

<sup>216</sup> *Cf.* *Jasniewski v. Rushing*, 678 N.E.2d 743, 747 (Ill. App. Ct. 1997) (holding older decision interpreting statute not to reach cohabiting couples should be reconsidered because it relied on anti-fornication laws that had since been repealed). The Illinois Supreme Court later denied a petition for leave to appeal from this decision but also vacated the judgment, leaving Illinois law on the point unsettled. *Jasniewski v. Rushing*, 685 N.E.2d 622 (Ill. 1997) (mem.).

<sup>217</sup> Living together without being married has become quite common, but since one-third of Americans still disapprove of non-marital cohabitation, *see supra* note 105 and accompanying text, it is almost certain that such discrimination persists, *see, e.g., Fair Housing Center Settles Case Addressing over 30 Years of Alleged Housing Discrimination*, GRAND RAPIDS TIMES (Mar. 18, 2011) [http://www.grtimes.com/archive2011/3\\_18\\_2011.asp](http://www.grtimes.com/archive2011/3_18_2011.asp) [<https://perma.cc/S2FU-UJ9L>] (describing Michigan fair housing agency’s use of “testers” to establish that owners of condominium complex routinely refused to rent to unmarried couples).

<sup>218</sup> Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2012). The statute includes a prohibition on discrimination on the basis of “familial status” but this is defined as the presence or absence of children, *id.* § 3602(k), and thus does not protect unmarried couples who might face discrimination.

face discrimination have no claim under federal law. About half of the states also do not address marital status in their housing antidiscrimination laws.<sup>219</sup> Accordingly, in these jurisdictions (absent applicable local law), such discrimination is likely lawful.

The other half of states, however, do explicitly prohibit discrimination on the basis of marital status.<sup>220</sup> This language was typically added to state codes during the 1970s and 1980s.<sup>221</sup> Several state supreme courts have concluded that these statutes preclude discrimination against cohabiting couples. As framed by these courts, the interpretation is straightforward. A landlord who would willingly rent to a couple who is married but refuses to rent to the same couple if they are not married has made a distinction on the basis of “marital status.”<sup>222</sup> Thus, for example, the Alaska Supreme Court explained: “The [landlord] would have rented the apartment to Hohman, Kiefer and [their infant baby] had Hohman and Kiefer been married; the [landlord] refused to rent the apartment only after they learned that Hohman and Kiefer were not married. This constitutes unlawful discrimination based on marital status.”<sup>223</sup> To the extent there is any ambiguity,

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<sup>219</sup> See sources cited *supra* note 56.

<sup>220</sup> *Id.*

<sup>221</sup> Joslin, *supra* note 13, at 806. Courtney G. Joslin, *Discrimination in and out of Marriage*, 98 B.U. L. REV. 1 (forthcoming January 2018), offers a detailed (and fascinating) history of a provision in federal law that prohibits marital status discrimination in access to credit, showing that this provision was spurred primarily by concerns about discrimination against married women. The article does not, however, discuss what concerns may have motivated adding marital status provisions to state housing discrimination protections. Notably, in the credit context, there is no reason to assume that there would ever be discrimination against cohabiting couples (or even that companies would know that individuals were cohabiting). In the housing context, by contrast, discrimination against cohabiting couples was common at the time. Moreover, as Joslin notes, even if cohabiting couples were not a primary intended beneficiary of the marital status provisions, the plain language of the statute readily applies to this context. See *generally id.*; cf. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

<sup>222</sup> See, e.g., *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 915 (Cal. 1996) (“The statutory language banning discrimination based on ‘marital status’ naturally carries both meanings [married and unmarried.]”); *Worcester Hous. Auth. v. Mass. Comm’n Against Discrimination*, 547 N.E.2d 43, 45 (Mass. 1989) (characterizing statute’s term “marital status” as “reasonably straightforward”).

<sup>223</sup> *Foreman v. Anchorage Equal Rights Comm’n*, 779 P.2d 1199, 1203 (Alaska 1989); see also, e.g., *McCready v. Hoffius*, 586 N.W.2d 723, 726 (Mich. 1998) (observing “sole factor that defendants employed in determining that plaintiffs were unworthy of renting their available apartments was plaintiffs’ marital status”), *partially vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999).



it tilts in favor of coverage under a general principle of statutory interpretation that remedial statutes are to be interpreted broadly.<sup>224</sup>

These courts deemed the plain meaning controlling, notwithstanding anti-fornication provisions that existed when the marital status provisions were added to the antidiscrimination statutes. In Alaska, the criminal prohibition on non-marital sex had been repealed prior to the state supreme court's decisions on the cohabitation question.<sup>225</sup> The landlord in the case, nonetheless, argued that the statutes should be interpreted restrictively so as not cover conduct that was technically illegal when it was enacted.<sup>226</sup> The court rejected these arguments, explaining it would be "manifestly unreasonable to limit the effect of these modern remedial provisions [prohibiting marital status discrimination] by reference to an outdated criminal statute that had been [subsequently] repealed."<sup>227</sup> In Michigan, the state's anti-fornication statute remained on the books when the court interpreted its marital status provision.<sup>228</sup> The Michigan Supreme Court nonetheless followed the plain meaning of the antidiscrimination statute, noting that the criminal prohibition on cohabitation had not been used successfully to prosecute unmarried couples for nearly sixty years (and further that it was not clear that the couple intended to engage in the "lewd and lascivious" conduct that was criminalized).<sup>229</sup>

Courts that have held the opposite—that is, that discrimination against cohabiting couples is not covered by bans on marital status discrimination—typically rely on the putative need to reconcile the prohibition on marital status discrimination with anti-fornication or anti-cohabitation provisions or the state's more generalized public policy in support of marriage. The North Dakota Supreme Court, for example, began its statutory analysis with the criminal prohibition on cohabitation, emphasizing that the state has prohibited "unlawful cohabitation" since statehood,<sup>230</sup> and that the legislature had not discussed the

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<sup>224</sup> See, e.g., *McCready*, 586 N.W.2d at 724 ("Being that the act is remedial, we construe it liberally.").

<sup>225</sup> See *Foreman*, 779 P.2d at 1202 (stating that legislature repealed its anti-fornication law in 1978).

<sup>226</sup> See *id.* The landlord made similar arguments in the California case, but they got even less traction because California had repealed its law criminalizing private sexual conduct between consenting adults a few months prior to prohibiting marital status discrimination in its housing law. See *Smith*, 913 P.2d at 918.

<sup>227</sup> *Foreman*, 779 P.2d at 1202; see *Jasniowski v. Rushing*, 678 N.E.2d 743, 747 (Ill. App. Ct. 1997) (concluding that earlier Illinois appellate decision, *Mister v. A.R.K. P'ship*, 553 N.E.2d 1152 (Ill. App. Ct. 1990), was not controlling because Illinois had subsequently decriminalized cohabitation). *Jasniowski*, however, was later vacated by the Illinois Supreme Court leaving the status of this interpretation unclear. *Jasniowski v. Rushing*, 685 N.E.2d 622 (Ill. 1997) (mem.).

<sup>228</sup> *McCready*, 586 N.W.2d at 730.

<sup>229</sup> *Id.* at 726-28.

<sup>230</sup> *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, ¶¶ 10-12, 625 N.W.2d 551, 555-56.

cohabitation statute when it enacted the prohibition on marital status discrimination as part of a more general human rights act in 1983.<sup>231</sup> It concluded that because repeals by implication are disfavored, the marital status provisions cannot be read to sanction conduct that would be prohibited by the cohabitation statute.<sup>232</sup> The Minnesota Supreme Court's reasoning was similar; it focused on the need to harmonize the marital status provision with the anti-fornication statute and thereby protect the "institutions which have sustained our civilization, namely marriage and family life."<sup>233</sup> Rather shockingly, the Wisconsin Supreme Court refused to enforce a local ordinance, which prohibited marital status discrimination and even explicitly defined marital status as including cohabitation, by suggesting the local ordinance was inconsistent with the general perambulatory language in the state's family law code encouraging marriage.<sup>234</sup>

Courts support these strained interpretations by distinguishing between what they call "status" based protections—that is, the status of being "married" or "single"—and allegedly improper conduct. For example, the North Dakota Supreme Court claimed that "the cohabitation statute and the discriminatory housing provision are harmonized by recognizing that the cohabitation statute regulates conduct, not status."<sup>235</sup> The Wisconsin Supreme Court reasoned similarly that "[l]iving together is 'conduct,' not 'status'."<sup>236</sup> Thus, under this interpretation, the statutes protect against a categorical exclusion of all married couples, or all single individuals, but they do not prohibit discrimination based on a couple's choice to live together. However, this putative distinction breaks down under scrutiny. As the Massachusetts Supreme Judicial Court observed in reaching the opposite conclusion, it is precisely the fact that the couple is unmarried but living together that is the basis for the objection; thus, it should be recognized as illegal marital status discrimination.<sup>237</sup>

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<sup>231</sup> *Id.* at ¶ 13, 625 N.W.2d at 556.

<sup>232</sup> *Id.* at ¶ 37, 625 N.W.2d at 562. ("The cohabitation statute and the discriminatory housing provision are harmonized by recognizing that the cohabitation statute regulates conduct, not status. The opposite interpretation would render the prohibition against cohabitation meaningless.")

<sup>233</sup> *Cooper v. French*, 460 N.W.2d 2, 5-6, 8 (Minn. 1990).

<sup>234</sup> *Cty. of Dane v. Norman*, 497 N.W.2d 714, 716 (Wis. 1993) (invalidating defendant county's statute because it infringed "spirit" or "policy" of state legislation). Wisconsin had repealed its criminal prohibition on fornication in 1983. *See BOWMAN, supra* note 25, at 16.

<sup>235</sup> *Peterson*, 2001 ND 81, ¶ 37, 625 N.W.2d at 562.

<sup>236</sup> *Norman*, 497 N.W.2d at 718.

<sup>237</sup> *See Att'y Gen. v. Desilets*, 636 N.E.2d 233, 235 (Mass. 1994) ("The controlling and discriminating difference between [a married couple who would be able to rent the apartment and an unmarried couple who is denied it] is the difference in the marital status of the two couples."); *see also Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 278 n.4 (Alaska 1994) (stating that landlord "cannot reasonably claim that he does not rent or show property to cohabiting couples based on their conduct (living together outside of marriage)

The robust constitutional protection afforded by *Lawrence* provides further support for rejecting any kind of claimed distinction between “status” and “conduct” in this context. As discussed above, anti-fornication and anti-cohabitation statutes almost certainly can no longer be constitutionally enforced. Indeed, even back in 1972, when the Supreme Court decided *Eisenstadt*, the case guaranteeing unmarried individuals access to contraceptives, the Court treated Massachusetts’s anti-fornication statute as relatively unimportant (in Susan Appleton’s words, merely a “data point”<sup>238</sup>), emphasizing that the punishment for use of contraception was so disproportionate to the punishment for fornication that it could not be justified as a reasonable means of enforcing the State’s interest.<sup>239</sup> It should be all the more apparent now that these remnants of the defunct marriage-crime binary should not be invoked to undermine the plain language of antidiscrimination protections. It is well established that courts may properly revisit statutory interpretation precedents to respond to intervening developments in the law.<sup>240</sup> Indeed, as the California Supreme Court observed in holding that cohabiting couples were protected by a marital status provision, the contrary interpretation could itself raise constitutional problems in that it would be treating couples unfavorably based on their exercise of constitutionally protected rights.<sup>241</sup>

## 2. Religious Objectors

In the states that held protections on the basis of marital status do apply to cohabiting couples, courts went on to determine whether, despite the statute’s general applicability, religious objectors could be excused from compliance under federal or state constitutional provisions or state RFRAs. In some states, the courts held that landlords had to comply with the antidiscrimination provisions as part of the deal they accepted when they chose to participate in the

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and not their marital status when their marital status (unmarried) is what makes their conduct immoral in his opinion”).

<sup>238</sup> Appleton, *supra* note 43, at 17.

<sup>239</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 449-50 (1972) (“We, like the Court of Appeals, cannot believe that in this instance Massachusetts has chosen to expose the aider and abetter who simply gives away a contraceptive to 20 times the 90-day sentence of the offender himself.”).

<sup>240</sup> *See Patterson v. McLean Credit Union*, 491 U.S. 164, 174-75 (1989) (indicating that where intervening developments “have removed or weakened the conceptual underpinnings from the primary decision, or where the law has rendered the decision irreconcilable with competing legal doctrines or policies,” it may appropriately be overruled); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that statutes should be “interpreted ‘dynamically,’ that is, in light of present societal, political, and legal context”).

<sup>241</sup> *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 917 n.10 (Cal. 1996). This claim is particularly strong in California, as the California Constitution includes an explicit right to privacy.

for-profit housing market.<sup>242</sup> For example, the California Supreme Court suggested that a landlord who was uncomfortable renting to unmarried couples could always sell the units and redeploy the capital in other investments, but that accommodating the landlord would have a “serious impact” on the public’s “legal and dignity interests in freedom from discrimination based on personal characteristics.”<sup>243</sup> The Minnesota Supreme Court reasoned similarly in a case concerning the application of the prohibition on marital status discrimination in employment.<sup>244</sup> The court explained that, “by engaging in this secular endeavor, [the owners of a chain of health clubs] have passed over the line that affords them absolute freedom to exercise religious beliefs,” and that the state’s “overriding compelling interest” in eliminating discrimination could be “substantially frustrated” if employers professing religious beliefs could discriminate on the prohibited grounds.<sup>245</sup>

But in a few of these early housing decisions, courts suggested that even in states that explicitly prohibited discrimination on the basis of marital status, that interest was not weighty enough to require compliance when weighed against religious liberty claims brought by landlords. The Massachusetts Supreme Judicial Court provided the fullest discussion of the issue. Although the court ultimately held that the constitutional issue could not be decided on summary judgment, it expressed significant skepticism that the State’s interest in eradicating discrimination on the basis of marital status was “compelling.”<sup>246</sup> Rather, it opined that “marital status discrimination is not as intense a State concern as is discrimination based on certain other classifications [such as race or sex] . . . because there is no constitutionally-based prohibition against

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<sup>242</sup> See *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283 (Ala. 1994) (noting that landlord had not made showing that his religion required him to engage in property rental business and that “[v]oluntary commercial activity does not receive same status accorded to directly religious activity”); *Smith*, 913 P.2d at 925 (noting that landlord could sell her property if she no longer wished to participate in market); *McClure v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) (noting that by trafficking in commercial market, defendants had made themselves subject to regulations). The Michigan Supreme Court initially held that the landlord’s religious freedom rights were not violated in *McCready v. Hoffius*, 586 N.W.2d 723, 728-29 (Mich. 1998) (finding “[t]he law is generally applicable because it prohibits all discrimination and has no religious motivation”), but subsequently vacated this aspect of the decision and remanded it to the lower court for further analysis in *McCready v. Hoffius*, 593 N.W.2d 545 (Mich. 1999).

<sup>243</sup> *Smith*, 913 P.2d at 925; see also *Swanner*, 874 P.2d at 283 (“The ‘Hobson’s choice,’ of which the [landlord] complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws.”).

<sup>244</sup> *McClure*, 370 N.W.2d at 853. As discussed above, a later decision by the Minnesota Supreme Court interpreted the prohibitions on discrimination on the basis of marital status in housing more narrowly, holding that it did not protect cohabiting couples. See *Cooper v. French*, 460 N.W.2d 2, 5-6, 8 (Minn. 1990).

<sup>245</sup> *McClure*, 370 N.W.2d at 853.

<sup>246</sup> *Att’y Gen. v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994).

discriminating on the basis of marital status.”<sup>247</sup> Three judges filed a dissent that went even further, arguing that the court should have granted summary judgment on behalf of the objecting landlords; they reasoned that because the “right to free exercise of religion is a fundamental right,” the State’s interest in “accommodating cohabitation *cannot possibly outweigh* the defendants’ interest.”<sup>248</sup> Justice Thomas expressed similar themes in a dissent from the Supreme Court’s refusal to hear an appeal from the Alaska Supreme Court’s decision,<sup>249</sup> as did a panel of the Ninth Circuit in a subsequent federal constitutional challenge to Alaska’s law<sup>250</sup> (although the panel decision was subsequently vacated by the full circuit).<sup>251</sup>

These precedents have been invoked in current controversies concerning businesses that refuse to serve same-sex couples or refuse to provide access to reproductive health care. For example, as discussed in the next Part, the Supreme Court will soon decide whether the Masterpiece Cakeshop’s freedoms of speech and religion were unconstitutionally abridged when it was fined for refusing to bake a wedding cake for a gay couple. The petitioners’ brief in the case cites to the Massachusetts housing case to argue that the state law does not serve a compelling interest, at least as applied to the bakery.<sup>252</sup> The Massachusetts decision was cited for the same proposition in briefs submitted to the Washington Supreme Court in a case concerning a florist who refused to serve a gay couple.<sup>253</sup> A federal district court considering a challenge to the Affordable

<sup>247</sup> *Id.* at 238-39.

<sup>248</sup> *Id.* at 247 (O’Connor, J., dissenting) (emphasis added).

<sup>249</sup> *Swanner v. Anchorage Equal Rights Comm’n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting from the denial of petition for writ of certiorari) (expressing high levels of skepticism that preventing discrimination on basis of marital status could satisfy “compelling interest” test under RFRA, in part on ground that marital status classifications are not afforded heightened scrutiny under Equal Protection Clause).

<sup>250</sup> *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 715 (9th Cir. 1999) (asserting “firm national policy” against race discrimination but “it is beyond cavil that there is no similar ‘firm national policy’ against marital-status discrimination” and that it is “eminently sensible to look to equal protection precedent as a proxy for the importance that attaches to the eradication of particular forms of discrimination”).

<sup>251</sup> *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1142 (9th Cir. 2000) (holding that action was not ripe for judicial review, as landlords had not yet suffered hardship under policy); *see also* *Thomas v. Anchorage Equal Rights Comm’n*, 102 P.2d 937, 946-947 (Alaska 2004) (reaffirming Alaska Supreme Court’s earlier decision that enforcement of antidiscrimination mandate did not violate landlords’ religious liberty).

<sup>252</sup> Brief for Petitioners at 21, *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111).

<sup>253</sup> *See, e.g.*, Brief of Christian Legal Society, Association of Christian Schools International, and National Association of Evangelicals as Amici Curiae Supporting Appellants at 13-15, *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (No. 91615-2) (relying heavily on *Desilets* to argue that prohibition on sexual orientation discrimination was not sufficiently compelling).

Care Act rules requiring businesses to provide contraception relied extensively on the Ninth Circuit panel's analysis regarding Alaska's law.<sup>254</sup> And, as noted above, in *Hobby Lobby* itself, Justice Ginsburg's dissent cited to one of these cases to illustrate the threat that the Court's expansive interpretation of RFRA would pose to antidiscrimination norms.<sup>255</sup> Justice Alito's decision for the Court stated that eradicating *race* discrimination would meet a compelling interest standard, but it made no such assertion regarding sex discrimination, sexual orientation discrimination, or marital status discrimination.<sup>256</sup>

The assumption that protection against marital status discrimination is less compelling than protection against discrimination on the basis of race or sex is deeply problematic. When first put forward in these early housing cases, it was not yet firmly established that the choice to engage in non-marital intimacy was protected as a fundamental liberty. Now it is. Moreover, as *Obergefell* and earlier cases emphasized, choices around marriage, sexual intimacy, and procreation also implicate equality norms protected by the Equal Protection Clause.<sup>257</sup> Thus, where states or the federal government have enacted explicit protections against marital status discrimination, or taken other steps to advance and secure these personal liberties (such as guaranteeing access to contraception in the Affordable Care Act), the underlying interests should clearly be recognized as compelling, a point I develop further in Part IV.

#### B. *Same-Sex Intimacy*

There have been several recent high-profile cases brought by, or on behalf of, same-sex couples challenging refusals by businesses to provide services in connection with a marriage or commitment ceremony, including the *Masterpiece Cakeshop* case pending (as this Article goes to press) before the Supreme Court.<sup>258</sup> These new cases are similar to the cohabitation cases. As

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<sup>254</sup> *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 121-22 (D.D.C. 2012). The *Tyndale House* court asserted that the panel decision had been "reversed on other grounds"; this is a misrepresentation, in that the decision was actually vacated entirely. *See Thomas*, 220 F.3d at 1142. Several briefs in these Affordable Care Act cases cited to the earlier housing cases, as well. *See, e.g.*, Brief for the Southern Baptist Theological Seminary et al. as Amicus Curiae Supporting Petitioner at 19, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) (citing Massachusetts and Minnesota housing cases, as well as vacated Ninth Circuit case, to support argument that businesses may advance religious freedom claims based on being "complicit" in sins of others).

<sup>255</sup> *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2804-05 (2014) (Ginsburg, J., dissenting) (citing *McClure v. Sports & Health Club*, 370 N.W.2d 844, 847 (Minn. 1985)).

<sup>256</sup> *Id.* at 2783 (majority opinion).

<sup>257</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (noting that intimacy, marriage, and procreation implicate Equal Protection Clause of Fourteenth Amendment).

<sup>258</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 3, 370 P.3d 272, 276, *cert. granted*, 137 S. Ct. 2290 (2017) (discussing how suit arose when defendant bakery refused to

discussed below, in state supreme courts and lower courts, there has been extensive litigation over whether refusing to provide baked goods, photography, or other goods or services to same-sex couples is an illegal denial of services based on the “status” of being homosexual, or a permissible response to “conduct.” This threshold question will not be addressed directly in *Masterpiece Cakeshop*, because the Court has no authority to review the Colorado Supreme Court’s interpretation of Colorado law; thus, the Court will address only the petitioner’s claim that application of the antidiscrimination law to the situation violates the petitioner’s rights of free speech and religion.<sup>259</sup> Accordingly, no matter how the Supreme Court rules in *Masterpiece Cakeshop*, some of these questions will likely continue to be litigated in courts across the country.

### 1. Discrimination

Again, a threshold question is whether discrimination on the basis of sexual orientation is illegal at all. Approximately half of the states do not explicitly prohibit discrimination on the basis of sexual orientation.<sup>260</sup> Thus, in those states, such denials are presumptively permissible (other than the extent to which the denial of services could be recognized as a form of discrimination on the basis of sex,<sup>261</sup> or covered by an applicable local law). But in states or localities that do have laws explicitly prohibiting discrimination on the basis of sexual orientation, plaintiffs reasonably allege that the refusal to serve them violates the law. The defendant businesses, however, typically argue (among other things) that they serve gay or lesbian customers in general, but they simply refuse to work with them on their weddings. Thus, the businesses claim, they oppose same-sex “marriage” and other formal recognition of same-sex relationships, but they do not hold any discriminatory animus against individuals on the basis of their sexual orientation.

For example, in one influential New Mexico Supreme Court case, a photography business refused to photograph a commitment ceremony for two women.<sup>262</sup> The store emphasized that it was happy to take “portrait photographs”

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provide baking services for plaintiffs’ wedding); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 7-9, 309 P.3d 53, 59-60 (discussing how suit arose when defendant photography company refused to photograph plaintiffs’ wedding).

<sup>259</sup> The state’s antidiscrimination law could be considered indirectly if the Court finds that the law impacts speech protected under the First Amendment and consequently must assess the importance of the government interest at stake.

<sup>260</sup> See *Maps of State Laws and Policies*, *supra* note 10.

<sup>261</sup> Such claims would presumably proceed under state public accommodations law, as federal law prohibiting discrimination in public accommodations does not address sex. That said, plaintiffs could likely make arguments analogous to those made in the employment discrimination context that discrimination on the basis of sexual orientation necessarily implicates sex discrimination. See cases cited *supra* note 11 (showing circuit split on this point).

<sup>262</sup> *Elane Photography*, 2013-NMSC-040, ¶ 7, 309 P.3d at 59-60.

of gay or lesbian customers, but simply refused to take any photographs that it understood as “endorsing” same-sex marriage.<sup>263</sup> In other words, it asserted that its refusal to provide services was not discrimination based on the potential client’s “*status* of being homosexual,” but rather disapproval of her “*conduct* in openly committing to a person of the same sex.”<sup>264</sup> Likewise, in a Washington Supreme Court case, a florist who refused to provide flowers for a gay couple’s wedding made the same argument, bolstering her claim that she did not discriminate against gays and lesbians in other contexts by pointing to the fact that she had provided flowers for the couple frequently during the prior ten years, and that she had previously hired a gay employee.<sup>265</sup> Similar arguments were made in the lower court decisions of *Masterpiece Cakeshop*<sup>266</sup> and other cases challenging denial of services.<sup>267</sup>

An amicus brief filed in the Washington case by several legal scholars made the same argument at greater length, suggesting that this interpretation offers a “sensible reconciliation of the laws and policies promoting both antidiscrimination and religious and expressive freedom.”<sup>268</sup> It argued that the florist at issue did not have any objection to serving people “who have the ‘status’ of being homosexual,” but that she was simply asking to be excused from assisting creatively in a ceremony that was contrary to her religious beliefs.<sup>269</sup> It suggests that a pluralistic society depends on “being able to

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<sup>263</sup> *Id.* at ¶ 14, 309 P.3d at 61.

<sup>264</sup> *Id.* at ¶ 16, 309 P.3d at 61 (emphasis added).

<sup>265</sup> Brief for Appellants at 9-10, *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (No. 91615-2).

<sup>266</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 30, 370 P.3d 272, 280, *cert. granted*, 137 S. Ct. 2290 (2017) (describing bakery’s claim that its refusal to serve couple was not “because of” their sexual orientation,” but rather “because of” [their] intended conduct”).

<sup>267</sup> *See, e.g.*, Verified Petition at 15, *Odgaard v. Iowa Civil Rights Comm’n* (Polk Cty. Dist. Ct. Oct. 7, 2013) (No. 046451) (asserting that “although the Odgaards['] . . . religious beliefs prevent them from planning, facilitating, or hosting same-sex wedding ceremonies at the Gallery,” and accordingly they had refused to permit same-sex couple to rent wedding venue they operated, they had “never discriminated against anyone at the Gallery because of his or her sexual orientation”); *In re Klein*, 34 BOLI 102, 124 (Or. Bureau of Labor & Indus. 2015) (characterizing bakery’s claim as “not denying service [to the same-sex couple] because of Complainants’ sexual orientation but rather because they do not wish to participate in their same sex wedding ceremony”).

<sup>268</sup> Brief for Legal Scholars in Support of Equality and Religious and Expressive Freedom as Amicus Curiae in Support of Appellants at 15, *Arlene’s Flowers*, 389 P.3d at 543 (No. 91615-2).

<sup>269</sup> The brief argues in passing that the florist did not “attempt to censure [the couple’s] sexual *conduct*,” in that she referred them to other florists, and accordingly claims that she did not as a “business matter make any opposition to *either* the status *or* the conduct of homosexuals.” *Id.* at 16-17. However, elsewhere the brief acknowledges that the refusal of services was undeniably because of their choice to marry, and generally argues that the



distinguish between *conduct* of which they disapprove and *persons* who engage in that conduct.”<sup>270</sup>

This argument is flawed. When a business or individual refuses to provide services to a same-sex couple that it would provide to a different-sex couple, the key difference between the two couples is their sexual orientation. Thus, the refusal is properly characterized as a form of discrimination on the basis of their sexual orientation. This is true even if the individual or business provides other services to gay or lesbian individuals. And this is true even if the refusal is based on sincere religious beliefs that homosexual intimacy, or same-sex marriage specifically, is morally wrong. Recognizing the refusal of service as a form of discrimination because of sexual orientation does not resolve whether federal or state protections for religious freedom might excuse compliance with the statute. But that analysis is properly separated from the threshold question of whether the refusal to provide services constitutes discrimination.

Notably, courts in this context (in contrast with the cohabitation cases discussed above and the pregnancy cases discussed below) have generally rejected these arguments. For example, the New Mexico Supreme Court explained:

[W]hen a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. Otherwise we would interpret the [human rights law] as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation.<sup>271</sup>

This statement captures two important points. Not only is the conduct—same-sex marriage—inextricably tied to sexual orientation, but also failing to protect the conduct at issue would make the underlying antidiscrimination protections related to status almost meaningless, in that it would necessitate hiding their status. In a unanimous decision, the Washington Supreme Court likewise rejected the florist’s claimed distinction between “status and conduct fundamentally linked to that status.”<sup>272</sup> The Colorado Court of Appeals

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distinction between “status” and “conduct” makes the florist’s actions acceptable. *See id.* at 17-19.

<sup>270</sup> *Id.* at 19.

<sup>271</sup> *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 18, 309 P.3d 53, 62.

<sup>272</sup> *Arlene’s Flowers*, 389 P.3d at 553.

employed similar reasoning in the *Masterpiece Cakeshop* case,<sup>273</sup> as did the Bureau of Labor and Industries in Oregon.<sup>274</sup>

These courts typically bolster their analysis by citing to constitutional Supreme Court precedents that had similarly rejected the status/conduct distinction in the context of sexual orientation as unworkable, including *Lawrence*, *Obergefell*, and *Christian Legal Society*, as well as *Bob Jones University v. United States*,<sup>275</sup> which had held that discrimination against individuals for interracial marriage or dating was a form of race discrimination.<sup>276</sup> Thus, in these cases challenging the denial of services to same-sex couples, courts have (so far at least) consistently rejected the claim that disapproval of same-sex marriage can be distinguished from discrimination on the basis of sexual orientation. However, these claims continue to be pressed, and there is a risk that other courts could begin to accept them.<sup>277</sup> More optimistically, these precedents should be used to challenge the similarly flawed

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<sup>273</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 25, 370 P.3d 272, 279, *cert. granted*, 137 S. Ct. 2290 (2017) (“[T]he act of same-sex marriage is closely correlated to Craig’s and Mullins’ sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece’s refusal to create a wedding cake for Craig and Mullins was ‘because of’ their sexual orientation, in violation of [Colorado’s antidiscrimination law].”). The highest state court decision in the case is this mid-level appellate division, because the Colorado Supreme Court refused to hear an appeal.

<sup>274</sup> *In re Klein*, 34 BOLI 102, 124 (Or. Bureau of Labor & Indus. 2015) (stating that “[t]he forum has already found there to be no distinction” between discrimination on basis of sexual orientation and desire not to participate in same-sex wedding ceremony).

<sup>275</sup> 461 U.S. 574 (1983).

<sup>276</sup> *See, e.g., Arlene’s Flowers*, 389 P.3d at 552-53 (asserting its rejection of status/conduct distinction was in accordance with *Obergefell*, *Christian Legal Society*, *Lawrence*, *Elane Photography*, and also precedent rejecting the status/conduct distinction in other contexts, such as *Bob Jones University*); *Craig*, 2015 COA 115, ¶ 32, 370 P.3d at 280 (stating that “Supreme Court has recognized that such distinctions [between person’s status and discrimination based on conduct closely associated with that status] are generally inappropriate,” and citing *Christian Legal Society*, *Lawrence*, and *Bob Jones University* to support this statement)).

<sup>277</sup> In *Lexington Fayette Urban County Human Rights Commission v. Hands on Originals, Inc.*, the Kentucky Court of Appeals considered whether a business’s refusal to print t-shirts for a local LGBT pride event was sexual orientation or gender identity discrimination. No. 2015-CA-000745-MR, 2017 WL 2211381, at \*7 (Ky. Ct. App. May 12, 2017). The three-judge panel splintered badly. The lead opinion (not joined by either other judge) held it was permissible because the conduct was not “an activity or conduct exclusively or predominantly [engaged in] by a protected class of people” and that the business would have refused to print the t-shirts no matter who asked. *Id.* The court claimed it was different from refusing to serve a gay person because of disapproval of same-sex marriage, which it suggested would have been actionable. *Id.* at \*6. One judge dissented and would have held it impermissible sexual orientation discrimination. *See id.* at \*9 (Taylor, J., dissenting). The other judge concurred in the result only, on the ground that the business’s refusal to print the t-shirts was protected under Kentucky’s Religious Freedom Restoration Act. *See id.* at \*8 (Lambert, J., concurring).

distinctions between status and conduct that courts have accepted in cases addressing the visibility of non-marital heterosexual intimacy.

## 2. Religious Objectors

The second question in these cases has been whether, notwithstanding the courts' general holding that the businesses in question have violated laws prohibiting discrimination on the basis of sexual orientation, noncompliance is justified by the business's religious beliefs or more general free speech rights.<sup>278</sup> Corporate defendants have premised claims on the First Amendment and state constitutional analogues, as well on state statutes analogous to the federal RFRA.<sup>279</sup> *Masterpiece Cakeshop* raises these claims directly, and the Court's interpretation of the First Amendment principles at issue will have ramifications not only for cases concerning denial of goods and services to same-sex couples, but also for other individuals whose choices regarding personal intimacy may conflict with the religious views of their employers, landlords, or service providers.

Up until now, these claims have been consistently unsuccessful in the same-sex marriage context. Much of the analysis, and much of the focus of the briefing in *Masterpiece Cakeshop*, has turned on whether the refusal to provide services constitutes compelled speech, or is sufficiently expressive as to merit protection as speech, issues that are outside the scope of this project.<sup>280</sup> On the separate question of whether the interest served by the antidiscrimination laws can justify any incursion on religion, several courts have held that because the law at issue is a neutral law of general applicability, only rational basis review applies and the antidiscrimination law easily meets this standard.<sup>281</sup> In the case concerning the florist in Washington state, the Washington Supreme Court held that the law could also satisfy strict scrutiny, relying on earlier holdings—including the

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<sup>278</sup> See, e.g., *Craig*, 2015 COA 115, ¶ 44, 370 P.3d at 283 (“Masterpiece contends that the . . . cease and desist order compels speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings.”); *Arlene’s Flowers*, 389 P.3d at 556 (“The first of these defenses is a free speech challenge: Stuzman contends that her floral arrangements are artistic expressions protected by the state and federal constitutions . . .”).

<sup>279</sup> *Arlene’s Flowers*, 389 P.3d at 556.

<sup>280</sup> See, e.g., *Craig*, 2015 COA 115, ¶¶ 47-73, 370 P.3d at 283-88; *Elane Photography*, 2013-NMSC-040, ¶¶ 32-57, 309 P.3d at 65-72; *Arlene’s Flowers*, 389 P.3d at 556-60.

<sup>281</sup> See, e.g., *Craig*, 2015 COA 115, ¶¶ 81-101, 370 P.3d at 289-94 (“Having concluded that CADA is neutral and generally applicable, we easily conclude that it is rationally related to Colorado’s interest in eliminating discrimination in places of public accommodation.”); *Elane Photography*, 2013-NMSC-040, ¶¶ 61-68, 309 P.3d at 73-75 (“We hold that the NMHRA is a neutral law of general applicability, and, as such it does not offend the Free Exercise Clause of the First Amendment.”). This standard is articulated in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-80 (1990). It is less protective of religious liberty than the standard required by RFRA; however, because there is no federal government action at stake in *Masterpiece Cakeshop*, RFRA has no bearing.

Alaska and Minnesota decisions concerning cohabiting couples discussed above—that the State’s interest in eradicating discrimination is compelling.<sup>282</sup> The Washington Supreme Court also “emphatically reject[ed]” the argument that the availability of alternative providers meant that the florists’ refusal to serve the gay couple did not cause real harm, stating that “[t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches.”<sup>283</sup>

In *Masterpiece Cakeshop*, if the Court holds that the fine imposed on the bakery *does* merit strict scrutiny because of an impact on freedoms protected by the First Amendment, it will need to determine whether the antidiscrimination statute is narrowly tailored to serve a compelling interest. The United States’ amicus brief takes the position that statutes addressing *race* discrimination can meet this standard, but statutes addressing *sexual orientation* discrimination—at least as applied here—cannot.<sup>284</sup> A similar hierarchy of interests was suggested by the Court in *Hobby Lobby*.<sup>285</sup> This argument should be rejected. Courts have long recognized that antidiscrimination statutes serve compelling purposes, even when they address factors that do not trigger strict scrutiny under

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<sup>282</sup> See, e.g., *Arlene’s Flowers*, 389 P.3d at 565-66 (concluding “numerous other courts have heard religious free speech challenges to such laws and upheld them under strict scrutiny” (citing *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 281-83 (Alaska 1994); *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 852-54 (Minn. 1985))).

<sup>283</sup> *Id.* at 566 (quoting Brief for Appellants at 32, *supra* note 265 (No. 91615-2)).

<sup>284</sup> Brief for the United States, *supra* note 22, at 32-33 (arguing laws targeting “race-based discrimination” are sufficiently compelling to survive heightened First Amendment scrutiny but that laws targeting discrimination on basis of sexual orientation are not); see also Brief for North Carolina Values Coalition and the Family Research Council as Amici Curiae in Support of Petitioners at 27, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111) (indicating support for prior Court decisions upholding civil rights laws passed to “eradicate America’s long history of racial discrimination” but contending antidiscrimination protections relating to other characteristics cannot justify any infringement on religious liberty). Notably, leading civil rights groups emphatically reject this argument. See, e.g., Brief for Lawyers’ Committee for Civil Rights Under Law et al. in Support of Respondents at 19, *Masterpiece Cakeshop*, 137 S. Ct. at 2290 (No. 16-111) (“Colorado undeniably has a compelling interest in protecting its population—and whatever classes of persons within that population are in need [of] protection—from discrimination in public accommodations.”); Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae in Support of Respondents at 4, *Masterpiece Cakeshop*, 137 S. Ct. at 2290 (No. 16-111) (“States have an interest in eliminating discrimination of all forms, no matter the motivation, in the enjoyment of places of public accommodation.”); Brief of the National Women’s Law Center and Other Groups as Amici Curiae in Support of Respondents at 30, *Masterpiece Cakeshop*, 137 S. Ct. at 2290 (No. 16-111) (“The important principle that commercial businesses have no constitutional right to discriminate applies equally to the context of all groups protected by public accommodation laws.”); cf. cases cited *infra* note 286.

<sup>285</sup> See *supra* text accompanying note 125.

the Equal Protection Clause.<sup>286</sup> The significance of the interest at stake here is particularly apparent because the Court has emphasized that choices regarding personal intimacy—including the choice to marry someone of the same-sex—implicate “fundamentally important” liberty and equality interests protected by the Due Process and Equal Protection Clauses.<sup>287</sup>

### C. *Non-Marital Pregnancy*

There have also been several recent cases brought by women who were fired for being pregnant without being married.<sup>288</sup> Again, this should be a two-step analysis in which courts assess the applicability of pregnancy discrimination law separate from any considerations that apply specifically to religious employers. In most of these cases, the employer is a religious organization or school, but sometimes even entirely secular businesses engage in such discrimination. For example, a vice president for the Mets baseball team alleged that her boss, upon learning of her pregnancy, stated that he was “morally opposed” to her having the baby without being married and that “when she gets a ring, she [would] make more money and get a bigger bonus.”<sup>289</sup> Courts in this context, however, have devoted comparatively little attention to the specific religious analysis because they have concluded that any organization—religious or secular—may enforce a (sex-neutral) policy against non-marital intimacy.

#### 1. Discrimination

The first step in the cohabitation and same-sex marriage contexts is determining whether there is any applicable antidiscrimination law that *could* apply. As noted, relevant federal laws do not address marital status or sexual orientation explicitly, and only about half of the states have provisions on point.<sup>290</sup> In the unmarried pregnancy context, by contrast, it is clear that federal

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<sup>286</sup> See, e.g., *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding that state has “compelling interest in eliminating discrimination against women”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) (“Assuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests.”); *Lumpkin v. Brown*, 109 F.3d 1498, 1501 (9th Cir. 1997) (holding that state has compelling interest in addressing discrimination based on sexual orientation); see also *supra* notes 242-45 and accompanying text (discussing cases that recognized state has compelling interest in addressing discrimination based on marital status).

<sup>287</sup> See *supra* Section I.A.

<sup>288</sup> Many of these cases are also discussed in Clarke, *supra* note 13, at 18-22. Professor Clarke is generally critical of these cases as examples of the way the law prioritizes marriage but she does not focus on the conduct/status distinction or argue that courts are misinterpreting Title VII as applied in this context.

<sup>289</sup> Richard Sandomir, *Ex-Mets Executive Sues Jeff Wilpon, Citing Discrimination over Pregnancy*, N.Y. TIMES, Sept. 11, 2014, at B16.

<sup>290</sup> See sources cited *supra* note 56.

law does prohibit discrimination against employees on the basis of pregnancy.<sup>291</sup> (This provision was enacted by Congress in 1978 to supersede a Supreme Court decision that had interpreted Title VII's prohibition on discrimination on the basis of sex as inapplicable to pregnancy discrimination.)<sup>292</sup> Nonetheless, courts in these cases typically suggest that they must distinguish between discrimination on the basis of *pregnancy*, which is illegal, and discrimination on the basis of *having engaged in non-marital sex* (or used reproductive technology), which courts contend is not prohibited by Title VII<sup>293</sup> or other applicable laws.<sup>294</sup> In other words, although they do not frame it in this language, they once again draw untenable lines between "status" and "conduct."

In one prominent example, the Eleventh Circuit considered a case brought by a woman who was fired after she admitted to her employer, a Christian school, that she had become pregnant before she married the father of her baby.<sup>295</sup> Her supervisor justified terminating her by claiming "there are consequences for disobeying the word of God."<sup>296</sup> The Eleventh Circuit opined that "Title VII does not protect any right to engage in premarital sex, but as amended by the Pregnancy Discrimination Act of 1978, Title VII does protect the right to get pregnant."<sup>297</sup> The Sixth Circuit has likewise framed the question as requiring a determination as to whether the adverse action "constituted discrimination based on her pregnancy as opposed to a gender-neutral enforcement of the school's premarital sex policy."<sup>298</sup> This same distinction has been applied by a number of district courts addressing claims of discrimination against unmarried pregnant women.<sup>299</sup>

<sup>291</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012).

<sup>292</sup> See Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 989-98 (2013).

<sup>293</sup> See, e.g., *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 1999); *Boyd v. Harding Acad. of Memphis, Inc.* 88 F.3d 410, 414-15 (6th Cir. 1996); *Dias v. Archdiocese of Cincinnati*, No. 11-cv-00251, 2013 WL 360355, at \*5 (S.D. Ohio Jan. 30, 2013).

<sup>294</sup> In jurisdictions that prohibit marital status discrimination in employment, plaintiffs could presumably argue that this constitutes unlawful discrimination, as in *Richardson v. Northwest Christian University*, 242 F. Supp. 3d 1132, 1152 (D. Or. 2017) (holding that "Oregon's marital status discrimination law makes it illegal for an employer to impose policy prohibiting extramarital sex or cohabitation"), discussed *infra* Section III.C.3. My research however located surprisingly few reported cases making this argument.

<sup>295</sup> *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1317 (11th Cir. 2012).

<sup>296</sup> *Id.* at 1317-18.

<sup>297</sup> *Id.* at 1319-20 (citations omitted).

<sup>298</sup> *Cline*, 206 F.3d at 658.

<sup>299</sup> See, e.g., *Dias v. Archdiocese of Cincinnati*, No. 1:11-cv-00251, 2013 WL 360355, at \*5 (S.D. Ohio Jan. 30, 2013) (being "pregnant and unwed" is not grounds for a Title VII claim per se); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 360 (E.D.N.Y. 1998) (holding that it was up to jury to decide "whether it was pregnancy or fornication that caused the Defendant to dismiss the Plaintiff").

Courts in these cases generally suggest that, although it may be murky, the line between discrimination based on pregnancy and discrimination based on having engaged in non-marital sex that results in a pregnancy exists. The Eleventh Circuit, for example, ultimately reversed the district court's grant of summary judgment to the employer, based on evidence that the woman's supervisor had expressed concern about how they would handle the logistics of the maternity leave, as well as distress that the baby had been conceived out of wedlock.<sup>300</sup> But the court made clear that if the employer had simply expressed opposition to the non-marital sex, it would not constitute a violation of Title VII.<sup>301</sup>

Importantly, courts have held that a policy of firing employees who engage in non-marital intimacy does violate Title VII if it is not applied evenly to men and women.<sup>302</sup> It is readily apparent that a woman who is pregnant without being married has engaged in non-marital sex (or employed assisted reproductive technology). There is no such visible marker for men who may have engaged in these activities. Thus, the fact that women are the ones who are likely to face discrimination is, in some sense, both a bug and a feature under existing law. It offers a viable hook for winning under the framework that courts have applied—but it also makes clear that women face a higher risk of job loss as a result of their intimate choices.<sup>303</sup> Some might ultimately be able to win a legal case, but most will never bring one.

The reasoning adopted by courts in these cases is particularly unpersuasive because federal employment discrimination law specifically provides that an

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<sup>300</sup> *Hamilton*, 680 F.3d at 1320-21.

<sup>301</sup> *Id.* at 1319-20; *see also* *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1178 (N.D. Ind. 2014) (“The triable issue is whether Mrs. Herx was nonrenewed because of her sex, or because of a sincere belief about the morality of in vitro fertilization.”).

<sup>302</sup> *See, e.g., Cline*, 206 F.3d at 667 (holding sex discrimination claim viable where school did not otherwise inquire of male teachers regarding premarital sex); *Dias*, 2013 WL 360355, at \*5 (indicating Title VII claim is viable if employer did not enforce its policy against premarital sex in gender neutral manner); *cf.* Aaron Vehling, *Indiana Catholic Diocese Must Pay \$2M in IVF Sex Bias Suit*, LAW360 (Dec. 22, 2014), <https://www.law360.com/articles/606761/indiana-catholic-diocese-must-pay-2m-in-ivf-sex-bias-suit> (awarding \$2 million to teacher based on evidence that school fired her for undergoing in vitro fertilization and that it had not fired men for participating in IVF).

<sup>303</sup> Even if one believes it is possible, as an analytic matter, to distinguish between disapproval of non-marital sex and disapproval of a pregnancy that was caused by non-marital sex, it would be very difficult for such a policy to *actually* be applied in a sex-neutral fashion. This is akin to a commonly held basis for opposition to the death penalty: an individual may believe that there are some crimes that are so heinous that death would be warranted as a penalty, but nonetheless feel that the death penalty should not be implemented because, at least in this country, it is impossible to apply the death penalty in a race-neutral fashion. My thanks to Bradley Arehart for helping me articulate this point.

adverse action that is motivated, even in part, by pregnancy is illegal.<sup>304</sup> It is nonsensical to suggest that these adverse actions are not at least *partially* motivated by pregnancy. As a factual matter, it is almost always the announcement of the pregnancy that triggers the adverse action.<sup>305</sup> Additionally, supervisors frequently emphasize how members of the community will respond to the pregnancy. For example, a first-grade teacher at a Catholic school was informed that the Diocese had instructed her principal to fire her “before her pregnancy began to show.”<sup>306</sup> These kinds of comments make clear that the visibility of the pregnancy is often at the root of the employer’s disapproval. Courts should not pretend that a line can be drawn between discrimination on the basis of pregnancy and discrimination on the basis of non-marital intimacy that results in a pregnancy, or, at a minimum, they should scrutinize the evidence extremely carefully to assess whether there is reason to believe the pregnancy played at least *some* role in the decisionmaking, even if other factors also played a role.<sup>307</sup>

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<sup>304</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy . . . .”); *id.* § 2000e-2(m) (prohibiting consideration of sex as motivating factor for any employment practice). A showing that the employer would have taken the same action in the absence of the prohibited factor can preclude the award of certain remedies, such as money damages, but it does not absolve the employer of liability. *See id.* § 2000e-5(g)(2)(B).

<sup>305</sup> *See, e.g.*, Complaint and Demand for Jury Trial at 4, *Daly v. St. Elizabeth Ann Seton Catholic Sch.*, No. 3:14-cv-01029 (M.D. Fla. dismissed Nov. 24, 2014), ECF No. 1 (alleging that when plaintiff, who was unmarried, informed principal of her school she was pregnant, he stated he needed to confer with Diocese “regarding her pregnancy” and that Diocese instructed school to terminate plaintiff); Complaint at 2-3, *supra* note 135 (alleging that employer knew plaintiff had other non-marital children, but when she told her supervisor of new pregnancy she was immediately terminated); *cf. Cline*, 206 F.3d at 667 (holding sex discrimination claim viable where pregnancy alone signaled teacher engaged in premarital sex).

<sup>306</sup> Complaint and Demand for Jury Trial, *supra* note 305, at 4; *see also Cline*, 206 F.3d at 656 (“[P]arents in the community have serious concerns about a teacher who marries and is expecting a child 5 months after the wedding date.”).

<sup>307</sup> For this reason, even evidence that a policy against non-marital sex is sometimes enforced against non-pregnant employees should not be sufficient to grant summary judgment to an employer, so long as there is reason to believe (as there typically will be) that the pregnancy played at least some role in the decision. *Cf. Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1149 (D. Or. 2017) (denying summary judgment in this situation). Relatedly, it is irrelevant whether evidence that a termination was premised on the plaintiff’s being “pregnant and unwed” is classified as direct or circumstantial evidence. *Cf. Dias*, 2013 WL 360355, at \*4 (considering this question). Although litigants and lower courts sometimes suggest otherwise, the Supreme Court long ago made clear that either kind of evidence may be used to establish a violation of the “motivating factor” language in 42 U.S.C. § 2000e-2(m). *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003) (“[D]irect evidence of discrimination is not required in mixed-motive cases . . . .”).



## 2. Religious Objectors

To the extent that special issues apply to (some positions at) religious employers, those questions should be handled separately from the question of how the Pregnancy Discrimination Act applies to non-marital pregnancies in general. But these cases include very little discussion of how Title VII should apply to religious employers specifically.

The older decisions barely consider the issue at all, other than to observe that the issue in the cases was pregnancy/sex discrimination, rather than religious discrimination.<sup>308</sup> This may seem obvious, but it is an important point. Religious entities might seek to frame the matter as a form of “religious” discrimination and thus within an exception included within Title VII, which permits such organizations to discriminate on the basis of “religion”—that is, they can prefer individuals who adhere to the organization’s religious beliefs over those with different beliefs.<sup>309</sup> But religious organizations are not given *carte blanche* to discriminate on the basis of sex, race, or other grounds. Because the argument in these cases is that women are being treated unequally, even under ostensibly sex-neutral rules regarding non-marital intimacy, they concern sex discrimination rather than religious discrimination. Thus, the general exception for religious organizations does not apply.<sup>310</sup>

More recent cases typically include separate consideration of whether the position involved fits within the “ministerial” exception. As explained in Section I.C, this is a judicially-created exception to antidiscrimination laws which holds that courts may not review the employment relationship between a religious organization and its ministers.<sup>311</sup> The exception would create the latitude for a religious organization to fire a *minister* because she became pregnant outside of marriage. Even though I argue this would constitute sex discrimination, it would be permissible, just as it is permissible for the Catholic Church to refuse to hire women as priests at all.<sup>312</sup> The First Amendment (properly, I believe) assures religious denominations the freedom to make such determinations in accordance with the tenets of their faith.

But these cases help highlight why it is important to limit the ministerial exception to persons who serve a true ministerial role. One of the cases discussed

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<sup>308</sup> See, e.g., *Cline*, 206 F.3d at 658 (“Because discrimination based on pregnancy is a clear form of discrimination on the basis of sex, religious schools cannot discriminate based on pregnancy.”); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (“Title VII still applies . . . to a religious institution charged with sex discrimination.”).

<sup>309</sup> 42 U.S.C. § 2000e-1(a).

<sup>310</sup> For the same reason, courts should not accept any argument that categorically excluding unmarried pregnant women can fit within the provision that permits organizations to consider religion when it is a bona fide occupational qualification for the position.

<sup>311</sup> See *supra* notes 129-32 and accompanying text.

<sup>312</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

above was brought by a *cook* at a community child care center,<sup>313</sup> a position that clearly cannot meet this standard. In several of these cases, defendants have pushed for exceptionally broad interpretations of the exception—e.g., that *every* teacher in a religious school should be considered a minister—but courts, so far at least, have properly rejected such claims.<sup>314</sup>

There is an additional way in which religious entities' efforts to bring more employees within the scope of the ministerial exception could affect the analysis. As discussed above, in the wake of *Obergefell* and *Hosanna-Tabor*, religious and religiously-affiliated employers have been increasingly vigilant about asking employees to sign morals clauses, which often include promises to forego non-marital intimacy.<sup>315</sup> Research by Lauren Edelman and others has identified a disturbing tendency among courts to assume that the mere existence of an antidiscrimination or harassment policy guarantees the absence of illegal discrimination, rather than scrutinizing such policies to determine whether they are effective.<sup>316</sup> These findings suggest that courts might likewise rubberstamp a morals clause policy as sufficient to show an evenhanded opposition to non-marital sex, without determining whether it is really enforced in an evenhanded manner.<sup>317</sup> Thus, even if courts continue to police the line on the "ministerial exception," these kinds of policies could increase the likelihood that employers would escape liability on the pregnancy discrimination question. It will be essential that litigants demonstrate that merely having a policy on paper is not sufficient to demonstrate that the rule is pregnancy neutral; the nature of the problem suggests that it will almost certainly not be pregnancy neutral.

Finally, there might be instances where religious organizations or religiously operated businesses could assert claims under RFRA or state analogues. Courts weighing such claims should explicitly recognize that employers' religious liberty claims must be balanced against the longstanding commitment to eradicating pregnancy discrimination in the workplace and the individual woman's fundamental right to make choices regarding personal intimacy.

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<sup>313</sup> Complaint at 2, *supra* note 135.

<sup>314</sup> *See, e.g.,* *Dias v. Archdiocese of Cincinnati*, No. 1:11-cv-00251, 2013 WL 360355, at \*4 (S.D. Ohio Jan. 30, 2013) (rejecting defendant's assertion that all teachers are "role models and therefore 'ministers'" and asserting that because teacher was not Catholic, she could not "genuinely be considered a 'minister' of the Catholic faith").

<sup>315</sup> *See supra* notes 134-35 and accompanying text.

<sup>316</sup> *See generally* Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888 (2011).

<sup>317</sup> *Cf. Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1178 (N.D. Ind. 2014) (observing "jury might well agree, after hearing evidence about the Church's view of in vitro fertilization, that an employer with so strong a view of this particular infertility treatment would discharge anyone involved with it, male or female").

### 3. A Better Approach

A recent district court decision serves as a promising counterpoint to the cases discussed above, in that it expresses a more nuanced understanding of how status and conduct interact in this context, bringing together the housing discrimination cases discussed in Section III.A and the gay rights cases discussed in Section III.B.<sup>318</sup> Coty Richardson was an exercise science professor at Northwest Christian University (“NCU”).<sup>319</sup> She was unmarried, and when she emailed her supervisor to let him know she was pregnant, he informed her that she had three options: she could marry the baby’s father before the beginning of the next academic school year, “admit that she had made a ‘mistake’ and stop living with the baby’s father, or lose her job.”<sup>320</sup> Richardson sued, alleging both pregnancy discrimination and violation of Oregon’s law prohibiting marital status discrimination, along with tort and contract based claims.<sup>321</sup> First, the court concluded that the ministerial exception did not apply, reasoning, correctly, that even though she, like all faculty at the school, “was expected to integrate her Christianity into her teaching and demonstrate a maturing Christian faith . . . any religious function was wholly secondary to her secular role.”<sup>322</sup>

On the pregnancy discrimination claim, the court followed the reasoning of other decisions, cited above, to hold that a “prohibition on extramarital sex/cohabitation does not automatically constitute pregnancy discrimination under Title VII.”<sup>323</sup> But it noted that NCU did not take “affirmative steps” to find out whether employees complied with this prohibition; rather, it only enforced its policy when it learned through “rumor or self-reporting that an employee is having extramarital sex/cohabiting,” or when it learned through “rumor, self-reporting, or *observation*” that an unmarried employee was pregnant.<sup>324</sup> Accordingly, even though NCU could—rather unusually—identify two non-pregnant employees (one male, one female) who had been told they would lose their job if they did not marry a cohabiting partner,<sup>325</sup> the court denied NCU’s motion for summary judgment on the pregnancy discrimination claim.<sup>326</sup> The court opined that a reasonable jury could conclude that the school’s “chosen enforcement method will necessarily and obviously lead to

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<sup>318</sup> Richardson v. Nw. Christian Univ., 242 F. Supp. 3d 1132 (D. Or. 2017).

<sup>319</sup> *Id.* at 1139.

<sup>320</sup> *Id.* at 1140-41.

<sup>321</sup> *Id.* at 1138.

<sup>322</sup> *Id.* at 1145.

<sup>323</sup> *Id.* at 1149 (citing Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2000); Hamilton v. Southland Christian Sch., 680 F.3d 1316, 1319 (11th Cir. 2012)).

<sup>324</sup> *Id.* at 1148 (emphasis added).

<sup>325</sup> *Id.* at 1142. In those instances, the male and female employees married their partners within days, rather than lose their jobs. The school also fired a faculty member who had had a sexual relationship with a student, in violation of the school’s fraternization policy, as well as its general prohibition on non-marital intimacy. *Id.*

<sup>326</sup> *Id.* at 1149.

disproportionate enforcement against pregnant women,” and also that NCU’s focus on the visibility of the pregnancy suggested it was “less concerned about its employees having sex outside of marriage and more concerned about people *knowing* its employees were having sex outside of marriage—a concern that arguably amounts to animus against pregnant women.”<sup>327</sup>

On the marital status claim, the arguments put forward by the parties echoed those in the earlier housing discrimination cases: Richardson asserted she was fired because of her marital status, in that she was explicitly told that she could keep her job if she married her partner, while the school contended that she was fired “because of her conduct,” in that it would have been happy to continue to employ her if she remained single, but not if she remained single *and* continued to live with her partner.<sup>328</sup> The court reviewed the split in the case law discussed in Section III.A and concluded that the text of the statute was ambiguous as to whether it applied in this context.<sup>329</sup> The court further noted that, as discussed above, most of the courts that had narrowly construed “marital status” provisions to not apply to cohabiting couples had done so to reconcile the provisions with anti-fornication or cohabitation statutes, but that Oregon lacked comparable criminal prohibitions on intimate conduct.<sup>330</sup> (As discussed above, even in the few states that retain such laws on the books, they can no longer be enforced and thus should not be grounds for reading the “marital status” provisions unduly narrowly.) Finally, the court relied on the gay rights cases discussed in Sections II.C and III.B,<sup>331</sup> concluding that although they did not directly resolve the question, they helped underscore that “conduct and status are often inextricably linked.”<sup>332</sup> This reality, combined with the general canon that remedial statutes are to be broadly construed to promote their objectives, led the court ultimately to conclude that “a policy against extramarital sex/cohabitation effectively discriminates on the basis of marital status,” and thus violated the Oregon law.<sup>333</sup>

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<sup>327</sup> *Id.* In a letter, the supervisor explained that the school’s actions were because “[her] marital status is generally known and [her] pregnancy will be obvious to all, it [would] be apparent to faculty and students [she had] engaged in a lifestyle that does not reflect faith based conduct consistent with NCU goals or expectations.” *Id.* at 1141; *see also* Complaint at 8, *Richardson*, 242 F. Supp. 3d at 1132 (No. 15-cv-20442) (alleging supervisor had told her that “‘the problem’ with her pregnancy . . . was that she was going to be ‘showing’ soon and that many of the students and staff would start to ‘ask questions’”).

<sup>328</sup> *Richardson*, 242 F. Supp. 3d at 1150 (explaining that defendant asserted that her conduct of living with her partner outside of marriage was reason for her discharge).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 1151.

<sup>331</sup> *Id.* (citing Christian Legal Soc’y Chapter of the Univ. of Cal., *Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 548-49 (Wash. 2017)).

<sup>332</sup> *Id.* at 1152 (quoting *Veenstra v. Washtenaw Country Club*, 645 N.W.2d 643, 650 (Mich. 2002) (Cavanaugh, J., dissenting)).

<sup>333</sup> *Id.*

Because the case subsequently settled, there was never a jury determination of whether the school's policy actually did discriminate against women.<sup>334</sup> However, the careful reasoning the court employed on both the pregnancy discrimination and the marital status discrimination claims offers a useful model for other courts grappling with these questions.

#### IV. ENHANCING PROTECTIONS FOR INTIMATE LIBERTIES

Part III focused on existing law. It argued that where legislative bodies have enacted protections against discrimination on the basis of marital status, sexual orientation, and pregnancy, courts should not employ unreasonably narrow interpretations premised on false distinctions between status and conduct to deny protection. This Part offers some initial thoughts on the larger normative question of why such provisions are essential. It argues that addressing discrimination by private actors is a necessary element of ensuring individuals have the personal autonomy to exercise the intimate liberties our Constitution promises, and it suggests that legislatures should consider adopting more general protections against discrimination on the basis of intimate liberties.

One of the groundbreaking aspects of the decision in *Lawrence* was its recognition that state condemnation of forms of intimacy that were associated with gays and lesbians—i.e., criminal statutes prohibiting sodomy—justified discrimination against gays and lesbians in the private sector.<sup>335</sup> This included specific consequences in civil law: for example, allegations of homosexual conduct were used to discredit a parent's claim in contested custody cases.<sup>336</sup> But the deeper, broader point is that criminalization denotes moral disapproval, and thus it actually encourages discrimination more generally throughout society.<sup>337</sup>

The interaction works in reverse as well. Permitting private discrimination based on intimate choices curtails individuals' ability to exercise fundamental constitutional liberties. The potential loss of a job can certainly be as significant a deterrent as the (usually small) possibility of criminal prosecution.<sup>338</sup> Looked

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<sup>334</sup> See Docket, *Richardson* 242 F. Supp. 3d at 1132 (No. 6:15-cv-01886).

<sup>335</sup> See *Lawrence*, 539 U.S. at 575 (discussing how criminalizing sodomy invites discrimination).

<sup>336</sup> See, e.g., *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (holding that "father's continuous exposure of the child to his immoral and illicit [same-sex] relationship renders him an unfit and improper custodian as a matter of law").

<sup>337</sup> See *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

<sup>338</sup> See generally ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017) (arguing that private employers have sweeping authoritarian power over employees' lives); cf. *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 925 (Cal. 1996) (noting that requiring Sabbatarian to avoid conflict

at through this lens, the allegations in the pregnancy discrimination cases discussed in Section III.C suggest that supervisors routinely feel empowered to place rather shocking demands on their employees. For example, when Shana Daly, a social studies and reading teacher at a Catholic school, announced her pregnancy, the pastor of the parish allegedly told her that she would need to marry the father of her unborn child within four weeks, or lose her job.<sup>339</sup> Leigh Castergine, the former Mets employee, was told by her boss that “when she gets a ring, she will make more money and get a bigger bonus.”<sup>340</sup> And as noted above, Coty Richardson was told that she would be fired unless she married her partner or admitted she had “made a ‘mistake’” and terminated her twelve-year relationship with him.<sup>341</sup>

In the *Richardson* case, the school’s defense on the pregnancy discrimination claim relied in large part on identifying two non-pregnant employees who had also been told that they would lose their jobs if they continued a cohabiting relationship.<sup>342</sup> Rather than sue, each of those individuals had simply complied with the demand, getting married within a few days.<sup>343</sup> This evidence clearly helped bolster the school’s claim that its policy against non-marital cohabitation did not violate Title VII (although I believe the court was right to deny the employer’s motion for summary judgment, as there was also evidence suggesting that pregnant women were more likely to be subject to the policy). However, the more significant fact may be that these individuals were pushed into marriages by their employer.<sup>344</sup> In other words, they made the “choice” to marry—a choice that the Supreme Court has characterized as a “profound commitment” of “transcendent importance” that is “inherent in the concept of individual autonomy” and “among the most intimate that an individual can make”<sup>345</sup>—to satisfy their employer. Even if the policy was applied in a truly sex neutral manner, there is an injury here that I believe antidiscrimination law should address.

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between his religion and work by “quitting work and foregoing compensation . . . is not a realistic solution for someone who lives on the wages earned through personal labor”).

<sup>339</sup> Complaint and Demand for Jury Trial, *supra* note 305, at 4.

<sup>340</sup> *See Sandomir, supra* note 289.

<sup>341</sup> *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1141 (D. Or. 2017); *see also* Complaint, *supra* note 327, at 8.

<sup>342</sup> *Richardson*, 242 F. Supp. 3d at 1142.

<sup>343</sup> *Id.*

<sup>344</sup> In at least one of the examples, the couple was already engaged when they began cohabiting, *id.*, and thus NCU’s demand likely only changed the timing of the marriage. Nonetheless, many couples carefully choose when and where to marry and plan a ceremony that includes their family and friends. By contrast, after being told he would lose his job because he had moved in with his fiancée, this faculty member “spent a few nights on a colleague’s couch and then the couple obtained a marriage license.” *Id.*

<sup>345</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2599 (2015).

Some might argue that the harm is less extreme, and the possibility of interfering with intimate choices is less likely, when the discrimination at issue is the denial of services at a public accommodation or the denial of housing rather than loss of a job. Certainly, a couple who has decided to get married is very unlikely to abandon that plan simply because a bakery or florist refuses to work with them. In most instances, they will be able to find alternative providers. That said, in some regions of the country this could be difficult. Indeed, Douglas Laycock, one of the most prominent proponents of expansive religious exemptions, was quite open about the challenge that this might pose, suggesting that it might mean that “same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago.”<sup>346</sup> And there are situations where the denial of services could have more devastating consequences, such as a Catholic hospital providing emergency care that could refuse to recognize a same-sex marriage.<sup>347</sup>

Even if alternative providers exist, the denial of services nonetheless causes a real and significant harm. The Senate committee report for the Civil Rights Act of 1964 made this point eloquently:

The primary purpose of [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . .<sup>348</sup>

This theme has been echoed and developed by courts applying and enforcing statutory laws precluding discrimination in public accommodations.<sup>349</sup> Just as it

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<sup>346</sup> Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 169 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008). To some extent, this expectation likely reflects the fact that it was written a decade ago. As support for same-sex marriage has grown, this risk has almost certainly decreased.

<sup>347</sup> Currently, this problem is partially mitigated by regulations issued in 2010 that apply to most hospitals and that permit patients who have sufficient capacity to designate whom they will receive as visitors. *See* 40 C.F.R. § 482.13(h) (2012) (requiring hospitals to inform patients of right to receive visitors, including same-sex domestic partners, and confirming that all visitors enjoy equal visitation privileges according to patient’s preferences). However, hospitals might seek religious exemptions from compliance, similar to the exemptions sought by religious entities for issues related to contraceptives and abortion. *Cf.* *Eternal World TV Network, Inc. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 818 F.3d 1122, 1137 (11th Cir. 2016) (addressing claims brought by Catholic organizations alleging Affordable Care Act’s provisions covering contraceptives violated RFRA and Free Exercise Clause).

<sup>348</sup> S. REP. No. 88-872, at 16 (1963).

<sup>349</sup> *See, e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring) (“The primary purpose of the Civil Rights Act of 1964, . . . as the Court recognizes, . . . is the vindication of human dignity and not mere economics.”); *see also, e.g.,*

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causes humiliation, frustration, and embarrassment when services are denied on the basis of race, it causes humiliation, frustration, and embarrassment when services are denied on the basis of intimate choices.<sup>350</sup>

But my point here is not simply that discrimination on the basis of intimate liberties is hurtful. Discrimination on many grounds—poverty, or disability, or wholly arbitrary grounds, like an aversion to Cubs fans—is hurtful. Antidiscrimination law is premised on legislative judgments about what factors merit statutory protection. They reflect local priorities and political whims; they do not (necessarily) track constitutional norms. There is no formal rule for factors that need to be weighed or processes that need to be observed. Nonetheless, there are several factors that are at least implicit in debates over the need for antidiscrimination laws. These include the harms such discrimination causes, the extent to which a particular factor gives rise to discrimination, the costs of interfering with the autonomy of businesses to make their own decisions, the extent to which the marketplace might effectively address any irrational biases without requiring regulation, and the expressive value of a clear statement against certain forms of discrimination.

Looking at this list suggests a strong case for enacting more robust protections for intimate liberties. In constitutional cases, the Supreme Court has been right to recognize that choices regarding personal intimacy and family formation are integral to personal autonomy and dignity. These choices are central to how we define ourselves and our roles in our communities. The factual scenarios that gave rise to the cases discussed above—marrying someone of the same sex, living with an intimate partner, or becoming pregnant without being married—make private choices around intimacy both visible and public. Without a shield against private discrimination, these choices cannot be made freely. The injury caused by this kind of discrimination is particularly acute, for the same reason that the Court has recognized that the freedom to make such choices implicates “fundamental” liberties protected by the Constitution. Moreover, as noted above, the rapid shifts in family form and choices around sexual intimacy and marriage remain sharply polarizing, suggesting there is reason to believe such discrimination is relatively prevalent. The cases described in Part III are likely only the tip of the iceberg, in that few individuals who are subject to such

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Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (“[Gender discrimination] thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”); Brief of Public Accommodation Law Scholars as Amici Curiae in Support of Respondents at 27-35, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111) (reviewing and explaining case law establishing enforcement of public accommodation laws is essential to protecting equality and dignity, even when market alternatives exist).

<sup>350</sup> See, e.g., *In re Klein*, 34 BOLI 102, 125 (Or. Bureau of Labor & Indus. 2015) (detailing how bakery’s refusal to provide cake for lesbian wedding, on grounds that it would be “abomination,” caused her to become severely depressed and “question[] whether there was something inherently wrong with [her] sexual orientation”).



discrimination will sue, and even fewer of those suits will result in published decisions. There are, of course, costs to interfering with businesses' autonomy to make decisions, but, at least outside the context of religious organizations, the harms posed to individual victims seem likely to outweigh the costs on the other side. The market is unlikely to correct fully for such discrimination,<sup>351</sup> and there is important expressive value in laws proclaiming certain kinds of discrimination to be impermissible and unacceptable.

These factors suggest, at a minimum, that states that have not yet enacted laws that prohibit discrimination on the basis of marital status and sexual orientation should do so, and Congress should follow suit (unless the Supreme Court holds definitively that the latter category is unlawful under existing statutory prohibitions on sex discrimination). Legislative bodies should also consider adopting more explicit and general protections for the exercise of (lawful) "intimate liberties." These could be modeled on existing state laws that protect employees against being penalized for any lawful out-of-work conduct.<sup>352</sup> Or they could be more narrowly drawn provisions that specifically refer to the kinds of choices around intimacy, procreation, and marriage that the Supreme Court has recognized merit special protection under our Constitution. Explicitly invoking conduct—rather than speaking in the language of status—would avoid the definitional conundrums that have tripped up the courts.<sup>353</sup> It would also

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<sup>351</sup> It is true that boycotts have been effective against some discriminatory laws, but service providers who have received publicity after refusing to serve gay customers have also seen financial benefits. *See, e.g.*, Justin Wm. Moyer, *Indiana Pizza Shop Won't Cater Gay Wedding, Gets Over \$50K from Supporters*, WASH. POST (Apr. 2, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/04/02/indianas-memories-pizza-wouldnt-cater-gay-wedding-gets-40k-in-crowdfunding/?utm\\_term=.c0e9811ea894](https://www.washingtonpost.com/news/morning-mix/wp/2015/04/02/indianas-memories-pizza-wouldnt-cater-gay-wedding-gets-40k-in-crowdfunding/?utm_term=.c0e9811ea894) [<https://perma.cc/82NZ-SHF5>].

<sup>352</sup> *See* Pagnattaro, *supra* note 165, at 640-60 (2004). However, several of these statutes state that employers may take adverse actions against employees if the conduct conflicts with the employer's business interests. *See, e.g.*, N.D. CENT. CODE § 14-02.4-03 (2017) (restricting adverse actions for employee's non-work conduct "which is not in direct conflict with the essential business-related interests of the employer"). This is a potentially large loophole, in that it suggests that reputational harm might justify adverse actions. It is quite different from the norm in antidiscrimination law, where it has long been established that customer preferences cannot justify discrimination. *See, e.g.*, *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) ("[I]t would be totally anomalous if we were to allow the preferences and prejudices of customers to determine whether . . . discrimination was valid. Indeed, it was, to large extent, these very prejudices the Act was meant to overcome.").

<sup>353</sup> This could also avoid potential thorny questions of coverage. For example, some individuals engage in same-sex intimacy but do not identify as gay or bisexual. *See, e.g.*, Jesse Singal, *How Straight Men Who Have Sex with Men Explain Their Encounters*, N.Y. MAG. (Feb. 14, 2017), <http://nymag.com/scienceofus/2017/02/how-straight-men-explain-their-same-sex-encounters.html> [<https://perma.cc/53Y2-VYED>]. If an employer fired an employee for this conduct, it is not clear whether he would be protected under existing laws prohibiting discrimination on the basis of sexual orientation. Presumably, such conduct would be protected under a law that specifically proscribed discrimination against individuals for their

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align more obviously with the way the constitutional interests have been defined. Thus, if businesses, individuals, or organizations asked to be excused from compliance on religious grounds, it would be readily apparent that there were fundamentally important interests underlying the claims on both sides.

I am not, in this Article, attempting to establish precisely what the scope of antidiscrimination provisions related to “intimate liberties” should be, or whether there might be certain circumstances where differential treatment is justified. Certainly, such protections could easily encompass, for example, protections from discrimination for choices regarding birth control or abortion (to the extent that such provisions are not already encompassed within existing protections against sex/pregnancy discrimination).<sup>354</sup> In some contexts, however, there might be countervailing business reasons for policies that interfere with intimate liberties that did not exist in the kinds of cases discussed in Part III (an example of this might be a policy prohibiting nepotism). Similarly, legislatures might decide that it should be illegal to take adverse actions against employees because they engage in non-marital intimacy, but that employers should be able to provide benefits to married couples (such as health insurance for a spouse) that they do not provide to unmarried couples.<sup>355</sup> That said, I would strongly advocate that antidiscrimination protections for gay and lesbian couples seeking marriage-related services be understood as part of a larger interest in protecting autonomous choices regarding intimacy in general, the fundamental interest that was recognized in *Lawrence*, rather than a particularized right regarding marriage, as it (arguably) was in *Obergefell*.

The key here is that, as noted in Part I, *Obergefell* rested in part on the humiliation the Court assumed that same-sex couples and their children would feel at being excluded from marriage.<sup>356</sup> In one sense, I whole-heartedly agree.

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choices regarding personal intimacy. My thanks to Naomi Schoenbaum for identifying this issue.

<sup>354</sup> See, e.g., Koran Addo, *Bill Protecting Women Against Discrimination for Having an Abortion Passes in St. Louis City Hall*, ST. LOUIS POST-DISPATCH (Feb. 11, 2017), [http://www.stltoday.com/news/local/govt-and-politics/bill-protecting-women-against-discrimination-for-having-an-abortion-passes/article\\_ebbfb676-ef5c-560a-ba0c-3b9a3a9672a1.html](http://www.stltoday.com/news/local/govt-and-politics/bill-protecting-women-against-discrimination-for-having-an-abortion-passes/article_ebbfb676-ef5c-560a-ba0c-3b9a3a9672a1.html) [<https://perma.cc/DFT9-77ME>] (describing St. Louis ordinance adding reproductive health decisions to city’s anti-discrimination ordinance); see also U.S. EQUAL EMP. OPPORTUNITY COMM’N, No. 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015) (“[I]t would be unlawful for a manager to pressure an employee to have an abortion, or not to have an abortion, in order to retain her job, get better assignments, or stay on a path for advancement.”).

<sup>355</sup> An employer might have legitimate interests in limiting such benefits to couples who have formalized their commitment through marriage; however, it might be possible to use factors other than marriage (such as length of relationship) to distinguish casual relationships from long-term committed relationships.

<sup>356</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015) (“Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser.”).

It is undoubtedly deeply humiliating to be told by one's government that one's relationship does not merit the same respect as a different-sex marriage. But the Court's decision was riddled with statements suggesting a different source of humiliation: that same-sex couples and their children would be "humiliated" by being unable to differentiate themselves from (less worthy) non-marital families.<sup>357</sup> This aspect of the decision is deeply troubling. It reflects the extent to which non-marital intimacy, and particularly non-marital child-bearing, remains stigmatized, even as it has become increasingly prevalent in many sectors of society.<sup>358</sup>

Part III demonstrated how, in each of the three contexts discussed, corporate defendants sought to justify their discriminatory treatment as a legitimate response to "conduct" rather than illegal discrimination based on a protected "status." Courts have (so far, at least) rejected that claim when advanced in the context of same-sex couples seeking marriage-related services but permitted it to succeed in cases concerning non-marital pregnancies or cohabiting couples. It is difficult to know precisely why this pattern has emerged, but it is certainly possible it reflects a hierarchy in which marital families (expanded to now include same-sex as well as different-sex headed families) are offered more respect and protection than non-marital families.

It is a credit to the efficacy of the LGBT advocacy movement that legislative proposals implicating discrimination against same-sex couples or trans-people spur high-profile boycotts and protests.<sup>359</sup> There is a danger, however, that the

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<sup>357</sup> This phenomenon may appear in the unmarried pregnancy context, where lesbian women fired for non-marital pregnancies have sometimes argued that they should not face sanction because their pregnancies were "planned" with a partner, and facilitated through artificial reproductive technology, rather than the careless result of unprotected sex. *See, e.g.,* Lydia Warren, *Lesbian Teacher Who Was Fired at Catholic School Because She Was Pregnant and Unmarried Gives Birth to Son*, DAILYMAIL.COM (Mar. 26, 2014), <http://www.dailymail.co.uk/news/article-2589899/Fired-Catholic-school-teacher-gives-birth-son.html> [<https://perma.cc/7855-D6FG>] (describing how teacher's GoFundMe page, established to help fund litigation, emphasized that teacher was in a "long-term, committed relationship" and that pregnancy was "hard-fought and very much wanted"); *Teacher Fired for Pregnancy Sues Butte Catholic Schools*, MONT. STANDARD (Aug. 21, 2014), [http://mtstandard.com/news/local/teacher-fired-for-pregnancy-sues-butte-catholic-schools/article\\_9f3df7ce-29a7-11e4-805b-001a4bcf887a.html](http://mtstandard.com/news/local/teacher-fired-for-pregnancy-sues-butte-catholic-schools/article_9f3df7ce-29a7-11e4-805b-001a4bcf887a.html) [<https://perma.cc/ZF3A-2J2C>] (explaining how teacher's artificial insemination led to her discharge by Catholic school).

<sup>358</sup> *See supra* Section I.B.

<sup>359</sup> *See, e.g.,* Andrew Bender, *Indiana's Religious Freedom Act Cost Indianapolis \$60 Million in Lost Revenue*, FORBES (Jan. 31, 2016), <https://www.forbes.com/sites/andrewbender/2016/01/31/indianas-religious-freedom-act-cost-indianapolis-60-million-in-lost-revenue/#18d4fe402e2a> [<https://perma.cc/ZGH9-SXXM>] (describing how boycott against Indiana when it passed Religious Freedom Restoration Act led to the Act's being amended one week later); Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-Gay*, WASH. POST (Mar. 28, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/?utm>

narrow focus on what the expansion of exemptions for religious objectors will mean for the LGBT community will obscure the equally pressing danger that exemptions pose to heterosexual couples who engage in non-marital intimacy and non-marital childbearing. As noted in Part I, public disapproval of these other intimate choices remains at least as high as public disapproval of same-sex parenting.<sup>360</sup> If courts adopt the hierarchy suggested by *Obergefell*—privileging and protecting married same-sex couples while disparaging non-marital families more generally—there is a very real risk that courts will continue to robustly interpret prohibitions on discrimination on the basis of sexual orientation and hold that such laws meet the compelling interest standard under RFRA or constitutional provisions related to religious freedom, while failing to protect the interests that are at stake when non-marital families face discrimination. Given the stark racial and class-based disparities in non-marital birthrates,<sup>361</sup> such discrimination would be especially harmful to minority communities whose interests have long been at the heart of the antidiscrimination project more generally.<sup>362</sup>

#### CONCLUSION

In the culture wars raging around religious objections to same-sex marriage, claims of autonomy—back-stopped by the Constitution’s commitment to religious freedom—have been made largely on behalf of religious organizations and business owners seeking exemptions from antidiscrimination laws. But claims of autonomy—back-stopped by the Constitution’s commitment to intimate liberties—could likewise be advanced on behalf of employees, tenants, or other members of the public seeking to enforce antidiscrimination guarantees. This is relevant not only for the LGBT community but also for others who challenge traditional norms around intimacy, such as cohabiting couples or unmarried pregnant women.

The constitutional law concerning intimate liberties recognizes a synergy between substantive due process doctrine and equal protection doctrine. Recognizing the interplay between equality and liberty is essential when interpreting private antidiscrimination law as well. This analysis should help debunk the putative distinction that courts make between “status” and “conduct” in these cases, and it should strengthen the claim that prohibitions on

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<sup>360</sup> See *supra* notes 108-11 and accompanying text.

<sup>361</sup> See *supra* note 98 and accompanying text.

<sup>362</sup> Cf. Joslin, *supra* note 13, at 822-23 (suggesting discrimination against non-marital families may be “used—consciously or unconsciously—as a pretext for race discrimination”). At a minimum, litigants should be able to bring disparate impact claims to challenge such policies. However, courts’ reluctance to credit societal statistics and general deference to claimed business justifications suggest such claims would rarely be successful.

discrimination on the basis of marital status, sexual orientation, and pregnancy are narrowly tailored to serve compelling government interests. Modern constitutional law, which makes clear that adult consensual sexual intimacy can no longer lead to criminal sanction, emphasizes the fundamental importance of being able to make individual choices regarding intimacy. But true liberty requires protecting individuals from discrimination in the private sector—you should not be fired, lose your housing, or be denied services simply because of whom you love.