
MARITAL STATUS DISCRIMINATION 2.0

COURTNEY G. JOSLIN*

INTRODUCTION	805
I. MEANING AND SCOPE OF MARITAL STATUS NONDISCRIMINATION	808
II. SUITABLE FOR REGULATION?.....	814
III. WHY NOW?	819
A. <i>Political Developments</i>	819
B. <i>Demographic Changes</i>	821
C. <i>Evidence of Discrimination</i>	823
D. <i>Changes in Law and Policy</i>	828
CHALLENGES AHEAD AND CONCLUDING THOUGHTS.....	829

INTRODUCTION

The fiftieth anniversary of the Civil Rights Act of 1964 is an appropriate moment to reflect on the state of our civil rights laws. In recent years, a number of scholars, including Richard Thompson Ford, Tristin Green, Linda Hamilton Krieger, and Susan Fiske, among others, have considered whether Title VII and other civil rights laws effectively address structural discrimination, as well as more subtle forms of individual discrimination.¹ While I share the concern about the limitations of our existing anti-

* Professor of Law, UC Davis School of Law. I thank Jeannine Bell, Chai Feldblum, Tristin Green, Serena Mayeri, Doug NeJaime, Noah Zatz, as well as the participants at the Boston University Law Review Symposium on the Civil Rights Act of 1964 at 50: Past, Present, and Future. I also thank Dean Kevin Johnson and Associate Dean Vikram Amar for generous financial support for this project.

¹ See, e.g., Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1382 (2014) (“It has long been well understood that antidiscrimination law needs a way of confronting subtler versions of the older Jim Crow policies.”); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 626 (2005) (explaining that other scholars “have made a strong case that employment discrimination takes a variety of forms, not always recognizable through the lens of targeted animus or identifiable job detriment,” and arguing that “[r]ecognizing work culture as a source of discrimination may help to address some of the harms that these scholars have identified, along with more traditionally recognized harms”); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1010 (2006) (arguing that contemporary legal definitions of what discrimination is and how it functions “have not withstood empirical scrutiny”).

discrimination laws, I leave those critiques in the able hands of others. This Essay explores another lens for reconsideration—the types of discrimination regulated by our civil rights statutes. This Essay urges the reconsideration of a category that exists in some, but not many civil rights laws—the category of “marital status.”

The idea of protecting people from discrimination on the basis of marital status is not new. There was a push in the 1970s and 1980s to add protections against marital status discrimination, and some jurisdictions heeded this earlier call.² The political movement to add protections against marital status discrimination, however, largely has been on hiatus since the late 1980s. This Essay argues it is time to revitalize those efforts.

Unmarried adults make up a large and growing segment of our population. Today, about fifty percent of American adults are unmarried.³ A significant share of these individuals are living in nonmarital families; indeed, the number of nonmarital cohabiting couples has increased more than 1500% since 1960.⁴ This group is much larger than it was during the first wave of advocacy in the 1970s and 1980s.⁵ And, critically, this growing slice of the American population is increasingly likely to be nonwhite, lower-income, and less-educated.⁶ Thus, discrimination against people because of their nonmarital family status may be felt disproportionately by people who are already vulnerable and marginalized in the employment, housing, and other sectors of our society. Moreover, reliance on nonmarital family form may, at times, serve as a cover for discrimination on the basis of race and/or class.⁷

² See, e.g., Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 15 (2000) (“Twenty-one states and the District of Columbia protect against marital status discrimination.”).

³ Natalie Crofts, *Report: For 1st Time, More Adults are Single than Married in US*, KSL.COM (Sept. 16, 2014, 8:30 PM), <http://www.ksl.com/?nid=1010&sid=31589541>, archived at <http://perma.cc/6ELX-VBYK> (reporting that single adults outnumbered married adults for the first time since the government began tracking the statistic).

⁴ Meg Jay, *The Downside of Cohabiting Before Marriage*, N.Y. TIMES (Apr. 14, 2012), http://www.nytimes.com/2012/04/15/opinion/sunday/the-downside-of-cohabiting-before-marriage.html?pagewanted=all&_r=0, archived at <http://perma.cc/UVM8-QBL3>.

⁵ *Id.*

⁶ See, e.g., Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621, 639 (2014) (“Although it was not true historically, today, reliance on formal family status has profound racial and class implications.”); June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F. L. REV. 313, 324-25 (2010) (“The cumulative result of these [demographic and economic] changes is that family form has become a marker of class and culture. . . . For the poorest Americans, concentrated in urban centers, marriage has effectively disappeared.”). Cf. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 187 (2015) (discussing demographic statistics regarding unmarried parents).

⁷ See *infra* Part II.

Bias against nonmarital families continues to be widespread. A significant percentage of the U.S. population continues to believe that nonmarital families, and especially nonmarital parents, are bad for society.⁸ Indeed, close to half of the U.S. population believes that people living in nonmarital cohabiting relationships are immoral.⁹ Recent controversies, including the *Hobby Lobby*¹⁰ litigation and a number of incidents involving same-sex couples,¹¹ suggest there may be an uptick, rather than a decrease, of discrimination based on moral considerations.¹² For these reasons, it is critical to reconsider prohibiting discrimination on the basis of marital status.

To be sure, some discrimination against nonmarital families may be rooted in religious belief. This piece does not seek to resolve the question of how to balance the free exercise of religion with the goal of protecting people from discrimination. That said, this piece offers an important and to date largely omitted context for thinking about that question. Currently, most of the contemporary discussions of whether to permit religious exemptions from nondiscrimination statutes have focused on lesbian, gay, bisexual, and transgender (“LGBT”) people and same-sex couples.¹³ But, to the extent that

⁸ See *infra* notes 120-123 (collecting polling data regarding Americans’ opinions about unmarried cohabitating couples).

⁹ See *id.*

¹⁰ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (holding that, with respect to closely held, for-profit corporations, the Department of Health and Human Services’ contraceptive mandate unconstitutionally burdened exercise of religion).

¹¹ See *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (involving a photography company that refused to photograph a same-sex commitment ceremony); *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civil Rights Comm’n May 30, 2014), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf, *archived at* <http://perma.cc/944H-2BTL> (involving a bakery that refused to provide a wedding cake for a same-sex wedding celebration).

¹² See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 181 (2014) (“[M]oral considerations . . . have played an increasingly visible and contested role in the marketplace.”).

¹³ See, e.g., Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. (forthcoming 2015) (“This tension between religious liberty and antidiscrimination protection for gay people has become the topic of a large academic and popular literature.”). See also generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010); Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. IN BRIEF 1 (2013); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL’Y 274, 276 (2010); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169 (2012); Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage*

employers, landlords, and businesses are permitted to refuse services to individuals because their family structure is considered to be sinful or immoral, LGBT people would be far from the only ones impacted by such a rule. Indeed, in terms of sheer numbers, different-sex unmarried couples, many of whom are nonwhite and lower-income, may constitute the majority of persons affected by such refusals.¹⁴ This recognition needs to be part of the conversation about religious exemptions.¹⁵

Part I provides an overview of existing laws prohibiting marital status discrimination. After describing the narrow scope of most current statutes, Part I then urges the adoption of broader provisions that prohibit not only discrimination based on the status of being married or single, but also discrimination because one is living in a nonmarital family. Part II argues that marital status is an appropriate category for inclusion in civil rights statutes. Part III explains why it is an appropriate moment to reconsider prohibitions against marital status discrimination. The last Part offers some concluding thoughts.

I. MEANING AND SCOPE OF MARITAL STATUS NONDISCRIMINATION

The idea of prohibiting marital status discrimination is not new. Today, almost half the states—approximately twenty-one—prohibit marital status discrimination in housing, employment, or both.¹⁶ In most of these states, however, the prohibitions have a surprisingly narrow scope.¹⁷ Either because

Debates, 89 IND. L.J. 703 (2014). *But see* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560658 (discussing a range of what the authors call “complicity-based conscience claims”).

¹⁴ See *supra* note 6 (reporting that a disproportionate percentage of unmarried people are black, impoverished, and in low-income households).

¹⁵ In the 1980s and 1990s, there was more of a scholarly focus on religious exemptions and unmarried, heterosexual couples. 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, 495-96 (1998); John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991); Rita M. Neuman, Note, *Closing the Door on Cohabitants Under Wisconsin’s Open Housing Law*, 1995 WIS. L. REV. 965, 965. The contemporary conversations, however, have largely omitted consideration of this population. See, e.g., sources cited *supra* note 13.

¹⁶ See, e.g., Lynne Marie Kohm, *Does Marriage Make Good Business? Examining the Notion of Employer Endorsement of Marriage*, 25 WHITTIER L. REV. 563, 576 n.69 (2004); Porter, *supra* note 2, at 15; James A. Sonne, *Love Doesn’t Pay: The Fiction of Marriage Rights in the Workplace*, 40 U. RICH. L. REV. 867, 931 (2006).

¹⁷ See, e.g., Caroll J. Miller, Annotation, *What Constitutes Illegal Discrimination Under State Statutory Prohibition Against Discrimination in Housing Accommodations on Account of Marital Status*, 33 A.L.R. 4th 964 (1984) (collecting cases).

the term is statutorily defined narrowly¹⁸ or through court interpretation,¹⁹ most of the existing provisions prohibit only discrimination based on the *status* of being a single, married, or divorced person.²⁰ That is, in most of these twenty-one states, it is not illegal to discriminate against a person because he or she is a member of an unmarried cohabiting couple.²¹ This Essay urges the enactment of broader provisions that would not only protect people from discrimination because they are married or unmarried, but would also protect them from discrimination because they are in nonmarital cohabiting relationships.

As noted above, most existing statutes do not cover the latter form of discrimination.²² In some states, the statute itself makes clear that it does not cover discrimination because someone is in a nonmarital, cohabiting relationship. For example, the Connecticut statute prohibiting housing discrimination on the basis of marital status clarifies that the 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.”²³

¹⁸ See, e.g., HAW. REV. STAT. § 378-1 (2010) (defining “marital status” to mean “the state of being married or being single”); NEB. REV. STAT. § 48-1102(12) (2010) (defining “marital status” to mean “the status of a person whether married or single”).

¹⁹ See, e.g., *Price George’s Cnty. v. Greenbelt Homes, Inc.*, 431 A.2d 745, 747-48 (Md. Ct. Spec. App. 1981) (holding that two unmarried individuals seeking to jointly purchase a co-op unit had individual marital statuses of “single,” but collectively did not have a marital status); *Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd.*, 415 N.E.2d 950, 953 (N.Y. 1980) (“[E]mployers may no longer decide whether to hire, fire, or promote someone because he or she is single, married, divorced, separated or the like. Had the Legislature desired to enlarge the scope of its proscription to prohibit discrimination based on an individual’s marital *relationships*—rather than simply on an individual’s marital *status*—surely it would have said so.”).

²⁰ There are, however, some state statutes that apply more broadly. For example, the statutes in Alaska, California, and Massachusetts have been interpreted to prohibit discrimination on the basis of being in a nonmarital cohabiting relationship. See, e.g., *Foreman v. Anchorage Equal Rights Comm’n*, 779 P.2d 1199, 1203 (Alaska 1989) (holding that unmarried couples are protected under state and municipal prohibitions against marital status discrimination); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 914-15 (Cal. 1996) (holding that the Fair Employment and Housing Act’s ban on marital status discrimination includes cohabiting unmarried couples); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 235 (Mass. 1994) (holding that prohibition against marital status discrimination in leasing protects unmarried couples seeking to cohabit).

²¹ See, e.g., *Miller*, *supra* note 17 (collecting cases).

²² See, e.g., *Porter*, *supra* note 2, at 18 (“Courts in at least five states have interpreted the term ‘marital status’ in their statutes according to the narrow interpretation: Florida, Michigan, New Jersey, New York, and Wisconsin.”).

²³ CONN. GEN. STAT. ANN. § 46a-64c(b)(1) (West 2009). See also WASH. REV. CODE ANN. § 49.60.040 (West 2008) (definition of marital status was amended to mean the “legal status of being married, single, separated, divorced, or widowed”).

Other states have reached this conclusion through case law.²⁴ This was the conclusion of the Minnesota Supreme Court in *Cooper v. French*.²⁵ In that case, a landlord refused to rent a two-bedroom house to an unmarried woman because the owner thought she might stay in the property with her nonmarital male partner.²⁶ The owner admitted that if the woman “had been married” to her male partner, he “would not have objected renting to them.”²⁷ At the time, the Minnesota Human Rights Act prohibited housing discrimination on the basis of marital status.²⁸ Notwithstanding this provision, the Minnesota Supreme Court held that the landlord did not engage in impermissible discrimination because—at least in the context of housing—the legislature only intended the marital status discrimination provision to prohibit discrimination on the basis of “the status of an *individual*, not an individual’s relationship with a spouse, fiancé, fiancée, or other domestic partner.”²⁹ The court continued: “The legislative history . . . indicates that the legislature did not intend to extend the protection of the MHRA to unmarried, cohabiting couples in the area of housing.”³⁰ Most other courts have reached similar conclusions.³¹ Only a minority of jurisdictions clearly prohibit discrimination against nonmarital couples.³²

In addition to the state statutes, there are a few federal statutes that seem like they might protect nonmarital couples from discrimination. For example, the federal Fair Housing Act prohibits discrimination on the basis of “familial status.”³³ One might think that this provision prohibits discrimination because

²⁴ See 38 Or. A.G. Op. 181, 182 (1976) (concluding that that state’s prohibition against marital status discrimination did not cover cases that “would necessarily result in common use of bathroom or bedroom facilities by unrelated persons of the opposite sex”).

²⁵ 460 N.W.2d 2 (Minn. 1990).

²⁶ *Id.* at 3-4.

²⁷ *Id.* at 4.

²⁸ MINN. STAT. ANN. § 363A.02, Subdivision 1(a)(2) (West 2011) (pronouncing the public policy of “freedom from discrimination” in “housing . . . because of . . . marital status”). Marital status was added to the Minnesota Human Rights Act in 1973. See *Cooper*, 460 N.W.2d at 5.

²⁹ *Cooper*, 460 N.W.2d at 6.

³⁰ *Id.*

³¹ See, e.g., *Hoy v. Mercado*, 698 N.Y.S.2d 384, 385 (N.Y. App. Div. 1999); *N.D. Fair Hous. Council, Inc. v. Peterson*, 625 N.W.2d 551, 563 (N.D. 2001).

³² See, e.g., *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 278 (Alaska 1994) (“Because Swanner would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, Swanner unlawfully discriminated on the basis of marital status.”); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 914-15 (Cal. 1996) (holding the Fair Employment and Housing Act’s ban on marital status discrimination includes cohabiting unmarried couples); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 235 (Mass. 1994) (holding prohibition against marital status discrimination in leasing protects unmarried couples seeking to cohabit).

³³ 42 U.S.C. § 3602(k) (2012).

the person is living in a nonmarital, as opposed to a marital, relationship. But the Federal Fair Housing Act statutorily defines “familial status” quite narrowly.³⁴ The term is generally understood to prohibit only discrimination against families with at least one minor child.³⁵ Indeed, the House Report specifically stated that the Committee did not “intend [familial status] to include marital status.”³⁶

Thus, very few jurisdictions prohibit discrimination against people because they are living in nonmarital relationships. These individuals—those living in nonmarital, cohabiting relationships, or who have children outside of marriage—are the very people I am most concerned about.

Why is it important to prohibit discrimination on the basis of nonmarital family form? As noted above, the existing provisions prohibiting marital status were enacted in the 1970s and 1980s. These first wave provisions grew out of the women’s rights movement.³⁷ A significant concern at the time was

³⁴ *Id.* (“‘Familial status’ means one or more individuals (who have not attained the age of 18 years) being domiciled with—(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.”).

³⁵ Tim Iglesias, *Moving Beyond Two-Person-Per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards*, 28 GA. ST. U. L. REV. 619, 628 (2012) (“The term ‘familial status’ is not used as in common parlance but is defined as a household which includes at least one minor child.”); *see also id.* at 628 n.29 (“‘Familial status’ refers to a household including a child under the age of eighteen and his or her legal guardian, regardless of age or number of children. Familial status also includes pregnant women, families that are planning to adopt, and families that have or are planning to have foster children (or to become guardians of children).”). *But see* Hann v. Hous. Auth. of Easton, 709 F. Supp. 605, 610 (E.D. Pa. 1989) (“I hold today that the practice of categorically excluding unmarried couples from eligibility for low-income housing programs violates USHA. The defendants cannot arbitrarily exclude all applicants who are not related by blood, marriage or adoption from low-income housing. They are required to make individual determinations concerning whether applicants constitute a family unit.”).

³⁶ H.R. REP. NO. 100-711, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184 (“Familial status. The Committee intends to cover by this definition a parent or other person having legal custody, or that individual’s designee, domiciled with a child or children under age 18. The Committee does not intend this definition to include marital status.”).

³⁷ *See, e.g.*, Colloquium, Suzanne Kahn, *Valuing Women’s Work in the 1970s Home and the Boundaries of the Gendered Imagination*, HARV. J.L. & GENDER (2013), available at http://harvardjlg.com/wp-content/uploads/2013/02/KahnComment.Final_2.15.13.pdf, archived at <http://perma.cc/J7KZ-BWLX> (“Because women’s access to such social welfare benefits was so often connected to their marital status, rapidly rising divorce rates—between 1967 and 1979, the divorce rate doubled—posed a serious challenge to their welfare policies. . . . Over the course of the 1970s, women called for a retirement pension system that insured women as individuals, regardless of marital status.”).

discrimination that impeded the financial independence of women, including single women. Thus, in 1974, Congress passed the Equal Credit Opportunity Act.³⁸ The original version of the Act prohibited discrimination on the bases of sex and marital status.³⁹ The Act was passed in the wake of congressional hearings revealing that it was difficult for single women—including never married, divorced, or widowed women—to obtain credit.⁴⁰

While unmarried women (as well as married women) continue to face discrimination because of their status of being married or single, an increasing concern today is a form of discrimination that is largely unregulated by the first wave statutes—discrimination because one is living in a nonmarital, cohabiting relationship or because one is a nonmarital parent. While there were people living in cohabiting relationships during the 1970s and 1980s, there were many fewer such individuals than there are now.⁴¹ In 1960, there were only about 450,000 nonmarital couples.⁴² By 2010, there were approximately 7.5 million unmarried couples in the United States.⁴³ Because there are so many more people in nonmarital cohabiting relationships, to the extent there is

³⁸ See Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974). Two years later, Congress added the bases of race, color, religion, national origin, and age. See Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251, 251.

³⁹ See Equal Credit Opportunity Act, Pub. L. No. 93-495, § 701(a), 88 Stat. 1521, 1521 (1974) (“It shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.”).

⁴⁰ Maureen R. St. Cyr, *Gender, Maternity Leave, and Home Financing: A Critical Analysis of Mortgage Lending Discrimination Against Pregnant Women*, 15 U. PA. J.L. & SOC. CHANGE 109, 109 (2011). See also *Magula v. Benton Franklin Title Co., Inc.*, 930 P.2d 307, 315 (Wash. 1997) (Sanders, J., dissenting) (quoting Letter from Jocelyn Marchisio, President, League of Women Voters of Wash., to Rep. Lorraine Wojann, Chairman, Comm. on Commerce (Feb. 13, 1973)) (“[T]he main purpose for adding ‘marital status’ to our antidiscrimination laws was to remedy situations, especially in credit and insurance transactions, where ‘women, particularly those *separated, divorced or widowed*, have received much discrimination,’ and to ‘provide women, regardless of marital status, rights and responsibilities equal to those held by men.’”).

The hearings also documented discrimination experienced by married women. In particular, lenders often ignored or discounted the earned income of married women based on the stereotype that women were likely to disengage from the workplace after they got married. Cyr, *supra*, at 114 (“[I]t was common practice to discount a woman’s income, in part or whole, when evaluating her qualifications for a mortgage loan as a single woman or as a wife.” (footnote omitted)).

⁴¹ See Jay, *supra* note 4 (tracking the upward trend in nonmarital cohabitation). The fact that there were relatively few cohabiting couples in the 1970s was due in part to the fact that cohabitation was still criminalized in many states at that time. See, e.g., CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* 15 (2010) (“[M]any states still had statutes against both fornication and cohabitation as late as 1978.”).

⁴² See *id.*

⁴³ *Id.*

discrimination on this basis, it affects a much larger group of people today than was true fifty years ago.

There is also a large and growing marriage gap on the bases of race, class, and education level. As Linda McClain explains, a class-based marriage divide did not exist even several decades ago; up until about the 1980s, “the patterns of family and community life among the wealthy differed little from that of the middle and working class”⁴⁴ Most adults married, and there was little variation in marriage rates based on education level. In 1960, “76% of college graduates and 72% of adults who did not attend college were married. . . .”⁴⁵ This is no longer the case. “By 2008, [what had been a] small gap had widened to a chasm: 64% of college graduates were married, compared with just 48% of those with a high school diploma or less.”⁴⁶

And while there were some differences in the marriage rates based on race, these differences were less pronounced than they are today. Through the 1980s, black women were “more often married” than white women.⁴⁷ But, starting in 1980, “both black men and women beg[a]n a sharp increase in the proportion never married by age 35 and age 45.”⁴⁸ The gulf has continued to grow since that time.⁴⁹

Thus, because people of color and lower-income people are now disproportionately represented among those living in nonmarital relationships, these groups may be disproportionately likely to face discrimination based on that family form. There is also reason to think that marital status discrimination might serve as a pretext for discrimination on those bases. As discussed below, these forms of discrimination have been intimately linked in the past.⁵⁰ Even

⁴⁴ Linda McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921, 960 (2013).

⁴⁵ PEW RESEARCH CENTER, *THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES* 23 (2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>, archived at <http://perma.cc/WEA9-XGQ3> [hereinafter *THE DECLINE OF MARRIAGE*].

⁴⁶ *Id.*

⁴⁷ DIANA B. ELLIOTT, KRISTY KRIVICKAS, MATTHEW W. BRAULT, & ROSE M. KREIDER, *HISTORICAL MARRIAGE TRENDS FROM 1890-2010: A FOCUS ON RACE DIFFERENCE* 1 (2012), available at <http://www.census.gov/hhes/socdemo/marriage/data/acs/ElliottetalPAA2012paper.pdf>, archived at <http://perma.cc/3V5Z-YLV7>.

⁴⁸ *Id.* at 15.

⁴⁹ See, e.g., *THE DECLINE OF MARRIAGE*, *supra* note 45, at 23 (“Blacks (32%) are much less likely than whites (56%) to be married, and this gap has increased significantly over time.”).

⁵⁰ See, e.g., ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 70 (2009) (stating that during the Jim Crow era illegitimacy laws functioned as “a type of code for punishing blacks”). See also Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, 104 CALIF. L. REV. (forthcoming 2015) (manuscript on file with author).

today, there continue to be strongly racialized negative stereotypes associated with nonmarital family structure.⁵¹ In recent years, family law scholars have become increasingly concerned about this growing marriage gap.⁵² But there has been little consideration of this issue in the context of discrimination law. This Essay seeks to bridge this gap.⁵³

II. SUITABLE FOR REGULATION?

States have been prohibiting at least some types of marital status discrimination for decades now.⁵⁴ It is nonetheless important to take a step back and consider whether this is a type of discrimination that should be regulated by civil rights laws.⁵⁵ Some may say the answer to that question is “no.” Unlike race, marital status is not an “immutable” characteristic. And, some may claim there is no similar long-standing history of discrimination. This Essay, however, takes the position that marital status is an appropriate category for inclusion in civil rights statutes.

First, states and the federal government prohibit discrimination on the basis of other non-immutable traits. For example, in many contexts, discrimination on the basis of alienage is prohibited⁵⁶ even though one’s citizenship status can be altered. And, recently, a number of states have passed statutes prohibiting discrimination on the basis of other non-immutable characteristics, including

(“Indeed, in the post-*Brown* period many efforts to punish non-marital childbirth were thinly veiled attacks on racial desegregation.”).

⁵¹ See, e.g., Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 414 (2012) (“For many, the paradigmatic image of single mothers is the young, African American woman receiving public assistance.”).

⁵² See NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010); JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 83 (2014); Huntington, *supra* note 6, at 169-70 (2015) (“Marriage, particularly long-term marriage that does not end in divorce, is thus increasingly becoming an institution concentrated among the most privileged families.”).

⁵³ Elsewhere, I consider how family laws and policies harm children born to and raised by nonmarital families. See generally, e.g., Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495 (2014) [hereinafter Joslin, *Leaving No (Nonmarital) Child Behind*]; Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) [hereinafter Joslin, *Protecting Children(?)*].

⁵⁴ See Porter, *supra* note 2, at 15-16 (listing states with statutory marital status discrimination protection).

⁵⁵ I thank Jeannine Bell for pressing me to address this issue.

⁵⁶ For example, § 1981 prohibits at least some forms of discrimination on the basis of alienage. See Rachel Bloomekatz, Note, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963, 1997 (2007).

employment status and credit status.⁵⁷ Thus, at least in the statutory context,⁵⁸ immutability is not a necessary requirement.⁵⁹

Second, decisions about adult intimate relationships and whether and how to form a family are decisions of constitutional import.⁶⁰ In *Lawrence v. Texas*,⁶¹ the Supreme Court held that adult, consensual intimate behavior is a liberty interest entitled to protection under the Constitution.⁶² Of course, the exact nature of that liberty interest, and the level of constitutional scrutiny that must be applied to infringements of that interest, remains open to debate.⁶³ Most recent federal decisions addressing the question, however, conclude that the liberty interest is an important one, and one that is entitled to meaningful constitutional protection.⁶⁴ It seems odd indeed to conclude that it is perfectly permissible for an employer or a landlord to penalize people in very significant ways (resulting, possibly, in the loss of one's job or one's home) for engaging in behavior that is constitutionally protected.

Third, discrimination on the basis of marital status certainly does not have a history that is comparable to our history of race discrimination. That said, there is a history, and indeed a long one, of discrimination against nonmarital families.⁶⁵ As Solangel Maldonado explains, “[n]o one would dispute that for most of U.S. history, ‘illegitimate’ children suffered significant legal and

⁵⁷ See, e.g., Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1439-52 (2014) (discussing statutes).

⁵⁸ But see Sharon Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1488 (2011) (“[I]mmutability more accurately describes the characteristics protected by the employment discrimination statutes.”).

⁵⁹ For considerations of whether immutability is required in the constitutional equal protection context, see, for example, Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 627 (2014) (“Insofar as immutability remains a factor in the Court’s view of equal protection, it seems to be neither a necessary nor a sufficient condition for a classification being deemed suspect.”).

⁶⁰ I thank Noah Zatz for flagging this point.

⁶¹ 539 U.S. 558 (2003).

⁶² *Id.* at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

⁶³ Compare Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1955 (2004) (arguing that the right identified in *Lawrence* is a fundamental right), with Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) (“We conclude that it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.”).

⁶⁴ See, e.g., Witt v. Dep’t of the Air Force, 527 F.3d 806, 817-19 (9th Cir. 2008) (holding that the Supreme Court in *Lawrence* applied intermediate scrutiny).

⁶⁵ See Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 367-68 (2011) (discussing history of discrimination against “illegitimate” children).

societal discrimination.”⁶⁶ It is also a history that is not as distinct from our history of race discrimination as some may think. Anders Walker, for example, documents how many modern-era statutes and policies targeting illegitimate children and their families were motivated by racism.⁶⁷ While we often think of discrimination on the basis of illegitimacy as a separate, distinct category, it is actually “deeply intertwined” with discrimination based on race, as well as sex.⁶⁸

Some may discount this history of discrimination, arguing that this discrimination primarily affected children, not adults. But while children certainly felt the effects of laws punishing illegitimacy, the effects were not limited to them; these laws also deeply and directly impacted the adults in those families.⁶⁹ Parents of nonmarital children, particularly mothers, were regularly denied critically important protections,⁷⁰ and they were also subjected to strong social stigma due to their family form.⁷¹ Indeed, for most of our history this stigma was communicated through laws declaring nonmarital cohabitation to be criminal.⁷²

Bias against nonmarital families has not disappeared. As discussed in more detail below, contemporary survey data suggests that there remains widespread disapproval of nonmarital families, particularly nonmarital families with children.⁷³ A key premise of anti-discrimination law is the notion that people should be judged based on their own, individual qualifications, rather than on the basis of widely-held negative stereotypes or biases.⁷⁴

⁶⁶ *Id.* at 346 (footnote omitted).

⁶⁷ WALKER, *supra* note 50, at 70 (explaining that during the Jim Crow era illegitimacy laws functioned as “a type of code for punishing blacks”). *See also* Mayeri, *supra* note 50.

⁶⁸ Mayeri, *supra* note 50 (“Further, ‘illegitimacy’ jurisprudence conveyed the impression that sex, race, and illegitimacy were separate, non-overlapping categories—suitable for purposes of (often unfavorable) comparison but not for illuminating their mutually reinforcing and deeply intertwined character.”).

⁶⁹ *See id.* (“The Court’s focus [in the illegitimacy cases] on the blamelessness of children obscured illegitimacy penalties’ impact on adults and these laws’ intimate relationship to racial, sexual, and socioeconomic inequality.”).

⁷⁰ *See, e.g.*, Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 73-74 (1968) (striking down statute that prohibited the mother of an illegitimate child from suing for the child’s wrongful death).

⁷¹ *See* Maldonado, *supra* note 65, at 371 (“Although few people would want to stigmatize nonmarital children, society seems to have no objection to stigmatizing their parents.”).

⁷² BOWMAN, *supra* note 41, at 12 (“The purpose of the statutes [criminalizing unmarried sex] was clear: to enforce conformity with the moral standards of the community.”).

⁷³ *See infra* Part III.C.

⁷⁴ *See, e.g.*, Koppelman, *supra* note 13 (“Antidiscrimination law is also concerned with insult, dignitary harm, and social equality.”).

Fourth, another objection some may offer against prohibiting marital status discrimination relates to the potential invisibility of the status.⁷⁵ The idea here is that—even if it is the case that many people hold biases against people in nonmarital cohabiting families—it would be unusual for an employer or other decision maker to learn of that status. Therefore, there is no need (or at least less of a need) to prohibit consideration of that characteristic.⁷⁶ In many cases it is surely easier to hide one’s marital status than it would be to hide one’s race. That said, marital status is frequently revealed in the context of job interviews or housing applications. In the context of rental housing, individuals are often required to disclose that they are in a nonmarital, cohabiting relationship. Housing applications typically require a person to disclose all “additional occupants” and their relationships to the housing applicant.⁷⁷ In the context of a job interview, it is less common today for a job application to directly ask a person’s marital status, but that information may be revealed in other ways. One very common way the information might be disclosed (accurately or not) is through the presence or absence of a wedding ring on the person’s hand.⁷⁸

To be sure, prohibiting marital status discrimination raises some challenging questions. One challenging question relates to how to resolve conflicts that may arise between the goal of prohibiting discrimination on the basis of marital status and protecting religious liberty. This issue is touched upon, but not resolved, in the concluding section of this Essay.

Another challenging issue that the inclusion of marital status as a category raises relates to the provision of benefits.⁷⁹ If discrimination based on marital status is prohibited, would it be impermissible to provide benefits only to the spouses of employees but not to the nonmarital partners of employees? This is a question worthy of an entire paper, and is also not resolved here. I will note, however, that the fact that the inclusion of a category raises challenging questions is not a reason in and of itself to exclude the category from

⁷⁵ I thank Chai Feldblum for raising this issue.

⁷⁶ Koppelman, *supra* note 13 (“Because antidiscrimination law’s economic purposes are a response to pervasive discrimination, it is not frustrated by discrimination that is unusual.”).

⁷⁷ See, e.g., *Rental Application*, ATLANTIC RENTAL MANAGEMENT, <http://www.atlanticrm.com/wp-content/uploads/2015/03/ARM-Rental-Application.pdf>, archived at <http://perma.cc/W45P-FKWX> (last visited Mar. 18, 2015).

⁷⁸ See, e.g., Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 TEX. J. WOMEN & L. 37, 51 n.83 (1995) (“In interviews conducted at Wharton, female MBA students admitted that it was a common practice for married women to remove wedding bands before going to job interviews. Armed with impressive resumes, excellent credentials, they nevertheless recognize the ‘realities’ of the competitive marketplace and remove their rings to get the jobs.”).

⁷⁹ Cf., e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) (“[There are] over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.”).

protection, much less consideration. Adding the category of sexual orientation to nondiscrimination statutes raised a similar question. When same-sex couples were completely excluded from marriage,⁸⁰ states and policy makers had to consider whether adding sexual orientation to nondiscrimination statutes would require employers to provide spousal employment benefits equally to same-sex partners.⁸¹ The fact that the inclusion of sexual orientation raised challenging drafting and policy questions did not cause people to abandon the project. The same should be true here.

⁸⁰ Remarkably, this was the case just over one decade ago. In 2004, Massachusetts became the first state to permit same-sex couples to marry. Pam Belluck & Warren St. John, *With Festive Mood, Gay Weddings Begin in Massachusetts*, N.Y. TIMES (May 17, 2004), <http://www.nytimes.com/2004/05/17/national/17CND-GAYS.html>, archived at <http://perma.cc/P2KT-6FEF>.

⁸¹ For example, the most recently introduced version of the Employment Nondiscrimination Act (“ENDA”) in the Senate bars disparate impact claims. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(g) (2013) (“Only disparate treatment claims may be brought under this Act.”). This exclusion would make it difficult to challenge unequal access to spousal employment benefits. *See, e.g.*, Jennifer C. Pizer, Brad Sears, Christy Mallory, & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 760 (2012) (“ENDA in its current form does not go far enough because it would not require equal access to employee benefits.”).

By including this example, however, I do not mean to suggest that excluding benefits claims is the correct approach. Indeed, the experience of many of this nation’s largest corporate employers with the provision of health benefits to the families of their LGBT employees demonstrates that it is possible to have equal benefits policies. *See, e.g.*, HUMAN RIGHTS CAMPAIGN FOUNDATION, CORPORATE EQUALITY INDEX 2015: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 9 (finding that 66% of Fortune 500 companies provide domestic partner health insurance benefits), available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/CEI-2015-rev.pdf#_utm=149406063.1197317464.1397861624.1420588657.1420760485.14&__utmb=149406063.1.10.1420760485&__utmc=149406063&__utmx=-&__utmz=149406063.1420760485.14.14.utmcsrc=google|utmccn=\(organic\)|utmcmd=organic|utmctr=\(not%20provided\)&__utmv=-&__utm=191872682](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/CEI-2015-rev.pdf#_utm=149406063.1197317464.1397861624.1420588657.1420760485.14&__utmb=149406063.1.10.1420760485&__utmc=149406063&__utmx=-&__utmz=149406063.1420760485.14.14.utmcsrc=google|utmccn=(organic)|utmcmd=organic|utmctr=(not%20provided)&__utmv=-&__utm=191872682), archived at <http://perma.cc/Z3DR-44JQ>. For a more comprehensive discussion about whether and how to provide equal benefits to all families, see NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

III. WHY NOW?

Discrimination on the basis of marital status was a (relatively) hot topic several decades ago. In the 1970s, a number of states passed statutes prohibiting discrimination on the basis of marital status, and indeed even the federal government prohibited discrimination on the basis of marital status in some contexts.⁸² A few additional states followed along in the 1980s.⁸³ But few if any states have added protections against marital status discrimination since the 1980s.

The drop-off in interest is not limited to the legislative arena. The past two decades have seen little scholarly focus on the matter. Notwithstanding the lack of attention to the matter, there are a number of reasons why it is important to revitalize those earlier efforts.

A. *Political Developments*

Some may think it is a particularly odd moment to push for marital status nondiscrimination given the recent success of the marriage equality movement.⁸⁴ Certainly, part of what motivated earlier advocacy on behalf of nonmarital families was concern about same-sex couples.⁸⁵ LGBT people were

⁸² See, e.g., 1975 Alaska Sess. Laws ch. 104, § 9 (codified as amended at ALASKA STAT. § 18.80.220 (2014)) (banning marital status discrimination in employment); 1976 Cal. Stat. 5460 (codified as amended at CAL. GOV'T CODE § 12940 (West 2014)) (banning marital status discrimination in employment); 1975 Conn. Acts 498 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 46a-60 (2014)) (banning marital status discrimination in employment); 1977 Fla. Laws 1461 (codified as amended at FLA. STAT. § 760.10 (2014)) (banning marital status discrimination in employment); Equal Credit Opportunity Act, Pub. L. No. 93-495, § 503, 88 Stat. 1521 (1974) (prohibiting discrimination on the bases of sex and marital status).

⁸³ See, e.g., 64 Del. Laws 723 (1984) (codified as amended at DEL. CODE ANN. tit. 19, § 711 (2014)) (prohibiting marital status discrimination in employment); 1988 Haw. Sess. Laws 387 (codified as amended at HAW. REV. STAT. § 368-1 (2014)) (prohibiting marital status discrimination in employment); 1980 Ill. Laws 4854 (codified as amended at 775 ILL. COMP. STAT. 5/1-102 (2014)) (prohibiting marital status discrimination in employment).

⁸⁴ Three years ago, in 2012, only nine states and the District of Columbia permitted same-sex couples to marry. Robert Barnes, *Supreme Court Agrees to Hear Gay Marriage Issue*, WASH. POST (Jan. 16, 2015), http://www.washingtonpost.com/politics/courts_law/supreme-court-agrees-to-hear-gay-marriage-issue/2015/01/16/865149ec-9d96-11e4-a7ee-526210d665b4_story.html, archived at <http://perma.cc/H6HF-7BQY>. By January 2015, the number of states permitting same-sex couples to marry had increased to 36. *Id.*

⁸⁵ See, e.g., Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291 (2013) (examining the evolution of domestic partnership advocacy); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CALIF. L. REV. 87, 112-54 (2014) (providing a detailed account of advocacy on behalf of same-sex and other unmarried couples in California); Nancy D. Polikoff, *What Marriage*

especially vulnerable to discrimination on the basis of being in a nonmarital relationship given that, until recent years, they were completely excluded from the right to marry.⁸⁶

But as of February 2015, more than 71% of the U.S. population now lives in a state that permits same-sex couples to marry,⁸⁷ and it is looking like this will become a nationwide right in the near future.⁸⁸ In light of these developments, why push now for protection against discrimination because one is not married?

Ironically, part of what fuels my concern about marital status discrimination is the very success of the marriage equality movement. I, like others, worry that some of the LGBT activists and advocates who once worked for family equality may drop out of this struggle now that marriage equality is in sight. Nancy Polikoff, for example, has been one of the loudest voices sounding this alarm.⁸⁹ Polikoff argues that while the national LGBT organizations strongly

Equality Arguments Portend for Domestic Partner Employee Benefits, 37 N.Y.U. REV. L. & SOC. CHANGE 49, 50 (2013) (“[B]reaking down rigid distinctions based on marital status had been a longstanding part of the lesbian and gay rights agenda.”).

Notably, the first version of a federal bill to prohibit employment discrimination against lesbian and gay people also included “marital status.” H.R. 14752, 93d Cong. § 2(a) (1974) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of . . . marital status . . .”). See also William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 495 (2011) (“Amending the Civil Rights Act of 1964 . . . to include some form of antidiscrimination protection for LGBT individuals is not a novel idea. Efforts to amend the Civil Rights Act began over three and a half decades ago when Congresswoman Bella S. Abzug introduced the Equality Act of 1974, an omnibus civil rights bill that proposed to add sex, marital status, and sexual orientation as protected classes under the Civil Rights Act.”).

⁸⁶ In May 2004, Massachusetts became the first state in the U.S. to permit same-sex couples to marry. See HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS (2014), available at <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-equality.pdf>, archived at <http://perma.cc/KC7Q-RERQ>. No other U.S. state permitted same-sex couples to marry until 2008. *Id.*

⁸⁷ *Percent of Population Living in States with Marriage Equality*, HUMAN RIGHTS CAMPAIGN (Feb. 10, 2015), <http://www.hrc.org/resources/entry/percent-of-population-living-in-states-with-marriage-equality>, archived at <http://perma.cc/N7LW-7REY>.

⁸⁸ See, e.g., Horwitz, *supra* note 12, at 160 (“The cause of marriage equality . . . seems to be a fait accompli awaiting final confirmation from the Court.”). But see *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (upholding the marriage bans in Kentucky, Michigan, Ohio, and Tennessee), *cert. granted*, 83 U.S.L.W. 3315 (2015).

⁸⁹ See Polikoff, *supra* note 85, at 50 (“Over a decade later—now that lesbians and gay men have won the right to marry in nine states and the District of Columbia . . . Lambda Legal and other national gay rights legal and political organizations no longer affirmatively

opposed distinctions based on marital status in the past (when same-sex couples were entirely excluded from state recognition), their advocacy on this issue in more recent years has become decidedly less strong.⁹⁰ While I do not necessarily wholly embrace Polikoff's description of the shift in the organizations' priorities or positions,⁹¹ I nonetheless wholeheartedly share her concern about leaving unmarried couples—both same-sex and different-sex—behind once marriage equality is achieved. While I support the right of all couples to marry, I also support a legal system that does not punish people for choosing not to marry.⁹²

B. *Increasing Number of Unmarried Couples*

Marital status discrimination does not only pose a threat to same-sex couples. Indeed, same-sex couples make up a small percentage of the large and rapidly growing population of nonmarital cohabiting couples in the United States.⁹³ According to a March 2012 census survey, “15.3 million unmarried heterosexual individuals were in live-in relationships.”⁹⁴ These nonmarital couples constitute “6.5% of all U.S. adults 18 and over.”⁹⁵ Among younger adults, the proportion is even larger; adults between the ages of 25 and 34 account for 35% of all heterosexual non-marital cohabiting couples.⁹⁶ Many of these 15.3 million American adults living in nonmarital relationships are parents; in fact, over 40% of all cohabiting couples families have children

endorse the position that they asserted in *Irizarry* [that workers' access to benefits should not turn on their marital status].”). See also Murray, *supra* note 85, at 296 (asking how “we [went] from seeking to recognize a wider range of relationships to marriage equality and the accompanying desire to herd more and more couples into marriage?”).

⁹⁰ Polikoff, *supra* note 85, at 50.

⁹¹ For another perspective on this history, see NeJaime, *supra* note 85, at 112 (“Consequently, viewing earlier LGBT advocacy primarily through the lens of marriage resistance tends to situate more recent marriage advocacy as a new phenomenon that defied, rather than sprung from, earlier work. In reality, today's marriage claims in many ways grew out of, rather than contradicted, the earliest claims to nonmarital recognition.”).

⁹² See, e.g., Joslin, *Leaving No (Nonmarital) Child Behind*, *supra* note 53 (describing how nonmarital couples and their children have been adversely affected by parentage laws that require a marital relationship); Joslin, *Protecting Children(?)*, *supra* note 53 (demonstrating “how marriage-only ART rules harm the financial stability and security of nonmarital children”).

⁹³ For example, when one focuses on adults ages 30-44, in 2009 only “400,000 adults . . . [were] partners in same-sex unmarried couples . . . compared with 4.2 million who live[d] with a partner of the opposite sex.” PEW RESEARCH CENTER, *LIVING TOGETHER: THE ECONOMICS OF COHABITATION* 4 (2011).

⁹⁴ Sharon Jayson, *Living Together Not Just for the Young*, *New Data Show*, USA TODAY (Oct. 17, 2012), <http://www.usatoday.com/story/news/nation/2012/10/17/older-couples-cohabitation/1630681/>, archived at <http://perma.cc/Q65M-64C8>.

⁹⁵ *Id.*

⁹⁶ *Id.*

living with them.⁹⁷ Additionally, the millions of individuals living in nonmarital cohabiting relationships today are disproportionately likely to be people of color,⁹⁸ lower-income people,⁹⁹ and people with lower education levels.¹⁰⁰

There is also reason to be concerned that discrimination on the basis of nonmarital family form may be used—consciously or unconsciously—as a pretext for race discrimination. Recent cases involving same-sex couples illustrate how employers or businesses sometimes seek to characterize what would otherwise be prohibited discrimination—in those cases prohibited sexual orientation discrimination—as permissible marital status discrimination. A 2008 case out of California is a useful example.¹⁰¹ In the case, a group of doctors refused to provide fertility services to Guadalupe Benitez, an unmarried lesbian woman.¹⁰² At the time, California’s public accommodations statute clearly prohibited discrimination on the basis of sexual orientation, but did not clearly prohibit discrimination on the basis of marital status.¹⁰³ As part of their defense, the doctors argued that their refusal to provide services was based on the woman’s marital status, not her sexual orientation.¹⁰⁴ In jurisdictions where discrimination because one is in a nonmarital, cohabiting relationship is not prohibited,¹⁰⁵ defendants could utilize a similar strategy. One could imagine, for example, cases in which an employer or a business argues that it was not the race of the person that was the basis for the refusal to hire or the refusal to serve, it was instead the fact that the person was in a nonmarital, cohabiting relationship.¹⁰⁶

⁹⁷ *Id.* See also BOWMAN, *supra* note 41, at 8.

⁹⁸ THE DECLINE OF MARRIAGE, *supra* note 45, at 23.

⁹⁹ See, e.g., CAHN & CARBONE, *supra* note 52, at 6 (“The third group is the poor or the marginalized . . . [This group] includes most of the 15 percent of Americans below the poverty line. In terms of family characteristics, it is a group for whom marriage is rapidly disappearing.”).

¹⁰⁰ Jayson, *supra* note 94 (“21% [of heterosexual adults in nonmarital cohabiting relationships] have a bachelor’s degree or higher, 31% have some college, 35% have a high school diploma, and 13% did not graduate from high school.”).

¹⁰¹ North Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct., 189 P.3d 959 (Cal. 2008).

¹⁰² *Id.* at 962-65.

¹⁰³ As described in the Court’s opinion, although California’s public accommodations nondiscrimination statute did not—at the relevant time—include “sexual orientation,” court decisions “in a variety of contexts, described the Act as prohibiting sexual orientation discrimination.” *Id.* at 965.

¹⁰⁴ *Id.* at 970.

¹⁰⁵ As explained in Part I, the vast majority of states do not prohibit discrimination because one is in a cohabiting, nonmarital relationship.

¹⁰⁶ Prior to adding the category of “family status” to the federal Fair Housing Amendments Act, Congress found that “discrimination against [families with] children often camouflages racism or has an undesirable impact on minorities.” *Soules v. U.S. Dep’t*

In addition to those cases involving intentional discrimination, there likely are also situations where employers unconsciously rely on negative stereotypes associated with nonmarital families.¹⁰⁷ Many of these negative stereotypes are racialized.¹⁰⁸ As Melissa Murray describes, “[f]or many, the paradigmatic image of single mothers is the young, African American woman receiving public assistance.”¹⁰⁹ These unmarried mothers “are stereotyped as ‘sexually irresponsible,’ ‘lazy and unmotivated,’ and low-income unmarried fathers are seen as ‘uncaring and irresponsible.’”¹¹⁰ The fact that the negative stereotypes are often racialized is not surprising, given that discrimination on the basis of nonmarital family form has a history that is closely “intertwined” with race discrimination.¹¹¹

C. *Extent of Discrimination on the Basis of Family Form*

Thus, if marital status discrimination is occurring, there are reasons that those who care about race and class inequality should be concerned. But is this discrimination occurring? Although there has been little empirical focus on this question, there are a number of reasons to suspect that marital status and nonmarital family form are being taken into account by employers and businesses.

First, while there has been very little empirical research specifically examining the extent and effect of contemporary marital status discrimination in the workplace,¹¹² the little research that exists gives at least some basis for

of Hous. & Urban Dev., 967 F.2d 817, 821 (2d Cir. 1992) (citing H.R. REP. NO. 100-711, at 19-21 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2180-2182.). See also Tim Iglesias, *Clarifying the Federal Fair Housing Act's Exemption for Reasonable Occupancy Restrictions*, 31 FORDHAM URB. L.J. 1211, 1222 (2004) (stating that the FHAA “also sought to address the use of familial discrimination as a subtle form of racial discrimination” (footnote omitted)).

¹⁰⁷ See Maldonado, *supra* note 65, at 371 (discussing some of the stereotypes associated with unmarried mothers).

¹⁰⁸ See, e.g., Murray, *supra* note 51, at 414.

¹⁰⁹ *Id.*

¹¹⁰ Maldonado, *supra* note 65, at 371.

¹¹¹ Mayeri, *supra* note 50 (arguing that race, gender, and illegitimacy discrimination have a “mutually reinforcing and deeply intertwined character”). See also WALKER, *supra* note 50, at 70.

¹¹² See, e.g., Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCHOL. 474, 475 (2012) (“Very limited prior research has investigated whether people show marital-status biases in perceptions related to employment decisions.”); Joel T. Nadler & Katie M. Kufahl, *Marital Status, Gender, and Sexual Orientation: Implications for Employment Hiring Decisions*, 1 PSYCHOL. OF SEXUAL ORIENTATION & GENDER DIVERSITY 270, 270 (2014) (“Since 1990, there have been no studies in the top seven industrial/organizational psychology journals or top seven social psychology journals that focus specifically on the interaction of marital status discrimination and gender in employment settings.”).

concern. A few recent studies examine the extent to which the status of being married or unmarried is taken into account. At least for highly educated employees, “[w]ith regard to the workplace, labor economists have observed for some time that married men are paid more than unmarried men.”¹¹³ While the cause of this wage gap remains a subject of debate, at least some of the gap might be the result of marital status discrimination. It may be that being married is often perceived as a positive attribute: “when a man is married, he is considered to be socially supported and is seen as having less family or role conflict with work roles.”¹¹⁴ By contrast, for women, it may be the case that “she is considered to have more social responsibilities, contributing to greater work or family role conflict” if she is married.¹¹⁵ Thus, the data that exists suggest that for highly educated employees, the status of being married or unmarried may play a role in employment decisions, although it appears that it may cut in different directions depending on the sex of the employee.

In terms of discrimination against people because they are in nonmarital cohabiting relationships, or because they are nonmarital parents, there is less available empirical data but there is still reason to believe that these statuses are often viewed negatively.¹¹⁶ To be clear, overt government discrimination against nonmarital couples and their children surely has decreased over time.¹¹⁷ Indeed, it is certainly the case that many of the government policies that explicitly discriminated against nonmarital couples have been eliminated. For example, in the past, local public housing authorities often had explicit policies prohibiting nonmarital cohabitation.¹¹⁸ Today, it is less likely (although still not unheard of¹¹⁹) to find government policies that explicitly discriminate in that way.

Despite these positive signs, however, bias against these families has not disappeared. In fact, levels of moral disapproval regarding nonmarital families are similar to levels of moral disapproval regarding lesbian and gay families. A

¹¹³ Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 668 (2010).

¹¹⁴ Nadler & Kufahl, *supra* note 112, at 271.

¹¹⁵ *Id.*

¹¹⁶ *See supra* notes 109-113 and accompanying text.

¹¹⁷ *Cf.* Maldonado, *supra* note 65, at 347 (“Undoubtedly, discrimination against nonmarital children has decreased significantly since 1968 . . .”). *But see* Murray, *supra* note 51, at 389 (“Though Levy and Glona struck down legal distinctions between marital and non-marital children, . . . these cases did not render a seachange in our understanding of illegitimacy.”).

¹¹⁸ *See, e.g.*, *Atkisson v. Kern Cnty. Hous. Auth.*, 59 Cal. App. 3d 89, 93 (1976) (invalidating local housing authority policy that forbade “any and all low income public housing tenants from living with anyone of the opposite sex to whom the tenant is not related by blood, marriage, or adoption”).

¹¹⁹ *See, e.g.*, *Freeman v. Sullivan*, 954 F. Supp. 2d 730 (W.D. Tenn. 2013) (upholding local housing authority’s decision to deny a housing voucher to an unmarried couple without children because they were not married).

2013 Gallup Poll found that the percentage of Americans who think that sex between an unmarried man and woman is morally wrong (33%)¹²⁰ and the percentage that think that “[h]aving a baby outside of marriage” is morally wrong (36%) are similar to the percentage of Americans who think that “gay or lesbian relations” are morally wrong (38%).¹²¹

Other studies report similar findings. According to another recent Pew study, nearly half of American adults believe that nonmarital cohabitation is bad for society, and nearly three quarters of American adults believe that single parenting is bad for society.¹²² And, notably, more people reported that it was bad for society for an unmarried couple to raise children than reported it was bad for society for a gay or lesbian couple to raise children.¹²³

Moreover, there is reason to fear that there may be an uptick in cases where businesses refuse to hire or serve people because their family status is considered “sinful” or “immoral.” Discrimination on the basis of one’s family status or form is very much a hot issue today in the courts, state legislatures, and in the public discourse.¹²⁴ Although the public conversation largely focuses around same-sex marriage, the reality is that discrimination based on family form is not limited to that context. The ACLU states that they are seeing these religiously based refusals to provide services “[w]ith increasing frequency.”¹²⁵ And many of the statutes that have been considered and, in

¹²⁰ A recent Pew Research Center survey reported similar numbers. PEW RESEARCH CENTER, MORALITY INTERACTIVE TOPLINE RESULTS: SPRING 2013 AND WINTER 2013-2014 SURVEYS 9 (2014) (providing a table identifying that 30% of Americans find sex between unmarried adults to be morally unacceptable).

¹²¹ Frank Newport & Igor Himmelfarb, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, GALLUP.COM (May 20, 2013), <http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx>, archived at <http://perma.cc/77GP-AD8V>.

¹²² THE DECLINE OF MARRIAGE, *supra* note 45, at 8 (“Seven-in-ten (69%) say the trend toward more single women having children is bad for society, and 61% say that a child needs both a mother and father to grow up happily. On the more accepting side, only a minority say the trend toward more cohabitation without marriage (43%), [and] more unmarried couples having children (43%) . . . are bad for society.”).

¹²³ Fifty-one percent of respondents reported that unmarried couples raising children was bad for society, compared to forty-nine percent who reported that gay and lesbian couples raising children was bad for society. *Id.* at 72. Seventy-five percent of respondents reported that it was bad for society for single women to raise children. *Id.*

¹²⁴ For example, a number of states in recent years have considered bills that would exempt certain individuals, businesses, or religiously affiliated groups from antidiscrimination laws. If enacted, some of the laws would allow business owners to refuse to serve someone because the would-be customer’s family form violates the tenets of the business owner’s faith. *See, e.g.*, S.B. 1062, 51st Leg., 2d Reg. Sess. § 2 (Ariz. 2014) (providing that state action, including laws of general applicability, may not substantially burden an individual’s free exercise of religion without being in furtherance of a “compelling governmental interest” and accomplished by “[t]he least restrictive means of furthering that compelling interest”).

¹²⁵ *Using Religion to Discriminate*, AM. CIV. LIBERTIES UNION,

some states, enacted, are not limited to same-sex marriage or even same-sex couples. In many instances, the legislation would arguably protect the right of an employer or a business to refuse to hire or refuse to serve anyone who has engaged in “sinful” behavior.¹²⁶ For example, a proposed Missouri law would permit a person to “act or [to] refus[e] to act” when that decision is “substantially motivated by one’s sincerely held religious belief.”¹²⁷ A similar bill was approved by the Arizona legislature although it was ultimately vetoed by the Governor.¹²⁸

These recent legislative efforts, some contend, reflect a shift in the population: “many have noticed that moral considerations . . . have played an increasingly visible and contested role in the marketplace.”¹²⁹ Paul Horwitz argues that, “[t]o a growing and increasingly visible extent, a range of faiths

<https://www.aclu.org/using-religion-discriminate>, archived at <http://perma.cc/65ZW-2VEY> (last visited Mar. 18, 2015) (“With increasing frequency, we are seeing individuals and institutions claiming a right to discriminate – by refusing to provide services to women and LGBT people – based on religious objections.”).

¹²⁶ See, e.g., S.B. 1062, 51st Leg., 2d Reg. Sess. § 2 (Ariz. 2014); Mississippi Religious Freedoms Restoration Act, S.B. 2681, 2014 Reg. Sess. § 1 (Miss. 2014) (providing that the government may not impose any rule, including one of general applicability, that substantially burdens an individual’s free exercise of religion without satisfying the “compelling interest” and “least restrictive means” standards of analysis). The Arizona bill was vetoed by the Governor. See Letter from Janice K. Brewer, Governor of Ariz., to Andy Biggs, President of the Ariz. Senate (Feb. 26, 2014) (“Senate Bill 1062 . . . does not seek to address a specific and present concern related to Arizona businesses. The out-of-state examples cited by proponents of the bill, while concerning, are issues not currently existing in Arizona. Furthermore, the bill is broadly worded and could result in unintended and negative consequences. . . . These concerns are among the primary reasons I have vetoed Senate Bill 1062.”).

¹²⁷ S.B. 916, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

¹²⁸ See S.B. 1062, 51st Leg., 2d Reg. Sess. § 2 (Ariz. 2014) (providing that state action, including laws of general applicability, may not substantially burden an individual’s free exercise of religion without being in furtherance of a “compelling governmental interest” and accomplished by “[t]he least restrictive means of furthering that compelling interest”); Letter from Janice K. Brewer, Governor of Ariz., to Andy Biggs, President of the Ariz. Senate (Feb. 26, 2014) (announcing the veto of S.B. 1062). Some of the bills were limited to religious obligations to lesbian and gay people, couples, or marriage. See, e.g., Kansas H.B. 2453 (2014) (permitting individuals or religious entities to refuse to provide a range of services related to the celebration of a same-sex relationship). See also Koppelman, *supra* note 13 (discussing similar bills); Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. TIMES (Mar. 6, 2015), <http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html>, archived at <http://perma.cc/U2XH-MAJK> (explaining that “bills that would make it easier for businesses and individuals to opt out of serving gay couples on religious grounds” have been recently introduced in Arizona, Arkansas, Colorado, Georgia, Hawaii, Indiana, Michigan, Utah, West Virginia, and Wyoming”).

¹²⁹ Horwitz, *supra* note 12, at 181.

and sects take an ‘integralist’ view that sees ‘religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of an individual’s life,’” including, importantly, in their work life.¹³⁰

In the context in which this type of discrimination is already permitted under Title VII—religious employers—one can find a number of cases involving people who were fired due to their “immoral” heterosexual sexual behavior.¹³¹ Title VII, the federal statute prohibiting discrimination in employment, has two different exemptions that apply to religious organizations.¹³² The exemptions permit religious schools to discriminate on the basis of religion. The other prohibitions included in Title VII, however, apply even to religious organizations.¹³³ Thus, unless the ministerial exception¹³⁴ applies, religious organizations are prohibited from discriminating on the bases of sex and pregnancy, among other grounds.¹³⁵ Taken together, this means is that under Title VII, it is not permissible for a religious school to fire an employee because she is pregnant, but it may be permissible to fire her because she engaged in conduct that violates the tenets of the particular faith, such as engaging in nonmarital cohabitation, or nonmarital sexual activity.¹³⁶ In this

¹³⁰ *Id.* at 180 (quoting Kenneth D. Wald, *Religion in the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL’Y J. 471, 481 (2009)). See generally Nancy L. Rosenblum, *Religious Parties, Religious Political Identity, and the Cold Shoulder of Liberal Democratic Thought*, 6 ETHICAL THEORY & MORAL PRAC. 23, 25 (2003) (discussing integralism).

¹³¹ See, e.g., Emily Herx, *Fired For My Family*, AM. CIV. LIBERTIES UNION, BLOG OF RTS. (Sep. 18, 2012), <https://www.aclu.org/blog/womens-rights-religion-belief/fired-my-family>, archived at <http://perma.cc/ET4W-QJZ3> (describing a case about a woman who was fired from a Catholic school for using IVF to try and become pregnant). A jury would later rule in favor of the plaintiff and award damages under Title VII. See *Herx v. Diocese of Fort Wayne – S. Bend, Inc.*, No. 1:12-CV-122 RLM, 2014 WL 7692713, *1 (N.D. Ind. Dec. 19, 2014).

¹³² See 42 U.S.C. § 2000e-1(a) (2012) (permitting religious corporations, associations, educational institutions, or societies to give preference to individuals of their own religion in employment); *id.* § 2000e-2(e) (permitting religious organizations to discriminate on the basis of religion in hiring practices based on faith being a bona fide occupational qualification).

¹³³ See *supra* note 132 and accompanying text.

¹³⁴ The Supreme Court recently affirmed the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012). “[The] ‘ministerial exception,’ grounded in the First Amendment . . . precludes application of [Title VII] to claims concerning the employment relationship between a religious institution and its ministers.” *Id.* at 705.

¹³⁵ Equal Employment Opportunity Commission, Compliance Manual, § 12-I, available at 2008 WL 3862096 (stating that the statutory religious exemption “does not allow religious organizations . . . to discriminate in employment on protected bases other than religion, such as race, color, national origin, sex, age, or disability”).

¹³⁶ For a discussion of these cases, see, e.g., Ralph D. Mawdsley, Note, *Employment*,

context, there is a line of cases in which employers have explicitly argued that they fired their employees¹³⁷ because the employees engaged in premarital sex and/or were in nonmarital or extramarital relationships.¹³⁸

D. *Legal Developments*

The time for revisiting marital status discrimination is also ripe as a legal matter. One of the core rationales for not prohibiting discrimination against nonmarital couples has fallen away. Many of the earlier decisions narrowly interpreting state marital status discrimination provisions relied heavily if not exclusively on the fact that the state criminalized nonmarital sexual relations¹³⁹ and nonmarital cohabitation¹⁴⁰ at the time.¹⁴¹ For example, in *North Dakota Fair Housing Council, Inc. v. Peterson*,¹⁴² unmarried prospective renters and a nonprofit housing advocacy organization sued landlords who refused to rent to the couple because “the unmarried couple were [sic] seeking to cohabit.”¹⁴³

Sexual Orientation, and Religious Beliefs: Do Religious Educational Institutions Have A Protected Right to Discriminate in the Selection and Discharge of Employees?, 2011 B.Y.U. EDUC. & L.J. 279, 281-90 (describing a number of cases where religious beliefs interface with the statutory exemptions in Title VII). For a description of a more recent such case, see Herx, *supra* note 131.

¹³⁷ Interestingly, all of the cases involve female plaintiffs.

¹³⁸ See, e.g., *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012) (raising a question about whether a female teacher was fired from a Christian school for engaging in premarital sex or because of a protected pregnancy status); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000) (holding that the school’s reasoning that it fired the teacher for a violation of its policy against premarital sex was a legitimate, non-discriminatory reason); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996) (holding that the teacher’s failure to show a discriminatory application of the school’s policy against extramarital sex eliminated potential employer liability under Title VII).

¹³⁹ Historically, all states prohibited sexual conduct between unmarried persons, commonly referred to as “fornication.” Traci Shallbetter Stratton, Note, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 769 (1998) (“Fornication laws were actively enforced throughout the colonial period. Historically, fornication was illegal in all jurisdictions of the United States. In the eighteenth century and thereafter, states less frequently prosecuted, and courts less frequently enforced, fornication laws.” (footnotes omitted)). “[A]s late as 1965 all but ten states prohibited fornication.” *Id.* at 769-70.

¹⁴⁰ “When the Model Penal Code [MPC] was published in 1962, most states in the United States criminalized nonmarital cohabitation.” Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. & FAM. STUD. 135, 141 (2005) (footnotes omitted).

¹⁴¹ See, e.g., *North Dakota Fair Hous. Council, Inc. v. Peterson*, 625 N.W.2d 551 (N.D. 2001) (construing state antidiscrimination laws on the basis of marital status narrowly to give effect to laws proscribing nonmarital cohabitation).

¹⁴² *Id.* at 553 (concluding that a landlord lawfully refused to rent to an unmarried couple seeking to cohabit).

¹⁴³ *Id.*

Despite the fact that North Dakota law prohibited housing discrimination on the basis of “status with respect to marriage,”¹⁴⁴ the court concluded that “it [wa]s not an unlawful discriminatory practice . . . to refuse to rent to unmarried persons seeking to cohabit.”¹⁴⁵

The court’s narrow interpretation of the statute was based on the fact that North Dakota criminalized nonmarital cohabitation.¹⁴⁶ The court explained, “[t]he 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.”¹⁴⁷

By contrast, today, most criminal prohibitions on nonmarital cohabitation and sexual relations have been struck down or repealed.¹⁴⁸ Moreover, it is now clear that any remaining such laws infringe constitutionally protected conduct.¹⁴⁹ The dramatic change in the legal treatment of nonmarital relationships alone is an important impetus to reconsider whether to prohibit discrimination on this basis.

CHALLENGES AHEAD AND CONCLUDING THOUGHTS

Bias against nonmarital families, particularly nonmarital families with children, remains high. And, importantly, many of these families are low-income families of color—families that already face real barriers to access to equal opportunity. There is reason to suspect that marital status, including nonmarital family form, is taken into account in the areas of employment, housing, and other contexts. One’s marital status or family form not related to

¹⁴⁴ N.D. CENT. CODE § 14-02.4-12 (1995) (prohibiting discriminatory practices in housing on the basis of marital status), *recodified at* N.D. CENT. CODE §§ 14-02.5-02 & 14-02.5-07 (2009).

¹⁴⁵ *Peterson*, 625 N.W.2d at 564.

¹⁴⁶ N.D. CENT. CODE § 12.1-20-10 (2005) (“A person is guilty of a class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person.”), *repealed by* Unlawful Cohabitation Repeal § 4, 2007 N.D. Laws 615, 616.

¹⁴⁷ *Peterson*, 625 N.W.2d at 562. *See also* *McFadden v. Elma Country Club*, 613 P.2d 146, 150 (Wash. Ct. App. 1980) (concluding that the existence of a criminal cohabitation statute “would seem to vitiate any argument that the legislature intended ‘marital status’ discrimination to include discrimination on the basis of a couple’s unwed cohabitation”).

¹⁴⁸ *See, e.g.*, *BOWMAN*, *supra* note 41, at 16 (“Laws against fornication and cohabitation were either repealed or overturned by the courts in half the states that still had them between 1978 and 2008.”).

¹⁴⁹ *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (holding sodomy statutes unconstitutional to the extent they apply to private, adult, noncommercial conduct). *See also* *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Ct. Aug. 25, 2006) (relying on *Lawrence* and holding unconstitutional a criminal ban on fornication); *Martin v. Zihler*, 607 S.E.2d 367, 371 (Va. 2005) (relying on *Lawrence* and holding unconstitutional a criminal ban on fornication).

her ability to perform a job well, or to be a good tenant. Moreover, the decision to form a family, including a nonmarital family, is one that is of constitutional magnitude. For all these reasons, it is time to reconsider whether to prohibit discrimination on the basis of marital status, including discrimination because one is in a nonmarital family.

If policymakers heed the call to revisit marital status discrimination, they will have to grapple with the question of how to balance the state's interest in protecting diverse family forms with its interest in protecting religious freedom.

While this piece does not seek to provide such a framework,¹⁵⁰ it does offer an important and heretofore largely ignored context in which to think about that question. To date, most of the contemporary discussions about religious exemptions from nondiscrimination statutes have focused on these exemptions in the context of lesbian and gay relationships.¹⁵¹ While discrimination against lesbian and gay people is certainly a serious issue and worthy of careful consideration, same-sex couples would be far from the only families affected by such rules.¹⁵² If employers, landlords, and businesses were broadly permitted to refuse to hire, rent to, or serve people because the employer, landlord, or business viewed the customer or candidate's family structure as immoral or sinful, the impact would extend well beyond the LGBT community. Indeed, LGBT families likely would constitute a minority of the people affected by such a rule. This reality—which to date has largely been ignored—needs to be part of conversation about the existence, meaning, and

¹⁵⁰ Many other scholars have sought to offer such a framework. See, e.g., Koppelman, *supra* note 13; Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839; Sepper, *supra* note 13; Brownstein, *supra* note 13; Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012).

¹⁵¹ See, e.g., Horwitz, *supra* note 12, at 185 (“A calmly worded and revisable judgment, *Hobby Lobby* sits withal in the eye of a hurricane: a perfect storm of foregrounded legal and social contestation over religious accommodation, LGBT rights, and a ‘re-enchanting’ and repoliticized marketplace.”); Lupu & Tuttle, *supra* note 13, at 275 (“The conflict between state recognition of same-sex families and religious concerns has been brewing up in recent storms.”); Paul Horwitz, *Same-Sex Marriage & Religious Freedom: A New Round in the Old Debate Between Liberty & Equality*, COMMONWEAL, Apr. 11, 2014, at 8 (discussing religious based exemptions from antidiscrimination statutes with respect to LGBT persons); Molly Ball, *How Hobby Lobby Split the Left and Set Back Gay Rights*, THE ATLANTIC, <http://www.theatlantic.com/politics/archive/2014/07/how-hobby-lobby-split-the-left-and-set-back-gay-rights/374721/>, archived at <http://perma.cc/Y7MZ-KG35> (last visited Mar. 18, 2015) (“But the major conflict that has erupted in the wake of [the *Hobby Lobby*] decision has been between religious freedom and gay rights.”).

¹⁵² In recent years, there has also been a focus on the right of businesses, including employers, to refuse to be “complicit” in the provision of various reproductive health services. For a discussion of these “complicity-based conscience claims,” see NeJaime & Siegel, *supra* note 13.

2015]

MARITAL STATUS DISCRIMINATION 2.0

831

scope of religious accommodations to generally applicable nondiscrimination statutes.