The Dukeminier Awards
Best Sexual Orientation and Gender Identity Law Review Articles of 2018

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OF SEXUAL ORIENTATION AND GENDER IDENTITY LAW

Best Sexual Orientation and Gender Identity Law Review Articles of 2018

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The Dukeminier Awards Journal and the Williams Institute would like to thank Jeffrey S. Haber, Brondi Borer, Stu Walter, Chuck Williams, and the family and friends of Ezekiel “Zeke” Webber for their endowment gifts to fund individual prizes recognizing outstanding scholarship related to sexual orientation and gender identity law.

The Ezekiel Webber Prize is named after Ezekiel “Zeke” Webber, a UCLA Law student who died in 2004 at the end of his 2L year. During his time at UCLA, Zeke was extremely involved with the Williams Institute and the Public Interest Law Program.
Introduction

The Williams Institute and student editors at the UCLA School of Law are pleased to publish Volume 18 of the Dukeminier Awards Journal, which recognizes the best legal scholarship on sexual orientation and gender identity issues. Each year, we award Dukeminier Prizes and publish this journal not only to recognize outstanding achievements in legal scholarship, but also to stimulate critical engagement with—and visionary thinking on—pressing issues of sexual orientation and gender identity. We also publish the journal in order to widely disseminate the important ideas and research contained in the winning articles to judges, legislators and other policymakers, professors and other teachers and researchers, lawyers and other advocates, and the public—with the goal that these articles inform ongoing legal, political, and academic debates. Because the Dukeminier Awards Journal is published by the Williams Institute in partnership with law students, the journal provides a unique educational opportunity for students to critically assess contributions to a vibrant and evolving field of study.

This year, we are pleased to announce the following winners:

- Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 B.U. L. Rev. 1–54 (2018);
- Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. Rev. 2083–2151 (2017); and

For summaries of these articles, I point you to the abstracts reproduced at the beginning of each. Eligible articles for this year’s prizes were published between September 2017 and August 2018. In late August 2018, the student editors of the journal ran search terms in legal scholarship databases to cast a wide net for relevant articles. The students then narrowed that large group to nearly 140 articles that the students deemed sufficiently focused on sexual orientation and gender identity issues. At this stage, the students were not determining merit; instead, the students focused on the degree of attention to relevant issues, broadly understood. For example, an article that merely cited the U.S. Supreme Court’s decision in *Obergefell v. Hodges* likely would have not made the cut, but an article that included an in-depth discussion of *Obergefell* would have.

In January 2019, we solicited nominations from law professors who regularly work on sexual orientation and gender identity issues, many
of whom are former winners of Dukeminier Prizes. We provided the professors with the students’ list of eligible articles, but did not limit nominations to articles appearing on that list. Numerous professors submitted nominations. The students also reviewed the eligible articles and made their own nominations, as did I. I then reviewed all of the nominations received and created a list of 14 finalists.

We convened a committee to select the winners among the finalists. The committee was comprised of the Williams Institute’s Executive Director (Jocelyn Samuels), two law professors who won Dukeminier prizes last year (Susan Appleton and Douglas NeJaime), one representative of the journal’s student editors (Thomas Costello), and myself. Each committee member and the student editors reviewed the finalists. The committee met in April 2019. Each year, the committee members decide the precise selection criteria for that year, guided only by the goals of the Dukeminier Awards Journal noted above. This year, our criteria included scholarly contribution, rigor, sophistication, innovation, originality, impact, and quality of research and writing. We viewed each article holistically and extensively discussed the finalists in light of these criteria. We selected the above four articles for prizes this year.

In addition, each year the Dukeminier Awards Journal publishes the winner of the Williams Institute’s annual student writing competition. This year’s winner is:


For the student note competition, the student editors and I selected the winner among entrants from law schools around the country. In selecting the winner, the student editors and I focused largely on originality, contribution, and overall quality.

We hope that everyone finds the winning articles to be as compelling as we did.

Adam P. Romero
Arnold D. Kassoy Scholar of Law, and
Director of Legal Scholarship and Federal Policy
Williams Institute
Adjunct Professor of Law
UCLA School of Law
September 2019
This journal is named in memory of Jesse J. Dukeminier (1925–2003), who was a member of the UCLA School of Law faculty for forty years. The journal celebrates scholarly excellence in the field of sexual orientation, and Jesse Dukeminier was an excellent scholar and gay man. His own scholarly eminence is unquestioned, but he never wrote on topics centered on sexual orientation, nor was he what one would call an activist in the cause of gay rights. His field was property law, and in that field he was most certainly a star. His casebook (Property, co-authored with James E. Krier) is, in substance and in number of adoptions, by far the leading casebook in the field. The same can be said of his casebook, Wills, Trusts, and Estates, co-authored with Stanley M. Johansen. He was a nationally known authority on the Rule Against Perpetuities, and he contributed to the law’s development not only in his scholarship but in the legislative process. Surely, however, the explanation for dedicating this journal to him lies elsewhere.

Jesse Dukeminier was a beloved teacher, among a handful of UCLA law teachers in the last generation who were revered by their students. (In his case it is not excessive to say “revered.”) His sexual orientation was no secret; his union with David S. Sanders, a prominent psychiatrist, began around the time Jesse joined the UCLA Law faculty, and was well known to all. Long before it became widely understood that Coming Out was an important act of social and political construction, Jesse was Out, without ceremony—indeed, without raising the subject, unless someone else raised it first. He went about his life, in work and in recreation, as himself. Precisely because he was so admired, he contributed to the cause of equal citizenship by carrying on his day-to-day living under the assumption that his sexual orientation, although very much a part of his sense of self, was not especially noteworthy.

For others who self-identified as gay, lesbian, bisexual, etc., Jesse’s behavior could help to ease the way to their own public acknowledgement of their sexual orientation. Imagine that the year is 1973, and that you are one of Jesse’s students, a gay man or lesbian who has remained largely closeted. You may think, “If this highly admired man is Out, why should I not be?” And for those acquaintances who self-identified as straight, Jesse’s presence in their lives helped them to redefine the meanings they
attached to sexual orientation. Such a person might think, “If Jesse is gay, then the negative things I have heard about a gay orientation have to be false.” Jesse was not vain, but he was aware of his high standing among his students, his colleagues, and his friends. So, without ever getting on a soapbox, he was—knowingly—a walking advertisement for the proposition that equal treatment for every person, of any self-identified sexual orientation, is the proper social norm, the entitlement of all persons. The difference in public attitudes on this subject from 1973 to present day is remarkable and has made itself felt in legislation and in Supreme Court decisions. In a quiet-but-public way that was very much his own, Jesse Dukeminier was one local leader in that change.

When the generous donation that was to become the Williams Institute was offered to our school, Jesse Dukeminier was one of a group of faculty who participated in the Institute’s design. He continued in active support of the Institute until his death. The UCLA Law School community is honored to dedicate this journal to his memory.

Kenneth L. Karst
2004, UCLA School of Law
Bureaucratic Agency:
Administering the Transformation of LGBT Rights

MARIE-AMÉLIE GEORGE

ABSTRACT

In the 1940s and 1950s, the administrative state served as a powerful engine of discrimination against homosexuals, with agency officials routinely implementing antigay policies that reinforced gays’ and lesbians’ subordinate social and legal status. By the mid-1980s, however, many bureaucrats had become incidental allies, subverting statutory bans on gay and lesbian foster and adoptive parenting and promoting gay-inclusive curricula in public schools. This Article asks how and why this shift happened, finding the answer not in legal doctrine or legislative enactments, but in scientific developments that influenced the decisions of social workers and other bureaucrats working in the administrative state. This phenomenon continues today, with educators resisting laws that limit transgender students’ bathroom access.

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By uncovering this bureaucratic resistance, this Article demonstrates the administrative state’s dynamism and that bureaucracy can be an important site of legal change. Because bureaucrats are charged with enforcing legislation, their actions also have significant normative implications, raising separation of powers and democratic legitimacy concerns. However, the very structure of administrative bureaucracies creates conflict between the branches, as civil servants are hired for their professional knowledge and abilities, yet are also responsible for complying with legislative mandates that may contradict that expertise. This Article argues that bureaucratic resistance is inevitable, can be legitimate, and may be desirable.

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INTRODUCTION

Over the course of fifty-five years, the American legal system has transformed from a regime that criminalized consensual sodomy to one that recognizes same-sex couples’ fundamental right to marry.¹ Within this jurisprudential revolution, one of the most startling reversals was in administrative law. In the 1940s and 1950s, the federal administrative state was a powerful engine of discrimination against homosexuals, with bureaucratic officials implementing antigay policies that reinforced homosexuals’ subordinate social and legal status. The same was true at the state and local levels, where administrative regulations influenced the

everyday lives of gays and lesbians. However, by the mid-1980s many bureaucrats had become incidental allies, subverting bans on gay and lesbian foster and adoptive parenting and promoting gay-inclusive curricula in public schools. In analyzing how and why this shift happened, this Article uncovers a mechanism for legal change that lies not just in doctrine or the decisions of legislators, but in the effect of scientific developments on bureaucrats working in the interstices of the administrative state.

Drawing on extensive original archival research and oral history interviews, this Article argues that changing psychiatric conceptions of sexual orientation drove the shift from the government’s mid-century antigay administrative operation to the more liberal legal regime of the 1980s. In the 1940s and 1950s, the government relied on psychiatric theories of homosexuality to bar gay men and women from serving in the military, revoke security clearances of employees it suspected of being homosexual, and exclude homosexuals from the country under the Immigration and Naturalization Act. When scientific understandings of homosexuality changed—from identifying same-sex sexual attractions as a sign of psychopathy to one of benign difference—it reframed the legal boundaries around gay and lesbian lives. The theoretical shift, which came from developments within scientific circles as well as from lobbying by gay and lesbian rights advocates, undermined criminal laws. These included sexual psychopath statutes, which had been used to commit gay men to psychiatric institutions, as well as consensual sodomy laws.

Equally important to legal change were shifting theories of the etiology of homosexuality, which contradicted the assumptions underlying the demands of elected officials. While many psychiatrists had once identified childhood molestation as the root cause of homosexuality, scientists increasingly investigated other explanations, including adult role models in children’s lives. This theory, which the Religious Right made a centerpiece of its politics beginning in the 1970s, became the principal issue in custody disputes between homosexual parents and their heterosexual ex-spouses, with courts asking what effect gay and lesbian adults would have on the children’s sexual orientation. To address the concerns of judges, researchers investigated and published studies that showed no difference between the sexual orientation of children of lesbian mothers, gay fathers, and heterosexual parents. The mental health professions


became increasingly vocal in their support of homosexual parents, influencing the decisions of bureaucrats. Social workers in several states undermined bans on gay and lesbian foster and adoptive parenting, following scientific consensus that identified homosexual parents as equally fit as their heterosexual counterparts. Similarly, educators working for administrative agencies followed scientific viewpoints when they incorporated gay-inclusive curricular materials in the face of popular and legislative opposition.

The approach to legal change that this Article identifies, in which scientific research influenced bureaucratic administration in rights-promoting ways, is not just a phenomenon of the recent past, but persists in contemporary LGBT advocacy. For several decades, transgender rights advocates have collaborated with executive agencies to secure administrative protections, including bathroom access rights. In schools across the country, administrators have promulgated policies affirming the rights of transgender students to use the facilities associated with their gender identity, even in the face of strident public opposition. Like educators who were willing to challenge gay rights opponents on curricular issues in the early 1990s, educators who support transgender students today often rely on scientific research.

By uncovering this untold history of bureaucratic resistance, this Article demonstrates the dynamism of the administrative state and that bureaucracy can be an important site of legal change. Because bureaucrats are charged with enforcing legislation, their actions also have significant normative implications, raising separation of powers and democratic legitimacy concerns. However, the very structure of administrative bureaucracies creates conflict between the branches, as civil servants are hired for their professional knowledge and abilities, yet are

4. This Article refers to “gay and lesbian rights” or just “gay rights” advocates when discussing the movement of the 1980s and early 1990s, as the movement’s scope had not yet expanded beyond these categories. It uses the term “LGBT” to refer to the contemporary rights movement, which formed in the late 1990s. While many communities have embraced a broader membership and vision of rights—including queer, intersex, and asexual individuals within their umbrella—the legal movement, for better or worse, has limited its focus to lesbian, gay, bisexual, and transgender issues. The Article also discusses identities according to the language individuals would themselves have used in that historical period, including homosexual and heterosexual. See Steven G. Epstein, Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy, in The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement 66-68, 74-75 (Adam et al. eds., 1998); Amy L. Stone, More than Adding a T: American Lesbian and Gay Activists’ Attitudes Towards Transgender Inclusion, 12 Sexualities 334, 335-36, 349 (2009).

also responsible for complying with legislative mandates that may contradict that expertise. This Article argues that this type of bureaucratic resistance is inevitable, can be legitimate, and may be desirable.

This Article identifies certain circumstances under which bureaucrats are justified in resisting laws to protect minority rights, a topic that has received increasing attention since Donald Trump’s election and inauguration. From the outset, his presidency has been marked by bureaucratic dissent, which has come in the form of internal complaints, news leaks, social media protests, and outright defiance. When the Trump transition team requested the names of Department of Energy employees who had attended climate change meetings, officials refused to comply and cast aspersions on his administration’s motivations. Hours after the President’s inauguration, social media managers at the National Parks Service began tweeting veiled criticisms of the new president, from images that showed a significantly larger attendance at Obama’s 2009 swearing-in ceremony to statistics on climate change, which the president had dismissed as a “hoax.” Although each tweet was quickly deleted, a new one followed from a different account in what one commentator aptly described as “a game of anti-Trump whack-a-mole.” These posts are what likely inspired a series of “rogue agency” accounts, critical and satirical feeds run anonymously by individuals claiming to be government


11. Id.
staffers. The Department of Homeland Security found these posts sufficiently unnerving that U.S. Customs and Border Protection (CBP) issued an administrative summons to Twitter for all records relating to the “alternative USCIS” account, including the user’s name and contact information. After Twitter filed a lawsuit to quash the subpoena, CBP withdrew its request.

The tweets may have appeared even less humorous to the President when bureaucrats began resisting his executive orders. Ten days into the new administration, acting Attorney General Sally Yates announced the Justice Department would not defend the President’s executive order blocking nationals from seven predominantly Muslim countries, explaining that she was not convinced the order was lawful. She later cited her confirmation hearing before Congress, where she had promised she would not enforce actions she believed to be against the law, in justifying her action. Although the President fired her hours after she defied his executive order, approximately 1,000 State Department diplomats voiced their opposition to the travel ban by joining a “memo of dissent.” The State Department instituted the formal memo of dissent during the Vietnam War to ensure senior officials could hear alternative policy views. In July 2017, after the President declared via Twitter that transgender individuals could no longer serve in the military, the head of


17. See sources cited supra note 16.
the Coast Guard said “he would continue to support transgender troops under his command.”

Unlike the state and local bureaucrats who are the subject of this Article, these examples illustrate resistance in the Trump administration by federal actors and address concerns beyond the rights of unrepresented minorities. However, these clashes demonstrate the varied ways in which bureaucrats can challenge government policies, regulations, and laws, as well as their increasing willingness to do so. Thus, while this Article addresses a particular subset of bureaucratic action, it implicates a broad range of conduct by a large number of individuals.

This Article uses the term “bureaucrat” to refer to those public servants who deliver government services as the frontline staff in public administration. Although bureaucrats are often derided as office workers who robotically implement government regulations, this Article employs the term in its sociological sense. In that literature, its definition is much more expansive; it includes members of professional, knowledge-based communities who share norms and values and who exercise considerable discretion in their positions in the community. Administrative agencies employ many different types of staff members, from political appointees to policy professionals, technocrats, civil servants, and front-line decisionmakers. This Article highlights the influence of those who are charged with implementing the administrative state’s policies and regulatory apparatuses at the street level, typically social workers, teachers, and police officers. Rather than elected representatives, most citizens’ encounters with government are mediated through


22. Lipsky, supra, note 19, at 3.
these types of bureaucrats, rendering the study of these administrators all the more important.\textsuperscript{23}

The conventional wisdom from many of these interactions is that bureaucrats are myopic, unimaginative, and resistant to change, and there are indeed myriad examples of administrative retrenchment. Additionally, experiences with these bureaucrats have led to increased state regulation and concomitant repression for many citizens, particularly those who are from economically marginalized backgrounds or from communities of color.\textsuperscript{24} However, this Article shows that the opposite is also true, with government administration serving as a site of legal transformation. In these accounts, those who benefited directly from bureaucratic resistance tended to be white and middle class. Thus, this Article does not challenge depictions of the administrative state as a site of contentious and problematic power imbalances, but rather provides a parallel narrative, in which the bureaucracy also served as an avenue for legal reform.

In presenting this history and its contemporary implications, this Article makes four distinct contributions to legal scholarship. First, it reorients the legal history of gay and lesbian rights, which has relied on Michel Foucault’s model to focus on the ways in which the administrative state and scientists foreclosed rights claims.\textsuperscript{25} Foucault identified how sex became a matter of governmental concern, with the state deploying scientific evidence to police, administer, and control public life.\textsuperscript{26} Foucault’s framework emphasized how social discourse on sexuality contributed to the creation of a gay and lesbian identity, and to the social exclusion and legal persecution of homosexual men and women.\textsuperscript{27} This Article reframes Foucault-based legal scholarship by demonstrating how the administrative state and scientific researchers came to serve as a source of liberation, rather than unmitigated repression.\textsuperscript{28}

\begin{thebibliography}{99}
\bibitem{23} Id. at 14.
\bibitem{26} Michel Foucault, \textit{The History of Sexuality: An Introduction} 23–26, 30–31 (1978).
\bibitem{27} Id. at 43–44. While Foucault identifies both the state and medicine as repressive institutions, he also emphasizes how they are influenced by the subjects they help produce. \textit{Id.} at 95–97; Felicia Kornbluh, \textit{Queer Legal History: A Field Grows Up and Comes Out}, 36 LAW & SOC. INQUIRY 537, 541 (2011).
\bibitem{28} As such, it demonstrates a different dimension of the “sex bureaucracy,” a reference for the ways in which administrative agencies regulate sexuality. Historically, that regulation served to deter, correct, and if necessary, punish transgressive behavior. \textit{See generally} Jacob Gersen & Jeannie Suk, \textit{The Sex Bureaucracy}, 104 CAL.
Second, by analyzing how bureaucrats administered law and resolved competing claims, this Article emphasizes the need to disaggregate the leviathan that is the administrative state. It joins recent work exploring the limits of administrative law scholarship, which foregrounds the external restraints on administrative action, emphasizing political and legal oversight and accountability.\(^{29}\) That literature’s focus is particularly problematic since, as Edward Rubin notes, much of the government’s interactions with its citizens, and a great deal of its work, occurs in the implementation of policies.\(^{30}\) This Article builds upon his point, identifying the value of including administrative governance in scholarship on administrative law, and arguing that the scope of inquiry should also expand beyond the federal and towards the state and local.\(^{31}\) The challenge of approaching legal studies through this lens is in the multiplicity of actors and the difficulty of deriving general conclusions from local politics, policies, and regulations.\(^{32}\) However, municipal laws and local decisions are often more consequential for individuals than are federal decisions, and the day-to-day process of legal change unfolds in towns and cities.\(^{33}\)


33. See Tomiko Brown-Nagin, *Courage To Dissent: Atlanta and the Long
Third, this Article sheds new light on how the executive branch is an important site for law reform and legal norm formation. To date, accounts of LGBT rights successes have focused on the courts and lawyers, rather than on administrative agencies or bureaucrats. Examining these other actors, and identifying how administrative agencies evolve to protect the rights of stigmatized minorities, highlights other mechanisms of legal change that are important for LGBT rights scholarship and other fields. The structural framework that this Article’s historical study uncovers applies beyond LGBT rights claims and underscores the powerful role of science on a cadre of bureaucrats, demonstrating the need to look beyond law’s traditional boundaries to understand change.

Finally, this Article contributes to scholarship on administrative law, especially administrative constitutionalism, which focuses on agency resistance when constitutional concerns compete with statutory goals. This Article extends that analysis by applying it to situations where scientific developments and legislative mandates conflict, leaving bureaucrats to decide how to balance two sources of authority that yield opposite results. As in the administrative constitutionalism context, bureaucrats’ unwillingness to execute legislative enactments that infringe on minority groups’ rights raises concerns about the separation of powers and democratic accountability. However, bureaucrats’ professional expertise is also a legitimate source of authority, and their resistance can introduce minority viewpoints that would otherwise go unheard.


35. Scientific developments have influenced a wide range of legal issues; in education, for example, policies that once excluded special-needs children now affirmatively recognize their rights. See generally Mitchell L. Yell et al., The Legal History of Special Education, 19 Remedial & Special Educ. 229 (1998).

Part I presents a theory of bureaucratic resistance, analyzing how it can be consistent with other legal principles. While resistance by bureaucrats may seem anomalous, this Part explains that it can in fact support the rule of law and promote democratic legitimacy, and that it does not necessarily violate the separation of powers. These are the three most frequently raised objections to bureaucratic discretion. By explaining how bureaucratic resistance can be justified as a theoretical matter, this Part demonstrates that the examples of resistance this Article presents are not as subversive as they may at first seem.

With this background in place, Part II turns to the history of the administrative regulation of gay and lesbian rights. This Part traces the evolution of psychiatric theories of homosexuality, analyzing their influence on the legal regulation of gay and lesbian life in the 1940s and 1950s, as well as the scientific studies that led to the reform of sexual psychopath statutes and consensual sodomy laws. This discussion emphasizes the key role of scientific work in legal regimes and legal change. Part II then examines the declassification of homosexuality as a mental illness in 1973, identifying how this effort transformed psychiatrists into crucial allies for gay and lesbian rights. After the declassification, mental health professionals became key expert witnesses in lesbian mother and gay father custody cases, with their testimony determinative in many instances.

The events in Part II fostered a scientific consensus that influenced the bureaucratic actions set out in Part III. Part III analyzes how a set of administrators became allies, thereby shifting the Foucauldian framework. This Part identifies the ways in which civil servants in the mid-1980s and early-1990s helped promote gay and lesbian rights in the face of widespread social and political disapproval. Using case studies of social workers in New Hampshire and educators in New York City, this Part examines how social science research influenced their actions and details the contours of their resistance.

Part IV connects history to present by identifying similar bureaucratic resistance within educational policies for transgender youth. Educators are challenging policies that require transgender students to use bathrooms and changing facilities of their sex assigned at birth; their actions are supported by scientific evidence that establishes that doing so is harmful for individuals with gender dysphoria. Like their historical predecessors, educators are engaging in bureaucratic resistance based on their expertise, with scientific developments influencing their exercises of discretion.

Part V concludes with the normative implications of this mechanism for legal change on behalf of minority rights. Drawing on the

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37. Gender dysphoria is a diagnostic term that refers to “the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.” AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).
historical and contemporary examples of bureaucratic resistance, it identifies some of the limits on resistance to rights-restricting legislation that contravenes bureaucratic expertise. This analysis provides insights as to when bureaucratic resistance is generally permissible.

This Article proceeds with three distinct, but related, arguments. First, bureaucrats are a source of legal change. Although they are responsible for implementing the law, their discretion allows them to introduce their own normative commitments, which can result in legal transformation. Second, this reform can come from scientific developments, which influence how bureaucrats exercise their discretion. Third, bureaucrats who are employed for their professional training, judgment, and skills not only resist laws that contradict their expert judgment, but this resistance can be both justified and desirable.

I. The Governance Problem

The fact that bureaucrats have an important role in lawmaking and in the process of law reform is all too rarely acknowledged. Resistance often appears inapposite for bureaucrats—a role for others to play. However, this Part demonstrates that administrative resistance can be justified from a theoretical standpoint. It sets out the competing concerns to illuminate why it is that the resistance in this Article is not as subversive as it may initially appear.

Bureaucratic dissent is not an anomaly in our legal system, which creates room for resistance within its organizational design. The same institutional mechanisms that promote democratic deliberation and encourage lawmakers to express dissent in federal and state constitutions, such as bicameralism, the Presentment Clause, and the Appointments Clause, also allow for resistance. The federalist system permits, and sometimes appears to encourage, resistance. Federalism scholars have noted that states contest federal laws, sometimes by exploiting gaps in the statutes or, more controversially, through outright refusals to enforce


For example, municipalities across the country have declared themselves “sanctuary cities,” enacting policies limiting cooperation between local law enforcement and federal immigration agents. Their actions manifest their objections to national immigration policy—a resistance that the Tenth Amendment enables.

Resistance also takes place within the branches of government, where officials may disagree as to their legal duties and obligations. This again occurs both at the federal and state levels. One particularly notorious example occurred in California in 2008, when the state controller refused to implement Governor Arnold Schwarzenegger’s executive order to reduce the pay of all state employees to $6.55 an hour, the federal minimum wage, until the legislature approved his budget. The controller believed the order was unlawful and would irreparably harm the state’s almost two hundred thousand employees. Although Schwarzenegger filed a lawsuit against the controller’s office to enforce the order, the Governor left office before it could be resolved and his successor did not pursue the case. Thus, the legal system creates room for dissent within branches of government, across the federal structure, and between branches of government.

Resistance between the branches of government most often occurs through the judicial review process, rather than in the bureaucracy. At the federal level, courts enforce the Constitution both by invalidating statutes and also through resistance norms, such as the constitutional avoidance canon and the clear statement rule. Resistance norms serve as a soft judicial limit on government authority to act, which “mak[es] it harder—but not impossible—to achieve certain legislative goals” that
may encroach on constitutional principles.\textsuperscript{49} For example, courts will accept a limit on federal jurisdiction, but only when Congress has made its intent clear.\textsuperscript{50} They do so because legislatures may find themselves unable to resolve a contentious issue, and thus compromise by not settling the matter in the statute.\textsuperscript{51} Proponents of limiting jurisdiction cannot later use this compromise to impose limits, but rather must, as a result of resistance norms, amass sufficient support and demonstrate an unequivocal consensus to make the restrictions clear.\textsuperscript{52} Resistance norms allow courts to prevent legislative enactments from infringing on other normative commitments, while at the same time ensuring judicial respect for duly enacted laws that are unambiguous in intent. Ultimately, by applying a resistance norm, the federal judiciary is not restraining Congress so much as enforcing Article III.\textsuperscript{53}

There is an important gap between the positive claim that bureaucrats can exercise resistance and the normative argument that they should express their dissent. Emerging scholarship on administrative constitutionalism, which refers to efforts by agencies to interpret, apply, and elaborate constitutional principles, has set out the competing concerns at issue when bureaucrats act beyond their legislative mandates.\textsuperscript{54} This literature helps identify and address the objections to bureaucratic resistance, which are rooted in separation of powers, rule of law, and democratic legitimacy concerns.

The separation of powers arguments arise from the fact that administrative agencies do not have any inherent or independent authority to act; they can only implement what the legislature has authorized.\textsuperscript{55} By resisting the legislature, administrators are not only substituting their opinions for those charged with enacting the law, but are also usurping the role of the judiciary, which is charged with reviewing the statutes’ validity.\textsuperscript{56} Thus, the idea of agencies fostering new normative commitments challenges the structure of the constitutional system that vests judicial power in courts and lawmaking authority in the legislative branch.\textsuperscript{57} In many ways, “[t]he challenge to administrative constitutionalism’s legitimacy . . . bears a close connection to the charge that the

\textsuperscript{49} Id. at 1596.  
\textsuperscript{50} Id. at 1552.  
\textsuperscript{51} Id. at 1597. Likewise, legislatures enact ambiguous statutes that delegate decision-making to agencies to reach consensus on politically contentious decisions. Lisa Schultz Bressman, \textit{Chevron’s Mistake}, 58 Duke L.J. 549, 571–72 (2009).  
\textsuperscript{52} Young, supra note 48, at 1598.  
\textsuperscript{53} Id. at 1552.  
\textsuperscript{54} See sources cited supra note 36.  
\textsuperscript{55} Metzger, \textit{Administrative Constitutionalism}, supra note 6, at 1917.  
\textsuperscript{57} Metzger, \textit{Administrative Constitutionalism}, supra note 6, at 1920.
modern administrative state as a whole is at odds with basic features of the Constitution.” An agency’s exercise of discretion that contravenes legislative enactments extends the concern about the role of the administrative state in the constitutional order one step further. In such a situation, it appears that the administrative agency is doing the opposite of exercising the authority it has been delegated.

However, bureaucrats who are hired specifically for their professional knowledge and judgment, and who then resist laws based on that expertise, are doing so based on delegated authority, which alleviates separation of powers concerns. Legislatures at both the state and federal level have limited time and resources, and thus delegate responsibilities to administrative agencies for their expertise. Indeed, because of their specialized knowledge, bureaucrats may be in a better position to understand a legislative action’s effects on the individuals with whom they interact. As a result, there is a practical benefit to delegating authority to administrators. The street level bureaucrats in this Article, who are more typical of state and local government, in turn, derive authority on-the-job from their status as professionals, where they are charged with using their education and outlook on a daily basis. Governments employ bureaucrats like social workers and educators, consign tasks to them, and ask them to utilize discretion because of their professional training, specialized knowledge, and unique skills. In following their professional expertise, bureaucrats are complying with a directive from elected representatives. Thus, in exercising resistance, bureaucrats are not necessarily usurping the legislature’s authority.

58. Id.
60. Similarly, administrative constitutionalism scholarship argues that because of agencies’ expertise in the areas they regulate, they are both better at integrating constitutional concerns and more likely to recognize the constitutional significance of their actions. Metzger, Administrative Constitutionalism, supra note 6, at 1922–23 (arguing that “agencies approach constitutional questions and normative issues from a background of expertise in the statutory schemes they implement and the areas they regulate,” and consequently “are likely to be better at integrating constitutional concerns with the least disruption to these schemes and regulatory priorities”); Ross, supra note 36, at 525 (emphasizing that “[a]gencies are able to update constitutional applications more speedily than courts, and they are more connected to public sentiment and evolving societal settings).
Bureaucratic resistance also raises rule of law concerns, as it appears to violate the principles that law should provide notice and be coherent.\footnote{62} Having “a government of laws, and not of men,” is a fundamental political commitment,\footnote{63} one that the administrative state must meet to sustain its legitimacy.\footnote{64} There are a number of dimensions to the rule of law, including that government actions must be authorized, justified, and procedurally fair.\footnote{65} The notice and coherence requirements are the ones that bureaucratic resistance most clearly implicate. The notice principle includes a number of other characteristics, including that laws should be public, clear, consistent, prospective, and stable, such that individuals can rely on executed laws to determine their actions.\footnote{66} When bureaucrats dissent from legislative enactments, this is no longer possible. However, if bureaucrats are transparent in their resistance, which all of the bureaucrats in this Article were, then this resolves the notice issue.

At first blush, bureaucratic resistance appears to introduce inconsistency into law, but it in fact may make the legal system more internally coherent. Administrative agencies must both implement laws consistently with respect to different individuals, as well as ensure that “the integrated body of its constituent statutes” is implemented “in a coherent, intelligent way.”\footnote{67} Although there are a range of external political and legal checks on administrative agency heads and policymakers, this is less true for bureaucrats, particularly at the state and local level.\footnote{68} There is a very practical reason for this: it is relatively easy to verify that a social services department has issued regulations that accord with the law, but it is much more complicated to ensure that social workers are complying with that regulation when they make placement decisions.\footnote{69}


\footnote{63. Novanglus [John Adams], Addressed to the Inhabitants of the Colony of Massachusetts Bay (Mar. 6, 1775) (newspaper essay), reprinted in JOHN ADAMS & JONATHAN SEWALL, NOVANGLUS, AND MASSACHUSETTENSIS; OR POLITICAL ESSAYS 78, 84 (Boston, Hews & Goss 1819).}

\footnote{64. Stack, supra note 62, at 1986–87; see also PHILIP HAMBURGER, Is Administrative Law Unlawful? 7–8 (2014) (arguing the administrative state violates historical rule of law principles); Nestor M. Davidson & Ethan J. Leib, Ruleprudence—At OIRA and Beyond, 103 GEO. L.J. 259, 266–67 (2015) (discussing rule of law concerns in administrative state).}

\footnote{65. Stack, supra note 62, at 1987.}

\footnote{66. Id. at 2002.}

\footnote{67. Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1146 (2012).}

\footnote{68. Davidson & Leib, supra note 64, at 269–70; see also Gillian B. Metzger, The Constitutional Duty to Supervise, 124 YALE L.J. 1836, 1841 (2015); Rubin, APA Administrative, supra note 29, at 100–01; Simon, supra note 29, at 71–79. But see Jennifer Nou, Intra-Agency Coordination, 129 HARV. L. REV. 421, 451–72 (2015) (discussing the institutional structures by which agency heads manage their staff and resources).}

\footnote{69. David A. Super, Are Rights Efficient?: Challenging the Managerial Critique of Individual Rights, 93 CALIF. L. REV. 1051, 1120 (2005); see also Matthew Diller, The...
Likewise, departments of education may promulgate policies that follow legislative mandates, but educators have almost complete autonomy in their classrooms, which is both necessary and inevitable when educators are teaching pupils of diverse backgrounds.\textsuperscript{70} State and local administrative agencies deliver the vast majority of government services to citizens, and these bureaucrats have an extraordinary amount of discretion in how they do so.

Professional knowledge serves as an informal limit on discretion, which is such a contested element of the administrative state.\textsuperscript{71} Expertise provides a means of ensuring coherence, consistency, and unity across dispersed, street-level bureaucrats.\textsuperscript{72} Scientific developments may allow individuals to predict how bureaucrats will exercise their discretion, augmenting the uniformity and reliability of the administrative process. Having bureaucrats follow their professional standards may thus provide a solution for a governance problem that is particular to municipal administrative agencies.

Bureaucratic resistance also gives rise to democratic legitimacy complaints, much like other areas of administrative law.\textsuperscript{73} As Sidney Shapiro and his colleagues wryly commented, “[t]he history of administrative law in the United States constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.”\textsuperscript{74} However, resistance amplifies the democratic legitimacy concerns underlying the administrative state more generally. Bureaucrats are unelected government agents who create laws through administrative processes; their refusal to enforce legislative enactments nullifies representatives’ power.\textsuperscript{75}

\textit{Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government}, 75 N.Y.U. L. Rev. 1121, 1126–27 (2000) (noting how, as a practical matter, administrative employees are accorded broad discretion). To the extent the fear is that bureaucrats will “be more intent on expanding their power than behaving like disinterested experts whose first allegiance is to the rule of law,” this is not the situation here. Richard A. Epstein, \textit{Why the Modern Administrative State is Inconsistent with the Rule of Law}, 3 NYU J.L. & LIBERTY 491, 505 (2008).

\textsuperscript{70} How to balance accountability and yet maintain bureaucratic efficiency is a question that administrative scholars have struggled to resolve. Jody Freeman, \textit{Collaborative Governance in the Administrative State}, 45 UCLA L. Rev. 1 (1997); Elena Kagan, \textit{Presidential Administration}, 114 Harv. L. Rev. 2245, 2339 (2001).


\textsuperscript{72} Stack, supra note 62, at 2013–14.

\textsuperscript{73} Metzger, \textit{Administrative Constitutionalism}, supra note 6, at 1901.

\textsuperscript{74} Shapiro et al., supra note 71, at 463.

\textsuperscript{75} \textit{See} Adam B. Cox & Cristina M. Rodríguez, \textit{The President and Immigration Law Redux}, 125 Yale L.J. 104, 174 (2015) (discussing the executive’s categorical non-enforcement of laws); Robert J. Delahunty & John C. Yoo, \textit{Dream On: The Obama
Resistance based on expertise may compound this problem further, as science is explicitly nondemocratic and scientific knowledge is not value-neutral or apolitical. Science cannot be separated from its social context, which renders certain research questions particularly salient and consequently yields certain normative stances. Scientific communities have their own norms and values about the proper modes of decision-making, using those perspectives to evaluate questions with political implications. That scientists are judging research studies according to the accepted methods of the profession should insulate those decisions from political pressure. However, experts do not always agree, leaving room for regulatory capture by interest groups. This is a particular concern at the federal level, where scientific experts are involved in formulating administrative regulations. Scientific support for a policy is supposed to connote objectivity, but that is not always the case.


77. David S. Caudill & Lewis H. LaRue, No Magic Wand: The Idealization of Science in Law 28, 42 (2006); Jasanoff, supra note 76, at 13, 28, 42.

78. Susan Stefan, Leaving Civil Rights to “Experts”: From Deference to Abdication Under the Professional Judgment Standard, 102 Yale L.J. 639, 656–58 (1992). For example, the ways in which psychiatrists have addressed the needs of transgender preadolescent youth reflect their conceptualization of gender dysphoria. Additionally, although recommending that patients live according to their gender identity has significant political implications, this does not make the instruction a political act.


81. Adrian Vermuele, The Parliament of the Experts, 58 Duke L.J. 2231, 2235–36 (2009). One of the most powerful interest groups is the federal government, which finances the majority of the country’s scientific research, either by providing funding to researchers or by conducting studies in government departments. Steven Goldberg, The Reluctant Embrace: Law and Science in America, 75
ing bureaucratic resistance based on expertise necessarily means ceding authority to scientists, who have their own biases, agendas, and ideologies that are not subject to external checks.

A lack of review can have extremely harmful consequences. Scientific research has been crucial for the gay and lesbian rights movement, but there is a long history of scientific “advances” hindering the rights of marginalized groups. For example, scientists and social workers were integrally involved in eugenics programs, which targeted low-income women and women of color for sterilization. Scientific projects justified racial oppression and sex-based discrimination more generally, reinforcing legal structures of subordination. Within the LGBT movement, the role of science continues to be contested on a number of different issues, including whether individuals can alter their same-sex sexual attractions. Simply because science can have a positive effect does not mean that it necessarily will, and opening the door for civil rights gains also means accepting the possibility of scientific setbacks for rights projects.

At the same time, bureaucratic resistance may promote democracy, insofar as resistance provides room for a diversity of viewpoints, which may give voice to unrepresented, politically powerless minorities who would not otherwise be heard. For that reason, Heather Gerken has argued that government actors who defy laws with which they disagree are furthering democracy, as their actions serve as “an alternative strategy for institutionalizing channels for dissent within the democratic process.” Applying Gerken’s theory to bureaucrats who resist based on scientific developments, these administrators are promoting democratic legitimacy insofar as they create room for dissenting viewpoints to be

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86. Gerken, Dissenting by Deciding, supra note 85, at 1749.
voiced within the government.\(^{87}\) Those perspectives may, in turn, become accepted more broadly, as in the case of gay and lesbian rights.

Introducing new voices through resistance can change constitutional commitments in favor of minority rights. Scholars have noted that “much of the law that constitutes our government and establishes our rights derives from legal materials outside the Constitution itself,” such as legislative enactments and administrative agencies’ interpretations of law.\(^{88}\) In these academics’ accounts, administrative officials have transformed how legislators, courts, and the American public understand individual rights and the government’s responsibilities under the Constitution.\(^{89}\) Bureaucratic expertise can play a transformative role in how lawmakers, lawyers, judges, and citizens understand the Constitution’s commitment to liberty and guarantee of equality. In this way, bureaucratic resistance based on expertise may overlap with administrative constitutionalism, with one reinforcing the other to create a more just legal system.

The potential benefits from bureaucratic resistance are significant, including the protection of minority rights and the introduction of unrepresented viewpoints into political debates, thereby promoting democratic deliberation. Resistance can also help ensure uniformity among street-level bureaucrats and coherence across statutory schemes. At the same time, resistance raises important concerns, including bureaucrats encroaching upon legislative authority—although if bureaucrats act within their delegated authority, their actions should not raise this separation of powers concern. Given that bureaucrats must have discretion to act so that public administration can effectively adapt to changing social realities, they will likely dissent from legislative policies at some point.\(^{90}\) For that reason, bureaucratic resistance may be all but inevitable.\(^{91}\) Thus, the governing structure makes room for bureaucratic


\(^{89}\) Metzger, Administrative Constitutionalism, supra note 6, at 1905–06; see sources cited supra note 36.


\(^{91}\) See Metzger, Administrative Constitutionalism, supra note 6, at 1929 (describing administrative constitutionalism as “inevitable”).
resistance, which this Part has shown is not necessarily an unprincipled or unjustified action.

II. SCIENTIFIC INTERVENTIONS

Although bureaucrats may sometimes legitimately resist, not all do. In the LGBT rights context, resistance was the product of a long historical connection between science, sexuality, and the regulatory state. Psychiatric authority was integral to the midcentury administrative state, which both drew from and reflected scientific theories of sexual deviance in its regulations. Administrative officials crafted policies based on the opinions of scientists, as well as justified their actions by pointing to expert knowledge. This was by design, as the administrative state expanded during the New Deal era to make scientific and other forms of expertise readily available to government authorities, and to ensure government policies would be implemented in accordance with those same precepts. As a result, medical theories of homosexuality, which identified same-sex attraction as a form of psychopathy, contributed to discrimination against homosexuals for decades. Given that the medical model of homosexuality undergirded this legal regime, changes in scientific thought about same-sex sexuality had significant consequences for administrative law.

This Part discusses the antigay legal regime in place in the mid-twentieth century, before tracing the gay-supportive social science evidence that emerged and analyzing that research’s effects on criminal and family law. Those scientific changes gave rise to the bureaucratic resistance that this Article will take up in Parts III and IV, such that the administrative state began moving away from its antigay foundations.

A. Cold War Criminal Law Reform

The midcentury federal administrative state both reflected and reinforced the idea that homosexuality was a flaw in psychosexual development, with executive agencies tying their legal regulations to psychiatric theories of sexual deviation. The Immigration and Naturalization Service excluded and deported homosexuals as “psychopathic personalities,” relying on psychiatric certifications from the Public Health Service, while the Civil Service Commission revoked the security clearances of employees it suspected of being homosexual because of their “emotional instability.” During World War II, the military attempted to

93. As Part II discusses, some of the bureaucrats charged with enforcing the laws were themselves in the mental health professions, and thus aware of these shifts.
95. Bérubé, supra note 3, at 19–20; Canaday, supra note 3, at 214–15, 220–21;
exclude homosexuals from service on the theory that they were mentally ill degenerates who were unable to control their desires and could not adjust to the rigors of military life. After the War, the Veterans Administration denied benefits under the Servicemen’s Readjustment Act, commonly known as the GI Bill, to those homosexual men it had discharged as “undesirable.” In doing so, it excluded them from one of the government’s largest assistance programs and significantly impeded their reintroduction into civilian life. Importantly, while the military issued undesirable discharges for a number of behaviors, their benefits denial policy only applied to homosexuality-based discharges, making clear the antigay animus underlying the decision.

The Cold War exacerbated anxieties about homosexuality, which became even more contentious as homosexual subcultures flourished in the late-1940s. At the same time, the Cold War emphasis on conformity rendered sexual perversity a potential threat to national security and stability. Federal investigations into disloyalty and security risks targeted homosexuals in particular, based on the belief that they were emotionally unstable and susceptible to blackmail. The federal government tried to purge itself of all homosexual employees, claiming that even “one homosexual can pollute a Government office.” In 1950, after an official revealed that the State Department had forced out ninety-one homosexuals as security risks, news reports on sexual perversity increased dramatically. The pervasive depiction of homosexual men and women as national security risks gave local police forces around the country additional license to harass homosexuals throughout the 1950s, which further tied homosexuality to criminality in the eyes of the anxious public.

Criminal laws reflected society’s opprobrium, with gays and lesbians subject to a host of penal provisions, primary among which were sodomy laws. In almost every state, consensual sodomy was a felony that carried the same punishments as its forcible counterpart, with sentence lengths that reflected extensive social disapproval.

J ohnson, supra note 3, at 21, 134, 128.
96. Bérbé, supra note 3, at 8–12, 15.
98. Canaday, supra note 3, at 138.
99. Id. at 151.
102. D’Emilio, supra note 100, at 42–43.
103. Id.
104. Johnson, supra note 3, at 1.
105. D’Emilio, supra note 100, at 49.
Georgia and Nevada, a sodomy conviction could lead to life in prison; in Connecticut and North Carolina, offenders risked thirty- and sixty-year sentences, respectively. Other states, including Arkansas, Montana, Nevada, and Tennessee, had five-year minimum sentences. Although prewar sodomy prosecutions had focused on cases involving force or child victims, this trend shifted in the 1950s to target consensual homosexual conduct, with sodomy arrests for consensual homosexual activity rising dramatically after World War II. Many homosexuals were also arrested under vagrancy, disorderly conduct, and lewdness provisions.

During this same period, sexual psychopath laws proliferated, with thirty states and the District of Columbia enacting versions of these statutes between 1937 and 1957. Under these laws, courts sentenced defendants charged with or convicted of specified crimes to psychiatric institutions. The statutes varied significantly in terms of what crimes triggered their application and how they defined sexual psychopathy, but they invariably applied to men convicted of consensual sodomy and were in fact used to institutionalize homosexual men. Given that these laws were a response to publicity about violent sex crimes committed against children, and that both the medical profession and the public often equated homosexuality with pedophilia, it is not surprising that the statutes contained clear homophobic undertones.

In 1948, Alfred Kinsey and his colleagues published a study that undermined many of the assumptions on which sexual psychopath and sodomy laws were based. Their book, *Sexual Behavior in the Human Male*, revealed that a significant percentage of adult men engaged in same-sex sexual activities, indicating this conduct was more normal than
deviant. His data showed that “at least 37 per cent [sic] of the male population has some homosexual experience between the beginning of adolescence and old age,” and that “persons with homosexual histories are to be found in every age group, in every social level, in every conceivable occupation, in cities and on farms, and in the most remote areas in the country.” Kinsey reported that thirteen percent of the male population was “predominantly homosexual,” a larger percentage of the American populace than anyone had ever estimated. Kinsey’s data about the prevalence of homosexuality showed that, if states enforced their sodomy and sexual psychopath laws, approximately 6.3 million men would be institutionalized. This demonstrated that many criminal laws had widespread application but were rarely enforced. Kinsey became a vocal opponent of both consensual sodomy laws and sexual psychopath statutes, denouncing them as “completely out of accord with the realities of human behavior.” Other social scientists and jurists agreed, setting in motion efforts to revise both types of laws.

State commissions that had been established to review sexual psychopath laws began advocating for their reform based on Kinsey’s findings. Commissions in Illinois, Pennsylvania, Michigan, New Jersey, New York, and Virginia all questioned whether—in light of Kinsey’s findings—criminal laws could effectively be enforced. In New Jersey, the state commission met with Kinsey before formulating its report, inviting him “to suggest what methods [he] consider[ed] most feasible for the handling of the sex deviate.” Its report noted that, based on Kinsey’s work,

115. Id. at 625, 650, 665.
116. Id. at 665.
120. Letter from Joseph P. Murphy, Chairman of New Jersey Commission on the Habitual Sex Offender, to Alfred C. Kinsey (Oct. 24, 1949) (on file with the Kinsey Institute for Research in Sex, Gender, and Reproduction, in correspondence folder
“there are sixty million homo-sexual acts performed in the United States for every twenty convictions in our courts.”121 It thus concluded that the state needed to revise its sexual psychopath law to distinguish between homosexuals and dangerous offenders.122 Likewise, the Illinois commission relied heavily on Kinsey’s work, consulting his studies and meeting with Kinsey on three separate occasions.123 It ultimately recommended that “[p]unishments for homosexual acts be modified to discriminate between socially distasteful and socially dangerous conduct” and urged the legislature to decriminalize consensual homosexual sodomy committed in private.124 In 1955, the legislature amended its sexual psychopath law so it would apply only to violent offenses or crimes against children.125 Unlike Illinois and New Jersey, New York did not have a sexual psychopath law, but rather established a Committee on the Sex Offender to draft such a statute. The researchers and lawmakers involved in the effort also consulted Kinsey before preparing their reports and recommendations.126 The law the Committee proposed, which the legislature enacted in 1950, both excluded consensual sodomy from its purview, and at Kinsey’s urging, also reduced consensual sodomy from a felony to a misdemeanor.127 Although most of the state commissions reviewing sexual psychopath laws advised revisions based on Kinsey’s work, only a few were successful in persuading the state legislatures to adopt their recommendations.128

Kinsey’s work had its greatest effect on the American Law Institute’s (ALI) Model Penal Code (MPC), which excluded consensual sodomy from its sex offenses provisions. A group of distinguished lawyers, judges,
and law professors founded the ALI in 1923; its mission was to clarify and simplify American laws, as well as adapt legal codes to meet changing societal norms. The ALI undertook restatements of nine areas of law between 1923 and 1944, and thereafter expanded its work to formulating model statutory codes. In 1950, the ALI turned its attention to criminal law due to the wide variation among states’ criminal provisions. The organization launched the MPC project to inspire legislatures to update their penal codes and to help them in doing so. The MPC, which the ALI promulgated in 1962, became highly influential in legislative efforts to revise state criminal laws and led twenty-two states to repeal their consensual sodomy statutes by 1978.

Kinsey’s findings shaped the debate over whether to include consensual sodomy within the MPC, demonstrating social science research’s impact on legal projects. Several members of the Advisory Committee on sexual offenses commented on the ways in which Kinsey’s work had changed their views of sex offenses, appreciating how his research undermined consensual sodomy laws. Louis Schwartz, the Associate Reporter responsible for drafting the sex offenses section, wrote to Kinsey requesting his comments and suggestions, emphasizing the ALI’s “indebtedness to [Kinsey’s] researches.” Schwartz’s initial draft, which the Advisory Committee unanimously approved, excluded consensual sodomy. However, the Council of the ALI, a volunteer board that reviewed draft sections, balked at the Committee’s decision. It inserted a provision criminalizing consensual sodomy, albeit only as a misdemeanor.

134. Draft of Article 207—Sexual Offenses 1–10 (Jan. 7, 1955) (on file with the Model Penal Code Records in the American Law Institute Archive at the University of Pennsylvania Law School Library, Box 8, Folder 8).
agreed with the Committee’s position, they feared that excluding consensual sodomy “would be totally unacceptable to American legislatures and would prejudice acceptance of the Code generally.” Rather than jeopardize what would ultimately become a decade-long project, the Council opted to include consensual sodomy in the model code. The Council was aware that it would face a battle between scientific evidence and political exigency. While scientific findings influence law, they are rarely the only consideration. However, the Council did not have the final word.

The ultimate decision on whether to include consensual sodomy rested with the entire ALI membership, which voted to exclude the provision after hearing from Judge Learned Hand. Judge Hand drew from Kinsey’s findings, making his determination based on the high rates of consensual sodomy that went unpunished. As he explained to his fellow ALI members, “criminal law which is not enforced practically, Mr. Chairman, is much worse than if it was not on the books at all.” Kinsey’s work had called into question why the law criminalized an activity in which so many Americans—homosexual and heterosexual—engaged. The reform the ALI undertook was not a means to protect homosexual citizens, but rather to have the law more accurately reflect victimless social practices.

Until 1980, sodomy law repeals came primarily from states rewriting their entire criminal codes, with the MPC influencing every single one of those revision efforts. Even before the ALI finalized the MPC, states used its drafts as models for their criminal code reforms; Illinois became the first state to decriminalize consensual sodomy when it adopted the MPC draft in 1961. Most state legislatures using the MPC to revise their criminal laws did not focus on the absence of a consensual sodomy provision. In fact, legislatures in Arkansas and Idaho belatedly realized it was missing from their new criminal codes and separately enacted consensual sodomy prohibitions. The gay liberation movement avoided

Library, Box 7, Folder 3).

137. Advisory Committee Meeting Minutes 129 (May 19, 1955) (on file with the Model Penal Code Records in the American Law Institute Archive at the University of Pennsylvania Law School Library, Box 4, Folder 19).
138. Indeed, the MPC continued to criminalize solicitation to engage in consensual sodomy, a provision that police would use against gay men. Eskridge, supra note 1, at 178.
140. Robinson & Dubber, supra note 139, at 326.
141. Eskridge, supra note 139, at 106.
142. Id. Six other states decriminalized consensual heterosexual sodomy but
drawing attention to the MPC’s sodomy law reform because they recognized the ALI’s recommendation would be controversial. Framing the reform as a gay rights issue would have been disastrous for the nascent gay rights movement.

In the mid-twentieth century, many laws categorized same-sex sexuality as pathological and discriminated against gays and lesbians on this basis. However, Kinsey’s work made clear that same-sex sexuality was more pervasive than anyone had believed, raising questions about whether homosexuality was truly deviant behavior and undermining sexual psychopath and consensual sodomy statutes. His research influenced several legal projects that eased the state’s restraints on gays and lesbians. Kinsey’s study marked the start of new scientific perspectives about homosexuality and a new legal regime, both of which continued to evolve over several decades.

B. Diagnosing Change

The power of social science in transforming legal regulations would become more pronounced in the years that followed, especially after the American Psychiatric Association (APA) declassified homosexuality as a mental illness. Gay rights activists lobbied the APA for the diagnostic change because the categorization of homosexuality as a mental illness had significant legal effects, and the scientific decision, in turn, had important consequences for gay rights. This Part traces the legal impetus for the diagnostic declassification, which the APA announced on December 15, 1973, as well as the declassification’s effects on law. It focuses on the important and unrecognized place of psychiatrists in law reform—a major shift from their previous role.

The change was in part a result of a different approach in gay rights organizing and visions of society. At the time of the MPC debates, a cohesive gay rights movement had not yet emerged. The homophile movement, founded in the 1950s, promoted the vision of gays and lesbians as respectable citizens, seeking legal change through educational campaigns. It was not until the late 1960s that gay liberationists coalesced into a vocal, assertive group that demanded equal rights for gays and lesbians. Drawing on the African American civil rights movement, which had become more militant in the 1960s, gay liberationists also adopted an increasingly aggressive posture towards institutions that kept its homosexual counterpart a crime. Id.; Eskridge, supra note 1, at 176–84.

143. Bernstein, supra note 131, at 361.
145. RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 67–100 (1987); D’EMILIO, supra note 100, at 83.
146. D’EMILIO, supra note 100, at 152–53, 173.
impeded their push for equality, marking their opposition with rallies, marches, and picket lines.147

One of gay liberationists’ main targets of reform was the APA’s Diagnostic and Statistical Manual (DSM), which classified homosexuality as a mental illness. This designation indicated that homosexuality was a sign of emotional instability, which supported the federal government’s efforts to fire gays and lesbians from civil service positions throughout the 1950s.148 One of the many who had lost their jobs was Franklin Kameny, an astronomer with a PhD from Harvard University, who became a leader in the gay liberation movement.149 Kameny, who devoted his life to legal change, identified homosexuality’s status as a mental illness as “the albatross around the neck of the Gay and Lesbian movement.”150 He thus launched an attack on the classification of homosexuality in the DSM. To get the psychiatric profession’s attention, he led pickets and interrupted the APA’s annual meeting plenary in 1971, announcing: “Psychiatry is the enemy incarnate. Psychiatry has waged a relentless war of extermination against us. You may take this as a declaration of war against you.”151 To avoid disruption at the next year’s conference, psychiatrists invited gay activists to appear on a panel to present their views. At the 1972 convention in Dallas, Texas, crowds of attendees gathered to hear a cloaked, wigged, and masked psychiatrist known only as “Dr. Henry Anonymous,” who dramatically disclosed his homosexuality to the audience while speaking through a voice-distorting microphone.152 Audience members were shocked to learn that Dr. Anonymous was only one of several hundred gay psychiatrists, who had been meeting clandestinely during the Association’s annual conventions as the “Gay-PA.”153

Although lobbying from gay liberationists pushed the APA to reconsider its diagnostic criteria, it was not the only driver of the declassification. Their challenges coincided with shifting views about the nature of homosexuality within the psychiatric profession. Kinsey’s

148. D’Emilio, supra note 100, at 154, 162; Johnson, supra note 3, at 183.
152. Bayer, supra note 145, at 109; Minton, supra note 147, at 258.
153. Bayer, supra note 145, at 110.
work indicated that same-sex sexuality was much more widespread than anyone previously thought, but it did not address whether homosexuals were pathological. Eight years after Kinsey published his work, Evelyn Hooker completed a study that tackled this issue. Her work revealed both that homosexuals were well-adjusted and that there was no psychological difference between homosexuals and heterosexuals.\textsuperscript{154} Hooker presented her results before a packed audience at the 1956 American Psychological Association’s annual meeting, unsettling her listeners and opening a debate on whether homosexuality indicated a mental illness.\textsuperscript{155} As a result of her pioneering research, the National Institute of Mental Health (NIMH) selected Hooker to head the NIMH Task Force on Homosexuality, which issued its final report in October 1969.\textsuperscript{156} The report called for tolerance and argued for both the repeal of consensual sodomy laws and an end to employment discrimination; as a result of its controversial conclusions, the Nixon Administration buried the report, delaying its publication until 1972.\textsuperscript{157} Hooker’s research spurred other mental health professionals to shift their thinking on homosexuality and to voice their dissent to the APA nosology, creating a network of scientists who joined gay liberationists in lobbying for the declassification of homosexuality from the DSM.\textsuperscript{158}

In pressing for change, gay liberationists emphasized these shifts in psychiatric thought as well as the legal effects of the diagnostic category.\textsuperscript{159} Rights groups noted the myriad ways in which homosexuality’s status as a mental illness gave rise to discriminatory practices, particularly in employment. These went far beyond the Department of Defense denying security clearances to gays and lesbians because of their supposed mental instability, extending to much less sensitive work. The New York City Taxi Commission, for example, refused to license a homosexual driver until he had obtained a psychiatrist’s certification of fitness.\textsuperscript{160} To maintain his right to operate a taxi, the man had to visit a psychiatrist twice a year to renew the certification.\textsuperscript{161}

Whether legal arguments should have a place in the decision to declassify homosexuality was a matter of debate both among psychiatrists and outside commentators, but they did sway scientists. Robert

\begin{itemize}
\item \textsuperscript{154} Evelyn Hooker, \textit{The Adjustment of the Male Overt Homosexual}, 21 J. Projective Techniques 18, 30 (1957).
\item \textsuperscript{155} Minton, \textit{supra} note 147, at 228.
\item \textsuperscript{156} Id. at 236.
\item \textsuperscript{157} Id. at 237.
\item \textsuperscript{158} Id. at 234.
\item \textsuperscript{159} Bayer, \textit{supra} note 145, at 125; Memorandum from Gay Organizations in New York City to Committee on Nomenclature of the American Psychiatric Association (1973) (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 164, Folder 36).
\item \textsuperscript{160} Memorandum from Gay Organizations, \textit{supra} note 159, at 10.
\item \textsuperscript{161} Id.
\end{itemize}
Spitzer, a member of the nomenclature committee, later explained his decision to support homosexuality’s declassification in both scientific and legal terms. When asked how much his reasoning had to do with “true scientific logic,” he answered: “I would like to think that part of it was that. But certainly[,] a large part of it was just feeling that they were right! That if they were going to be successful in overcoming discrimination, this clearly was something that had to change.”

From the outset, rights advocates and the APA’s Board of Trustees worked to leverage the legal impact of the declassification. When the APA’s Board of Trustees announced that it had deleted homosexuality from the DSM, it simultaneously issued a press release supporting the civil rights of homosexuals. Kameny, with the help of gay activist Ron Gold, had drafted the civil rights resolution, which he circulated while the Board considered the declassification question. Kameny later explained the document as a means of countering the federal government’s antigay claims in security clearance cases. In Adams v. Laird, the Department of Defense had successfully justified its revocation of security clearances based in part on homosexuals’ assumed instability. With characteristic flair, Kameny provided the resolution to Spitzer at a gay bar in Waikiki during the APA’s 1973 conference. The position paper garnered a great deal of support from psychiatrists who were concerned that the nosology had contributed to discrimination against gays and lesbians. After the Board of Trustees approved the resolution, the National Gay and Lesbian Task Force immediately used it to argue for the repeal of sodomy laws and the introduction of antidiscrimination laws in states and cities around the country.


163. Bayer, supra note 145, at 3, 136–37. The APA was the third major psychiatric association to declassify homosexuality as a mental illness. The Group for the Advancement of Psychiatry adopted this position in 1966 and the National Association for Mental Health followed in 1970. However, since the APA published the DSM, its decision had a much greater impact than the declarations of the other societies. Gays Lose “Deviate” Label, Dec. 16, 1973 (on file with the ONE National Gay and Lesbian Archives at the University of Southern California Libraries, APA Subject File); Position Statement on Homosexuality and Mental Illness, Nat’l Ass’n for Mental Health (Sept. 17, 1970) (on file with the ONE National Gay and Lesbian Archives at the University of Southern California Libraries, Psychiatry and Gays Subject File).

164. Adams v. Laird, 420 F.2d 230, 240 (D.C. Cir. 1969); Note from Franklin E. Kameny, President of the Washington, D.C. Mattachine Society (on file with the Frank Kameny Papers at the Library of Congress, MSS 85340, Box 122, Folder 10); Letter from Kameny, supra note 150.

165. Note from Kameny, supra note 164.

166. Bayer, supra note 145, at 129.

The declassification engendered a new relationship between scientists and gay rights advocates, with mental health professionals emerging as crucial allies in the struggle for legal change. Mental health groups issued a number of resolutions in support of gay and lesbian rights and weighed in as amici to lend their professional expertise to gay rights cases. These efforts reflected a burgeoning scientific consensus that later undergirded the decisions of bureaucrats in the mental health and associated professions. The scientific viewpoints guiding those bureaucrats’ actions were both the research and debates of scientists and the specific statements on gay and lesbian rights that professional associations promulgated over the course of several decades.

Even before scientific consensus developed on specific gay rights issues, and prior to the organizations becoming involved in litigation, the declassification had immediate legal effects. However, they were different than what gay liberationists had expected. With respect to federal security clearances and employment discrimination, some changes were already underway when the APA announced its decision. In 1969, the D.C. Circuit ruled in favor of a gay litigant who challenged his termination. The court determined, based on the plain text of the statute, that the civil service could not terminate an employee without showing that his private sexual conduct interfered with his work. That decision led the Civil Service Commission (CSC) to reconsider its blanket exclusion policy in late 1972, announcing a change to its personnel manual on December 21, 1973, six days after the APA’s decision. Gays and lesbians could still lose their jobs, but only if their sexual conduct had an impact on their work. In 1975, the CSC eliminated “immoral conduct” from the list of disqualifications for federal government service.


171. Singer, 530 F.2d at 255 n.15.

172. JOHNSON, supra note 3, at 210.
Thus, while social science was important in changing many legal norms, law reform also came from other sources. In this instance, although the CSC justified its decisions on homosexuals’ supposed emotional instability, psychiatrists were not involved in assessing employees; rather, homosexual conduct served as incontrovertible evidence of a psychiatric condition that did not require diagnosis. Given that the government had severed the link between its employment decisions and the scientific justification, the shift in psychiatric views did not lead to any change.

It initially appeared that the declassification would have a more tangible effect on immigration law. The 1952 McCarran-Walter Act barred immigrants suffering from “psychopathic personalities,” which included gays and lesbians, from entering the country.173 In 1979, the Surgeon General announced that the Public Health Service (PHS) would no longer certify gay aliens as psychopathic personalities since homosexuality was no longer a mental illness.174 However, that did not end the immigration exclusion. In 1983, the Fifth Circuit determined that “psychopathic personality” was “a term of art, not dependent on [a] medical definition,” and thus that immigration law continued to bar homosexuals.175 That same year, in Hill v. INS, the Ninth Circuit ruled that the Immigration and Naturalization Service (INS) could not exclude homosexuals without a certification from the PHS.176 The Department of Justice consequently directed the PHS to issue certificates for “self-proclaimed homosexual aliens”—but only within the Ninth Circuit.177 Everywhere else in the country, the PHS refused to be involved with the adjudication of homosexuals, and the INS continued to exclude gays and lesbians without a PHS certification. In 1990, Congress finally repealed the psychopathic personality provision, eliminating the immigration bar.178

Gay rights advocates had seen the classification of homosexuality as a mental illness as a significant impediment to rights claims. They consequently lobbied for a diagnostic change, mixing scientific evidence and


174. In re Longstaff, 716 F.2d 1439, 1444 (5th Cir. 1983).

175. Id. at 1450–51.

176. Hill v. Immigration & Naturalization Serv., 714 F.2d 1470, 1481 (9th Cir. 1983).


legal arguments in their appeals. Doing so did not have the effect they were expecting on federal laws and policies, but it did have a significant impact at the state and local levels. There, new questions about psychosexual development dominated family law decisions, with scientific research stemming from custody cases that later influenced administrative law determinations.

C. Contesting Custody

The APA’s decision, while contested, marked the beginning of what became a scientific consensus that gays and lesbians were akin to heterosexuals in all but sexual object choice. Given the civil rights questions motivating the declassification, it is perhaps not surprising that an avowedly neutral and objective scientific profession became so involved in advocating for gay and lesbian rights. The declassification did not sever the ties between science and gay and lesbian rights, but rather created a different relationship. New legal questions emerged that turned on professional research and required psychiatric expert testimony, such that scientific evidence made gay rights victories possible.

Support from science was particularly key in the custody context, as the APA’s declassification removed a barrier that had prevented lesbian mothers and gay fathers from seeking custody of their children. However, once gays and lesbians were no longer mentally ill, another question arose. The crucial issue became what impact homosexual adults would have on their children’s psychosexual development, as courts were concerned that children raised by gays and lesbians would not be able to adopt traditional gender roles or heterosexual orientations.\(^\text{179}\) To address these issues, lesbian mothers and gay fathers enlisted the help of psychiatrists and psychologists, who researched the question and presented their findings in court and scientific periodicals.\(^\text{180}\) Thus, these studies were both determinative in the individual cases, and also created a broader medical consensus that adult homosexuality did not influence the sexual development of children.


orientation of children. Law thus spurred scientific research, which later influenced the work of bureaucrats.

Lesbian and gay parents did not begin asserting their custody rights as a response to the declassification, but rather these cases were part and parcel of the gay rights movement that produced the diagnostic change. At the same time that gay rights activism forced mental health professionals to reconsider their position on homosexuality as a mental illness, it empowered homosexual parents to come out, leave their stilted marriages, and assert their custody rights in court.\textsuperscript{181} Before the gay liberation movement, heterosexual parents would often blackmail their homosexual ex-spouses into waiving their custody rights, wielding the threat of disclosing the gay parent’s sexual orientation to family, friends, neighbors, and coworkers.\textsuperscript{182} Even as American society became increasingly tolerant of gays and lesbians, most Americans continued to identify homosexuality as fundamentally incompatible with parenthood, giving heterosexual ex-spouses the upper hand in custody negotiations.\textsuperscript{183}

Custody cases produced a new relationship between gay rights activists and scientists, who became crucial allies in these disputes. In the mid-1970s, jurisdictions around the country instituted a “nexus requirement,” which required a parent to produce expert evidence that the ex-spouse’s homosexuality would harm their child.\textsuperscript{184} The new requirement replaced the “per se” rule that identified homosexual parents as inherently unfit, which had prevented lesbian mothers and gay fathers from succeeding when petitioning for custody or visitation. The nexus requirement came about as a result of the fathers’ rights movement, which challenged the presumption of maternal custody and demanded courts identify specific reasons for denying fathers equal custody rights.\textsuperscript{185}

\begin{footnotes}
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Fathers’ rights groups deployed feminists’ equality rhetoric, which had undergirded divorce law reform, in their efforts, leading courts to develop the gender-neutral “best interests of the child” standard.\(^{186}\) The shift came after a New York Family Court ruled the “tender years” presumption unconstitutional in 1973, with courts around the country following suit in quick succession.\(^{187}\) Lesbian mothers and gay fathers were consequently fighting for custody during a period of shifting legal and scientific landscapes, creating an opportunity for social science research to effectuate legal change.\(^{188}\)

Scientists undertook their research to provide the evidence the courts needed, skirting the boundaries between neutral science and advocacy.\(^{189}\) In doing so, their work promoted gay parents’ rights and helped shift scientific consensus and norms. The first scientist to conduct a research study on the impact of parental homosexuality on children was Richard Green, who was also one of the first psychiatrists to argue for the declassification of homosexuality as a mental illness in a peer-reviewed journal.\(^{190}\) For Green, “the struggle to remove homosexuality from the APA’s list of mental disorders was directly linked to the assertion that having lesbian or gay parents was not necessarily contrary to the ‘best interests of the child.’”\(^{191}\) While Green had always focused his research on sexual orientation and gender roles, he designed a study of lesbian mothers and their children in response to questions courts had raised.\(^{192}\) Psychiatrist Martha Kirkpatrick likewise published a study identifying no difference between the future sexual orientation of children of heterosexual and homosexual women, citing lesbian custody cases as a primary motivator for undertaking the research.\(^{193}\)


\(^{188}\) Courts are a vital part of the social context of social scientific inquiries, which render certain research questions more salient than others. *Caudill & LaRue*, *supra* note 77, at 28, 42–43; *Jasanoff, supra* note 76, at 13; Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 *Va. L. Rev.* 1723, 1744 (2001).


\(^{190}\) Telephone Interview with Richard Green, Founding President of the Int’l Acad. of Sex Research (May 31, 2014); *Bayer, supra* note 145, at 112; see also Richard Green, *Homosexuality as a Mental Illness*, 10 *Int’l J. Psychiatry* 77 (1972).

\(^{191}\) *Rivers, supra* note 25, at 69.


\(^{193}\) Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 *Am. J. Orthopsychiatry* 545, 545 (1981); Telephone Interview with
The scholarly inquiry quickly moved beyond psychiatrists into other academic disciplines, creating broader conversations on this question. In 1981, Ellen Lewin, an anthropologist at the University of California at Berkeley, published a study of eighty divorced lesbian and heterosexual mothers. She concluded that both groups had “fairly traditional notions about family” and provided male role models for their children, a fact that addressed judicial fears that children in lesbian households would not learn traditional gender roles and therefore would not become heterosexual.194 In explaining her research agenda, Lewin also cited “the questions that the judicial system has raised” in lesbian custody cases; she entitled her preliminary report Lesbianism and Motherhood: Implications for Child Custody.195 Lewin began her research after hearing about two lesbian mother custody battles in 1977, with the “fantasy that [she] would be called upon to be an expert witness in some of these cases.”196 In the United Kingdom, Susan Golombok began her career studying lesbian mothers after she read an article that explained the need for social science research to support lesbian mothers’ claims.197 Golombok initially conducted the research for her master’s thesis; esteemed child psychiatrist Michael Rutter learned about her work and offered to secure funding so Golombok could expand it into a doctoral dissertation project. Rutter had served as an expert witness in several lesbian mother custody cases and consequently appreciated the need for social science research to support lesbian mothers’ rights.198 In asserting their custody rights, lesbian mothers in the United States drew upon all of these studies, which concluded that a parent’s sexual orientation did not have any influence on children.199

Martha Kirkpatrick, former Clinical Professor, UCLA Med. Sch. (June 16, 2014).
195. Id. at 6.
196. Interview with Ellen Lewin, Professor of Anthropology, Univ. of Iowa (Sept. 19, 2014); Email from Ellen Lewin, Professor of Anthropology, Univ. of Iowa, to Jo-anne Meyerowitz, Arthur Unobskey Professor of History and Am. Studies, Yale Univ. (Aug. 19, 2014) (on file with author).
198. Interview with Susan Golombok, Professor of Family Research, Univ. of Cambridge (Aug. 28, 2014).
199. In re Adoption of Evan, 583 N.Y.S.2d 997, 1001 n.1 (N.Y. Surrogate’s Ct. 1992); Brief for Appellant, Teegarden v. Teegarden, No. 38A04-0406-CV-212, 1994 WL 16461688, at *16 n.4 (Ind. Ct. App. July 5, 1994); Brief for Appellee, Bottoms v. Bottoms, No. 94–1166, 1994 WL 16199380, at *16 n.6 (Va. Dec. 28, 1994). The only studies that concluded otherwise were the work of controversial psychologist Paul Cameron, who the American Psychological Association expelled in 1983 following an ethics investigation. Although a number of scholars critiqued Cameron’s methodology and conclusions at length, the majority of the scientific community ignored his work, since his articles were published in low-ranked and non-peer reviewed journals. George, supra note 180, at 520–23.
Gay rights organizations and movement lawyers recognized that psychiatric testimony was crucial in custody disputes, emphasizing its role and circulating information about scientific studies and experts to lesbian and gay parents. The National Gay Task Force (NGTF), one of the first groups to address the rights of homosexual parents, prepared the *Gay Parent Support Packet*, which contained statements from ten renowned experts, including Drs. Richard Green, Evelyn Hooker, Judd Marmor, John Money, Wardell Pomeroy, and Benjamin Spock. Spock, who the *New York Times* described as “arguably the most influential pediatrician of all time,” was the author of *Baby and Child Care*, the world’s second-bestselling book (after the Bible) for five decades. The packet also included statements that supported gay parent custody rights from leading mental health organizations and listed useful psychiatric studies parents could introduce in court. The NGTF first published the packet in 1973, but reissued it in 1979 to provide updated information for homosexual parents. Other gay and lesbian rights litigation groups emphasized the importance of psychological studies to custody cases, including the ACLU, Lesbian Mothers National Defense Fund (LMNDF), Lesbian Rights Project (LRP), and Lambda Legal Defense & Education Fund. The attorneys at LMNDF and LRP drafted manuals for lesbian mothers that emphasized the role of expert testimony and highlighted the importance of psychiatric studies in custody determinations.

With these studies in hand and the support of experts who testified on their behalf, lesbian mothers began securing custody of their children, but at a cost. The research studies were a double-edged sword, because although they were necessary to convince courts, they also identified homosexuality as undesirable. By steadfastly maintaining that gay and lesbian households would not produce homosexual children, researchers “implicitly accept[ed] a view of homosexuality as a negative outcome


203. Telephone Interview with Marilyn Haft, former ACLU litigator (June 26, 2014); Maureen Downey, *Custody Battle Illuminates Courts’ Bias: Lesbian Mom Loses Her Son and Her Job*, Atl. J.-Const., May 21, 1987; DONNA J. HITCHENS, LESBIAN MOTHER LITIGATION MANUAL (1982) (on file with the Phyllis Lyon and Del Martin Papers at the GLBT Historical Society, Collection Number 1993–13, Box 124, Folder 3); HITCHENS & THOMAS, supra note 189; Michigan Supreme Court Awards Custody to Lesbian Mother (1979) (on file with the National Gay and Lesbian Task Force Records at the Cornell University Carl A. Kroch Library, Collection No. 7301, Box 88, Folder 14).

204. HITCHENS, supra note 203; HITCHENS & THOMAS, supra note 189.

205. George, supra note 180, at 497–99.
of development.” In one sociological study, an interviewee perceptively noted, “to keep my children[,] I’ve had to agree to bring them up to be heterosexual, whatever that means, and I ask myself what does that say about being gay, which I am.” Thus, while researchers’ work constituted a rights-promoting measure that cut against stereotypes, it also reinforced the notion that homosexuality was an aberration that needed to be prevented.

Over the course of three decades, social scientists had introduced a radically new vision of homosexuality. Kinsey’s work revealed the extent to which “deviant” behavior was in fact quite common, spurring changes in criminal law. When the APA declassified homosexuality as a mental illness, mental health professionals became allies in efforts to secure custody rights for gay and lesbian parents. The studies they developed helped create a scientific consensus that parental homosexuality did not influence children’s sexual orientation, which would guide the work of civil servants in the administrative state. These normative shifts within the mental health professions had a profound impact on law, first in the courts and later by influencing the exercise of bureaucrats’ discretion.

III. Administrative Allies

While psychiatrists convinced courts to grant custody to lesbian mothers and gay fathers, using scientific studies that showed parental homosexuality did not affect children’s sexual orientation, political battles continued to be waged over the same issue. Many Americans remained unconvinced of homosexuality’s benign nature. In the 1970s, religious conservatives argued that the state could and should deny rights to gays and lesbians, lest they serve as role models to impressionable children who would then choose to become homosexuals themselves. This Part provides a brief overview of this political context to explain the extent to which scientific consensus deviated from the popular baseline, such that its influence on administrative actors would create a contest between regulators, legislators, and voters. Since these studies showed adult homosexuality did not influence children, bureaucrats utilized their discretion to resist legislative mandates, introducing new normative visions into the law.


207. Id.

208. In critiquing the methodology and conclusions of these research studies, sociologists Judith Stacey and Timothy Biblarz recognized the difficult position for researchers who acknowledged differences between the children raised in heterosexual and homosexual households, given that this information could result in gay parents losing custody of their children. Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 Am. Soc. Rev. 159, 178 (2001).
This Part then provides case studies of social workers in New Hampshire and educators in New York City, demonstrating how these bureaucrats relied on the scientific evidence developed in the lesbian mother and gay father custody cases. It uses the New Hampshire example because this was the only state to enact an explicit ban on gay and lesbian foster and adoptive parenting during this period; other states reached the same result by enacting prohibitions on unmarried couples or through administrative regulations.209 Thus, the events in New Hampshire offer a clear case study of a dispute between the legislature and executive branch over gay and lesbian parenting. This Part then presents the New York City example, which was both one of the first curricular disputes and one of the most consequential. It spurred national debate, such that the events in New York City provide insight into much more than a single American city. These examples highlight how scientific developments complicate administrative governance and illustrate bureaucrats’ role in effectuating legal change on behalf of a minority group.

A. Political Context

The Religious Right gained prominence in local, state, and federal politics in the late-1970s, entrenching opposition to gay rights advocacy at all levels of government.210 The Religious Right originated in early twentieth-century Protestant fundamentalism, whose adherents focused on keeping evolution out of the nation’s classrooms and returning Americans to the “fundamentals” of the Christian faith.211 However, Christian conservatism gained new life in the Cold War, leading to Richard Nixon’s election in 1968.212 A growing coalition of Evangelicals and other conservative Christians became a visible and influential national political force in the 1970s, galvanizing in response to a variety of issues including the Equal Rights Amendment, Roe v. Wade,213 and the gay liberation movement, all of which undermined traditional gender roles and the sanctity


of the nuclear family. As a result, “conservative evangelicals created a furor over the state of the American family without precedent in the twentieth century.” The 1976 presidential campaign drew attention to the increasing role of Evangelicals in politics, as well as the nation’s religious resurgence, such that Newsweek declared 1976 “The Year of the Evangelicals.” The Evangelical emphasis on “traditional family” values shaped national politics, framing political debates for decades to come.

The antigay activism of the Religious Right became a hallmark of its politics in 1977 after Anita Bryant launched a voter referendum campaign to overturn Miami’s sexual orientation nondiscrimination law. The fear of homosexual role models was a central part of Bryant’s “Save Our Children” campaign, which conservatives described as necessary to counter “role modeling homosexuals, the ones who aren’t openly recruiting, but who don’t stay in the closet,” identifying the problem as “the homosexual who is blatant in his profession of his preference and who gives the impression to young people that this lifestyle is not odd or to be avoided, but just an alternative.”

The campaign rhetoric, which emphasized the alleged danger that gays and lesbians posed to children, resonated with more than just Miami residents. After almost seventy percent of that city’s voters approved the law’s repeal, other conservative groups launched ballot initiatives around the country. Voters in Wichita, Kansas; Eugene, Oregon; and St. Paul, Minnesota overturned their gay rights ordinances the following year. In California, citizens rejected a statewide referendum to ban homosexual teachers from public schools. While unsuccessful, that initiative reinforced a national antigay climate; it also taught conservative leaders, including Jerry Falwell and Louis Sheldon, how to organize ballot

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216. Kenneth L. Woodward et al., *Born Again!*, Newsweek, Oct. 25, 1976, at 69; *see also Dochuk, supra* note 212, at 365.


222. *See Fejes, supra* note 220, at 183, 209.
measure campaigns, which became one of the main ways the Religious Right enacted antigay legislation in the 1980s.\(^\text{223}\)

Religious conservatives deployed child protection rhetoric in their opposition to gay rights in the decades that followed. For much of the twentieth century, medical, social, and political discourse equated homosexuality with pedophilia, identifying child molestation as both the root cause and the product of same-sex sexual attraction.\(^\text{224}\) The Religious Right repackaged and modernized these claims, arguing that the danger was psychological, not physical.\(^\text{225}\) According to this theory, gay and lesbian adults would role model their sexual orientation, which children would unwittingly adopt.\(^\text{226}\) The fear was one of indoctrination that presented homosexuality as a choice—one that children would elect if they were not taught that homosexuality was both dangerous and socially unacceptable.\(^\text{227}\) Jerry Falwell, the founder of the Moral Majority, explained that allowing gays and lesbians to teach “might be an open invitation for [homosexuals] to subvert our young and impressionable children into their lifestyle.”\(^\text{228}\) Likewise, Beverly LaHaye, who founded Concerned Women for America, a national lobbying group, warned that “[e]very homosexual is potentially an evangelist of homosexuality, capable of perverting many young people to his sinful way of life.”\(^\text{229}\) As a result, religious conservatives argued it was important for the state to oppose gay rights, lest children mistakenly believe that homosexuality was an acceptable alternative they should elect. The Religious Right’s antigay activism gained newfound cultural salience because of the AIDS crisis, which popularly became known as the “homosexual plague.”\(^\text{230}\)

As the Religious Right became a national political force, gay and lesbian families were becoming more common. In addition to lesbian mothers who sought and attained custody of their children from their heterosexual relationships, same-sex couples formed families through alternative reproductive technologies.\(^\text{231}\) In the 1970s, the Lesbian Rights

\(^{223}\) See Stone, supra note 212, at 14–15.  
\(^{224}\) Denno, supra note 101, at 1339, 1341–42; Freedman, supra note 113, at 103; Schmeiser, supra note 94, at 215.  
\(^{226}\) Eskridge, supra note 225, at 1328; Rosky, supra note 225, at 608.  
\(^{227}\) Eskridge, supra note 225, at 1329; Melissa Murray, Marriage Rights and Parental Rights: Parents, the State, and Proposition 8, 8 Stan. J. C.R.-C.L. 357, 359 (2009); Rosky, supra note 225, at 641; see also Clifford J. Rosky, No Promo Hetero: Children’s Right to be Queer, 35 Cardozo L. Rev. 425, 428 (2013).  
\(^{228}\) Irvine, supra note 210, at 173.  
\(^{231}\) George Chauncey, Why Marriage?: The History Shaping Today’s Debate Over Gay Equality 105 (2004); Douglas NeJaime, Marriage Equality and the
Project of San Francisco did not receive many calls from lesbians who wanted information about donor insemination. By 1984, however, the group was receiving approximately thirty-five calls a month on this subject, a number that had quadrupled by 1989.232 Between 1982 and 1989, the Sperm Bank of Northern California doubled the number of its lesbian clients.233 Hundreds of women attended workshops on the legal implications of donor insemination that a prominent lesbian rights attorney offered.234 Similarly, the Lesbian Mothers’ National Defense Fund in Seattle received requests for information about alternative reproduction from women all over the United States.235 Given the growing numbers of gay and lesbian families, the LGBT rights movement began focusing on parental and domestic rights in the late-1980s and early-1990s.236 The HIV/AIDS crisis, which began in the early-1980s, also contributed to this shift. Partners of those with HIV/AIDS did not have legal relationships with their loved ones; as a result, hospitals denied them access to their partners and excluded them from the medical decisionmaking process.237 That exclusion rendered the question of marriage and domestic relationships more salient to the LGBT community, such that family law became a focal point of rights advocacy.

Gays and lesbians were thus increasingly visible as parents when religious conservatives, with their focus on child protection, were gaining power in American society. The result was a political firestorm that waged around the country, which came to a head over gay and lesbian foster care and adoption policies, as well as gay-inclusive school curricula, which bureaucrats were charged with implementing.

B. Agency Resistance

Debates over gay and lesbian foster and adoptive parenting became a national political issue in the mid-1980s. As elected officials promulgated bans on gay and lesbian foster and adoptive parenting, social workers subverted the policies because of scientific developments, creating gay- and lesbian-headed families. These civil servants went against popular sentiment and their legislative mandate, demonstrating the power of scientific paradigms on the law. In doing so, they identified gays and lesbians as fit parents deserving of respect. At the same time,
by refusing to enforce the laws as the legislatures intended, they created a governance problem.

Scientific research demonstrated that gays and lesbians were fit parents at a time when the foster care system was in crisis, providing a solution to a mounting problem. In the 1970s, the foster system was overburdened, with ever-increasing numbers of children entering the system, but few being placed with adoptive parents or returned to their families. In response to mounting criticism, Congress enacted the Adoption Assistance and Child Welfare Act in 1980, which provided financial incentives for state agencies that quickly found permanent placements for foster children to provide those children with stability. The law had its intended effect: the number of children in foster care dropped sharply, and the time children stayed in foster care also declined. However, both of those figures quickly rose again as families struggled with the effects of an economic recession and the crack cocaine and HIV/AIDS epidemics. Between 1986 and 1992, the number of children in foster care increased by 54 percent.

Social workers, who had been struggling to find homes for children, began placing their wards in the homes of gay and lesbian parents. In doing so, they were following the consensus of the mental health professions. Mental health professional associations had issued position statements in favor of gay and lesbian foster and adoptive parenting based largely on the research studies developed in response to lesbian mother and gay father custody cases. Soon after the declassification, the American Psychological Association admonished that the “sex, gender identity, or sexual orientation of natural[] or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or


241. See id.

242. Gays and lesbians often provided homes for harder to place children, including children of color and special needs children, or turned to international adoption from countries that welcomed same-sex parents. George, supra note 209, at 375, 378; see also Laura Briggs, Somebody’s Children: The Politics of Transracial and Transnational Adoption 256–57 (2012).

243. Social workers have a close historical association with psychiatrists and psychologists, which explains why these bureaucrats were so responsive to scientific developments. Regina G. Kunzel, Fallen Women, Problem Girls: Unmarried Mothers and the Professionalization of Social Work, 1890–1945, at 115, 151–52, 169 (1993) (detailing how social work obtained professional legitimacy by employing psychological techniques and rhetoric).
placement cases.” In 1980, the National Association of Social Workers (NASW) amended its code of ethics to prohibit discrimination on the basis of sexual orientation. Six years later, the American Psychiatric Association also affirmed that homosexuals should be allowed to serve as foster parents, citing the wide body of clinical experience and research studies that demonstrated parental homosexuality was irrelevant to child development. In 1987, the NASW announced it would be “working for the adoption of policies and legislation to end all forms of discrimination against lesbians and gay men at the federal, state, and local levels in all institutions.” These announcements, from a number of different organizations, demonstrate that many professionals had reviewed the issue and come to the same conclusion. They guided social workers’ decisions and provided empirical support for their politically unpopular choices.

Although it is possible that social workers decided to place children with gay and lesbian parents for reasons other than scientific consensus, the available evidence indicates otherwise. It is true that social workers on the whole tend to be politically liberal, such that social workers may have been more inclined to view these placements as more appropriate than other Americans. However, liberal politics during this period were not necessarily committed to gay and lesbian rights. Any decision to support gay adoption was also a significant departure from the rest of American society, with only 29 percent of Americans supporting gay and

244. AM. PSYCHOL. ASS’N, COMM. ON LESBIAN & GAY CONCERNS, AMERICAN PSYCHOLOGICAL ASSOCIATION POLICY STATEMENTS ON LESBIAN AND GAY ISSUES 2 (1991) (on file with the ONE National Gay and Lesbian Archives at the University of Southern California Libraries, American Psychological Association Subject File). The organization issued this statement in 1976. Id.


247. NAT’L ASS’N SOC. WORKERS, supra note 245.

248. Professional organizations subject policy statements to many layers of review before adopting them, with each group following its own process. See, e.g., ASSOCIATION RULES, AM. PSYCHOL. ASS’N § 30–8 (2017), http://apa.org/about/governance/bylaws/rules.pdf [http://perma.cc/Q9NK-M5L7]. Since these organizations often lobby on behalf of their members, and therefore have vested interests in certain policies, having multiple groups concur on a principle indicates a broader agreement among scientists.

lesbian foster and adoptive parenting in 1992. More telling is the shift in social workers’ placements before and after the scientists published their studies and scientific organizations issued their policy statements. Prior to this evidence becoming available, social workers—afraid of the effect the parents’ sexual orientation could have on younger children—only placed self-identified gay and lesbian teenagers in the homes of homosexual adults. After scientific evidence demonstrated this concern was unfounded, the types of placements social workers were willing to make expanded to children of all ages.

These placements spurred controversy, leading to legislative bans and executive prohibitions on gay and lesbian foster and adoptive parenting that government bureaucrats resisted. In 1985, after the Boston Globe reported that two young boys had been placed with a gay couple, Massachusetts Governor Michael Dukakis instituted a hierarchy for prospective foster parents that gave preference to “traditional family settings.” The policy did not explicitly exclude gays or lesbians, but officials in the Dukakis administration stated that such placements were “highly unlikely” and the regulation became known as a ban on gay foster and adoptive parents. Civil servants, particularly social workers, vocally denounced the policy, criticizing it at public forums and lobbying Dukakis to eliminate the hierarchy. The Massachusetts chapter of the NASW joined a lawsuit challenging the ban; Dukakis ultimately revised the regulation in 1990 to settle the case.

A similar contest broke out in New Hampshire that same year. There, bureaucrats resisted enforcing the ban with which they disagreed.

251. Id. at 375–78.
253. Id.
256. At the time Florida was the only state with a law prohibiting gays from
parenting became a subject of debate after a local paper reported that the state’s child welfare agency had knowingly licensed a gay man as a foster parent. The state House of Representatives quickly began debating a bill to bar “admitted homosexuals” from adopting a child or receiving foster care licenses. The proposed law also prohibited licensing anyone whose household members were gay. Representative Mildred Ingram, the bill’s sponsor, claimed that homosexuals molested children at higher rates than heterosexuals and argued that gays and lesbians would role model their homosexuality to their wards. In rhetoric that mirrored Anita Bryant, Ingram asserted: “The only way for homosexuals to carry on their lifestyle is to proselytize.” However, after receiving assurances from the Judiciary Committee that the Division of Children, Youth and Families (DCYF) would stop placing children in the homes of gays and lesbians, and would address the issue through rulemaking procedures, the House voted down Ingram’s proposal.

Despite its agreement with legislators, DCYF proposed rules two-and-a-half months later that did not prohibit homosexual foster parents. The new rules only required foster parents to provide “a safe, nurturing, and stable family environment which is free from abuse and neglect.” The Director of DCYF, David Bundy, disagreed with the legislature’s views on gay and lesbian foster parents, and wanted to maintain flexibility in child placements. Jack Lightfoot, an attorney for Child and Family Services involved in the drafting, later explained the decision by pointing to social workers’ expertise: he said the rules did not address sexual orientation “because the professionals didn’t think it was an issue.”

adopter children, although North Dakota prohibited placements with unmarried couples. MASS. EXEC. OFFICE OF HUMAN SERVS., REVIEW OF STATES’ POLICIES REGARDING FOSTER PLACEMENTS 5–6 (1985) (on file with the Wendell Ricketts Papers at the Cornell University Carl A. Kroch Library, Collection No. 7681, Box 1, Folder 11). Four states—New York, New Jersey, New Mexico, and Vermont—had agency regulations or policies prohibiting discrimination on the basis of sexual orientation. Id.

257. See Paul R. Lessard, Sexuality Issue Raised in Foster Child Care Case, Union Leader, June 19, 1985, at 1.
260. Id.
263. Telephone Interview with David Bundy, President and CEO, Children’s Home Society of America (Sept. 24, 2014).
264. Telephone Interview with Jack Lightfoot, Advocacy Director, Child and Family Services (Nov. 12, 2014).
The agency’s victory over gay and lesbian foster and adoptive parenting was shortlived, as the legislature quickly reintroduced and enacted a ban amid debates that emphasized child protection.\textsuperscript{265} As supporters explained, “the association of children with homosexuals in a social setting could turn these children into homosexuals.”\textsuperscript{266} Former state Supreme Court Justice Charles Douglas framed this perspective at one of the hearings in the following way: “A friend tells me that if you speak French at home around young children, they grow up learning how to speak French . . . . I think that same principle applies to young children who are raised by foster parents or who are in day care centers run by homosexuals.”\textsuperscript{267} Senator Jack Chandler put the issue more dramatically, analogizing child placements with gay and lesbian parents to “putting a pound of roast beef in a cage with a lion. You know it’s going to get eaten.”\textsuperscript{268} His statement drew on the decades-long stereotype of gays as predators and child molesters, which the role modeling theory of homosexuality had not entirely displaced. Both chambers of the legislature approved the ban, and the Governor signed it into law.\textsuperscript{269}

Despite the new statute, civil servants continued to approve gays and lesbians as foster parents, subverting the statute’s aim because they believed doing so best served the needs of New Hampshire’s children. After the law’s enactment, DCYF mailed questionnaires to foster parents asking them to disclose their sexual orientation; however, ten percent objected to the intrusion on their privacy and refused to answer.\textsuperscript{270} Bundy announced that since New Hampshire was facing a “critical shortage of foster homes,” the state would not take any action against foster parents who declined to respond to inquiries about their sexuality.\textsuperscript{271} Moving forward, social workers would not ask prospective parents about their sexual orientation.\textsuperscript{272}


\textsuperscript{267} Distaso, supra note 266.

\textsuperscript{268} Clay Wirestone, In 1987, the New Hampshire Legislature Targeted Gay People as Unfit for Parenting, CONCORD MONITOR, June 30, 2013.

\textsuperscript{269} 1987 N.H. Laws 379.

\textsuperscript{270} Ben Stocking, State May Relent for Some Foster Parents, CONCORD MONITOR, Nov. 24, 1987, at A1, A6.

\textsuperscript{271} Pat Hammond, Foster Parents Crisis Feared, UNION LEADER, Sept. 27, 1987, at 1; see also Ben Stocking, Lawmakers Split Over Enforcement of Gay Ban, CONCORD MONITOR, Nov. 25, 1987, at B1, B12.

\textsuperscript{272} Telephone Interview with Bundy, supra note 263.
The legislature did not respond to the agency’s announcement, and since there was “no support for the law” among DCYF employees, bureaucrats continued with their resistance. Bundy later characterized the situation by saying “we came up with ‘don’t ask don’t tell’ way before Clinton.” In mid-1980s New Hampshire, few gays or lesbians were open about their homosexuality; throughout the country, passing was a common aspect of gay and lesbian life, which is why liberationists identified coming out of the closet as a political act. Consequently, those who wanted to become parents simply kept their sexual orientation hidden. Social workers’ disobedience allowed gays and lesbians to foster and adopt children, albeit at the significant cost of suppressing their sexual identity. The state’s law condemned gays and lesbians as harmful to children—an idea that social workers offset with individual placements.

New Hampshire’s social workers were not the only bureaucrats to resist bans on gay and lesbian foster and adoptive parents in the late-1980s and early-1990s. Indeed, civil servants in other states with antigay policies, such as California and Florida, likewise undermined their bans, helping gays and lesbians around the country to become parents. These bureaucrats followed the letter, but not the spirit, of the law, raising important questions about the proper actions of professionals within the administrative state. Given that the role of the executive branch is to implement the law, not challenge or change it, the contest between a legislative mandate and professional expertise seems to have a clear answer. However, bureaucrats are also employed for their expertise and charged with using their discretion in implementing laws, thereby creating a governance problem that is more complicated than it initially appears.

In New Hampshire, as in the other states, the legislature created a situation in which bureaucrats had to choose between their professional judgment, which provided the basis for their authority as social workers, and a law that countermanded that same expertise. By exploiting a statutory gap, social workers found a means to balance their two sources of authority. These professionals were employed specifically to use their knowledge on child welfare. That they subverted the legislature’s goal, with scientific principles shaping their discretion, demonstrates the
powerful role of scientific developments in administrative law.\textsuperscript{279} The New Hampshire example also illustrates how developments in scientific understanding and agents of the administrative state moved towards a new role of supporting gays and lesbians in their struggle for legal rights.

The New Hampshire legislature may not have realized that it had enacted a statute with room for resistance. However, when the agency’s director announced that the agency would not enforce the ban as intended, the legislature could have acted to clarify the prohibition and remove the ambiguity that made dissent possible. The legislature had the opportunity to weigh in on the social workers’ decisions, but chose not to do so. Although this fell short of a silent endorsement, it nevertheless allowed the social workers’ expertise to determine policy.\textsuperscript{280} These events demonstrate how the administrative state can become a crucible for legal change.

C. Breaching the Schoolhouse Doors

Much like the adoption debates, the fear of child indoctrination pervaded efforts to update school textbooks to incorporate materials on gays and lesbians in the late-1980s and early-1990s. Also, like the adoption context, many of these debates involved a divide between elected representatives and professionals within executive agencies, with the administrative state more responsive to the claims of gays and lesbians than its legislative counterpart.\textsuperscript{281}

Gay rights advocates around the country argued for inclusive curricula both to protect the welfare of sexual minority youth and to create a more tolerant society. They supported their claims with an increasing number of scientific studies. In 1989, the U.S. Department of Health and Human Services published a report that revealed exceptionally high rates of suicide among gay and lesbian youth,\textsuperscript{282} which experts attributed to social marginalization, family rejection, and harassment in schools by

\textsuperscript{279} Notably, scientific principles provided a solution to a practical problem: a lack of homes for children. This may explain why social workers were willing to engage in rights-promoting resistance.


\textsuperscript{281} While educators, unlike social workers, are not members of the mental health community, they are knowledge-based professionals. See Haupt, supra note 20, at 1250–51. Teachers also tend to be motivated by professional norms and codes of ethics that include respect for diversity, an impetus towards inclusion, and a concern for the welfare of their students. Carol A. Bartell, A Normative Vision of Teacher as Professional, 25 TCHR. EDUC. Q. 24, 29 (1998); see also Code of Ethics for Educators, ASS’N OF AM. EDUCATORS (Feb. 23, 2010), http://www.aateachers.org/images/pdfs/aae-codeofethicsforeducators.pdf [http://perma.cc/5G7B-PGY9].

\textsuperscript{282} Paul Gibson, Gay Male and Lesbian Youth Suicide, in 3 Report of the Secretary’s Task Force on Youth Suicide 110 (1989); Lou Chibbaro, Jr., HHS: Gay Youth More Likely to Try Suicide, WASH. BLADE, Aug. 18, 1989, at 1, 4.
At the same time, studies demonstrated that schools’ failure to educate young people about gays and lesbians contributed to homophobia and discrimination. Indeed, most acts of violence against gays and lesbians were committed by teenagers and young adults. These research studies reinforced gay and lesbian rights advocates’ calls for inclusive curricula that emphasized tolerance for sexual minorities. When implementing gay-inclusive curricula, educators faced similar arguments as the ones social workers had encountered, namely that exposure to ideas about same-sex sexuality would result in children becoming homosexual. The battles over curricula thus turned on the same questions as those over foster and adoptive parenting, with bureaucrats coming into conflict with legislators.

One of the most contentious battlegrounds over instructional materials was New York City in 1991, where a first-grade multicultural teacher’s guide became a national symbol of the country’s culture wars. The city created the *Children of the Rainbow* curriculum after a group of white teenagers killed a black high school student in Brooklyn in 1989. To promote tolerance and appreciation of cultural diversity, the New York City Board of Education adopted a resolution calling for the creation of a multicultural education curriculum focused on tolerance based on race, religion, national origin, sex, age, physical handicaps, and sexual orientation. Part of the reason the resultant *Rainbow* guide became

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285. Educators’ associations generally supported efforts to make schools more inclusive and welcoming of gay students. In 1987, the American Federation of Teachers enacted a resolution calling for equal educational opportunities for gay and lesbian students, a principle the National Education Association endorsed the following year. *NEA Approves Sexual Orientation Advice for Students*, S.F. SENTINEL, July 15, 1988; *Teachers Pass Gay Rights Resolution*, S.F. SENTINEL, July 8, 1988; Pat Ordovensky, *NEA: Get Gay Teens Counseling*, USA TODAY, July 7, 1988.


287. New York City Board of Education, Statement of Policy on Multicultural Education and Promotion of Positive Intergroup Relations (Nov. 9, 1989) (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community
so contentious was because of NYC’s educational administrative structure. The Board of Education, which had two members appointed by the Mayor and five by each of the borough presidents, was responsible for setting high school policies and overseeing the city’s educational system.\textsuperscript{288} The actual drafting fell to the school system Chancellor Joseph Fernandez and his staff at the Department of Education, but the decision to use the materials was in the hands of the thirty-two district school boards, whose members were popularly elected for three-year terms.\textsuperscript{289} As a result, the policy and the actual documents were created by administrative agencies, while the approval depended on quasilegislative bodies.\textsuperscript{290}

The controversy over the \textit{Rainbow} curriculum pitted educators in the Department of Education against elected school board members who opposed the materials, with the two groups ultimately compromising on a solution both could accept. None of the administrative agency staff expected the vitriolic opposition to the guide, which only referenced gays and lesbians on three of its 443 pages.\textsuperscript{291} The guide urged teachers to discuss the value of every type of family household, “including two-parent or single-parent households, gay or lesbian parents, divorced parents, adoptive parents, and guardians or foster parents.”\textsuperscript{292} The guide also emphasized the need for teachers to help children develop a positive attitude towards gays and lesbians, to forestall later homophobic
discrimination and violence. Included in its list of recommended readings were three books that became a focal point of the controversy—Heather Has Two Mommies, Daddy’s Roommate, and Gloria Goes to Gay Pride—for their depiction of loving gay parents.

A vocal contingent of parents and school board members attacked the guide, accusing the Board of Education of indoctrinating students and supporting immorality. Four of the city school boards voted to reject the pages of the guide that addressed gays and lesbians. Parents took to the streets, participating in six public demonstrations, including a rally outside the Department of Education that drew 2,000 attendees. Mary Cummins, president of Queens School Board 24, sent a letter to the district’s 22,000 parents accusing the curriculum’s supporters of “pro-selytizing” homosexuality and asserting: “We will not accept two people of the same sex engaged in deviant sex practices as ‘family.’” Other opponents also made recruitment rhetoric a central part of their campaign, depicting reformers as opening the door to homosexual indoctrination. They disseminated videos, posters, and pamphlets identifying the curriculum as a “gay recruitment campaign.” This argument proved effective, with parents expressing their fears that teaching anything about gays and lesbians would predispose their children towards homosexuality. For example, Barbara Kay, a mother of three, was concerned that the Rainbow curriculum would encourage her children to be gay: “They’re trying to confuse [children] and make them accept it for themselves.” Another New Yorker explained his opposition similarly: “It was the first time that someone was probably trying to woo our children into a [gay]

293. Id. at 372.
295. IRVINE, supra note 210, at 154; Myers, supra note 286.
298. Myers, supra note 296, at A20.
299. IRVINE, supra note 210, at 174.
302. Byron, supra note 301.
lifestyle.” Some of the arguments were more extreme, with Rainbow opponents creating a video that claimed the gay movement’s goal was to “sodomize your sons.” That argument drew upon the notion that homosexuality was the cause and product of childhood sexual molestation, thereby identifying abuse as a means of indoctrination.

These protests led elected school board members and motivated parents to fight city bureaucrats, but what is particularly striking about the tenor of the debate and its vitriolic rhetoric is that the Rainbow curriculum was a purely advisory document—and a teacher’s guide at that. None of its pages were meant to be handed to children, nor were teachers required to use it as a manual for classroom activities. The Rainbow curriculum was written to help districts implement the Board of Education policy, which school boards were required to follow. Under the regulation, teachers had to provide multicultural instruction that promoted tolerance for gays and lesbians; the only question was how and when they would do so. The vast majority of districts were willing to incorporate discussions about gays and lesbians in later grades. The quarrel centered on what information should be provided to young children. The fear the debate revealed was that these children, exposed to homosexuality at too early an age, would grow up to be gay or lesbian themselves.

New York’s parents and their elected representatives were not the only ones to express those fears, with school boards around the country mobilizing in response to the Rainbow curriculum to prevent gay-inclusive material from breaching their schoolhouse doors. In Merrimack, New Hampshire, the town’s school board passed a sweeping policy that banned any activity or instruction that had “the effect of encouraging or supporting homosexuality as a positive lifestyle alternative.” Chris Ager, the board’s chairman, described the policy as a means “to keep our Merrimack schools free from promoting homosexuality.” Ager explained that the small town, with a population of 22,000, needed to prevent materials like Children of the Rainbow and Heather Has Two Mommies from being introduced in schools. To avoid violating the

303. Irvine, supra note 210, at 174.
304. Irvine, supra note 210, at 156; Entous, supra note 300; Minkowitz, supra note 297, at 902.
306. Id.
307. Id.
308. Irvine, supra note 210, at 154.
311. PERSON Project, The P.E.R.S.O.N. Organizing Manual (Sept. 11, 1995) (on file with the Jessea Greenman/PERSO Project Records at the S.F. Public Library,
ban, teachers removed canonical works, including Shakespeare’s *Twelfth Night*, from the curriculum; eliminated instructional materials, such as one that referenced Walt Whitman’s homosexuality; and stopped teaching students about AIDS prevention.\(^{312}\) School boards in towns from Anoka Hennepin, Minnesota, to East Allen County, Indiana, enacted similar measures.\(^{313}\)

Some of these legislative actions had consequences that most people would now identify as absurd; however, they provide insight into the deepseated fears surrounding child indoctrination. In Elizabeth-town, Pennsylvania, the school board approved a policy affirming that the district would never tolerate or accept “pro-homosexual concepts on sex and family.”\(^{314}\) One of the board members, Thomas A. Bowen, explained that the resolution was necessary in light of the *Rainbow* curriculum: “I think parents in New York wish they’d taken preemptive action before the superintendent introduced textbooks that present homosexuality as an approved alternative lifestyle.”\(^{315}\) As a result of the resolution, the town’s administrators and music teachers prohibited the school band from performing “YMCA,” as both the song and the Village People were “associated with the gay lifestyle.”\(^{316}\) The 1979 hit was not the only pop culture casualty in the fight to keep homosexuality out of schools. In Sawyers Bar, California, the school principal had to review episodes of Sesame Street before they could be shown to kindergarten classes after a parent objected that Bert and Ernie “promote homosexuality.”\(^{317}\) Questions about the fuzzy puppets’ sexuality generated so much attention that the show’s producers eventually issued a press release denying that Bert and Ernie were dating.\(^{318}\) These cultural flashpoints underscore the anxieties around homosexuality and its effects on children, as well as why bureaucrats’ stances in favor of gay-inclusive curricula were so consequential.

In New York, the bitter dispute ended when the Department of Education proposed a modified curriculum. By softening controversial passages in the first grade guide and agreeing that school districts could

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wait until sixth grade to address families headed by same-sex couples, the administrative agency was able to defuse the rancor, calm anxieties, and reach a compromise with the objecting school boards.\footnote{319} Gay rights advocates decried these changes, seeing them as a capitulation to intolerance.\footnote{320} Although these advocates did not win the war over the first grade curriculum, they succeeded in changing the debate’s baseline in New York, from one over whether information on gays and lesbians belonged in schools, to one that asked when those lessons should be taught. In doing so, they challenged the notion that the state should protect children from learning about gays and lesbians, taking on the Religious Right’s primary argument for opposing gay rights.

The resolution came from a compromise between the bureaucracy and the legislative body, demonstrating the influence of administrators. By incorporating information on gay and lesbian parents in the \textit{Rainbow} curriculum, the Board of Education and the educators on its administrative staff identified these types of families as an ordinary element of American life, a view that many in their community contested—and that four school boards initially refused to endorse. In making this claim, these educators were presenting the scientific consensus that children’s exposure to information on homosexuality was irrelevant to the development of future sexual orientation. Here, two sources of administrative authority—the bureaucrats’ knowledge, training, and skills as professionals, and the dictates of elected representatives—conflicted, raising concerns about the proper role of administrators that this Article will take up again in Part \textit{V}.


\footnote{320}{Revisions Made in \textit{Children of the Rainbow Curriculum}, LGTA \textsc{Newsletter}, Mar. 1993, at 1 (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community Center, Box 1, Folder 32); Letter from Mindy Chermak et al., Steering Comm., Lesbian and Gay Teachers Ass’n, to Joseph Fernandez, Chancellor, NYC Public Schools (May 16, 1992) (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community Center, Box 6, Folder 283); Letter from Paula L. Ettelbrick, Legal Director, Lambda Legal, to Joseph A. Fernandez, Chancellor, NYC Public Schools (Oct. 29, 1992) (on file with the Lesbian Gay Teachers Association Records at the NYC LGBT Community Center, Box 4, Folder 217); Letter from Marjorie Hill, Director, Office for the Gay and Lesbian Community, City of New York, et al., to Joseph A. Fernandez, Chancellor, NYC Public Schools (Oct. 27, 1992) (on file with the Park Files at the NYC Municipal Archives, No. 99–43, Box 9, Folder 312).}
In New York, as in New Hampshire, scientific consensus conflicted with popular beliefs, leading to contests between civil servants and elected officials. The bureaucrats, who were hired for their expertise, drew upon scientific developments in exercising resistance. Their actions contrast sharply with the midcentury administrative state, in which regulators and legislators concurred on antigay policies. Shifts in scientific theories undergirded changes in the implementation of law, with both contributing to support for gays and lesbians. These events show a move away from the antigay regime, with both scientists and the administrative state becoming sources of support for gays and lesbians.

IV. PAST AS PROLOGUE: TRANSGENDER STUDENTS

Scientific developments had a profound impact on how professionals working in administrative bureaucracies implemented the law, with executive agencies more sympathetic to the claims of gays and lesbians than legislators. Bureaucrats, drawing on their expertise, resisted legislative enactments and popular pressure that identified gays and lesbians as harmful to children. The dynamic this Article presents is not just one of the recent past, but continues today. In debates over transgender bathroom access rights, some administrative agencies have been more responsive to transgender rights claims than legislators. Much as in the gay rights context, scientific consensus is providing important support for administrators, although LGBT social, political, and legal activism also plays an important role. This Part details bureaucratic resistance in schools, where a number of educators have followed medical guidelines in protecting the rights of transgender students, much as their colleagues did in supporting gay-inclusive curricula in the early 1990s.

The contest over transgender bathroom access rights, with its tension between legislatures and bureaucracies, has in many ways evolved in parallel to the debates over gay and lesbian rights. Elected officials around the country have made opposition to transgender rights a central part of their legislative agenda—with bathroom access becoming a focal point of this effort. In the first two months of 2016, legislators filed forty-four antitransgender bills in sixteen states. North Carolina drew


322. This is, of course, not true of every legislature. In 2013, California enacted a statute requiring schools to allow pupils to “participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.” 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West 2017) (codified at CAL. EDUC. CODE § 221.5).

323. Anti-Transgender Legislation Spreads Nationwide, Bills Targeting
widespread attention when it enacted H.B. 2, a law that instructed public agencies to “require every multiple occupancy bathroom or changing facility” to be “designated for and only used by persons based on their biological sex.”\(^{324}\) North Carolina’s law was not the first time that bathroom access had become a political flashpoint in LGBT rights. In 2015, for example, voters repealed Houston’s Human Rights Ordinance after opponents claimed that its gender identity protection would allow men to use women’s bathrooms.\(^{325}\) The Department of Justice responded to H.B. 2 by issuing letters to public agencies and officials, asserting that North Carolina’s statute violated three federal civil rights laws.\(^{326}\) H.B. 2 spurred national controversy, with companies and celebrities announcing boycotts of the state until legislators repealed the law.\(^{327}\) A little more than one year after enacting H.B. 2, North Carolina modified the bathroom provisions.\(^{328}\)

Despite the increasingly hostile debates over transgender bathroom access in legislatures, educators within administrative agencies have been quietly securing necessary accommodations for transgender students, much like teachers in the gay-inclusive curricular context.\(^{329}\) These educators have been willing to support transgender students in the face of considerable opposition in part because of scientific standards for the care of youth with gender dysphoria.\(^{330}\) There are likely other


\(^{326}\) Complaint for Declaratory Relief, Berger v. U.S. Dep’t of Justice, No. 5:16-cv-00240-FL, 2016 WL 2642261 ¶¶ 1, 7 (E.D.N.C. May 9, 2016).


reasons motivating this support, including the personal relationships they have developed with the students. However, objective scientific evidence helps bolster their arguments and can convince those who are not personally invested in individual pupils. The consensus among medical professionals is that adolescents with gender dysphoria should have their gender identity affirmed, as gender dysphoria at this age typically persists into adulthood. Treatment for these adolescents includes medical interventions, such as hormone suppressants to delay the onset of puberty, as well as social affirmations of gender identity. According to scientific research, it is best when families and communities address adolescents with gender dysphoria according to their gender identity. A logical extension of this research is that teachers’ failure to act accordingly could cause their students psychological harm. Scientific consensus makes it clear to educators what course of action is in these adolescents’ best interests.

The psychological community is divided, however, as to what constitutes optimal treatment for preadolescent children, as studies have shown that gender dysphoria in childhood often does not persist through adolescence. In longitudinal studies of children treated in clinics for gender dysphoria, only 6–23 percent of preadolescent boys, and 12–27 percent of girls, later identified as transgender adults. Thus, while transgender adolescents and adults have stable and permanent gender identities, the same is not always true of prepubertal children, leading to divisions among psychologists as to whether it is better to affirm these children’s asserted gender identity or work to decrease their crossgender identification. There is growing evidence as to the benefits of the affirmative approach, a position that is based on the notion that the benefits of affirming the child’s gender identity outweighs the possible distress the child might later face if he or she later transitions back.

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331. Am. Psychol. Ass’n, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70 AM. PSYCHOLOGIST 832, 842 (2015).
332. Id. at 842, 846.
333. Id.
335. Drescher & Pula, supra note 334, at S17. Most of the children in these studies whose gender dysphoria desisted later identified as gay or lesbian. Id. at S18; WPATH, supra note 334, at 172.
336. Drescher & Pula, supra note 334, at S17; Am. Psychol. Ass’n, supra note 331, at 842; WPATH, supra note 334, at 176.
337. Jack L. Turban, Transgender Youth: The Building Evidence Base for Early Social Transition, 56 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 101, 102 (2017); Drescher & Pula, supra note 334, at S18–S20; WPATH, supra note 334, at 176.
who attempt to keep the child in his or her natal gender role, on the other hand, want to forestall the child’s later difficulty of a second transition.\textsuperscript{338} The most prominent advocate of this latter treatment method, psychologist Kenneth Zucker, who led the Child Youth and Family Gender Identity Clinic in Toronto, was recently dismissed amid allegations that his clinic shamed and traumatized children.\textsuperscript{339} Unlike in the gay and lesbian context, scientists have not reached a consensus on prepubescent children with gender dysphoria, although there appears to be a growing commitment to gender identity affirmation.

Scientific views as to best treatment practices for adolescents with gender dysphoria have shaped the administrative responses to transgender student rights, much as they did in the gay rights issues detailed in this Article. In eight states and the District of Columbia, departments of education have promulgated policies to support and protect transgender students.\textsuperscript{340} These address a range of issues, including updating school records, using appropriate pronouns, ensuring access to the sex-segregated

\textsuperscript{338} Drescher & Pula, supra note 334, at S20; WPATH, supra note 334, at 176. Other proponents of this approach have identified adult transgender identity as an undesirable outcome due to the social stigma associated with transgender identity and the invasive medical procedures that transgender individuals often undertake. Drescher & Pula, supra note 334, at S18; Kenneth J. Zucker et al., A Developmental, Biospychosocial Model for the Treatment of Children with Gender Identity Disorder, 59 J. Homosexuality 369, 391 (2012).


activities and facilities that align with the students’ gender identity, accommodations to dress codes, respecting transgender students’ privacy, and fostering respectful school communities.\textsuperscript{341} School districts in another seven states without statewide policies have also adopted similar guidelines, and school sports leagues governing five states have announced that transgender students may play on the sports team of their gender identity.\textsuperscript{342} In 2015, the National Education Association—the largest association of professional educators—coauthored a guidebook identifying the ways in which educators may best support transgender students.\textsuperscript{343} That guide emphasized that transgender students must be granted access to the restrooms and locker rooms that accorded with their gender identity, and that students who were uncomfortable with using facilities with a transgender student should be given the option of using a private facility, such as the bathroom in the nurse’s office.\textsuperscript{344} These recommendations ensured that transgender students were not set apart from their peers or marked as different. Of course, not all school personnel have welcomed transgender students or respected their gender identities.\textsuperscript{345} The legal landscape is murky at best, as the Department of Education recently rescinded its interpretive guidance,\textsuperscript{346} issued in 2015 and reinforced in a 2016 “Dear Colleague” letter, which had maintained schools “must treat transgender students consistent with their gender identity.”\textsuperscript{347}

\footnotesize{341. Office of Elementary and Secondary Educ. & Office of Safe and Healthy Students, \textit{supra} note 340.  \\
344. \textit{Id.} at 25.  \\
As a result, administrative agencies and democratically elected school boards sometimes take opposing sides, creating a contest much like the battle over curricula in New York City. In *Grimm v. Gloucester County School Board*, school officials were supportive of the student’s transition and ensured teachers and staff would treat the student as a boy. In addition to changing school records to reflect the student’s new male name, the guidance counselor contacted teachers to explain that the student should be addressed with his new name and gender pronoun. School officials allowed the student to use the boys’ restroom until the school board, responding to community member complaints, adopted a policy restricting the use of school restrooms and locker rooms to students with “the corresponding biological genders.” The public hearings on the policy were replete with hostile and vitriolic rhetoric; one speaker called the student “a ‘freak’ and compared him to a person who thinks he is a ‘dog’ and wants to urinate on fire hydrants.” The Fourth Circuit initially held that the student had a right to use the boys’ restroom, giving deference to the Department of Education’s interpretation of Title IX; however, after the Department of Education rescinded its interpretive guidance, the U.S. Supreme Court vacated and remanded that decision. The Fourth Circuit recently sent the case back to the district court to determine whether the case had become moot as a result of the student’s graduation.

Similar contests are continuing, with schools needing to resolve the competing claims of its transgender students and parents who object to students using the facilities associated with their gender identities. In Manchester, Michigan, the local Board of Education maintained its non-discrimination policy in the face of a standing room–only crowd of angry parents, who had gathered in response to a transgender student using the girls’ restroom, citing its legal obligations. The school superintendent told parents that if any children “felt uncomfortable or threatened” by the transgender student, they could use the staff restrooms. This statement indicated that students who did not want to share facilities

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349. *Id.* at 731.

350. *Id.* at 716.

351. *Id.* at 723.


356. *Id.*
with their transgender peers should be seen as the minority, and that the majority supported transgender bathroom rights. This discursive shift is quite similar to debates over gay-inclusive education materials; when educators introduced comprehensive curricula, religious conservatives responded that these materials should not be in schools. To allay their concerns, school districts did not eliminate the offending lessons, but rather allowed individual students to opt out, turning vocal objectors into silent minorities.\footnote{357}{Steven Lee Myers, *Queens School Board Suspended In Fight on Gay-Life Curriculum*, N.Y. Times (Dec. 2, 1992), http://www.nytimes.com/1992/12/02/nyregion/queens-school-board-suspended-in-fight-on-gay-life-curriculum.html [http://perma.cc/E9C9-2KJ5]; Erica Gordon Sorohan, *School Districts Reach Out to Gay and Lesbian Youth*, Sch. Bd. News, June 19, 1990, at 12 (on file with the Jesse Greenman/PERSON Project Records at the S.F. Public Library, GLC 104, Box 4, folder labeled “Hate Violence P21”).}


UNC’s President, Margaret Spellings, explained that the University was required under H.B. 2 to label multiple-occupancy bathrooms with single-sex signage and provide notice of the law to students and employees.\footnote{359}{Memorandum from Margaret Spellings, President, University of North Carolina, to U.N.C. Chancellors at 1–2 (Apr. 5, 2016), http://www.northcarolina.edu/sites/default/files/public_facilities_guidance_memo_0.pdf [http://perma.cc/9XM2-UXDX].} However, the law did not require the University to change its nondiscrimination policies. As a result, should any transgender students or employees be forced to use restrooms inconsistent with their gender identity on campus, UNC would investigate those complaints as violations of the school’s nondiscrimination policy.\footnote{360}{Brief for U.N.C. in Response to Plaintiffs’ Motion for Preliminary Injunction at 6, 15, Carcaño v. McCrory, 1:16-cv-00236 (M.D.N.C. June 9, 2016), ECF No. 50; Declaration of President Spellings at 4, Carcaño v. McCrory, 1:16-cv-00236 (M.D.N.C. May 27, 2016), ECF No. 38.} In making these announcements, Spellings contested the legislature’s action by identifying the interstitial space between the statute and the Uni-
versity’s policies. Much like social workers in New Hampshire in 1987, the University complied with the minimum requirements of the law, but did not acquiesce in the legislature’s aims. Spelling’s actions made clear that the legislature had to enact a stronger statute to attain its goals, as administrators would not fill in the gaps with discrimination. The North Carolina legislature ultimately replaced H.B. 2 when it became clear the N.C.A.A. would not hold any tournaments in the state as long as the so-called “bathroom bill” was in place. The new law prevents any state agency, including UNC, from regulating access to multiple-occupancy restrooms, showers, or changing facilities without authorization from the General Assembly.

Although the historical and contemporary accounts parallel one another in many ways, there is an important difference between the two. In the debates over gay rights, the focus was on the effect that gay and lesbian adults might have on children. Under sexual psychopath statutes, gay men were considered physical threats; after the declassification of homosexuality from the DSM, the concern then became the psychological impact of a gay or lesbian role model. In both, children were neutral objects who might improperly be influenced by the adults in their lives. By contrast, transgender children, not adults, are the agents driving the contests over their place in schools. The question might be how adults should respond to the children’s behavior, but not whether the gender identity expression is inherent to the child. It is not yet clear if and how this will change advocacy strategies or legal results, but it is a shift worth noting.

Despite this different framework, the problem remains the same. When school boards issue policies and legislatures enact minority rights-restricting laws that teachers defy, this creates a governance dilemma much like the situation in New Hampshire. Like social workers, educators are hired for their special training, education, and skills, and it is their professional judgment that is leading to resistance. The circumstances under which bureaucratic dissent is justified is a normative question that the next Part will take up.


363. Within that debate, the question is whether to prioritize the welfare of transgender or cisgender children. A similar contest is playing out over antibullying policies. Daniel B. Weddle & Kathryn E. New, What Did Jesus Do?: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 325, 325–27 (2011).
V. JUSTIFYING RESISTANCE

Psychiatric theories of sexuality have had a profound impact on the law, affecting both what regulations are promulgated and how the law is implemented. Examining law as it has been applied on the ground to protect LGBT rights reveals a process of legal change with significant normative implications, demonstrating the importance of studying law in action. This Part argues that the social workers’ and educators’ actions were justified by applying Part I’s theoretical insights as to separation of powers, rule of law, and democratic legitimacy. From this analysis, it draws broader conclusions about when bureaucratic resistance may be legitimate.

A. Separation of Powers

Even though the social workers and educators in these accounts resisted rights-restricting legislative mandates, they did not violate the separation of powers because they were acting within their delegated authority. This is because they were motivated by their specialized knowledge, rather than political leanings, religious ideology, or personal preferences. Additionally, the resistance was only resistance, not defiance, and thus the bureaucrats did not arrogate the legislature’s role.

In New Hampshire, social workers were responding to research studies on the parental effects of homosexuality and the scientific consensus that developed in response. Until the mid-1980s, social workers only placed self-identified homosexual teenagers in the homes of gay and lesbian foster and adoptive parents, as they were afraid that children would learn homosexuality from their adult role models.\(^{364}\) It was only after researchers established there was no connection between parental homosexuality and children’s future sexual orientation that social workers expanded placements in gay and lesbian homes to include heterosexual and young children.\(^{365}\) Scientific evidence may have coincided with social workers’ political views, although liberal politics in the mid-1980s were not committed to gay and lesbian rights in the way they are today.\(^{366}\) As a result, although social workers tend to identify with the political left, this does not mean they necessarily supported gay and lesbian rights.\(^{367}\) When explaining their opposition to a ban on gay and

\(^{364}\) George, supra note 209, at 375.

\(^{365}\) Id. at 378; George, supra note 180, at 510–15. These decisions were thus very different than the ones Wendy Wagner documented at the EPA, where bureaucrats deployed science as a guise for policymaking. As this Article demonstrates, not all uses of science in the administrative state are necessarily charades. Wendy E. Wagner, The Science Charade in Toxic Risk Regulation, 95 Colum. L. Rev. 1613, 1640 (1995).

\(^{366}\) George, supra note 209, at 387–88.

\(^{367}\) See Reeser & Epstein, supra note 249, at 62; Rosenwald & Hyde, supra note 249, at 15.
lesbian foster and adoptive parenting, social workers cited studies and the state of scientific knowledge, not personal preferences or politics.\textsuperscript{368}

In some situations, expertise was only one of several motivating factors, but this does not necessarily render their resistance illegitimate. In North Carolina, UNC’s resistance to H.B. 2 was likely motivated by student protests and a desire to avoid legal liability, rather than scientific consensus as to what was best for transgender individuals. The UNC president initially reported that the school would comply with H.B. 2, but changed her response after the federal government and the ACLU filed lawsuits against UNC.\textsuperscript{369} Given that other educators around the country are resisting laws and policies on the basis of expert medical views, which maintain that transgender adults and adolescents should live in accordance with their gender identity, UNC’s justification could be valid if it was at least one of Spellings’s motivations and not a post-hoc rationalization.\textsuperscript{370}

As a corollary to the question of motivation, the scientific evidence at issue fell within the scope of the bureaucrats’ expertise, reinforcing the principle that the actions were within the bureaucrats’ delegated authority. Social workers and educators are expected to be aware of the latest research on child welfare, and thus it seems appropriate for them to respond to this evidence. This is not to say that bureaucrats need to review the studies or analyze their methodology. Many learn of developments by discussing them with their colleagues, attending workshops, participating in trainings, and reading books and articles.\textsuperscript{371} The bureaucratic resistance in these examples was based on expertise within the knowledge base the professional groups could be expected to have, which diminishes the separation of powers concerns.

In addition to the substantive question of expertise, these actions were justified because bureaucrats limited their dissent to resistance, rather than defiance. Resistance in the administrative context can take a range of forms, falling on a spectrum from calculated noncompliance to covert expressions of disagreement.\textsuperscript{372} Bureaucrats are able to

\textsuperscript{368} George, supra note 209, at 390–91, 404.
\textsuperscript{370} Under SEC v. Chenery Corp., 318 U.S. 80, 94 (1943), courts review agency actions under the rationales the agencies articulate at the time.
\textsuperscript{372} Adam Shinar, Dissenting from Within: Why and How Public Officials Resist
express their dissent in all areas in which they exercise discretion, which includes a wide variety of activities—from allocating resources to prioritizing tasks and interpreting statutory obligations. For example, Joseph Landau has identified the ways in which immigration officials undermined the Defense of Marriage Act (DOMA), which limited marriage for federal purposes to opposite sex couples, through exercises of discretion. Because of DOMA, many gay and lesbian foreign nationals in relationships with U.S. citizens and permanent residents could not obtain family-based immigration status. To remedy the harm the statute imposed on these couples, immigration officers moved to administratively close pending cases or granted deferred action status to prevent citizens and permanent residents from being separated from their loved ones. Resistance in this example came in the form of discretion.

It is clear that, although bureaucrats have a great deal of autonomy, they cannot simply defy unambiguous laws, but rather must find a means for expressing resistance that does not elide the separation between the branches of government. In New Hampshire, bureaucrats exploited a statutory gap; the president of UNC has done the same. By following the strict letter of the law, the University is expressing its dissent and challenging the legislature’s claim that its goals are to promote the privacy and security of all citizens, rather than to discriminate against transgender individuals. These bureaucrats’ actions are defensible, based on reasonable statutory interpretation. However, were legislatures to respond by enacting laws that remove the ambiguities, bureaucrats would then have to comply with the statutes. Resistance does not mean ignoring the rule of law.

B. Rule of Law

Respecting the rule of law means more than maintaining the role of the legislature—it also requires providing notice as to the law and coherence in its administration. The bureaucrats in this Article seem to have violated this principle in notable ways, as their practices introduced inconsistency and instability into the law by diverging from how the legislatures interpreted the law. However, their transparency may have remedied this harm. Additionally, by operating according to a national

375. Landau, supra note 374, at 1199.
376. Id. at 1202–04.
scientific consensus, their actions may have introduced greater coherence into local administrative practices. Ultimately, it is possible that bureaucratic resistance did more to promote the rule of law than to undermine it.

In each instance of resistance in this Article, bureaucrats were candid about their interpretations, such that elected officials could respond. In New Hampshire, the agency head gave a press conference delineating how social workers would enforce the statute. Likewise, in the trans-gender student context, educators have made public statements about their understanding of laws and policies. Surprisingly, legislatures did not shut down the resistance, which were rooted in latent ambiguities, but rather allowed it to continue. Gillian Metzger has identified the benefits and pitfalls of requiring transparency for administrative constitutionalism, noting that “[a]dministrative constitutionalism may well flourish best in the shade.” Although this may be true, this Article shows that open resistance can endure.

Transparency seems essential to the legitimacy of expertise-based resistance, as compared to administrative constitutionalism, because the legislature has only authorized bureaucrats to act under specific circumstances, and has the right to limit those bureaucrats’ exercise of discretion. Professional expertise, unlike the Constitution, is not the highest authority under which government officials function, and thus it is all the more necessary for bureaucrats resisting based on their expertise to be transparent in their actions. Given the middle ground that bureaucratic expertise occupies, it is all the more imperative for administrators to be transparent about their actions. Like judicial resistance norms, bureaucratic resistance based on expertise should not make it impossible for legislatures to achieve their ends unless the Constitution prohibits the statutory scheme. Transparency also allows individuals to file suit to vindicate any rights that bureaucratic resistance may violate, thereby safeguarding rule of law principles.

In addition to providing notice as to how administrators were going to be applying the law, and implementing policies in a consistent way, the bureaucrats in this Article promoted the rule of law by making the legal system more coherent. Bureaucrats at the local level are dispersed and enjoy a particular amount of discretion that national scientific consensus helped unify. New Hampshire’s social workers based their resistance on

377. See Part III.B, supra.
378. See Part IV, supra.
379. Metzger, supra note 6, at 1931.
380. In some situations, not following scientific consensus could create tort liability concerns. Government employees do not stop being members of their professions, and in fact continue to be held to the standards of their profession during their employment. Claudia E. Haupt, Unprofessional Advice, 19 U. PA. J. Const. L. 671 (2017).
psychiatric consensus, reflected in the position papers of the American Psychiatric Association, the American Psychological Association, and the code of ethics of the National Association of Social Workers. Having bureaucrats follow the same professional standards and expectations limits how they will exercise their discretion, ensuring uniformity in their execution of laws.

Not all expertise-based resistance provides administrative coherence, as it requires scientific consensus to be well articulated and stable. Scientific theories emerge, develop, and are then debated, contested, and reformulated. It typically takes decades of research and discussion for scientific consensus to form, based on shared reasoning, standards, and notions of validity.\(^{382}\) Dissenting opinions may gain traction and become accepted principles, or disputes might continue to divide the scientific community.\(^{383}\) New studies may lead researchers to revise their theories, leading to changing perspectives on established views. Indeed, gay rights advocacy became possible because scientists revisited their outlook as to the nature and origins of homosexuality. Legal progress is often possible because of the scientific developments, but the fact that scientific “truth” changes and evolves raises the question of when a theory has become a stable and certain fact. Science now supports the principle that differences in sex, race, and sexual orientation do not denote inferiority, but the same field once steadfastly maintained the opposite. That there are individual dissenters, or even vocal groups of outliers, does not mean scientific orthodoxy is invalid, but these are important issues to consider.\(^{384}\)

Teachers who resist policies that restrict bathroom access for transgender adolescents are on solid scientific ground, but the question becomes more difficult in situations involving preadolescent children. There, the scientific community has not come to a consensus, although individuals’ doctors may make treatment recommendations that encourage bureaucratic resistance. In those cases, it seems that educators are motivated by a mixture of scientific principles and constitutional arguments, in that they are protecting what they identify as the constitutional rights of their students. This combines two models of agency resistance, expertise and administrative constitutionalism, which may provide a different justification for bureaucratic resistance. What this example demonstrates is that not all science-based resistance is necessarily justified, as expertise cannot become so expansive as to encompass any type of bureaucratic knowledge, lest it open the door to self-serving, power-preserving retrenchment and dissent.\(^{385}\)

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382. See Haupt, supra note 380, at 680.
383. Id.
384. Id. at 691.
C. Democratic Legitimacy

In addition to supporting the rule of law and maintaining separation of powers, this Article’s examples of bureaucratic resistance furthered democratic legitimacy by promoting the rights of gays, lesbians, and transgender individuals. Bureaucrats’ transparency proved integral to this rights project because of the expressive element of their actions. Laws not only authorize, proscribe, and regulate conduct, but also contain normative messages that shape society. As a result, the law “matters for what it says in addition to what it does.” The effect of New Hampshire’s prohibition on gay and lesbian foster and adoptive parenting reached further than the families the law targeted; it sent a message that homosexuals were excluded from the polity that extended far beyond the state’s borders. It was only by being open about their resistance that social workers could counter their elected representatives’ normative claims about gays and lesbians. Likewise, although educators could subtly undermine antitransgender policies, their open resistance serves a valuable expressive function. In this way, resistance can both benefit individuals whose rights are vindicated and provide an expressive effect that reaches much further.

By being transparent, bureaucrats both legitimated their dissent and infused it with expressive value that helped change normative commitments in favor of minority rights. The majority of Americans eventually agreed with New Hampshire’s social workers that gays and lesbians were fit parents, which ultimately supported marriage equality and other gay rights claims. Bureaucratic resistance promoted democratic legitimacy by introducing new and otherwise unrepresented viewpoints into the law.

* * *

The conflict between legislatures and bureaucrats is likely inevitable, but the legitimacy and desirability of resistance is not. Bureaucrats should not be permitted to usurp the legislature’s authority, undermine the democratic process, or destabilize the rule of law. Although the


expertise in this Article promoted the rights of a minority group, new developments are not always rights-enabling.

The examples of resistance in this Article help identify when bureaucratic dissent is legitimate, although they cannot provide a comprehensive test from which to judge whether bureaucratic resistance is appropriate. They demonstrate that resistance can be legally justified when it is: 1) within the scope of the bureaucrats’ experience; 2) limited to resistance and not defiance; 3) transparent; 4) based on stable, national scientific consensus; and 5) undertaken to promote the rights of minorities. This is not to say that resistance is necessarily justified when all five factors are present, only that they enable bureaucratic resistance to be both legal and desirable.

CONCLUSION

Bureaucrats came to identify gays and lesbians in a new way over the course of the twentieth century due to shifting scientific theories of homosexuality. As psychiatric understandings of same-sex sexual attraction changed, administrative agents went from being significant sources of oppression to allies who supported gay and lesbian parenting and households headed by same-sex couples. These changes in scientific views as to the causes and consequences of homosexuality had a profound impact on how bureaucrats implemented regulations, influencing the decisions of social workers and educators. Teachers today may increasingly find themselves in similar positions as their historical counterparts, particularly as a growing number of legislatures consider laws limiting bathroom access according to sex assigned at birth.

These changes outside the law had a significant impact on how bureaucrats approached their legal obligations, revealing a mechanism of law reform that occurs outside of courts and legislatures. This Article’s conceptualization of administrative actors reframes traditional conceptions of the executive, which does not just implement law, but also introduces legal change. As such, questions of governance are as important for scholars of LGBT rights as they are for administrative law theorists.

Complicated questions arise when bureaucrats’ expertise conflicts with legislative preferences. While bureaucratic resistance implicates separation of powers and democratic legitimacy concerns, these civil servants are hired to use their professional judgment, and thus conflict between their expertise and their legislative mandates are inevitable. Under certain circumstances, bureaucrats may be justified in resisting legislative enactments that contradict their professional judgment, and bureaucratic resistance may even be desirable, since it creates room for minority viewpoints that might otherwise not be heard.
The popular image of bureaucracy is a place where innovation takes a number, only to languish in the waiting room. The account this Article presents, however, identifies the administrative state as a dynamic locus of contestation and change. Bureaucracy is more than the means by which law is implemented, as, in fact, administrators can lead legal transformations.
Discrimination In and Out of Marriage

COURTNEY G. JOSLIN

ABSTRACT

The Supreme Court’s decision in Obergefell v. Hodges marks a tremendous victory for lesbian, gay, bisexual, and transgender people. Some scholars suggest, however, that in addressing one form of discrimination, the Court derailed efforts to dismantle another—the privileging of marriage over nonmarriage.

By excavating the forgotten history of marital status advocacy, this Article complicates the progress-and-decline narrative of the law of nonmarriage. Using original archival research, this Article illuminates how the conventional narrative of nonmarriage overstates the progressive nature of its past. Statutes prohibiting marital status discrimination are cited as examples of earlier attempts to unseat marriage from its privileged position. This uncovered history demonstrates that marital status advocacy was a critical step on the road to greater equality. But this work primarily sought to address discrimination within marriage, not discrimination against those living outside of it.

This Article also sheds light on the future of nonmarriage. As a result of earlier marital status activism, discrimination within marriage is much less pronounced today. Many of the statutes and practices that

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required differential treatment of husbands and wives have been repealed or invalidated. These remarkable successes can be attributed to the multi-dimensional strategy utilized by advocates. This strategy holds much promise for the contemporary struggle to address discrimination against those living outside of marriage.

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**INTRODUCTION**

The Supreme Court’s decision in *Obergefell v. Hodges*\(^1\) marks a tremendous victory for lesbian, gay, bisexual, and transgender (LGBT) people. Some scholars suggest, however, that in addressing one form of discrimination, the Court derailed earlier efforts to dismantle another—the privileging of marriage over nonmarriage.\(^2\) These scholars are rightly concerned about the legal treatment of nonmarital families.\(^3\) It remains

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2. See, e.g., Susan Frelch Appleton, Obergefell’s Liberties: All in the Family, 77 Ohio St. L.J. 919, 977 (2016) (“In the wake of Obergefell, several scholars predicted re-trenchment in the gradual embrace of ‘relationship pluralism’ that family law had witnessed in recent decades.”); Melissa Murray, Obergefell v. Hodges and Nonmarriage Inequality, 104 Calif. L. Rev. 1207, 1239 (2016) (“In this regard, we might understand Obergefell not simply as an effort to nationalize marriage equality, but also as an effort to further entrench marriage’s primacy and foreclose opportunities to establish and protect nonmarital alternatives.”).
3. See, e.g., Courtney G. Joslin, Leaving No (Nonmarital) Child Behind, 48 Fam. L.Q. 495, 496 (2014) (urging that “[a]s advocates strive to ensure that marriage is an option for all families, they must also strive to make sure that the children of families who cannot marry, or who choose not to, are still adequately protected under the law”). See generally, e.g., Courtney G. Joslin, Marital Status Discrimination
to be seen, however, whether these accounts of the law’s trajectory are complete. By excavating the forgotten history of marital status advocacy, this Article complicates the conventional progress-and-decline narrative of nonmarriage.

The number of adults living outside of marriage is large and growing. In 1960, there were fewer than one million unmarried cohabitants. Today, there are over eighteen million. The rate of increase of nonmarital cohabitation shows no sign of stopping. This trend, however, is not consistent across all socioeconomic groups.


8. Clare Huntington, Postmarital Family Law: A Legal Structure for Nonmarital Families, 67 Stan. L. Rev. 167, 171 (2015) (“Marital family law is hardly ideal for the married families it governs, but it wreaks havoc on the nonmarital families it excludes. . . . [T]he fundamental mismatch between marital family law and nonmarital family life undermines relationships in nonmarital families.” (footnotes omitted)). To be clear, however, it is sometimes financially beneficial for a couple to remain unmarried. E.g., Erez Aloni, Deprivative Recognition, 61 UCLA L. Rev. 1276, 1290 (2014); Courtney G. Joslin, Family Support and Supporting Families, 68 Vand. L. Rev. En Banc 153, 170 (2015) (“[N]onrecognition may be financially beneficial for some
of marriage are disproportionately nonwhite and lower income.\textsuperscript{10} Marriage, by contrast, has become “a hallmark of privilege.”\textsuperscript{11} Despite these demographic developments, our system of family law remains stubbornly marriage based.\textsuperscript{12} To use the words of Serena Mayeri, “[m]arital supremacy . . . endures.”\textsuperscript{13}

The now-conventional narrative suggests that efforts to unseat marriage from its privileged position had been moving on a positive trajectory. To bolster this narrative about the earlier positive arc in nonmarriage law, scholars cite a range of progressive developments during the second half of the twentieth century. These developments include the emergence of new procreative freedom rights;\textsuperscript{14} court decisions invalidating laws that discriminated against nonmarital children;\textsuperscript{15} no-fault divorce laws that made exiting marriage easier;\textsuperscript{16} case law protecting former nonmarital partners’ property rights upon dissolution;\textsuperscript{17} and, most relevant to this Article, statutes prohibiting marital status discrimination.\textsuperscript{18}

families. This would be the case if the combined income of both adults put them over the income threshold for a particular need-based benefit.”\textsuperscript{10}

10. Joslin, supra note 9, at 170 (“People of color, people in lower income brackets, and people with less education are significantly less likely to get married.”).

11. June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family 19–20 (2014) (“For the majority of Americans who haven’t graduated from college, marriage rates are low, divorce rates are high, and a first child is more likely to be born to parents who are single than to parents who are married.”). See generally Serena Mayeri, Marital Supremacy and the Constitution of the Non-Marital Family, 103 Cal. L. Rev. 1277 (2015).

12. E.g., Huntington, supra note 9, at 167 (“Family law is based on marriage, but family life increasingly is not.”); see also, e.g., Clare Huntington, Family Law and Nonmarital Families, 53 Fam. Ct. Rev. 233, 235 (2015) (“The central dividing line in family law is marriage.”).

13. Mayeri, supra note 11, at 1279 (footnote omitted).

14. See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“We need not and do not, however, decide [whether a statute limiting access to contraceptives may be sustained] in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).


According to the conventional narrative, this successful, although admittedly incomplete, movement to dismantle marital supremacy was derailed by the marriage equality efforts. Critics argue that by extending protections to same-sex couples, the gay rights decisions deflated the pressure to protect those living outside of marriage. Moreover, critics continue, the marriage equality movement itself, and the decisions it generated, glorify marriage and denigrate nonmarriage.

Other scholars, including Douglas NeJaime and Serena Mayeri, push back against this description of nonmarriage’s evolution. These scholars present a more nuanced perspective on the role of marriage in earlier reform efforts. It is true that negative attitudes about nonmarital sex and cohabitation moderated during the second half of the twentieth century. And legal progress was made. Nonetheless, some of these legal developments—including decisions prohibiting some forms of discrimination against nonmarital children, as well as the emergence of domestic partnership registries—were less revolutionary than “typically assumed.”

While these efforts resulted in the extension of some

19. E.g., Katherine Franke, Longing for Loving, 76 Fordham L. Rev. 2685, 2701 (2008) (“Advocates on behalf of the cause of same-sex marriage have played a role in reinforcing the benchmark status marriage enjoys. Their arguments have rendered the viability of counterpublics that lie beyond the social field of marriage all the more difficult to imagine.”); Anthony C. Infanti, Victims of Our Own Success: The Perils of Obergefell and Windsor, 76 Ohio St. L.J. Furthermore 79, 82 (2015) (“[T]he Obergefell and Windsor decisions have reified the privileged position of marriage in our laws . . . [and have] actually set back the movement for equal legal treatment of all regardless of relationship status.”); Catherine Powell, Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality, 84 Fordham L. Rev. 69, 69–70 (2015) (“The problem with Obergefell, however, is that in the majority opinion, Justice Kennedy’s adulation for the dignity of marriage risks undermining the dignity of the individual, whether in marriage or not.” (footnote omitted)).

20. To be clear, the scholars that I am referring to are critics of marital supremacy; they support the extension of rights to LGBT people.

21. See supra note 19.

22. See generally Mayeri, supra note 11 (exploring litigation challenging laws that discriminated against illegitimate children and their parents).


24. See generally Mayeri, supra note 11 (exploring polling data regarding public outlook on nonmarital families and cohabitation).

25. See, e.g., Joslin, Marital Status, supra note 3, at 824–25 (discussing polling data regarding public outlook on nonmarital families and cohabitation).

26. Deborah A. Widiss, Non-Marital Families and (or After?) Marriage Equality, 42 Fla. St. U. L. Rev. 547, 558 (2015) (“Melissa Murray has persuasively argued that these [nonmarital father cases] were less transformative than typically assumed because in each of these early cases, the Court compares the parent-child relationship—and, more surprisingly, the relationship between the parents—to a marital norm.”).
important benefits to those living outside of marriage, marriage continued to hold a central and privileged place. As NeJaime argues, “[e]ven if advocates [in these earlier reform movements] wished to destabilize marriage — and certainly some did — they were constrained by a legal, political, and cultural framework that prioritized marriage . . . .”

This Article adds a critical new layer to the study of nonmarriage’s past and future by examining an overlooked piece of the puzzle — statutes prohibiting marital status discrimination. During the 1970s and 1980s, over twenty states and the federal government enacted statutes prohibiting this form of discrimination in a variety of areas. At first glance, these statutes appear to support the conventional narrative that earlier activism sought to unseat marriage from its privileged position. The recovered history of these statutes, however, tells a more complicated account of the relationship between marital status nondiscrimination and marital supremacy.

Many assume that statutes prohibiting marital status discrimination protect nonmarital families. It turns out, however, that only some of the statutes prohibit this form of discrimination. While there is some state-to-state variation, a number of courts and attorneys general concluded that these statutes prohibiting marital status discrimination only protect individuals who experienced discrimination because of his or her status as a single, married, or divorced person. In these jurisdictions, statutes

27. See, e.g., Mayeri, Marital Supremacy, supra note 11, at 1279–80 (exploring cases challenging laws that “discriminated against ‘illegitimate’ children in areas such as wrongful death recovery, workers’ compensation, child support, inheritance, and government benefits”); NeJaime, supra note 23, passim (exploring history of efforts to extend rights and protections to nonmarital couples through domestic partnerships).


29. There are only a small handful of contemporary articles exploring statutes prohibiting marital status and none of them explores the historical roots of these statutes.

30. E.g., Porter, supra note 18, at 15–16 (“Twenty-one states and the District of Columbia protect against marital status discrimination.”). But see Joslin, Marital Status, supra note 3, at 808–09 (explaining that some of these statutes do not prohibit discrimination against nonmarital couples).

31. E.g., Judith T. Younger, Responsible Parents and Good Children, 14 Law & Ineq. 489, 500 n.109 (1996) (“Unmarried couples now are protected from discrimination on the basis of their marital status in employment, housing, use of public accommodations, and credit.”).

32. Joslin, Marital Status, supra note 3, at 808–09 (noting that most of these statutes “prohibit only discrimination based on the status of being a single, married, or divorced person”).

33. See, e.g., Prince George’s Cty. v. Greenbelt Homes, Inc., 431 A.2d 745, 747–48 (Md. Ct. Spec. App. 1981) (holding that two unmarried individuals seeking to jointly purchase co-op unit did not collectively have marital status and, therefore, were not protected by statute); 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
prohibiting marital status discrimination do not prohibit discrimination against a person because the person is living in a nonmarital cohabiting relationship. In other words, in these states, it would be impermissible to refuse to rent to a single woman because she is single, but it would be acceptable to refuse to rent to an unmarried couple because they were unmarried.

Consider *North Dakota Fair Housing Council, Inc. v. Peterson*. In *Peterson*, the North Dakota Supreme Court held that a landlord’s refusal to rent an apartment to an unmarried couple was not unlawful discrimination based on “status with respect to marriage.” Instead, the landlord’s refusal was based on the couple’s “conduct,” specifically the conduct of cohabiting while unmarried, which was not discrimination prohibited by the statute. Thus, in some states, the scope of protection extended by these statutes is not as broad as many assume.

This Article demonstrates that marital status advocates sought to address discrimination, but it was a different form of discrimination than some assume. Today, when one thinks about marital status discrimination, one often focuses on discrimination against nonmarital families. But the history uncovered in this Article illustrates that efforts to prohibit marital status discrimination were part of a campaign that sought primarily to eliminate discrimination within marriage. Historically, 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.”; N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶¶ 47–49, 625 N.W.2d 551, 563 (N.D. 2001) (holding that statutes prohibiting discrimination based on “status with respect to marriage” did not prohibit a landlord from refusing to rent to cohabiting couple); N.D. Op. Att’y Gen. 90–12, 43, 45 (1990) (“[I]t is my opinion that it is not an unlawful discriminating practice under N.D.C.C. § 14–02.4–12 to discriminate against two individuals who chose to cohabit together without being married.”). But 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.”).

34. *See generally Peterson*, 2001 ND 81, 625 N.W.2d 551.
35. *Id.* at ¶¶ 47–49, 625 N.W.2d at 563. The current version of the housing nondiscrimination provision is codified at § 14–02.5–02 of the North Dakota Century Code. N.D. CENT. CODE § 14–02.5–02 (2015) (providing that “person may not refuse to sell or rent . . . to an individual because of . . . status with respect to marriage”). When initially enacted, the provision was codified at § 14–02.4–12. N.D. CENT. CODE § 14–02.4–12 (1999).
36. *Peterson*, 2001 ND 81, ¶ 41, 625 N.W.2d at 562 (“Thus, the continuing existence of the [criminal] unlawful cohabitation statute after enactment of [the provision prohibiting housing discrimination because of status with respect to marriage] vitiates ‘any argument that the legislature intended “marital status” discrimination to include discrimination on the basis of a couple’s unwed cohabitation.’” (quoting N.D. Op. Att’y Gen. 90–12, at 44)).
37. *See infra* Part III.
married women experienced the most severe legal disabilities. Under
the doctrine of coverture, women lost their separate legal identities
upon marriage, as well as many important rights, including the rights
to contract and to sue or be sued.\footnote{1 William Blackstone, Commentaries, *429–33; Jill Elaine Hasday, Protecting
Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race
Inequality, 84 N.Y.U. L. Rev. 1464, 1497 (2009) (“Under common law coverture, a
wife’s legal identity was almost entirely subsumed, or covered, by her husband’s. Mar-
nied women could not sue, be sued, make contracts, own property, or keep their own
earnings. Husbands had legal custody and control over a married couple’s children.”).}

Statutes prohibiting marital status
discrimination—especially those that prohibited discrimination in the
context of credit—were a critical part of second-wave feminists’ efforts
to eradicate the legal and cultural relics of coverture that continued to
hinder the ability of women, especially married and formerly married
women, to achieve independence and equality.\footnote{See infra Part II.}

This Article uses the federal Equal Credit Opportunity Act
(ECOA) as a case study to explore this history.\footnote{Equal Credit Opportunity
(codified as amended at 15 U.S.C. § 1691).} As originally enacted
in 1974, the ECOA prohibited credit discrimination on the bases of sex
and marital status.\footnote{Id. at sec. 503, § 701. Two years later, additional bases, including race, color,
religion, national origin, and age, were added to the statute. Pub. L. No. 94–239, sec. 2,
§ 701, 90 Stat. 251, 251 (codified as amended at 15 U.S.C. § 1691).} The ECOA sought to address practices that made it
difficult for women, particularly married and formerly married women,
to obtain credit.\footnote{E.g., Margaret J. Gates, Credit Discrimination Against Women: Causes and
Solutions, 27 Vand. L. Rev. 409, 410–11 (1974).} These difficulties were based both on persistent stel-
reotypes about the “appropriate” roles of husbands and wives, as well
as laws, including those governing community property, which were pre-
mised on and perpetuated these gender-based stereotypes about the
distinct roles of husband and wife.

What were these practices that the ECOA was intended to remedy?
At the time, banks often refused to count all or any of a woman’s earned
income.\footnote{See infra Part II.} Even when women were in the paid workforce, lenders relied
on the persistent stereotype that women’s participation in the workforce
was temporary and supplemental.\footnote{See infra Part II.} Working women, banks presumed,
would eventually quit their jobs and assume their “proper place” in the
home.\footnote{See infra Part II.} Indeed, some lenders considered a married woman’s income
only if she provided proof she was on birth control.\footnote{See infra Part II.} Utilizing a practice
that seems virtually unimaginable today, some lenders agreed to count a
wife’s income only if she and her husband not only provided proof that
they were using birth control, but also affidavits attesting that they would have an abortion if the wife became pregnant.\footnote{47. Letter from Carol Knapp Lowicke to Ami Scupi, Nat’l Org. of Women (Aug. 1, 1972) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, NOW Papers, Box 45, Folder 19) [hereinafter Lowicke Letter].}

Relatedly, many banks refused to issue credit cards in the name of a married woman; banks insisted that credit cards needed to be issued in the name of the husband, who was regarded as the financial head of the house.\footnote{48. See infra Part II.} For example, BankAmericard advised customers that “BankAmericards are [only] issued in the name of the husband.”\footnote{49. Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency, 93d Cong. 499 (report of the Nat’l Comm’n on Consumer Fin., Consumer Credit in the United States) [hereinafter NCCF Report].} Like the practices with regard to income counting, these policies were rooted in the stereotype that husbands were the true managers and providers for the family. And in some instances, these stereotypes were still embedded in law. In a number of community property states, including California, the law still gave husbands sole management and control over some or all of the couple’s marital property.\footnote{50. See infra Part III.} Thus, in some states, banks could persuasively argue that their practices were appropriate. If wives had no property over which they had management and control rights, lenders argued, they could not enforce a judgment against them.\footnote{51. See infra Part III.}

Thus, these statutes tell a story of progress, and it is a story about marriage. But this story is primarily about achieving equality within marriage, not equality for those living outside of it.\footnote{52. E.g., Mayeri, supra note 11, at 1342 (“Attacking male supremacy within marriage—which loomed large on the agenda of leading feminist legal advocates—posed a fairly radical challenge to American law and social life. Challenging marital supremacy in a political environment where feminists stood accused by ERA opponents of assaulting traditional marriage and family relationships likely seemed impolitic.”).} The ECOA was part of a larger campaign that sought to dismantle the lingering effects of coverture that impeded women’s—particularly married women’s— independence.\footnote{53. See, e.g., Kenneth L. Karst, “A Discrimination So Trivial”: A Note on Law and the Symbolism of Women’s Dependency, 35 Ohio St. L.J. 546, 551–52 (1974) (“[A] central concern of today’s women’s movement is the problem of dependency.”); see also infra Part III.} By illustrating how marital status advocacy fit into this work on behalf of married and formerly married women, this recovered history offers a more nuanced understanding of marital status advocacy and its relationship to marriage.

This Article makes three novel and critical contributions to this important conversation about nonmarriage’s past and future.\footnote{54. For a few of the many recent articles devoted to considering this critical and
First, this Article documents an almost entirely overlooked form of activism—activism to prohibit marital status discrimination. Discrimination on the basis of marital status—albeit a particular form of marital status discrimination—is particularly salient today given the growing race- and class-based marriage gap. Second, this Article offers new and important insights on the ongoing debate about nonmarriage’s trajectory. Building on my prior work, this Article complicates the conventional progress-and-decline narrative of nonmarriage.

Third, this Article closes by drawing upon some lessons that can be gleaned from this forgotten history of marital status advocacy. The marital status advocates of the 1960s and 1970s were successful in removing many of the formal barriers to equality within marriage. Many of the statutes and practices that required differential treatment of husbands and wives have been repealed or invalidated. To achieve these successes, advocates utilized what Cary Franklin calls an “interspherical” approach—an approach that targeted discrimination not only in the “public” spaces of the workplace and the marketplace but also in the “private” realm of the

timely issue, see generally, for example, June Carbone & Naomi Cahn, Nonmarriage, 76 Md. L. Rev. 55, passim (2016) (examining and critiquing way law currently regulates nonmarital families and arguing that laws of marriage should not be applied to nonmarital families); Kaiponanea T. Matsumura, A Right Not to Marry, 84 Fordham L. Rev. 1509 (2016) (arguing that terminating nonmarital status or converting it into marriage without consent of parties to relationship is unconstitutional); Serena Mayeri, Foundling Fathers: (Non)Marriage and Parental Rights in the Age of Equality, 125 Yale L.J. 2292 (2016) (examining advocacy challenging unequal treatment of nonmarital children and their families); Mayeri, supra note 22, at 127 (considering Obergefell v. Hodges in relation to “two legacies of second-wave feminist legal advocacy: the largely successful campaign to make civil marriage formally gender-neutral, and the lesser-known, less successful struggle against laws and practices that penalized women who lived their lives outside of marriage”); Melissa Murray, Accommodating Nonmarriage, 88 S. Cal. L. Rev. 661, 665–66 (2015) (arguing that “impulse to translate coupled intimate relationships into the vernacular of marriage . . . leads to the diminution of legal space for accommodating nonmarriage”); Murray, supra note 2 (discussing how Obergefell v. Hodges venerated marriage as privileged institution, potentially stunting development of protections for nonmarital couples).

55. See generally, e.g., Joslin, Gay Rights Canon, supra note 4 (arguing that gay rights canon can support rather than foreclose claim of constitutional protections to those living outside of marriage); Joslin, Marital Status, supra note 3 (arguing for broader protections for nonmarital relationships through context of current civil rights statutes).

56. E.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992–93 (N.D. Cal. 2010) (“The marital bargain in California (along with other states) traditionally required that a woman’s legal and economic identity be subsumed by her husband’s upon marriage under the doctrine of coverture; this once-unquestioned aspect of marriage now is regarded as antithetical to the notion of marriage as a union of equals. As states moved to recognize the equality of the sexes, they eliminated laws and practices like coverture that had made gender a proxy for a spouse’s role within a marriage. Marriage was thus transformed from a male-dominated institution into an institution recognizing men and women as equals.”).
This approach to legal change offers important lessons for those engaged in the contemporary struggle to address discrimination against those living outside of marriage.\textsuperscript{58}

Part I provides an overview of the evolving demographics and law of nonmarriage. Today growing numbers of American adults live outside of marriage. Family law, however, remains stubbornly marriage-based. To better understand the current law of nonmarriage and how we got here, Part II unearths the history of advocacy to prohibit marital status discrimination. This Part shows how this marital status advocacy focused heavily on challenges faced by married and formerly married women.

Part III places marital status advocacy within the larger women’s rights movement of the 1960s and 1970s. This Part shows how this advocacy was an important step in the struggle to dismantle women’s tangible and symbolic dependency. This Part highlights the multidimensional or “interspherical” nature of this work; activists understood that eradicating discrimination in the “public” sphere of work and the market required reforms to the “private” sphere of the home and the family as well. Women could not be autonomous, financially independent actors in the workplace and the marketplace if they remained dependent housewives. This Article closes by identifying important lessons that can be gleaned from this history.

I. **Discrimination out of Marriage**

A. **Changes in the Family**

Throughout most of our history, very few adults cohabited together outside of marriage.\textsuperscript{59} In 1960, there were fewer than five hundred thousand unmarried heterosexual couples.\textsuperscript{60} Since 1960, however, this number of cohabiting adults in the United States has been on the rise. By 2016, an estimated eighteen million unmarried individuals lived in nonmarital, cohabiting relationships.\textsuperscript{61} This quickly growing population is

\textsuperscript{57} Cary Franklin, *Separate Spheres*, 123 Yale L.J. 2878, 2889 (2014) (“When the women’s movement began to garner national attention in the mid-1960s, it took aim at this ideology [dividing men and women into public and private spheres, respectively], arguing that in order to achieve true equality between the sexes, the law needed to move beyond the concept of separate spheres and begin to address the interspherical impacts that rendered women second-class citizens across a wide range of social and legal contexts.”).

\textsuperscript{58} Huntington, *supra* note 9, at 239 (arguing that marriage-based family law rules have “a pernicious effect on nonmarital families”).


\textsuperscript{60} Bowman, *supra* note 59, at 97.

\textsuperscript{61} U.S. Census Bureau, *supra* note 7; Matsumura, *supra* note 7 (manuscript at
disproportionately lower income, non-white, and non-college educated.\footnote{Joslin, \textit{Marital Status}, supra note 3, at 813.}

The law, however, has not kept up with these demographic developments. To be sure, many measures that imposed particularly harsh criminal penalties on those living outside of marriage have been removed.\footnote{E.g., \textit{Bowman}, supra note 59, at 12–20; Solangel Maldonado, \textit{Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children}, 63 \textit{Fla. L. Rev.} 345, 350–56 (2011) (describing developments with regard to nonmarital children).} But in many other realms, including in the area of family law, the law remains stubbornly marriage based.\footnote{Huntington, \textit{supra} note 9, at 170 (“Family law places marriage at the very foundation of legal regulation. Indeed, the most fundamental divide in family law is between married and unmarried couples, and this schism carries over to how the law addresses nonmarital children.”).}

Historically, marriage was the only legally permissible relationship between adults.\footnote{See \textit{Bowman}, \textit{supra} note 59, at 12 (“Although they were not illegal at common law, the early American colonies quickly passed statutes criminalizing adultery and fornication (sexual intercourse between unmarried persons).”).} The law criminalized not only sex outside of marriage (fornication), but also living together outside of marriage (cohabitation).\footnote{\textit{Id.}} As Cynthia Bowman explains, “In addition to the regulation of morality associated with laws against fornication, the criminal statutes against cohabitation were intended to protect the institution of marriage, as well as the state’s control over entry into it.”\footnote{\textit{Id.}}

Moral disapproval and negative stigma regarding nonmarital relationships were expressed through other laws as well,\footnote{Garrison, \textit{supra} note 59, at 311 (“[C]ourts viewed nonmarital cohabitation as socially undesirable, and they wanted to discourage such arrangements. . . . In 1958, cohabitation outside of marriage was widely viewed as shameful . . . .”).} including laws that subjected nonmarital children to disfavorable treatment.\footnote{Maldonado, \textit{supra} note 63, at 346 (“No one would dispute that for most of U.S. history, ‘illegitimate’ children suffered significant legal and societal discrimination.” (footnote omitted)).} At common law, the penalties were particularly harsh; nonmarital children were considered \textit{filius nullius}, literally the children of no one.\footnote{E.g., \textit{Bowman}, \textit{supra} note 59, at 13 (“Virtually every state had criminal sanctions against cohabitation.”).} Nonmarital children had no right to inherit, or to be supported by either parent.\footnote{\textit{Id.}} And although the legal treatment of children born outside of marriage

\footnote{2); Sharon Jayson, \textit{Living Together Not Just for the Young, New Data Show}, USA Today (Oct. 17, 2012, 9:01 PM), http://www.usatoday.com/story/news/nation/2012/10/17/older-couples-cohabitation/1630681 [https://perma.cc/C2CK-SF85] (reporting that in 2012, there were 15.3 million unmarried individuals living in nonmarital different-sex relationships).}
was slightly less harsh in this country, states continued to discriminate against nonmarital children throughout most of our history.

To be sure, the social and legal treatment of nonmarital families has improved since that time. The advent of the birth control pill in 1960 made pre-marital sex much less risky. “With premarital sex came open premarital cohabitation.” Over time, these changes in behavior lead to greater social acceptance of cohabitation and other nonmarital family forms.

With changes in behavior came changes in the law. In 1972, the Supreme Court declared that women—married and unmarried—have a constitutionally protected right to decide “whether to bear and beget a child.” This protected liberty interest includes the rights to access contraception and abortion (within certain, ever increasing limits). Fornication (when done in a private, noncommercial setting) and cohabitation are no longer subject to criminal sanctions. Contracts between nonmarital partners are now enforceable in most states. And in one or two states, sufficiently committed nonmarital partners are entitled to automatic property and intestacy protections. In terms of the children


73. There were some exceptions to this statement. Arizona and North Dakota are frequently described as having been the first states to eliminate the distinctions between legitimate and illegitimate children. See, e.g., id. at 297. To be clear, however, the differential treatment of nonmarital children has not been entirely eliminated. See generally, e.g., Maldonado, supra note 63 (exploring ways in which law continues to discriminate against nonmarital children).


75. Garrison, supra note 59, at 313.


77. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the 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.”).

78. E.g., id.


81. Estin, supra note 17, at 383 (“[M]ost states’ courts routinely enforce express agreements and recognize various equitable claims between unmarried partners, particularly where they share a business or property.” (footnote omitted)).

82. See, e.g., D. Kelly Weisberg & Susan Frelich Appleton, Modern Family Law: Cases and Materials 393 (3d ed. 2006) (noting that a “few community property
born into these relationships, many (although not all) of the legal disabili-
ties imposed on nonmarital children have been mitigated.\textsuperscript{83}

But while nonmarital relationships are no longer criminal, “marital
supremacy . . . endures.”\textsuperscript{84} As the same-sex marriage litigation poignantly
illustrates, hundreds of rights are automatically granted to married
spouses.\textsuperscript{85} Unmarried cohabitants, by contrast, are denied many of these
protections, regardless of the length or strength of their relationships. As
I explain elsewhere, “marriage continues to be a prerequisite for many
family-based subsidies.”\textsuperscript{86} In contrast, these critical protections typically
are not automatically extended to nonmarital couples.\textsuperscript{87} In light of the
sheer numbers of people living outside of marriage, as well as the race
and class lines that marriage draws, scholars are increasingly calling for a
careful review of our current marriage-based system.\textsuperscript{88}

This Article builds on my scholarship exploring the legal treatment
of the significant and growing group of people living outside of marriage.
This Article contributes to that body of work by exploring an obvious, yet
almost entirely unexplored body of law—statutes prohibiting discrimina-
tion on the basis of marital status.

B. Statutory Protections for Nonmarital Families

Today, over twenty states and the federal government have statutes
prohibiting discrimination on the basis of marital status in a variety of
areas of law and life, including housing, employment, and credit.\textsuperscript{89} All of
these statutes were passed in the 1970s and 1980s; no state has added stat-
utory protections against marital status discrimination since the 1980s.\textsuperscript{90}

The statutes, as they say on their faces, prohibit “marital status” dis-
crimination.\textsuperscript{91} Especially when read through a contemporary lens, this
language could be read to suggest that they prohibit differential treat-
ment of people because they are in nonmarital rather than marital
families. Historical context also might suggest that states intended these
statutes to ensure fairer treatment of nonmarital families. The period in

\begin{itemize}
\item \textsuperscript{83} E.g., Maldonado, supra note 63, at 347 (arguing that although much of the
discrimination against nonmarital children has been eliminated, “nonmarital children
continue to suffer legal and social disadvantages as a result of their birth status”).
\item \textsuperscript{84} Mayeri, supra note 11, at 1279 (footnote omitted).
\item \textsuperscript{85} Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) (“The
benefits accessible only by way of a marriage license are enormous, touching nearly
every aspect of life and death. The department states that ‘hundreds of statutes’ are
related to marriage and to marital benefits.”).
\item \textsuperscript{86} Joslin, supra note 9, at 167.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} E.g., Joslin, Marital Status, supra note 3, at 828–29.
\item \textsuperscript{89} E.g., Porter, supra note 18, at 15–16.
\item \textsuperscript{90} E.g., Joslin, Marital Status, supra note 3, at 806.
\item \textsuperscript{91} E.g., CAL. GOV’T CODE § 12955(a) (West 2017) (prohibiting housing discrimi-
nation on basis of “marital status”).
\end{itemize}
which these statutes were passed—the 1970s—saw a burgeoning public conversation about cohabitation. Articles about cohabitation appeared on the front page of the *New York Times* and in *Newsweek*. “In 1972, the psychologist Eleanor Macklin, an assistant professor at Cornell University . . . became the first sex expert to publish a scholarly article on cohabitation.”

The Supreme Court considered and decided a number of cases involving the rights of unmarried persons to access contraception and abortion services, as well as the rights of nonmarital children.

Thus, the statutory text and historical context could support the perception that these statutes do and were intended to help unseat marriage from its privileged position. This understanding of the statute’s effect and purpose is not uncommon. Lynn Kohm, for example, recently wrote: “Generally, state prohibitions against marital status discrimination have played a major role in protecting the rights of unmarried couples.”

It turns out, however, the case law is mixed as to whether these statutes prohibiting marital status discrimination protect, as Kohm put it, “the rights of unmarried couples.” Courts and attorneys general in a number of states have interpreted these statutes to prohibit only discrimination against individual people because of that person’s status as a single, married, divorced, separated, or widowed person. In these jurisdictions, the statutes do not prohibit unfavorable treatment of unmarried

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92. See Pleck, *supra* note 74, at 72–74.
93. *Id.* at 72, 74.
94. *Id.* at 119.
98. *E.g.*, Younger, *supra* note 31, at 501 (listing statutes prohibiting marital status, along with host of other legal developments, as evidence that “[f]ar from being favored by the law, the married are worse off than the unmarried in some respects”).
couples (as compared to married couples) for their “conduct” of living together.\textsuperscript{102} To state it in concrete terms, in many of the states that prohibit marital status discrimination, it would be impermissible to refuse to rent an apartment to a particular woman because she is unmarried or divorced, but it would be lawful to refuse to rent to a couple upon learning that the couple is unmarried even though the landlord would have rented to the couple had they been married.

Consider \textit{Hoy v. Mercado}.\textsuperscript{103} In \textit{Hoy}, a New York appellate court held that the landlords did not discriminate on the basis of marital status when they refused to rent an apartment to an unmarried couple.\textsuperscript{104} The court concluded that the nondiscrimination prohibition “do[es] not extend to complainants in these circumstances because the denial of housing to a cohabiting couple does not constitute unlawful discrimination on the basis of ‘marital status.’”\textsuperscript{105} The court went on to explain: “New York law prohibits landlords from discriminating against individuals (as a class) because they are unmarried, but permits them to discriminate against individuals, married or unmarried, who wish to cohabit with a nonspouse.”\textsuperscript{106}

To be clear, the high courts in Alaska, California, and Massachusetts have held that their statutes prohibiting marital status discrimination bar discrimination against nonmarital couples, including cohabiting unmarried couples.\textsuperscript{107} But “more state supreme courts have ruled the other way.”\textsuperscript{108} One could argue, as I have argued elsewhere, that even if this was not true in the past, today, these statutes should be interpreted to prohibit differential and disfavored treatment of those living in nonmarital families.\textsuperscript{109} As I stated elsewhere, “[m]any 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

\textsuperscript{102} For a contemporary argument that this conduct/status distinction must be rejected, see Widiss, \textit{supra} note 100, at 2135–50.
\textsuperscript{104} \textit{Id.} at 385.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.} at 386.
\textsuperscript{107} 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 that the Fair Employment and Housing Act’s ban on marital status discrimination prohibited discrimination against cohabiting, nonmarital couples); Att’y Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994) (holding that housing statute prohibiting marital status discrimination prohibited discrimination against cohabiting, nonmarital couples).
\textsuperscript{108} Widiss, \textit{supra} note 100, at 2120; see also Joslin, \textit{Marital Status}, \textit{supra} note 3, at 80911.
\textsuperscript{109} E.g., Joslin, \textit{Marital Status}, \textit{supra} note 3, at 828–29.
relations and nonmarital cohabitation at the time.” Today, to the extent these criminal laws are still on the books, they are unenforceable. It is now clear that these criminal fornication and cohabitation laws “infringe constitutionally protected conduct.”

Moreover, especially when analyzed under the principles of the Supreme Court’s gay rights canon, interpreting these marital status non-discrimination statutes to permit the disfavored treatment of nonmarital families raises significant constitutional questions. Thus, again to be clear, there are persuasive arguments that these statutes should be interpreted more broadly today. This Article, however, is not focused on how these statutes should be interpreted and applied today. Instead, this Article explores the historical roots of these statutes.

II. MARITAL STATUS ADVOCACY AND ITS RELATIONSHIP TO MARRIAGE

A. Nonmarriage, Same-Sex Marriage, and the Arc of Change

This Part uses the uncovered archival materials of this earlier wave of marital status advocacy to complicate the story of nonmarriage’s evolution. As noted above, many contemporary scholars are concerned about the legal treatment of the large and growing number of people living outside of marriage. The now-conventional narrative suggests that the law of nonmarriage had been proceeding along a progressive arc. But the gay rights victories—what I call the “gay rights canon”—it is said, may have brought this positive trajectory to a grinding halt. In addressing one form of discrimination—discrimination against lesbian and gay people—some contend the gay rights canon exacerbated another form of discrimination—discrimination against those living outside of marriage.
For example, Melissa Murray argues that in establishing the right of same-sex couples to marry, the Supreme Court’s decision in Obergefell v. Hodges “promote[d] marriage—as only marriage—as the normative ideal for intimate life.” In so doing, she continues, “the Obergefell decision goes beyond simply favoring marriage over potential alternatives; it gestures toward the repudiation of the jurisprudence of nonmarriage and its aspirations for nonmarital equality.” Melissa Murray is not alone in predicting the demise of the law of nonmarriage. For example, just after the Court’s earlier decision in United States v. Windsor, Deborah Widiss wrote that in rectifying inequality against same-sex couples, the Court reaffirmed a different inequality by perpetuating the belief “that marriage is clearly superior to other family forms.”

Elsewhere, I offer a rereading of the constitutional gay rights decisions that suggests another path forward. In my article The Gay Rights Canon and the Right to Nonmarriage, I argue that the gay rights decisions can be read to bolster rather than to repudiate a constitutional right to nonmarriage. As I explain, “[w]hen read consistently with the principles of the gay rights canon, Obergefell supports, rather than forecloses, the claim that the denial of meaningful protection to those living outside of marriage raises a serious constitutional question.” I suggest that nonmarriage’s future arc may not be as bleak as some suggest.

Here, my focus is on an earlier period in nonmarriage’s evolution. Specifically, this Article explores the relationship between advocacy to prohibit marital status discrimination and marriage. There is a direct relationship between the two. But it turns out that the relationship is different than many today assume. Today, many scholars and advocates

family as children with married parents, and by penning an unnecessary paean to marriage, Justice Kennedy made the lives of nonmarital families lesser.”); Widiss, supra note 26, at 553 (“In recognizing the injury that DOMA wrought by treating same-sex marriages as second-tier marriages, the Windsor opinion embraces a traditional understanding of marriage as superior to all other family forms.”).

117. Murray, supra note 2, at 1240.
118. Id.
119. See, e.g., Leonore Carpenter & David S. Cohen, A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority, 104 Geo. L.J. Online 124, 126 (2015) (“In the process of explaining how vital marriage is to individuals and society, Obergefell repeatedly shames those who do not marry.”); Infanti, supra note 19, at 82 (“[T]he Obergefell and Windsor decisions have reified the privileged position of marriage in our laws. . . . [Obergefell] has actually set back movement for equal treatment of all regardless of relationship status.”).
120. 133 S. Ct. 2675, 2696 (2013) (invalidating Section 3 of Defense of Marriage Act, which defined marriage for all federal purposes to include only marriage between one man and one woman).
121. Widiss, supra note 26, at 552.
122. See generally Joslin, Gay Rights Canon, supra note 4.
123. Id. at 464.
124. Id. at 475.
view these marital status nondiscrimination statutes as a means to pro-
tect those living outside of marriage. The advocates who worked to
pass these statutes, however, were primarily concerned about the treat-
ment of those who were living inside of marriage. Historically, married
women faced more legal disabilities than did unmarried women. Under
the doctrine of coverture, women lost their separate legal identities upon
marriage; married women’s identity was “[s]upended” or “con[s]oli-
dated” into that of their husbands. As William Blackstone explained:
“By marriage, the hu[s]band and wife are one per[s]on in law: that is, the
very being or legal existence of the woman is [s]upended during the
marriage, or at lea[s]t is incorporated and con[s]olidated into that of the
husband: under who[s]e wing, protection, and cover, she performed every
thing . . . “

As beings without independent legal identities, wives were prohib-
ited “from contracting, filing suit, drafting wills, or holding property in
their own names.” Within the home, husbands were the “master[s] of
the household.” A husband had control over all of his wife’s property
and he owned any income his wife earned during their marriage. If the
wife earned money through employment, her wages were her husband’s,
not her own. Because he owned her wages, the husband (and only the
husband) had a legal duty to support his wife. In sum, “under coverture
wives became economically and legally dependent on their husbands.”

These legal rules were premised on and reinforced the cultural belief that
“women’s appropriate sphere was limited to their family roles as wives
and mothers.” Accordingly, the rules of coverture “kept women exactly
where they belonged.”

Even after married women formally gained the right to contract
and to sue and be sued, these deeply-held cultural beliefs about the
“proper” roles of husbands and wives continued to shape the life and law
of families. For example, even after women gained the right to enter into
contracts, the Supreme Court affirmed Illinois’s refusal to admit Myra

125. 1 Blackstone, supra note 38, at *429–33; Hasday, supra note 38, at 1497.
126. 1 Blackstone, supra note 38, at *430 (emphasis removed) (footnote
omitted).
127. Reva B. Siegel, The Modernization of Marital Status Law: Adjudicating
128. D. Kelly Weisberg & Susan Freligh Appleton, Modern Family Law: Cas-
129. Siegel, supra note 127, at 2127 (1994); see also Joanna L. Grossman & Law-
rence M. Friedman, Inside the Castle: Law and the Family in 20th Century Amer-
ica 59 (2011).
131. Mary L. Heen, From Coverture to Contract: Engendering Insurance on Lives,
23 Yale J.L. & Feminism 335, 346 (2011) (“[A] woman entered marriage as a depen-
dent, without property or the legal right to earnings through her own labor.”).
132. Hasday, supra note 38, at 1499.
133. Id.
Bradwell to the Illinois Bar. In his concurring opinion, Supreme Court Justice Joseph Bradley explained: “[t]he harmony . . . of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.”

Statutes prohibiting marital status discrimination—especially those that prohibited discrimination in the context of credit—were an important part of second-wave feminists’ efforts to eradicate coverture’s legal and cultural relics that continued to hinder the ability of women, especially married and formerly married women, to achieve independence and equality.

B. The Equal Credit Opportunity Act: A Case Study

In many jurisdictions, marital status discrimination was first prohibited in the context of credit. At the federal level, prohibitions against marital status discrimination never made it far past this context. For example, federal law currently does not prohibit marital status discrimination in the areas of employment or housing.

135. Id. at 141 (Bradley, J., concurring).
136. Articles discussing marital status discrimination typically focus on marital status discrimination in other contexts, such as housing and employment. See generally Beattie, supra note 99 (exploring cases arising primarily in contexts of employment, housing, and public accommodations); Porter, supra note 18, at 15–17.
137. Title VII, a federal employment nondiscrimination statute, prohibits discrimination on the bases of race, sex, color, religion, and national origin. 42 U.S.C. § 2000e-2(a) (2012). Attempts to enact a federal ban on discrimination on the basis of “marital status” in the areas of employment and public accommodations have been unsuccessful. See H.R. 14752, 93d Cong. (1974) (proposing prohibiting discrimination on bases of sex, sexual orientation, and marital status in employment and public accommodations).
138. The federal Fair Housing Act does not prohibit discrimination on the basis of marital status. See 42 U.S.C. § 3604(b). It does prohibit discrimination on the basis of “familial status,” but the statute defines that term to mean an adult living with a minor child. Id.; id. § 3602(k) (“‘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.”); see also 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.”). But cf. 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 [federal Fair Housing Act]. The defendants cannot arbitrarily exclude all applicants who are not related by blood, marriage or adoption
1970s, a range of civil rights advocates came to view access to credit as a critical step to achieving equality for marginalized communities. For example, in the late 1960s, the National Welfare Rights Organization (NWRO) spearheaded a campaign intended to ensure credit access for poor people, particularly poor urban blacks.\(^{139}\) “The NWRO campaign focused on credit access as a way to bridge the seemingly distant worlds of the white middle class and poor urban blacks.”\(^{140}\)

Starting around the early 1970s, feminist activists turned to credit access.\(^{141}\) At the federal level, these efforts of women’s rights advocates led to the passage of the ECOA.\(^{142}\) As originally enacted in 1974, the ECOA prohibited discrimination in credit on the bases of sex and marital status.\(^{143}\) Two years later, other bases, including race, color, and national origin, were added to the statute.\(^{144}\) Like many of the state statutes prohibiting marital status discrimination, the ECOA has been interpreted to prohibit only discrimination against people because of their \textit{individual} marital status; it does not prohibit discrimination against people because they are living in a nonmarital family.\(^{145}\)

The campaign to enact the ECOA was fueled in part by \textit{Ms. Magazine}’s receipt of thousands of letters from women documenting the discrimination they faced when trying to gain access to credit.\(^{146}\) The complaints to \textit{Ms. Magazine}, which were later presented to Congress, focused on the treatment of married and formerly married women.\(^{147}\) After women’s rights advocates brought attention to the issue, the National Commission on Consumer Finance (NCCF) undertook to study

\(^{139}\) See Gunnar Trumbull, \textit{Consumer Lending in France and America: Credit and Welfare} 168 (2014).

\(^{140}\) Id. at 173.

\(^{141}\) Id. at 179 (“The plight of women in credit markets became the focus of a social and political campaign in 1972.”).

\(^{142}\) Id. at 184.


\(^{145}\) Anne P. Fortney, \textit{Fair Lending Law Developments}, 55 BUS. LAW. 1309, 1316 (2000) (“The legislative history of the ECOA makes clear that the prohibition against marital status discrimination applied only to the marital \textit{status of an applicant}; Congress did not mean to preclude creditors from considering the marital \textit{relationship between co-applicants}.”).

\(^{146}\) Trumbull, supra note 139, at 179 (noting that campaign for ECOA was “stimulated initially by a wave of letters sent in response to an editorial in \textit{Ms. Magazine}, in which the author described her experience applying for an American Express card”).

\(^{147}\) See id. at 180 (“The largest share of complaints concerned the credit plight of married women, who faced a series of discriminatory and degrading lending practices.”).
the issue. Following the release of the Commission’s report in December 1972,148 Congress held a series of hearings to further explore problems related to access to credit for women.149 “These hearings culminated in a Senate report citing no fewer than thirteen types of credit discrimination based on sex and marital status commonly employed by creditors in their credit evaluations . . . .”150 Of the thirteen problems identified by the Senate Report, ten related specifically to the experiences of married, separated, or divorced women; none concerned the treatment of nonmarital couples.151 Thus, to use the words of Margaret Gates, Co-Director of the

148. The December 1972 Report of the Commission summarized the findings as follows:

1. Single women have more trouble obtaining credit than single men. (This appeared to be more characteristic of mortgage credit than of consumer credit.)
2. Creditors generally require a woman upon marriage to reapply for credit, usually in her husband’s name. Similar reapplication is not asked of men when they marry.
3. Creditors are often unwilling to extend credit to a married woman in her own name.
4. Creditors are often unwilling to count the wife’s income when a married couple applies for credit.
5. Women who are divorced or widowed have trouble re-establishing credit. Women who are separated have a particularly difficult time, since the accounts may still be in the husband’s name.


150. Id.

151. The thirteen identified problems were the following:

(1) Single women have more trouble than single men in obtaining credit.
(2) Creditors generally require a woman upon marriage to reapply for credit, usually in her husband’s name.
(3) Creditors are unwilling to extend credit to a married woman in her own name.
(4) Creditors are often unwilling to consider the wife’s income when a married couple applies for credit.
(5) Women who are separated have a particularly difficult time, since the accounts may still be in the husband’s name.
(6) Creditors arbitrarily refuse to consider alimony and child support as a valid source of income when such source is subject to validation.
(7) Creditors apply stricter standards to married applicants where the wife rather than husband is the primary supporter for the family.
(8) Creditors request or use information concerning birth control practices in evaluating a credit application.
(9) Creditors request or use information concerning the creditworthiness of a spouse where an otherwise creditworthy married person applies for credit as an individual.
(10) Creditors refuse to issue separate accounts to married persons where each would be creditworthy if unmarried.
Center for Women's Policy Studies: “It [wa]s the married, or formerly married, women who appear[ed] to be the prime victim of sex discrimination in credit.”\textsuperscript{152} Courts interpreting the statute agreed. For example, in \textit{Anderson v. United Finance Co.},\textsuperscript{153} the Ninth Circuit explained that the purpose of the ECOA was “to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit.”\textsuperscript{154}

As noted above, historically, under the doctrine of coverture, married women lost a range of important rights upon marriage.\textsuperscript{155} By the 1960s, the formal doctrine of coverture had been eliminated; women no longer lost their separate legal identity upon marriage; they maintained the right to contract, and the right to sue and be sued.\textsuperscript{156} And, in 1964, Congress prohibited sex discrimination in the workplace.\textsuperscript{157} Notwithstanding those legal developments, the long-standing and deeply-held belief that the “paramount destiny and mission of woman [sic] [was] to fulfil [sic] the noble and benign offices of wife and mother,” continued to shape the practice of credit.\textsuperscript{158}

What were these problems that married and formerly married women faced with regard to credit? In terms of married women, the problems largely fell into three basic categories. First, creditors often refused to allow married women to apply for and receive credit, primarily in the form of credit cards, in their own names. The 1972 NCCF Report included the following example, which it found to be a common problem:

\begin{quote}
(11) Creditors consider as “dependents” spouses who are employed and not actually dependent on the applicant.
(12) Creditors use credit scoring systems that apply different values depending on sex or marital status.
(13) Creditors alter an individual’s credit rating on the basis of the credit rating of the spouse.
\end{quote}

\textit{Id.} \textsuperscript{152}, Gates, \textit{supra} note 42, at 410.
\textsuperscript{153} 666 F.2d 1274 (9th Cir. 1982).
\textsuperscript{154} \textit{Id.} at 1277; Resolution Trust Corp. v. Townsend Assocs. Ltd. P’ship., 840 F. Supp. 1127, 1141 (E.D. Mich. 1993) (stating that ECOA was enacted “to eliminate credit discrimination against married women, who traditionally had been required to obtain their husbands’ joinder to any credit applications”); Riggs Nat’l Bank of Wash. D.C. v. Linch, 829 F. Supp. 163, 168 (E.D. Va. 1993) (stating that “[t]he ECOA was implemented to prevent this discriminatory practice of forcing women to have their husbands guarantee any loan they wished to receive”).
\textsuperscript{155} See \textit{supra} notes 125–33 and accompanying text.
\textsuperscript{156} See \textit{infra} note 280 and accompanying text.
\textsuperscript{158} Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring). For fascinating explorations of the lingering effects of coverture even after the passage of Married Women's Property Acts, see generally, for example, Jill Elaine Hasday, \textit{Contest and Consent: A Legal History of Marital Rape}, 88 CALIF. L. REV. 1373 (2000) (exploring contemporary legal treatment of marital rape and its connections to coverture); Siegel, \textit{supra} note 127.
Shortly after my marriage I wrote all the stores where I had charge accounts and requested new credit cards with my new name and address. That’s all that had changed—my name and address. Otherwise, I maintained the same status—the same job, the same salary, and, presumably, the same credit rating. The response of the stores was swift. One store closed my account immediately. All of them sent me application forms to open a new account—forms that asked for my husband’s name, my husband’s bank, my husband’s employer. There was no longer any interest in me, my job, my bank, or my ability to pay my own bills.\textsuperscript{159}

The Report also noted that these problems did not arise simply as the result of the actions of individual bank officials. Instead, it often resulted from official policy. For example, BankAmericard advised customers that their “policy allows card [sic] in the husband’s name only.”\textsuperscript{160} The subsequent report of the Congressional Research Service explained the problem this way: “One of the largest difficulties which [married] women seem to confront is their ability to obtain credit in the name of their choosing.”\textsuperscript{161} This “name problem,” the Congressional Report continued, was “reflective of the older common law system whereby a wife was her husband’s ward and from him obtained her socio-legal identity.”\textsuperscript{162} In other words, this common practice of issuing family credit cards only in the name of the husband was rooted in and reinforced the long-standing belief that women were “dreadful decisionmakers” who needed to be protected from their own bad decisions.\textsuperscript{163}

The second major hurdle facing married women was the very common policy of excluding or discounting the wife’s income, typically in the context of a loan request.\textsuperscript{164} That is, many banks and other institutions would not count any or all of the wife’s income in assessing the family’s credit request.\textsuperscript{165} This common practice was based on the presumption that the working wife would eventually become pregnant and, after pregnancy, she would drop out of the labor force.\textsuperscript{166}

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\textsuperscript{159.} \textit{NCCF Report}, supra note 49, at 498.
\textsuperscript{160.} \textit{Id.} at 499.
\textsuperscript{161.} \textit{Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency}, 93d Cong. 660–61 (\textit{Sylvia L. Bekey, Cong. Research Serv., Women and Credit: Synopsis of Protective Findings of Study on Available Legal Remedies Against Sex Discrimination in the Granting of Credit and Possible State Statutory Origins of Unequal Treatment Based Primarily on the Credit Applicant’s Sex or Marital Status}) [hereinafter \textit{Women and Credit}].
\textsuperscript{162.} \textit{Id.} at 661.
\textsuperscript{163.} See \textit{id.} (concluding that difficulty women face in obtaining credit in their own name is reflective of coverture system); Hasday, supra note 38, at 1499 (“Coverture’s advocates also insisted that women were dreadful decisionmakers.”).
\textsuperscript{164.} See \textit{infra} notes 167-74 and accompanying text.
\textsuperscript{165.} \textit{Economic Problems of Women, Part III}, supra note 148, at 547 (statement of Hon. Frankie M. Freeman, Member, U.S. Commission on Civil Rights).
\textsuperscript{166.} \textit{Id.} at 547–48.
wives were more likely to have their incomes excluded or discounted. A 1971 survey of savings and loan associations by the Federal Home Loan Bank found that “25 percent would not count any of the income of a wife, age 25, with two school children, who held a full-time secretarial position; that more than 50 percent would limit credit to 50 percent or less of her salary; and that only 22 percent would count it all.” Until the mid-1960s, the Federal Housing Authority would not count any of the wife’s income. And until 1973, the Veterans Administration (VA) continued to discount wives’ incomes. The official loan policy of the VA at the time was to grant some consideration to the wife’s income where she had “previously had children and the pattern of employment indicate[d] that she ha[d] been able to work after each addition to the family.”

Not all jobs were treated the same. As Frankie Freeman, a member of the U.S. Commission on Civil Rights, explained in her statement to Congress, “the type of job the wife [held] was considered in the loan decision.” A working wife’s income was more likely to be considered (at least in part) if she held what was considered to be a “professional,” as opposed to a “nonprofessional” position. A report produced by the District of Columbia Commission on the Status of Women, in collaboration with the Women’s Legal Defense Fund, for example, found that of the forty lenders surveyed, “only 27 count[ed] 100% of a woman’s income if she is ‘professional,’ and 13 if she is ‘nonprofessional.’”

A third hurdle married working women faced related to the second. Some lenders would only consider the income of a young working wife if she provided evidence that she would not have a child in the near future. This proof was often in the form of a “baby letter.”

167. See id. at 549.
169. See id.
170. Id.
171. Economic Problems of Women, Part III, supra note 148, at 533 (report of the D.C. Commission on the Status of Women, Residential Mortgage Lending Practices of Commercial Banks, Savings and Loan Associations, and Mortgage Bankers) [hereinafter D.C. Commission Report]; Gates, supra note 42, at 424 (noting that VA policy “persisted until mid-1973” and that until the revisions in 1973, in order to comply with “VA guidelines lenders were demanding affidavits from wives stating that they were practicing birth control and did not intend to have children”).
174. Id.
176. See id.
[wa]s a physician’s statement which disclose[d] the birth control method practiced by the couple or state[d] that the couple [wa]s unable to have children.”

In some instances, women had to sign affidavits stating that they would have abortions if they became pregnant. Carol Knapp Lowicke wrote a letter to the National Organization for Women (NOW) documenting one particularly egregious example. When Lowicke and her husband applied for a loan guarantee from the VA, they were told that the only way both of their full incomes could be considered would be if they submitted the following proof:

1) Two letters from my gynecologist—one stating that I was under his supervision in birth control. The other had to state that due to the condition of my ovaries, it would be difficult for me to get pregnant even without birth control; 2) [M]y husband’s notarized statement that if I should become pregnant, he would agree to an abortion. And if for some reason I had to stop taking the pill, that he would have a vasectomy performed; 3) [M]y notarized statement that if I should become pregnant, that I would agree to have an abortion performed. And if I had to stop taking the pill, that I would agree to my husband’s vasectomy.

Another set of the identified challenges concerned formerly married women. First, because women were often unable to maintain credit in their own names during their marriages (because banks often insisted that loans be held in the names of the husbands), wives had little to no established credit history after they divorced. As one expert explained, “[a]fter divorce, unless the woman has been adamant about insisting on credit in her own name, and assuming that she has been able to get it, she will not have any credit references to rely on in establishing new credit. [In addition] almost every retailer will cut her off from using her prior joint account, even though most will allow her husband to continue using it, since the account is in his name.”

There were some concerns voiced about younger, never married women, but with regard to this group, the concern was not related to their likelihood of living with a nonmarital male partner. Instead, the identified challenges faced by single women related to creditors’

177. Id.
178. Id. at 548–49.
179. Lowicke Letter, supra note 47.
180. Id.
181. David Ira Brown, The Discredited American Woman: Sex Discrimination in Consumer Credit, 6 U.C. DAVIS L. REV. 61, 64 n.21 (1973) (quoting Symposium of Women and the Law, Credit: Are Women Treated Differently (on file with the U.C. Davis Law Review)).
182. Id. (alterations in the original) (quoting Symposium of Women and the Law, Credit: Are Women Treated Differently (on file with the UC Davis Law Review)).
assumptions that these women were not likely to have long-term employment because they would soon marry, have children, and, in turn, leave the paid work force. As one scholar put it at the time: “Much credit discrimination results from the assumption that women are poor credit risks because they do not remain long in the work force; single women will marry, and married women will become pregnant and cease working outside the home.”

Second, banks often refused to consider alimony or child support payments as a form of income. At the time, this had a primary and dramatic effect on divorced women, many of whom relied on one or both sources of income post divorce.

Opponents of the legislation, which included banks and other lenders, also focused primarily on married women. Opponents did not publicly express any concerns regarding nonmarital couples. One primary concern raised by the banking industry was simply the alleged costs of compliance. And here, the costs were primarily associated with having to redo the accounts of married couples to include the names of both the wife and the husband. For example, after Congress enacted the ECOA, leaders in the banking industry objected to the proposed regulations that required both names to be listed. Kenneth V. Larkin, a senior vice president at Bank of America, asserted that it would cost “$3 million and ‘300 person years’” to switch their accounting procedures to list both spouses’ names on the accounts.

Banking officials’ other concerns related to their ability to enforce a judgment against a wife, especially a nonworking wife, and whether allowing married women to maintain separate accounts was consistent with existing state family and property laws. Banking officials pointed out that, at the time, in some states (including California), state prop-

184. Id.
185. Id. at 877.
187. Id.
189. Id.
190. Id.
191. See, e.g., Gates, supra note 42, at 429 (noting that under laws that gave only husband management and control over marital property, “creditor might refuse a woman credit because he could not expect to obtain a judgment against the community”).
192. For more discussion of this issue, see infra Part III.
193. California amended its law regarding management and control of marital property in 1975, in conjunction with amendments to its credit nondiscrimination provision. See, e.g., Brown, supra note 181, at 68–69.
Property laws provided that only the husband had management and control over marital property.\(^{194}\)

Today, much of the concern regarding marital status classifications relates to the growing race and class divide between the married and unmarried.\(^{195}\) Unmarried couples continue to be denied access to hundreds of rights and benefits extended to married couples.\(^{196}\) And people of color and people in lower income brackets are disproportionately more likely to be in this group of unmarried couples.\(^{197}\) With regard to the ECOA, some advocates focused on the race and class implications of discriminatory lending practices. But even this part of the conversation focused on the race and class effects of credit discrimination against married or formerly married women. So, for example, a number of experts testified to Congress that the practice of discounting wives’ incomes had a disproportionately negative impact on black women.\(^{198}\) This was true, William L. Taylor, Director for the Center for National Policy Review, explained, “because in minority families the income of the wife often represents a significant contribution to the family’s income and standard of living.”\(^{199}\) Bureau of Labor data at the time showed that for women aged twenty-five to thirty-four, “nonwhite wives had a 59.4% labor force participation rate, as contrasted with 38.0% for white wives.”\(^{200}\) Not only were nonwhite wives more likely to be in the paid work force, but their incomes were more likely to constitute a significant portion of their family’s total income.\(^{201}\) This disparity was compounded by the

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194. See, e.g., Gates, supra note 42, at 415.
195. See, e.g., Joslin, Marital Status, supra note 3, at 813–14 (“There is also a large and growing marriage gap on the bases of race, class, and education level.”); see also Carbone & Cahn, supra note 11, at 17–20; Huntington, supra note 9, at 186–87 (“As compared with their married counterparts, unmarried parents are younger, lower income, less educated, disproportionately nonwhite, and more likely to have children from multiple partners.” (footnotes omitted)).
196. Joslin, supra note 9, at 165–68.
197. E.g., Joslin, Marital Status, supra note 3, at 813; see also Carbone & Cahn, supra note 11, at 17–20; Huntington, supra note 9, at 186–87.
199. Id. at 195 (statement of William L. Taylor, Director, Center for National Policy Review, School of Law, Catholic University); Women & Housing, supra note 168, at 71 (“Since a higher proportion of minority families rely on the wife’s salary for part of the family’s income, the impact of policies discounting the wife’s income has been much harsher on the non-white.”).
201. Economic Problems of Women, Part III, supra note 148, at 550 (statement of Hon. Frankie M. Freeman, Member of the U.S. Commission on Civil Rights) (“[The practice of discounting the wife’s income] is racially discriminatory in effect because of its impact on the large number of minority families who rely on wives’ incomes.”); Policy on Nondiscrimination in Lending, 38 Fed. Reg. 34,653, 34,653 (1973) (noting
practice of granting even less consideration to the incomes of “non-professional” wives. “Whereas 2/3 of the responding lenders said they would count 100% of a wife’s income if she were a professional, only 1/3 would fully count the income of a nonprofessional wife.”

Women of color were more likely than white women to be in so-called “nonprofessional” positions.

A few speakers discussed the impact of credit discrimination on female-headed families. These speakers, however, were typically talking about households in which only one adult—typically the mother—was present. So, for example, Arline Lotman, Executive Director of the Pennsylvania Commission on the Status of Women, noted in her comments that discrimination on the basis of marital status affected “families without both a husband and a wife present in the household.” Lotman went on to note that discrimination targeted against such families disproportionately affected minority women because “53 percent of minority women fall into that category.”

Even this discussion was in the distinct minority. Very few speakers focused on any form of two-adult families in which the adults were not and never had been married.

Thus, marital status advocacy was about marriage. But these advocates were not attacking marriage or marital supremacy. Instead, they primarily sought to address discrimination experienced within marriage.

That “larger proportion of minority group families rely on the wife’s income to afford housing and other necessities”).


204. Economic Problems of Women, Part III, supra note 148, at 484 (statement of Arline Lotman, Executive Director, Pennsylvania Commission on the Status of Women); see Economic Problems of Women, Part I, supra note 199, at 129 (statement of Aileen Hernandez, Former Member, Equal Employment Opportunity Commission) (“I saw black women turned down for employment because they had children born out of wedlock, while white women were not even asked the question. I saw women, white and nonwhite, terminated for ‘indiscretions’ while men, similarly indiscreet, gained stature in the eyes of their employers.”); Gates, supra note 42, at 410 (“As a result, the female-headed household and the family with a working wife are most affected; and disproportionately so affected are black and other minority families.”); id. at 410 n.4 (pointing out that “27 percent of women heading households are black”).

205. See supra Part II; cf. Mayeri, supra note 11, at 1342 (“Attacking male supremacy within marriage—which loomed large on the agenda of leading feminist legal advocates—posed a fairly radical challenge to American law and social life. Challenging marital supremacy in a political environment where feminists stood accused by ERA opponents of assaulting traditional marriage and family relationships likely seemed impolitic.”).

206. E.g., Pleck, supra note 74, at 235–36 (“[A]dvocating cohabitation was a very minor theme in feminist manifestoes and in pressing for an end to marital status
III. Discrimination in Marriage

This Part develops this history further by situating marital status advocacy within the larger women’s rights movement of the late 1960s and early 1970s. A critical goal of the mainstream women’s rights movement of this time period was to promote economic independence for women. Throughout our history, it was married women who faced the most severe hurdles to economic independence. Single women held many (but not all) of the same rights as men. Unmarried women “could enter into contracts, sue and be sued, own property, and earn and keep their own income and the rents from their real property.”

Married women stood in sharp contrast to both men and to unmarried women. Under the common law doctrine of coverture, wives were prohibited “from contracting, filing suit, drafting wills, or holding property in their own names.” And, particularly important in this context, husbands controlled the money.

A wife’s dependence on her husband was also deeply embedded in the culture as well. “[T]he principle of wifely dependence,” historian Hendrik Hartog explains, “helped establish the terms of republican male citizenship.” By the middle of the nineteenth century, states began to eliminate some of the legal disabilities imposed on wives under coverture. Notwithstanding the passage of these so-called “[M]arried [W]omen’s [P]roperty [A]cts,” women’s, especially married women’s, dependency persisted. “Blackstone’s unities fiction was for the most part replaced by a theory that recognized women’s legal personhood but which assigned her a place before the law different and distinct from that of her husband.”

Husbands were assigned to the public sphere; they were responsible for supporting the family and, generally for serving as the family’s representative with the world through, among other

discrimination . . . ”).

207. See, e.g., Karst, supra note 53, at 551–52 (“[A] central concern of today’s women’s movement is the problem of dependency.”); Mary Ziegler, An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform, 19 Mich. J. Gender & L. 259, 26869 (2013) (noting that six priority issues identified by NOW in 1967 included “the subsidization of child care, the introduction of no-fault divorce, the revision of tax laws to allow deductions for homemaking and child-care services for working women, revision of Social Security laws to expand coverage for widowed and divorced women, and laws prohibiting pregnancy discrimination and guaranteeing family medical leave”).

208. Hartog, supra note 130, at 118.
209. Heen, supra note 131, at 347.
210. Siegel, supra note 127, at 2127.
211. Id.
212. Hartog, supra note 130, at 110.
213. Siegel, supra note 127, at 2135.
214. Id. at 2127.
things, voting. Wives, by contrast, were consigned to the “private” sphere of the home; they were responsible for caring for the home and any children in it.

These beliefs were pervasive. Indeed, these stereotypes about the “appropriate” roles of husbands and wives continued to shape the law for decades after the passage of Married Women’s Property Acts. Thus, even as the legally imposed disabilities on married women with respect to the right to contract and to own property began to fall away, the reality of wives’ dependence on their husbands persisted. Ensuring equal access to credit was a critical piece of the work to achieve equality and independence for women.

Marital status advocacy is a good example of multi-dimensional, or to use Cary Franklin’s term “interspherical,” advocacy. One dimension of this work involved addressing discrimination against women in the “public” sphere of the workplace and the marketplace. These public sphere efforts included prohibiting discrimination that directly impeded the ability to married women to obtain good employment at equal pay. Thus, at the federal level, advocates successfully lobbied Congress to enact the Equal Pay Act in 1963, which required equal pay for equal work without regard to sex. The next year, Congress passed the Civil Rights Act of 1964, which, among other things, prohibited employment discrimination on the basis of sex. Title VII opened up job opportunities to women that previously had been closed to them.

Advocates understood that prohibiting discrimination against women in the public realm—the workplace and the marketplace—was important but insufficient alone. Women would not have full and equal opportunity in the public sphere so long as stereotypes and family law rules that enforced these stereotypes about their “true homemaker status” persisted. Change, therefore, also required reform of the

216. Id.
217. Id.
218. Franklin, supra note 57 at 2883 (arguing “that concern about interspherical impacts motivated some of the key [sex discrimination] statutes and legal decisions of the 1960s and early 1970s”).
219. See, e.g., Cary Franklin, Inventing the “Traditional Concept” of Sex Discrimination, 125 Harv. L. Rev. 1307, 1328 (2012) (“But in fact, the legislative debate over Title VII’s sex provision emphasized the most distinctive feature of sex discrimination, in 1964 and throughout American history: namely, that it was understood as a means of enforcing conventional sex and family roles.”).
222. See, e.g., Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235–36 (5th Cir. 1969) (holding that employer’s refusal to hire women as switchmen was impermissible sex discrimination).
223. E.g., Mayeri, supra note 54, at 2324 (“Second-wave feminist legal advocates
rules governing marriage. Take *Reed v. Reed*.

The case concerned the appointment of an administrator for a deceased child’s estate. After the child died, the child’s mother (who was separated from the child’s father at the time), filed a petition to be named as the administrator of her child’s estate. The father later filed a competing petition. Idaho law at the time provided that, as between members within a designed class of relatives entitled to be named as an administrator of the estate, “males must be preferred to females.” This statute, like many other statutes still in existence at the time, reinforced the notion of husbands as the true managers of the family. In *Reed*, the Court began to chip away at this deeply-held belief by holding the statute unconstitutional.

These successes advanced the cause for all women—married and unmarried. That said, like *Reed*, most of the cases litigated by Ruth Bader Ginsburg and the ACLU’s Women’s Rights Project (WRP) involved married or formerly married people. Moreover, as was true in the *Reed* litigation, Ginsburg and her colleagues did not seek to eliminate marriage; they sought to reform it into a more equal institution.

Again, marital status advocacy is a useful example of this type of interspherical work. In order to buy homes; to purchase what they needed for themselves and their families; to get loans to open small businesses; and generally to be seen as autonomous, equal beings, banks and other lenders needed to be prohibited from discriminating. But, advocates understood that equal credit access for women could not be fully realized unless changes were also made to rules governing the “private” realm of marriage and the family.

*set out to transform the traditional marital bargain in which husbands supported wives and children in exchange for wives’ caregiving labor and personal services.”*.

225. *Id.* at 71–72.
226. *Id.*
227. *Id.* at 72.
228. *Id.* at 73 (quoting *Idaho Code* § 15–314 (1932) (repealed July 1, 1972)).
229. *Id.* at 76.


231. Mayeri, *supra* note 54, at 2325 (“Many feminist legal advocates saw marriage as a primary vehicle for the perpetuation of sex and gender rules that confined women to a stifling domesticity and deprived them of political and economic power.”).

232. Gates, *supra* note 42, at 410 (“The availability of credit to women [was] vital to the upgrading of their economic status because it determine[d] their access to education, homeownership, entrepreneurship, and investment, as well as their ability to provide for the more immediate needs of their families.” (citation omitted)); *see also* Economic Problems of Women, *Part I*, *supra* note 199, at 153 (statement of Hon. Herbert S. Denenberg, Comm’r of Insurance, State of Pennsylvania) (“Denial of equal access to insurance, at fair rates, affects the economic status of all women. It touches employment discrimination, opportunities to hold a job, ability to maintain a family in the face of personal catastrophe, and economic security.”).
A. Women and Dependency

1. Second-Wave Feminism

The wake of World War II saw increasing public interest and discussion about women’s role and place in society. By the 1960s, activists began a more concerted and organized push to address the legal rights and claims of women. On December 14, 1961, President John F. Kennedy “issued an executive order creating the President’s Commission on the Status of Women . . . .” The Commission’s mandate was to consider and recommend ways to end “prejudices and outmoded customs [that] act as barriers to the full realization of women’s basic rights.” Eleanor Roosevelt chaired the Commission. The twenty-six member commission was comprised of national leaders, including cabinet members and members of Congress, as well as women’s rights activists. Despite the ambitious stated goals of the Commission, some argued that Kennedy issued the executive order primarily to “appease” women’s rights activists. Indeed,

233. Mary Frances Berry, Why ERA Failed: Politics, Women’s Rights, and the Amending Process of the Constitution 60 (1986) (“The late 1940s and the 1950s saw increasing public discussion of women’s appropriate place in view of the fact that so many women worked outside the home.”); William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062, 2125 (2002) (“Women’s politics of recognition picked up speed after World War II, and the renewed interest showed up immediately in constitutional cases such as Goesaert [v. Cleary]. Women who had proved themselves fully equal to men during the war were often unwilling to re-assume their subordinate status after the war.”).

234. Deborah N. McFarland, Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation, 65 Fordham L. Rev. 493, 499 (1996) (“With the civil rights movement in the African-American community during the 1960s came a ‘renewed struggle’ for women’s equality.”); see also Berry, supra note 233, at 60 (“The 1960s brought a revival of the women’s rights movement and more insistence on changed social and legal rights and responsibilities.”).


239. McFarland, supra note 234, at 500 n.36 (“Kennedy’s establishment of the CSW was partially an effort to appease women voters who felt that Kennedy failed to fulfill his promise of promoting the equality of women.”); see also Nancy E. McGlen & Karen O’Connor, Women’s Rights: The Struggle for Equality in the Nineteenth and Twentieth Centuries 169 (1983) (likewise suggesting that Kennedy created Commission to appease women who had supported his candidacy but became disappointed with his lack of commitment to women’s rights after his election).
some believed Kennedy constituted the group “to quiet the struggle for the Equal Rights Amendment [(ERA)].”

In terms of tangible results, the legacy of the Commission was “mixed.” For the most part, the Commission did not push radical reforms. For example, the Commission opposed the ERA. As one of the Commission’s members, Esther Peterson, said: “[the Committee] made few avant-garde recommendations; we did not propose to restructure society. Rather, we strove to fit new opportunities into women’s lives as they were.”

Nonetheless, the Commission helped enact several important pieces of legislation. In 1963, the Commission issued a report entitled *American Women: The Report of the President’s Commission on the Status of Women.* Due in part to its recommendations, the Equal Pay Act was enacted that same year. Title VII, including its prohibition against sex discrimination, was enacted the following year.

In addition to moving forward some concrete legislative developments, the Commission shone a public and high-level spotlight to the

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240. McFarland, *supra* note 234, at 500 n.36; see also Becker, *supra* note 238, at 218 (“Although the purpose of the PCSW was ‘to undermine’ the ERA, [Esther] Peterson realized it was important to include at least one supporter of the ERA, and that one person was Marguerite Rawalt.”).

241. “As an advocate for the emancipation of women, the Commission had a somewhat mixed record. . . .” Kay, *supra* note 235, at 2048.

242. It is important to note, however, that some of the recommendations likely seemed radical to some. For example, the Report recommended “that marriage should be considered an economic partnership and that any property acquired during the marriage should belong to both spouses.” Davis, *supra* note 235, at 37.

243. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871, 875 (1971) (“Thus the President’s Commission on the Status of Women argued in 1963 that ‘the principle of equality [could] become firmly established in constitutional doctrine’ through use of the Fourteenth and Fifth Amendments, and concluded that ‘a constitutional amendment need not now be sought.’” (alterations in the original)).


issue of women’s rights. The Commission also brought together a number of women who would soon become leaders in the women’s rights movement. Several members of the Commission, including Catherine East, Mary Eastwood, Pauli Murray, and Marguerite Rawalt, later helped form NOW.

Indeed, NOW was formed in 1966, just three years after the Commission issued its report. The “spark” that led to NOW’s formation was the EEOC’s refusal “to make sex discrimination a priority in its enforcement of [Title VII].” When officials ignored their complaints at a 1966 conference on women’s status, [Pauli] Murray, Betty Friedan, and other feminists stormed out in protest and founded the [NOW]. “By the end of 1970, activities for the promotion of women’s equality constituted a major social movement with a substantial organized component.” In addition to NOW, other organizations emerged during this period, including the Women’s Equality Action League (WEAL), the National Women’s Political Caucus, and the ACLU’s WRP.

248. See Davis, supra note 235, at 47–48 (“Surprisingly, both the establishment of the Kennedy Commission and the passage of Title VII happened before the second wave got under way. They were, in fact, part of what made it possible. Together, they legitimated sex discrimination as an issue.”).

249. Jennifer Woodward, Making Rights Work: Legal Mobilization at the Agency Level, 49 Law & Soc’y Rev. 691, 707 (2015) (“The founders of NOW were either members of the President’s Commission on the Status of Women or friends of the members.” (citation omitted)).

250. Davis, supra note 235, at 37 (“The experience of working for the Commission opened the eyes of several women who later became leaders of the revitalized women’s movement, including Catherine East, a young attorney named Mary Eastwood, and Pauli Murray, the civil rights lawyer. Years later, Murray described the experience as ‘intensive consciousness-raising.’ Afterward, all three women became part of an informal network of feminists brought together because of the Commission.”); see also President’s Commission on the Status of Women, Schlesinger Libr. On the Hist. of Women in Am. http://guides.library.harvard.edu/schlesinger_presidents_commission_on_the_status_of_women [https://perma.cc/V668–3DCQ] (last visited Oct. 20, 2017).

251. Kay, supra note 235, at 2049–50 (“[As a result,] on June 29, 1966, a small group of women, convinced that Title VII would never be enforced to benefit women unless an advocacy group for women equivalent to the National Association for the Advancement of Colored People existed, founded the [NOW].”).


254. Id.

255. Cowan, supra note 246, at 376.

256. Id. For a history of the Women’s Rights Project, see id. at 376–83.
One of the core goals of NOW and other mainstream women’s rights organizations was to challenge women’s dependency on men. Advocates were concerned both about actual, tangible economic dependence, as well as intangible symbols of women’s dependence. Addressing both forms—the tangible and the symbolic—was important. As Dr. Jean Lipman-Blumen, Director of the Women’s Research Staff of the National Institute of Education, stated in her testimony, “The socialization of women as dependent, vicarious people makes both men and women believe that females cannot deal with adult financial responsibilities.”

While most feminist advocates “did not assume the superiority of marital families,” challenging dependency within the marital relationship was a priority for the women’s rights movement. Addressing gender inequality in marriage—which was the dominant family form at the time—was seen as a critical means of addressing gender inequality more broadly. Thus, feminist advocates “set out to transform the traditional marital bargain in which husbands supported wives and children in exchange for wives’ caregiving labor and personal services.” NOW’s original 1966 statement of purpose, for example, focused on challenging the stereotypical roles of husband as breadwinner and wife as carer of the home. The 1966 purpose statement declared: “We believe that a true partnership between the sexes demands a different concept of marriage, an equitable sharing of the responsibilities of home and children and of the economic burdens of their support.”

There certainly were some feminist organizations during the 1960s and 1970s that directly challenged marriage. These groups believed that the institution of marriage was so “permeated” with male supremacy

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257. See, e.g., Women & Housing, supra note 168, at 11 (“[W]omen must now achieve the economic resources to live with or without a man . . . .”); June K. Inuzaka, Women of Color and Public Policy: A Case Study of the Women’s Business Ownership Act, 43 STAN. L. REV. 1215, 1222 (1991) (“WEAL’s primary focus was on economic equity issues for women.”).

258. Karst, supra note 258, at 551–52 (“[A] central concern of today’s women’s movement is the problem of dependency. The point finds expression in the economic and political terms, but the most destructive dependency of all is psychological, the dependency that limits a woman’s sense of who she is and what she can do.”).

259. Women & Housing, supra note 168, at 15.


261. Id. at 2324 (“Second-wave feminist legal advocates set out to transform the traditional marital bargain in which husbands supported wives and children in exchange for wives’ caregiving labor and personal services.”).

262. Id. at 2391 (“A sex-neutral approach to parenting within marriage seemed clearly to advance feminist aspirations for an egalitarian division of labor at home, a prerequisite for freedom and equal opportunity in the public sphere.”).

263. Id. at 2324.

264. Jane J. Mansbridge, Why We Lost the ERA 99 (1986) (quoting Judith Hole & Ellen Levine, Rebirth of Feminism 85 (1971)).
there would be no way for women to achieve equality in a marriage. So, for example, some radical feminists took the position “that marriage must be destroyed.” Extending recognition and protection to non-marital, different-sex couples was not always the goal, even among these more radical activists. One such group—The Feminists—however, did not encourage individuals to enter into nonmarital, cohabiting relationships. Instead, they recommended “raising children communally.” Other activists at the time sought to protect the rights of women to raise children without men. To be sure, these anti-marriage activists participated not only in the more radical groups of the time; some of them started in NOW and other mainstream groups.

Again, some individual activists at the time sought to dismantle marital supremacy. In contrast, the mainstream organizations lacked consensus about whether and how to attack discrimination against non-marital families. In the context of nonmarital families, many feminists recognized the reality that women bore the brunt of the obligations. And while feminists were interested in distributing those responsibilities, many simultaneously wanted to protect the autonomy of those unmarried women and mothers. Thus, “[w]here [unmarried] mothers’ and fathers’ interests coincided, feminists could wholeheartedly attack the legal privileging of marriage. [But w]hen fathers’ rights threatened mothers’ freedom, marital primacy [was invoked to] shield[] unmarried women from the downside of sex neutrality.” Moreover, there was a sense that a campaign to dismantle marital supremacy was unlikely to succeed.

Ruth Bader Ginsburg subscribed to this position, explaining: “Another [issue] that I didn’t think we should attack—at least not

265. Id. at 101.
266. Davis, supra note 235, at 90.
267. Id.
268. Id.
270. For example, NOW adopted a proposal, agreeing that sex should not be the state’s interest and that “[m]arriage’ should become a social institution, i.e. persons of the same or opposite sex agreeing to live together . . . .” Eliza Paschall, Marriage, Sex, and Economics, 2–3 (Aug. 23, 1971) (unpublished proposal adopted by NOW) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, MC725, Box 21, Folder 17). Another activist resigned from her position as NOW’s New York City chapter President “because she disagree[d] with NOW’s basic polic[ies] regarding marriage and organization structure. . . . She [said] she [wa]s opposed to both . . . .” Letter from Dolores Alexander to Members of NOW 1968 Nominating Committee and Members of the NOW Board of Directors (Nov. 19, 1968) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 1, Folder 50).
271. See, e.g., Mayeri, supra note 54, at 2303 (“[N]onmarital children traditionally were the mothers’ responsibility by default.”).
272. Id. at 2392.
273. Id.
274. See, e.g., Cowan, supra note 246, at 392–93.
yet—was the distinction between married couples and individuals who are not married. Because that distinction runs throughout law to such a tremendous extent, the Court was just not ready to take it on.”275 Thus, for these and other reasons, the mainstream women’s rights organizations at the time did not prioritize dismantling marital supremacy.

2. Public Sphere Reforms

Initially workplace issues were front and center.276 Feminist activists recognized that women could not be financially independent if they could not obtain well-paid jobs.277 Accordingly, mainstream women’s rights advocates continued to pressure the Equal Employment Opportunity Commission (EEOC) to enforce Title VII’s sex discrimination prohibition and to challenge what were viewed as unfavorable positions about Title VII’s sex discrimination protection that the EEOC had taken.278 For example, activists protested the EEOC’s initial position that Title VII permitted sex-specific want ads,279 and they urged the EEOC to conclude that firing female stewardesses when they married violated Title VII.280 In addition to working on Title VII implementation, advocates also successfully urged the enactment of an Executive Order prohibiting sex discrimination by federal contractors.281

These employment-related cases were also thought to be more winnable ones. The ACLU’s WRP, for example, “had a preference for litigating employment related issues. This inclination resulted partly because they involved matters of vital concern to women but also, and more importantly, because they appealed to the principle of equal pay for equal work, the most widely accepted of the women’s rights goals.”

275. Id. at 393.
276. DAVIS, supra note 235, at 49 (“In the beginning, NOW focused mostly on sex discrimination in the work place.”).
278. Id. at 1014.
279. Id. at 1028–29 (“Despite acting quickly to prohibit racially segregated advertisements in August 1965, the EEOC did not similarly outlaw sex-segregated ads, but instead convened a task force composed mostly of advertisers and business interests that unsurprisingly concluded that sex-segregated ads did not violate Title VII. . . . [T]he EEOC issued a guideline permitting sex-segregated advertising so long as newspapers published a disclaimer stating that the segregated advertising was not meant to be discriminatory, but rather simply reflected the fact that ‘some jobs were of more interest to one sex than another.’”).
280. Franklin, supra note 219, at 1380 n.233 (noting that “NOW actively supported the stewardesses’ campaign to eradicate age and marital termination policies from the start”).
282. Cowan, supra note 246, at 392.
3. Private Sphere Reforms

Feminist advocacy was not limited to public spaces of the office and the marketplace. Women’s rights activists understood that equality in these public spaces could not be achieved without altering rules governing the “private” sphere of the family. Some scholars suggest that women’s rights advocates were not core players in the pivotal and numerous family law reforms going on at the time. Among other developments, California became the first state to adopt no-fault divorce in 1969. Other states quickly followed. Many states reformed their property division rules during this time as well.

These scholars argue that the ERA preoccupied women’s rights advocates of the 1960s and 1970s and, as a result, they did not attend to family law developments at the time. For example, numerous scholars contend that feminist advocates did not play a leading role in the divorce reform revolution. Milton Regan wrote in 1992 that “[d]ivorce reforms in general, and changes in property distribution in particular, by and large simply were not the product of feminist efforts to impose a vision of equality.”

In recent years, however, others have pushed back on, or at least complicated, this narrative. For example, as Cary Franklin demonstrates, feminist advocates did not confine themselves to employment, or

283. Franklin, supra note 57, at 2891.
284. Id.
285. E.g., Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law, in Divorce Reform at the Crossroads 191, 195 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (stating that “women’s rights movement was not significantly involved with early divorce reforms”).
287. Id. at 2 (noting that “no-fault divorce [was] available in all fifty states” by 1987).
288. Id. at 7–12.
289. Herma Hill Kay, An Appraisal of California’s No-Fault Divorce Law, 75 CALIF. L. REV. 291, 293 (1987) (“[T]he achievement of legal equality between women and men was not a central goal of the divorce reform effort in California.”); Isabel Marcus, Locked in and Locked out: Reflections on the History of Divorce Law Reform in New York State, 37 BUFF. L. REV. 375, 435–36 (1988) (noting that feminists were mostly concerned with issues other than divorce reform during period of greatest legal change); Milton C. Regan, Jr., Divorce Reform and the Legacy of Gender, 90 MICH. L. REV. 1453, 1464 (1992) (arguing that feminists were “conspicuous[ly]” absent from debate on divorce reform); Rhode & Minow, supra note 285, at 195 (stating that “women’s rights movement was not significantly involved with early divorce reforms,” primarily because “implications of such reforms were not yet apparent”).
290. Regan, supra note 289, at 1465, 1457 (“[Fineman’s] argument that feminists were a powerful influence on the shape of divorce reform, for instance, is belied by evidence that in most states feminists had little involvement in the passage of divorce legislation.”).
education; their advocacy also recognized and sought to achieve “structural changes in the sphere of the family, because without such changes, women would continue to lack practical access to opportunities widely available to men.” Feminists understood that unless these family law rules were addressed, “sex-role enforcement that associated men with the marketplace and women with the home” would persist. Thus, as Mary Zeigler shows, feminists did play a role in reshaping the rules governing alimony and the distribution of property upon divorce.

ERA advocacy of the time also reflected this understanding of the interspherical nature of discrimination against women. In the highly influential *Yale Law Journal* article about the ERA and its possible effects, the authors noted that despite coverture’s partial demise, the law still “tended to frame a more dignified but nevertheless distinct and circumscribed legal status for married women.” The authors continued: “In many respects, such as name and domicile, the law continues overtly to subordinate a woman’s identity to her husband’s.” Accordingly, “[m]uch of the national discussion about women’s status has focused on marriage and divorce laws, and rightly so, because the issues involved are important to people personally, and because women’s domestic role has traditionally been considered their primary one.”

Given this understanding, it is not surprising that many of the cases brought by (and usually won by) Ruth Bader Ginsburg and the ACLU’s WRP challenged family law rules that were based on stereotyped assumptions about the distinct roles of husbands and wives. The law, Ginsburg explained,

awarded husbands the exclusive right to control family assets and to determine the family’s domicile; expected wives to adopt their husbands’ names upon marriage; and permitted girls to marry at a younger age than boys, thereby according the latter “more time to prepare for bigger, better and more useful pursuits.”

Take *Orr v. Orr.* This seminal constitutional sex discrimination case challenged an Alabama statute that allowed courts to require husbands but not wives to pay alimony upon divorce. Ginsburg and her colleagues at the ACLU filed an amicus brief arguing that the statute was

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295. *Id.*
296. *Id.*
298. *Id.* at 2892.
300. *Id.*
unconstitutional. The Court, in an opinion by Justice Brennan, agreed. This was just one of many cases the WRP litigated that “questioned the traditional assumptions about appropriate family sex roles, i.e., the assumptions that women belonged at home as wives, homemakers and mothers and men belonged outside the home as chief wage earners.”

B. Credit and Dependency

1. Public Sphere Reforms

Eradicating credit discrimination was an important step in the struggle to achieve independence for women. Credit discrimination impeded women’s ability to be financially independent. Most directly, lack of equal credit access inhibited women’s ability to financially support themselves. As NOW leader Cynthia Harrison wrote in 1972: “a woman’s ability to obtain credit independent of her husband is essential to permitting her to achieve true economic self-sufficiency.” Credit discrimination also “[did] violence to her self-esteem, her confidence in dealing with economics on an equal footing with men.”

As described above, women faced a variety of forms of discrimination with regard to credit access. Some banks refused to issue credit in the name of a married woman. Because married women often could not get credit in their own names during marriage, upon divorce, they often had difficulty obtaining credit because they had no or little credit history in their own names. Women—both married and unmarried—often had their incomes discounted when seeking mortgages and loans to start small businesses.

Most obviously and most directly, credit discrimination inhibited women’s ability to be financially independent.

In a credit-oriented society, the most important single aspect of a wife’s financial rights during marriage is the ability to obtain credit. Through the use of credit, she may effectively enforce her husband’s duty to support—which is otherwise totally unenforceable—by

303. Cowan, supra note 246, at 392, 394 (“Frontiero, Wiesenfeld and the subsequent Social Security cases attacked the legal stereotype line pervasive in the law that the woman is the homemaker and the man is the breadwinner.”).
304. See Women & Housing, supra note 168, at 12–14.
305. Letter from Cynthia Harrison, Coordinator, Task Force on Credit, Nat’l Org. for Women (Nov. 18, 1972) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, 83-M238, Carton 2, Folder 25).
306. Women & Housing, supra note 168, at 12.
307. See supra Part II.
308. See supra Part II.
309. See supra Part II.
purchasing needed items and deferring payment for them, or obtain-
ing unsecured loans to make such purchases.\footnote{310}

These discriminatory credit practices were also rooted in and per-
petuated stereotypes about women’s dependency—stereotypes that
were a core target for women’s rights advocates.\footnote{311} Lenders often
discounted the incomes of women—both married and unmarried—based
on the stereotyped assumption that women were only temporary, sec-
ondary workers.\footnote{312} For example a female associate professor at the
Massachusetts Institute of Technology who had given birth to two chil-
dren during the decade that she had already served as a professor was
told that “she need[ed] her husband’s signature to get a loan from the
university’s federally chartered credit union, because she ‘might get preg-
nant and leave.’”\footnote{313}

Moreover, even when they had paid jobs in the workplace, many
married women were often unable to obtain credit in their own names.\footnote{314}
Instead, it was not uncommon for banks to require the account to be
taken out by the husband.\footnote{315} This happened to Jorie Leuloff Friedmann,
who at the time was a Chicago newscaster.\footnote{316} When she got married,
Friedman wrote to the companies with which she had charge accounts
and asked for new cards with her new name and address.\footnote{317} Despite the
fact that Friedman “ha[d] supported herself for nine years” on her own
salary, the companies either closed the accounts altogether, or required
her to reapply for credit using only her husband’s information.\footnote{318} “There
was no longer any interest in me, my job, my bank or my ability to pay
my own bills. Marriage,” Friedman explained, “had made me a nonper-
son.”\footnote{319} Another woman exclaimed that that although she made $12,000

\footnote{310. Anne K. Bingaman, The Impact of the Equal Rights Amendment on Married
Women’s Financial Individual Rights, 3 Pepp. L. Rev. 26, 29 (1976).}
\footnote{311. Women & Housing, supra note 168, at 10–26.}
\footnote{312. Economic Problems of Women, Part I, supra note 198, at 205 (statement of
Jane R. Chapman and Margaret J. Gates, Co-directors, Ctr. for Women Policy Stud-
ies) (“Credit extenders often voice doubt over the permanence of women’s employ-
ment.”); id. at 174 (statement of Barbara Shack, Assistant Director, N.Y. Civil Liber-
ties Union) (“Another prevailing attitude is that women are only temporary members
of the workforce, dependent on a male primary wage earner, burdened with home
responsibilities . . . .”).}
29, 1974, at E2.}
\footnote{314. Economic Problems of Women, Part I, supra note 198, at 204 (statement of
Jane R. Chapman and Margaret J. Gates, Co-directors, Ctr. for Women Policy Stud-
ies).}
\footnote{315. See id. at 204.}
\footnote{316. Marlene Cimons, Women Charge Credit Bias at Hearings, L.A. Times, May
26, 1972, at F1.}
\footnote{317. Id.}
\footnote{318. Id.}
\footnote{319. Id.}
a year and her husband was an unemployed student, when she sought a car loan, “[m]ost [banks] insisted on having her husband’s signature.”

Prohibiting discrimination by banks and lenders in the public marketplace was critical to achieving tangible economic independence and security for women. It was also important in intangible ways. These credit practices perpetuated a pernicious stereotype about women. “[The] prevailing attitude [was] that women [were] only temporary members of the work force, dependent on a male primary wage earner, burdened with home responsibilities . . . .” The refusal of credit card companies to issue cards in the names of married women also perpetuated the long-ago rejected notion that married women did not have separate legal identities. Many feminists considered the custom of women taking their husband’s names upon marriage a poignant relic of coverture. Accordingly, during the late 1960s and 1970s, increasing numbers of women began retaining their maiden names after marriage. This action was viewed as a powerful rejection of the long-standing principle that wives merged into their husbands’ marriage.

The passage of Married Women’s Property Acts (MWPAs) in the nineteenth and twentieth centuries removed many of the legal disabilities associated with coverture. Despite these legal developments, however, most married women continued, and indeed continue today, to take their husbands’ names. With a few notable exceptions, this custom con-

322. See Suzanne A. Kim, Marital Naming/Naming Marriage: Language and Status in Family Law, 85 Ind. L.J. 893, 911 (2010) (“Debates over women’s surnames have historically borne on state recognition of women’s equality insofar as the state has denied women’s equality by mandating the adoption of one’s husband’s last name.”).
323. See id.
324. Id. at 948.
326. See Patricia J. Gorence, Women’s Name Rights, 59 Marq. L. Rev. 876, 883 (1976) (noting that “unity of person” under coverture “undoubtedly encouraged the custom of a woman’s assuming her husband’s surname after marriage”). To be clear, even in the 1970s, that “there was no legal requirement under the common law for a married woman to adopt her husband’s name.” Shirley Raissi Bysiewicz & Gloria Jeanne Stillson MacDonnell, Married Women’s Surnames, 5 Conn. L. Rev. 598, 602 (1973). Despite the lack of a legal requirement to do so, most married women took their husbands’ names. Gorence, supra, at 876.
327. “Lucy Stone is credited with being the first woman to retain her maiden name after marriage.” Omi [Morgenstern Leissner], The Problem that Has No Name, 4 Cardozo Women’s L.J. 321, 353 (1998). “My name,” Stone explained, “is the symbol of my identity which must not be lost.” Una Stannard, Mrs Man 192 (1977).
continued largely unchallenged until the late 1960s and early 1970s when women’s activists began to direct more attention to the issue. A number of women sued, challenging the refusal to allow them to use their maiden names during marriage or after separation or divorce.

As Roslyn Goodman Dunn wrote at the time, “a name is a symbol of status. For many women, a requirement to use their husbands’ names is a shackle which symbolizes ownership and dependence.”

Years earlier, Lucy Stone expressed a similar perspective. “My name,” she wrote, “is the symbol of my identity which must not be lost.” As contemporary legal theorist Suzanne Kim explains: “The law and practice of marital name change[—that women take their husband’s names—] symbolized for many [at the time] the subordinate status of women in marriage.”

Organizations were formed to advocate on this issue. For example, in 1973 the Center for a Woman’s Own Name was formed. National women’s rights organizations participated in some of the legal cases. For example, in one case, Kruzel v. Podell, the ACLU’s WRP and NOW jointly filed an amicus brief.

ERA advocates also grappled with the issue of married women’s names. The seminal 1971 Yale Law Journal article on the potential effects of the ERA, argued:

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328. Elizabeth F. Emens, Changing Name Changing: Framing Rules and the Future of Marital Names, 74 U. Chi. L. Rev. 761, 772 (2007) (“This legal regime largely continued until the 1970s, when a series of cases established the right of women to continue to bear their birthnames after marriage.”); Kim, supra note 322, at 950–51 (“By the 1960s and early 1970s, ‘many women began consciously seeking ways to retain their maiden names.’ Indeed, social scientists have documented dramatic increases in name retention after the 1960s.” (footnotes omitted)).


I guarantee you that the first generation of women who grow up without scribbling “Mrs. Paul Newman” all over their notebooks “just to see what it looks like” is going to think we [the feminists who fought against mandatory name change for women] were mad. It is a very odd and radical idea indeed that a woman would nominally disappear just because she got married.


331. Stannard, supra note 327 at 192.

332. Kim, supra note 322, at 945.

333. Id. at 952.


335. Gorence, supra note 326, at 893.
The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband’s name at the time of marriage. In a case where a married woman wished to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name.336

Credit was one of the legal regimes in which married women’s names was especially prominent. One of the most common problems that women identified in their testimony to Congress and in their letters to women’s rights organizations was the inability to obtain credit cards in their own names.337 As letter after letter indicated, banks regularly refused to issue credit cards to married women in their own names. One letter provided to Congress, for example, brought attention to the woman’s difficulty in “trying to obtain credit in [her] own name.”338 “As a married woman,” she continued, “credit [wa]s invariably issued in [her] husband’s name.”339 This was true despite the fact that her own salary was “sufficient to meet” the standards of the credit card company.340 Many other women reported similar experiences.341

Advocacy to prohibit these discriminatory credit practices of banks and lenders was part and parcel of the larger movement to promote the principle that women—including married women—were independent and autonomous beings. Not only did these common name practices in the credit industry reinforce the principle that women merged into their husbands upon rrrrrrdecisionmakers for the family.

2. Private Sphere Reform

Credit advocacy, therefore, was part and parcel of feminists’ focus on women’s dependency—symbolic and tangible. These efforts included the enactment of laws regulating conduct in the “public” realm of banking and credit. But advocates recognized that equality for women could not be achieved solely by focusing on reforms in the workplace and the marketplace. Equality for women also required addressing sex discrimination within the “private” sphere of the family, especially the marital family. As Cary Franklin explains, “NOW’s key claim was that gender equity in spheres such as education and employment depended

337. See, e.g., Economic Problems of Women, Part III, supra note 148, at 564 (Letter from Laurinda W. Porter to Stanford Parris, Representative, U.S. House of Representatives (July 26, 1973)).
338. Id.
339. Id.
340. Id.
341. See, e.g., Availability of Credit to Women: Hearing Before Nat’l Comm’n on Consumer Fin. 150 (1972) (testimony by Bella Abzug, Representative, House of Representatives) (on file with the National Archives) [hereinafter NCCF Hearings].
on structural changes in the sphere of the family, because without such changes, women would continue to lack practical access to opportunities widely available to men.”

Like other campaigns of the time, equality for women in the credit context could not be achieved without simultaneous work to dismantle sex-based rules governing the marital family. The problem was particularly acute in community property states. Community property states are often characterized as more protective for wives by ensuring that wives, including wives with no earned income, have a claim to a share in the success of the community. This is so because under the community property system, all spouses have “present, undivided, one-half interest[s]” in the community property during the marriage. Until the late 1960s, however, husbands in all of the community property states had sole management and control rights over community property. “Thus, in some of the community property states [at that time] a working wife may be put in the position of a woman before passage of the [MWPA]: she may lose control of her own earnings to her husband.”

Indeed, prior to “1972, no community property state allowed wives to manage community personal property equally with their husbands, although some did allow them to manage their own wages.” And in all but one of the community property states at that time, “the husband ha[d] power of management and control over the community property; and in some states he [could] assign, encumber or convey the property without his wife’s consent.” For example, prior to January 1, 1975,

342. Franklin, supra note 57, at 2890.
343. The eight community property states at the time were Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Id. at 946.
344. Id. (noting that community property system “is sometimes championed by advocates of women’s rights because it gives a housewife who earns no independent income a legal share in the family property”); see also Weisberg & Appleton, supra note 128, at 231 (noting that “[u]nlike the commonlaw system, community property recognizes the contributions, for example, of the homemaker spouse”).
345. Weisberg & Appleton, supra note 128, at 231.
346. Brown et al., supra note 243, at 946–47.
347. Id. at 947.
348. Bingaman, supra note 310, at 28. By 1972, California, Idaho, Nevada, Texas, and Washington all permitted wives to manage their own wages, at least if uncommingled. See id. at 28 n.8.
a husband in California had absolute control of the community personal property (other than the wife’s uncommingled earnings and personal injury damage awards), with gratuitous transfers requiring the wife’s written consent. The husband likewise had management and control over the community real property, subject to the wife’s written consent to transfers or encumbrances for periods exceeding 1 year.\textsuperscript{352}

“The wife, who lacked powers of management and control over the community property, could not contract for the community except as an agent of the husband.”\textsuperscript{353} Many banks argued—persuasively in some states, including California—that these community property rules justified the denial of equal credit access to married women.\textsuperscript{354} In states where married women did not have the right to manage and control community property, including their own earnings,\textsuperscript{355} banks would be without a remedy if the wife defaulted on an account issued in her name alone.

To address this concern, advocacy to prohibit credit discrimination on the basis of marital status often proceeded hand-in-hand with advocacy to amend state rules regarding the management and control of community property. This multi-prong strategy was followed, for example, in California. As noted above, married women in California did not have equal rights to manage and control community property until 1975. In 1972, the California Legislature held a series of hearings to discuss this and other issues related to the community property rules.\textsuperscript{356} A number of legislative enactments resulted from these hearings.\textsuperscript{357} Critically, one provision, effective January 1, 1975, “extended to wives the same power to manage community property that their husbands had

\begin{itemize}
\item 352. Id. at 1616.
\item 353. Id. at 1617.
\item 354. “[Banking officials] argue that they must know whether a person is married in order to comply with certain state laws and to protect their interest in collateral to which a spouse may have a right.” Gates, \textit{supra} note 42, at 428 (citing \textit{Fair Credit Reporting Act and Other Titles of the Consumer Credit Protection Act: Hearing Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking and Currency, 93d Cong., 381–88 (1973)} (statement of John Dillon, Executive Vice President of National Bank Americard (also representing Interbank)) (unpublished transcript on file with author); \textit{see also ‘Task Force on Family Law and Policy, Report to the Citizens’ Advisory Council on the Status of Women 147 (1968)} (“[In community property states,] [t]he income of a working wife as well as that of the husband becomes part of the community property and, under the traditional community property system is managed by the husband, with the wife having no say in how her income is to be spent.”).\textsuperscript{367}
\item 355. \textit{See supra} notes 347–54 and accompanying text.
\item 357. \textit{Kay, supra} note 289, at 303.
\end{itemize}
enjoyed.”

Another provision prohibited credit discrimination against married women.

To be sure, not all of the credit discrimination women experienced resulted from unfair community property laws. In 1967, Texas became the first community property state to enact legislation giving wives the right to manage and control community property. Despite this change to the family law rules, some banks in Texas continued to deny equal credit to married women.

And, indeed, it was this experience in Texas that fueled much of the work on credit reform. In 1971, several years after Texas amended its laws to give wives the right to manage and control community property, women’s rights advocates in Texas turned their focus to banks and credit unions. Initially, advocates investigated employment practices at banks. Sex discrimination in employment, they argued, violated the recent executive order banning sex discrimination in entities that


361. See Letter from Marsha King, Women’s Equity Action League, to Betty, Women’s Equity Action League (Sept. 22, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 2, Folder 121) [hereinafter King Letter I].

362. See, e.g., Letter from Bert Harley, Secretary, Nat’l Capital Chapter of Women’s Equity Action League, to unknown (Oct. 12, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC500, Carton 10, Folder 39) [hereinafter Harley Letter] (stating that chapter was thinking of starting national banking investigation and inviting interested activists to contact Marge Gates); see also Agenda for Nov. 8 Meeting of National Capital Chapter of Women’s Equity Action League (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC500, Carton 10, Folder 56) (noting that member would outline Texas Chapter’s banking investigation and tell others how they can set up their own Task Force); Letter from Paula Latimer, Chairperson, Comm. on Credit and Money, Women’s Equity Action League, to Women’s Equity Action League President or Convenor (Jan. 10, 1973) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC500, Carton 12, Folder 42) (suggesting that banking investigations began in Texas).

363. Letter from Marsha King, Women’s Equity Action League, to Betty, Women’s Equity Action League (Aug. 4, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 2, Folder 121) [hereinafter King Letter II].

364. See Harley Letter, supra note 362.
received federal financial assistance,365 as was the case at federal credit
unions.366 Advocates then quickly shifted their focus to credit,367 with a
particular focus on their extension of credit to married women.

As advocates in Texas noted at the time, what they found was that
even though married women had an equal right to manage and con-
trol the community property in Texas, they nonetheless continued to
be denied equal access to credit. It appeared that old habits—and ste-
reotypes—were hard to break. The situation was aptly described by a
WEAL activist: “You see, in Texas women have only been able to con-
tract for themselves for about three years, and our department stores and
banks are simply not used to having women arrange their own credit.”368

Thus, in Texas, the family law reforms preceded public sphere efforts
to achieve credit equality. In other jurisdictions, the reforms proceeded
in the opposite order. But in any event, the experiences demonstrate
that changes in both spheres were necessary ingredients in the struggle
for equality. As Cary Franklin has explained: “NOW’s key claim was that
gender equity in spheres such as education and employment depended
on structural changes in the sphere of the family, because without such
changes, women would continue to lack practical access to opportunities
widely available to men.”369

CONCLUSION

By recovering the history of marital status advocacy of the 1960s
and 1970s, this Article complicates the understanding of nonmarriage’s
trajectory. This account reveals that advocacy to prohibit marital status
discrimination is a story of progressive advancement, and it is a story
about marriage. But this story is primarily about achieving equality in
marriage, not equality for those outside of it. To be sure, statutes pro-
hibiting marital status discrimination extend important protections to
those living outside of marriage. These statutes ensure that single women

366. Letter from Marsha King, Women’s Equity Action League, to James W.
Keay, Republic Nat’l Bank of Dall. (Sept. 7, 1971) (on file with the Schlesinger Library,
Radcliffe Institute, Harvard University, WEAL Papers, MC311, Carton 2, Folder 121)
(asserting that they were discriminating against female employees in violation of ex-
cecutive order).
367. King Letter I, supra note 361 (“We are now working on a project of finding
out which banks will give women equal credit with men.”); see Letter from Marsha
King, Women’s Equity Action League, to Betty Women’s Equity Action League (Sept.
25, 1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University,
WEAL Papers, MC311, Carton 2, Folder 121) (stating that latest investigation is “bet-
ter . . . than the other, because it affects so many more people”).
368. King Letter I, supra note 361 (“We are now working on a project of finding
out which banks will give women equal credit with men.”).
369. Franklin, supra note 57, at 2890.
cannot be denied credit solely because they are single.\textsuperscript{370} The ECOA was not, however, intended to be a direct assault on marital supremacy. By uncovering this movement, this Article deepens our understanding of nonmarriage’s past.

This story also sheds new light on the future of nonmarriage. It has been suggested that recent gay rights victories brought a halt to earlier efforts to unseat marriage from its privileged position.\textsuperscript{371} Elsewhere, I challenge this prediction from a constitutional law perspective.\textsuperscript{372} I argue that the gay rights canon can be read to support, rather than to foreclose a constitutional right to nonmarriage.\textsuperscript{373} The history explored in this Article offers another set of tools for those seeking to forge a progressive path forward. Advocacy to prohibit discrimination in the workplace and the marketplace is critical, of course. Those living in nonmarital families need to be protected not only from discrimination against them based on their status as a “single” person. They also need to be protected from employment and housing discrimination because they are living in nonmarital families.\textsuperscript{374} Being in a nonmarital relationship is not relevant to a person’s ability to do a job, and it should not be a permissible basis for refusing to rent to someone.\textsuperscript{375}

This type of public sphere advocacy is critical, but it must be accompanied by other reforms as well. Advocates for nonmarital families must also work to reform the rules governing families. That is, advocates must challenge the many family law rules that continue to privilege the marital family over the nonmarital family. These rules that privilege marriage are ubiquitous. They range from tax rules, to social security rules, to parentage, to the military.\textsuperscript{376} As Clare Huntington so eloquently illustrates, not only are our family law rules stubbornly marriage based, but when they are applied to nonmarital families, these rules often inflict harm.\textsuperscript{377} This, of course, is contrary to what family law rules are supposed to do; family law rules are supposed to support families and provide them with stability and protection.\textsuperscript{378} Change is necessary. These families make up

\begin{itemize}
\item 371. See, e.g., Huntington, supra note 116, at 23 (arguing that Obergefell “reifies marriage as a key element in the social front of family, further marginalizing nonmarital families”); Powell, supra note 19, at 69–70 (“The problem with Obergefell, however, is that in the majority opinion, Justice Kennedy’s adulation for the dignity of marriage risks undermining the dignity of the individual, whether in marriage or not.” (footnote omitted)).
\item 372. See generally Joslin, Gay Rights Canon, supra note 4.
\item 373. Id. at 432–33.
\item 374. Joslin, Marital Status, supra note 3, at 823–28.
\item 375. Id. at 829–30.
\item 376. See, e.g., Aloni, supra note 9, passim (exploring benefits and burdens of being in recognized marriage).
\item 377. Huntington, supra note 9, at 239 (arguing that marriage-based family law rules “have a pernicious effect on nonmarital families”).
\item 378. See, e.g., Joslin, supra note 9, at 165.
\end{itemize}
a large and growing share of our population, and they are just as in need of stability and support as marital ones.

The challenges are great, but advocates are not treading on entirely new ground. Feminist advocates of the past waged a successful battle to reform the law of marriage. Today, the law of marriage is dramatically different than it was in the past. Historically, wives’ identities merged into that of their husbands. They had no right to contract, no right to sue or be sued. And even a century after many of these legal disabilities were formally eliminated, many family law rules still forced husbands and wives into different gender-based roles. Through the 1960s, in some states, only husbands were responsible for alimony. A regime in which husbands and wives are legally permitted to play equal roles seemed unimaginable to many, even fifty years ago. But due to the efforts of these advocates, that is indeed the law of marriage today.

Likewise, achieving a regime in which marriage is not privileged over nonmarriage may seem like an impossible quest. But the important legacy unearthed in this Article suggests that such radical reforms are possible, and this history lays a path forward.

379. 1 William Blackstone, supra note 38, at *430.
380. See, e.g., Orr v. Orr, 440 U.S. 268, 271 (1979) (holding unconstitutional Alabama law that provided that husbands, but not wives could be required to pay alimony upon divorce).
381. Deborah A. Widiss, Changing the Marriage Equation, 89 Wash. U. L. Rev. 721, 723 (2012) (“The groundbreaking sex discrimination cases of the 1970s required legislatures to strip away virtually all of the sex-based classifications within marriage law other than the basic requirement that marriage must be between a man and a woman.” (footnote omitted)). To be sure, however, many forces continue to channel husbands and wives into different roles. E.g., id. at 729 (arguing that “prevalence and persistence of gendered divisions of responsibilities is due both to social norms and to substantive provisions of marriage and related benefits law that continue to encourage specialization”).
Intimate Liberties and Antidiscrimination Law

DEBORAH A. WIDISS

ABSTRACT

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 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 nonmarital intimacy or nonmarital 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., nonmarital 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.

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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.

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**Introduction**

Individual choices regarding marriage, procreation, and sexual intimacy are, in the words of the Supreme Court, “central to personal dignity and autonomy.”

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.² Leading constitutional law scholars have likewise long recognized the interplay between these doctrines.³ 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.⁴ 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,⁵ 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

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² 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.”).


⁴ 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).

couple. The bakery alleges its rights to free speech and freedom of religion were violated. Commentary on this case typically presents it as an example of a “clash” between religious rights and gay rights. This framing obscures a key issue. In many states, a gay couple denied services would have no recourse in the first place; the “gay rights” side of the “clash” would be nonexistent. 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. That is also the case in approximately half of the states. Thus, in these jurisdictions, plaintiffs generally can proceed only if they can show that the action violates a prohibition on sex discrimination. This problem is relatively straightforward, though crucially important, and it obviously

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7. Id.
10. See Maps of State Laws and Policies, HUMAN RIGHTS CAMPAIGN 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).
11. 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), reheg 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).
supports enacting explicit protections or clarifying that such discrimination is actionable under existing discrimination laws.\textsuperscript{12}

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.\textsuperscript{13} 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., nonmarital intimacy), rather than impermissible marital status discrimination.\textsuperscript{14} 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 nonmarital sex is permissible.\textsuperscript{15} And in the \textit{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

\textsuperscript{12} 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. \textit{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.

\textsuperscript{13} 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. \textit{See generally, e.g.}, Courtney G. Joslin, \textit{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 nonmarital families); Nicole Buonocore Porter, \textit{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, \textit{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 article by Melissa Murray, \textit{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. Murray’s article 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.

\textsuperscript{14} \textit{See infra} Part III.A.

\textsuperscript{15} \textit{See infra} Part III.C.
arguments. In this last context these claims have been largely unsuccessful, and this precise issue will not be before the Supreme Court. However, the argument might well find purchase as other lower courts in more conservative regions weigh in.

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 nonmarital 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 nonmarital intimacy. But now, it is clear that these antifornication and anticohabitation statutes are unconstitutional. 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. The Supreme Court recently intimated a similar hierarchy, as did the Department of Justice on behalf of the United States in an amicus brief submitted in the currently pending Masterpiece Cakeshop

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16. See infra Part III.B.
17. See infra text accompanying note 259 (explaining that Supreme Court has no authority to review Colorado courts’ interpretation of Colorado statutory law).
18. 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.”).
20. See infra Subpart III.A.2.
21. See infra text accompanying note 125 (discussing Court’s decision in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)).
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. These arguments are 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.

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 nonmarital 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

22. 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.

23. See infra note 138 and accompanying text.

24. See infra Part I.A.
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. Sexual intercourse
could only occur lawfully within marriage; such sex, and any children
that resulted from such sex, were “legitimate.” 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. Sexual inti-
macy 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), and the sex-specific crime of seduction (seducing unmar-
rried women, of a previously “chaste character,” under the promise
of marriage). 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. Subse-
quently, women who gave birth to children outside of marriage were
recognized as legal mothers of their children, but nonmarital fathers still
had no claim to parental rights.

25.  Rules at common law were somewhat more flexible, but the early Ameri-
can colonies and later states all prohibited nonmarital sexual intimacy. See CYNTHIA
GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 12 (2010) (discussing
colonial laws criminalizing adultery and fornication).

73 (2017) (describing how the Anglo-American legal system historically understood
“parentage as a relationship defined through marriage” and that any child born to
unmarried woman was presumptively “legitimate”).

27.  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).

28.  See, e.g., Bowman, supra note 25, at 12–18. Additionally, common law mar-
rriage 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).

29.  See, e.g., Melissa Murray, Marriage as Punishment, 112 Colum. L. Rev. 1, 5
(2012).

30.  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.

31.  NeJaime, supra note 26, at 2280; see also In re Stanley, 256 N.E.2d 814, 815
(III. 1970) (explaining that nonmarital fathers had no rights unless they went through
legal proceeding similar to that used in adoption or guardianship proceeding).
Criminal law enforced the expectation that sex was at least potentially procreative by criminalizing the use of contraception, abortion, and nonprocreative forms of sexual intimacy between men and women. And criminal law prohibited nonheterosexual 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 antisodomy laws. This framework established what Professor Melissa Murray has called the “criminal-marriage” binary, under which there was—literally—no legal space in which nonmarital sex could occur. Notwithstanding the criminal prohibitions, couples still had sex outside of marriage. But couples making the choice to engage in nonmarital 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. This constitutional revolution began with *Griswold*

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32. 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.


34. Antisodomy 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).

35. 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)”).

36. 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).

37. 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...
v. Connecticut, which held that married couples had a constitutionally protected right to access contraception, and Loving v. Virginia, which struck down bans on interracial marriage.

The Court quickly expanded this doctrine to protect aspects of nonmarital intimacy. The first wave of decisions did not directly address the constitutionality of criminal laws that proscribed nonmarital intimacy itself; they simply mitigated the collateral consequences of the conduct. The Court expanded the concept of privacy first announced in Griswold to hold that unmarried individuals could not be denied access to contraception or abortions. The Court also held that the benefits that flow from the child-parent relationship cannot be categorically denied to nonmarital families, that nonmarital children were owed child support, and that they had the right to inherit from their natural parents under intestacy laws. 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

government interest and is narrowly tailored to achieve that objective.

38. 381 U.S. 479 (1965).
39. Id. at 485–86.
40. 388 U.S. 1 (1967).
41. Id. at 12.
42. 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).
43. 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”).
44. 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”).
47. 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 nonmarital children to inherit from their fathers).
legal fathers. Many of these cases rested on Equal Protection Clause
grounds, with the Court reasoning that even if states could criminalize
nonmarital intimacy, these other legal rules, and their often harshly puni-
tive effects, were not sufficiently rationally related to the states’ claimed
objective of reducing nonmarital sex.

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 con-
sensual nonmarital sex. By 1978, only fifteen states still criminalized
fornication and only sixteen states still criminalized cohabitation, and
prosecutions under these laws were extremely rare. Parentage law was
likewise substantially reformed to affirm and recognize rights of nonmar-
ital parents, often going beyond the constitutional minimums announced
by the Supreme Court. Divorce law was liberalized to permit no-fault
divorce, and states and the federal government directed new energy
to enforcing child support obligations on nonmarital and divorced
parents. And finally, as discussed more fully in Parts II and III, legisla-

48. See Caban v. Mohammed, 441 U.S. 380, 391–92 (1979) (holding statute al-
lowing 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).

49. 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).

50. Bowman, supra note 25, at 15; see also Lawrence v. Texas, 539 U.S. 558, 572
(2003).

51. Bowman, supra note 25, at 15; see generally JoAnne Sweeney, Undead Stat-
utes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal 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 Mar-
tha L. Fineman, Law and Changing Patterns of Behavior: Sanctions on Non-Marital

52. See, e.g., NeJaime, supra note 26, at 2285–2316.

53. 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

54. See generally, e.g., Maureen A. Pirog & Kathleen M. Ziol-Guest, Child Sup-
port Enforcement: Programs and Policies, Impacts and Questions, 25 J. POL’Y ANALYSIS
tures amended antidiscrimination laws to preclude some discrimination related to decisions around intimacy, procreation, and marriage. In 1978, Congress explicitly prohibited pregnancy discrimination in employment, and during the 1970s and 1980s, about half of the states amended their antidiscrimination laws to explicitly prohibit discrimination in the private sector based on an individual’s marital status.

In the 2003 case *Lawrence v. Texas*, the Court squarely addressed the constitutional limits on the state’s ability to proscribe intimacy. As will be familiar to many readers, the case was a constitutional challenge to a Texas law that criminalized same-sex sodomy. 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.”

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 nonmarital intimacy. 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.” 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

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56. 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.
58. Id. at 564.
59. Id. at 562.
60. Id.
61. Id. at 567.
62. Id. at 566.
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 Four-
teenth Amendment.”\textsuperscript{63} Thus, the Court deemed it essential to address
the due process argument directly (and overrule its prior precedent hold-
ing 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.\textsuperscript{64}

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 tra-
ditional community norms around intimacy, most typically by engaging
in nonmarital sex or nonmarital 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.\textsuperscript{65} \textit{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.\textsuperscript{66}
Lower courts relied on \textit{Lawrence} to strike down lingering bans on forni-
cation and cohabitation.\textsuperscript{67}

The second aspect of the \textit{Lawrence} decision that is particularly
important to the analysis that follows is the interaction the Court iden-
tified 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 inter-
ests.”\textsuperscript{68} \textit{Lawrence}, which explicitly and affirmatively protected the liberty
to engage in same-sex intimacy, thus served to delegitimize discrimination

\textsuperscript{63.} \textit{Id.} at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851
(1992)).

\textsuperscript{64.} \textit{Id.} at 574–75. Justice O’Connor concurred on equal protection grounds, rea-
soning 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. \textit{Id.} at 579
(O’Connor, J., concurring in judgment).

\textsuperscript{65.} \textit{See Bowman, supra} note 25, at 15–16.

\textsuperscript{66.} \textit{See, e.g.}, Murray, \textit{supra} note 13, at 578–84.

\textsuperscript{67.} \textit{See Bowman, supra} note 25, at 18–20.

\textsuperscript{68.} \textit{Lawrence}, 539 U.S. at 575. Commentators have examined this interplay be-
 tween equality and liberty claims both before and after \textit{Lawrence}. \textit{See} sources cited
\textit{supra} note 3. I have previously written of the interplay specifically in the context of
marriage. \textit{See generally} Nelson Tebbe & Deborah A. Widiss, \textit{Equal Access and the
fundamental rights branch of equal protection jurisprudence which incorporates
liberty interests typically protected under Due Process Clause).
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 develops—the idea of a “synergy” between liberty and equality. 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. 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. Permitting same-sex couples to marry helps discredit the ongoing disapproval of same-sex intimacy.

But in addressing this harm, Obergefell reaffirms the equally long-standing disapproval of nonmarital 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.” The Court asserts that marriage protects children of same-sex couples from the “stigma” and “humiliat[ion]” 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.” 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 nonmarital intimacy.

I believe that same-sex couples who choose to marry have a constitutionally protected right to do so. However, like many other commentators, I am concerned by Obergefell’s implicit denigration of

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70. See id. at 2603–04.
71. Id. at 2604.
72. Id. at 2593–94.
73. Id. at 2602.
74. Id. at 2601.
75. See id.
76. 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).
77. See generally Tèbbe & 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).
couples (same-sex and different-sex) who choose not to marry.\textsuperscript{78} In \textit{Lawrence}, the individual autonomy to make intimate choices on one’s own terms was celebrated as “transcendent” in and of itself.\textsuperscript{79} But in \textit{Obergefell}, the Court dramatically recharacterized this shift as merely moving an individual from “outlaw” to “outcast.”\textsuperscript{80} To be truly respected, \textit{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 nonmarital intimacy and nonmarital procreation may be appropriately scorned as “outcasts,” even if not criminalized as “outlaws,” the Court’s rhetoric may have farreaching harms.

B. \textit{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, 72 percent of adults were married, and 85 percent of adults had been married at some point.\textsuperscript{81} 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.\textsuperscript{82} Couples sometimes engaged in premarital sex, but when an unplanned pregnancy occurred, the most common response was a “shotgun” marriage prior to the baby’s


\textsuperscript{79} \textit{Lawrence} v. Texas, 539 U.S. 558, 562 (2003).

\textsuperscript{80} \textit{Obergefell}, 135 S. Ct. at 2600 (“Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”).


birth, less common options included abortion or adoption. In 1960, only five percent of all children were born outside of marriage.

All of that looks very different today. Barely half of adults are currently married, and roughly half of all marriages end in divorce. Nonmarital sex is entirely commonplace; almost all adult Americans—95 percent—have exercised this liberty. 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. Few nonmarital couples faced with an unplanned pregnancy now rush to marry; rather, most couples either have the child without marrying or choose to abort. Forty percent of all births in the United States are now to unmarried women, about half of whom are living with their partner at the time of the birth.


84. See id. at 12 (reporting that before 1973, 8.7 percent of children born to unmarried women were relinquished for adoption).


86. 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).


90. 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.

91. Sheela Kennedy & Larry L. Bumpass, Cohabitation and Children’s Living
increasingly common to have children with multiple partners, resulting in 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. And, of course, gay men and women no longer need to fear criminal prosecution if they engage in sexual intimacy. 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.

These averages mask significant divergence by race, class, and education level. Marriage rates rise dramatically as household income and education level rise, and non-Hispanic white women are much more likely than black or Hispanic women to get married. The nonmarital birth rate slopes in the opposite direction. Currently, 71 percent of black women and 53 percent of Hispanic women who give birth are unmarried; the birth rate for non-Hispanic whites, by contrast, is 29 percent. 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 statistics. Edin and Kefalas


93. 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).


96. 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).

97. Raley, Sweeney & Wondra, supra note 82, at 17.


99. See Child Trends Databank, supra note 85, at 3.

100. See Kathryn Edin & Timothy J. Nelson, Doing the Best I Can: Fatherhood
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. Nonetheless, the women were unwilling to forego sexual intimacy or motherhood.

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. 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. 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. 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. Among “rejecters,” opposition is strongest among those who identify as white evangelicals. This finding accords with a 2007 study, which similarly found a wide divergence based on religiosity on moral disapproval of

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101. 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”).


104. 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).

105. Id. at 1–2.

106. Id. at 1.

107. Id. at 6 (noting that 62 percent of socially conservative white Evangelicals and more than 40 percent of Protestants were rejecters).
premarital sex and nonmarital parenting. 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 and to believe that premarital sex and nonmarital child bearing is morally wrong.

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. This accords with commentators who have suggested that the rapid growth in nonmarital childrearing may be more threatening to many religious understandings of marriage than same-sex marriage. 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. Nonmarital 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 children of gay and lesbian parents would be forced to bear the “stigma” of having unmarried parents.

108. 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 premarital sex or bear children outside of marriage).

109. Taylor, Morin & Wang, supra note 103, at 7 (finding that 54 percent of Republicans, 17 percent of Democrats, and 31 percent of political independents were rejecters).

110. 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).

111. Taylor, Morin & Wang, supra note 103, at 4–5 (reporting that 87 percent of rejecters viewed gay and lesbian couples raising children as bad for society, compared to 90 percent or higher in other categories).


113. 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?”).

114. 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”).
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 Part 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 Part 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.

The first significant change concerns the scope of the federal Religious Freedom Restoration Act (RFRA) and similar state laws. 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 achieve that objective. In 2014, in Burwell v. Hobby Lobby Stores Inc., the Supreme Court held for

115. 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://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).


117. 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.”).

118. 134 S. Ct. 2751 (2014).
the first time that for-profit businesses could bring RFRA claims. 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.

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. 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. 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. The third case involved race discrimination.

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. The particularity of this response arguably heightens, rather than

119. 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).

120. 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).

121. 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.

122. Id. at 2804–05 (Ginsburg, J., dissenting).

123. 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).


125. Id. at 2783. The Court assumed without deciding that the government’s interest in providing access to contraception was compelling, but indicated support for
mitigates, concerns that antidiscrimination protections related to sexual liberties might be vulnerable. Importantly, the Court characterized the least-restrictive means standard as “exceptionally demanding.” A federal court has already held that a funeral home—officially nondenominational, but owned by a man with strong conservative Christian beliefs—could use the RFRA as a defense in a case brought by a transgender woman fired after she informed her boss she would be transitioning. A wide variety of businesses, from small florists to large fast-food companies, embrace conservative Christian values in their management. 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.* 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.” This general concept had long been recognized in the lower courts, but a circuit split had developed as to how broadly the concept of “ministers” should be understood. 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.

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 arguments pressed by Hobby Lobby and asserted the Affordable Care Act’s mandate failed this standard. Id. at 2780.

126. Id. at 2780.
127. 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.
130. Id. (emphasis added).
131. Id. at 202–04 (Alito, J., concurring) (listing circuits and their various standards for defining “ministers”).
132. Id. at 190.
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.\textsuperscript{133} Although the district court rejected that argument, the diocese in question, and several other Catholic dioceses, have since designated \textit{all} of their school teachers as “ministers.”\textsuperscript{134} 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.\textsuperscript{135} 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 speech and religious liberty.”\textsuperscript{136} Although the order itself was rather vague in scope,\textsuperscript{137} the memorandum issued by

\begin{footnotesize}

133. 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”).


Attorney General Sessions to implement it is quite sweeping, prioritizing
religious liberty over virtually every other governmental policy objec-
tive. 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 “reli-
gious entities” permitted to discriminate on the basis of religion—such
that they could choose to only hire coreligionists. The memorandum
also asserts that federal agencies generally may not condition receipt of
a grant or a contract on relinquishing any protections for an organiza-
tion’s religious beliefs. 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 families or cohabiting cou-
ples—that do not match the organization’s religious beliefs.

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;

138. Memorandum from Jeff Sessions, Attorney Gen., Office of the Attorney
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).

139. See id. at 12a (asserting religious entity exemptions apply to any for-profit
or nonprofit organization that is “organized for religious purposes and engages in ac-
tivity 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 al-
though judges failed to agree on single standard, they did agree that, at minimum, it in-
cludes 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).

140. Sessions Memorandum, supra note 138, at 8.
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).

142. 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
reversing the prior government position as to whether discrimination on the basis of sexual orientation is a form of sex discrimination;\textsuperscript{143} and, as noted above, submitting an amicus brief on behalf of Masterpiece Cake-shop in the pending Supreme Court case, which contends that religious liberty claims necessarily supersede statutory prohibitions on sexual orientation discrimination.\textsuperscript{144} The Administration has also backed away from transgender rights on several fronts.\textsuperscript{145} 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 \textit{Obergefell} has been the First Amendment Defense Act (FADA).\textsuperscript{146} In the 114th Congress (2015–2016), this bill was cosponsored by almost seventy percent of the Republicans,\textsuperscript{147} and supported by then-candidate Donald Trump.\textsuperscript{148} FADA would prohibit the federal government from taking any “discriminatory action” against a person (defined to include both for-profit and nonprofit 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.”\textsuperscript{149} “Discriminatory action,” in turn, is defined to include from providing contraception “based on its sincerely held religious beliefs” or other “moral convictions”).

\textsuperscript{143} See Alan Feuer, \textit{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”).

\textsuperscript{144} See Brief for the United States, \textit{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).


\textsuperscript{147} See generally S. 1598 (listing thirty-seven out of fifty-four Republican Senators as cosponsors); H.R. 2802 (listing 171 out of 248 Republican House members as cosponsors, as well as one Democratic House member as a cosponsor).


\textsuperscript{149} S. 1598, § 3(a); H.R. 2802, § 3(a). Immediately before the House held a
withholding, terminating, or denying federal grants, contracts, or licenses; imposing any kind of tax penalty; and revoking tax exempt status.\textsuperscript{150}

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.\textsuperscript{151} 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;\textsuperscript{152} this was also true of a challenge to the constitutionality of the Mississippi law.\textsuperscript{153} 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.\textsuperscript{154}

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 nonmarital sex by also protecting beliefs that “extra-martial relations are improper.” \textsc{Amendment in the Nature of a Substitute to H.R. 2802, at 3 (on file with the author).}

\textsuperscript{150} S. 1598, § 3(b)(1), (3); H.R. 2802, § 3(b)(1), (3).

\textsuperscript{151} 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, \textit{States of Emergency: Legislation that Threatens Church-State Separation Is Pending in Half the Country}, 70 \textit{Church & State} 1, 8 (2017) (reporting that Illinois, Minnesota, Oklahoma, Virginia, Washington, and Wyoming considered versions of FADA).


\textsuperscript{153} 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.

\textsuperscript{154} See generally \textit{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).
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 nondiscrimination 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 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.155 As Part I discussed, modern constitutional law also protects

155. See Yoshino, supra note 3, at 755–57 & n.61 (listing classifications that
individual choices around intimacy, procreation, and marriage from government control. The First Amendment likewise protects the freedom of speech, religion, and assembly.\textsuperscript{156} 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.\textsuperscript{157} 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.\textsuperscript{158} That said, this discretion is limited by relatively robust antidiscrimination protections that regulate private businesses or other entities that operate in a public or semipublic sphere.\textsuperscript{159} Employers, housing providers, and public accommodations are prohibited from discriminating on the basis of (at least) race, sex, religion, and national origin.\textsuperscript{160} 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.\textsuperscript{161}

receive strict scrutiny and observing that “[h]eightened scrutiny generally results in the invalidation of state action”).

\textsuperscript{156} U.S. Const. amend I.

\textsuperscript{157} 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, \textit{supra} note 13. As Professor Murray argues, this seems an unreasonable narrowing of the concept of liberty endorsed by \textit{Eisenstadt} and \textit{Lawrence}. See Murray, \textit{supra} note 13, at 593; see also Clarke, \textit{supra} note 13 (making similar point).

\textsuperscript{158} See, e.g., Pauline Kim, \textit{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).

\textsuperscript{159} 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).

\textsuperscript{160} 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, \textit{supra} note 56, at 638 (stating that virtually all states prohibit public accommodations from discriminating based on sex, even though federal law does not).

\textsuperscript{161} See Maps of State Laws and Policies, \textit{supra} note 10; sources cited \textit{supra} note 56.
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.\(^ \text{162} \) 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.”\(^ \text{163} \) This rationale has been offered not only to justify protections against religious discrimination, but also protections against discrimination on the basis of sexual orientation.\(^ \text{164} \) 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.\(^ \text{165} \) Common law provides some weak limits on exceptional interference with the autonomy of third parties.\(^ \text{166} \) But in most jurisdictions, an employer can fire an employee with impunity for engaging in conduct it finds distasteful.\(^ \text{167} \)


\(^ {163} \) 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).

\(^ {164} \) See generally, e.g., Watkins, 875 F.2d 699 (discussing discrimination based on sexual orientation and what protection law should offer).


\(^ {166} \) 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 common law and statutory provisions that can protect association al 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 § 708(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.

\(^ {167} \) See generally, e.g., Pagnattaro, supra note 165 (discussing various scenarios in
This can include speech or actions that would merit protection under the First Amendment if the government engaged in comparable actions. 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. 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 Part 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 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.” 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

which employer may fire employee for conduct of which employer disapproves).

168. See generally Kim, supra note 158.
169. An exception to this general rule is status-based discrimination that is premised on religious belief; as described supra Part 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.
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.\(^\text{171}\) 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.\(^\text{172}\) 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.\(^\text{173}\)

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 prescribe 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.\(^\text{174}\) Courts have similarly rejected claims that English-only policies intentionally discriminate on the basis of national origin, at least where they are applied to

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\(^{172}\) 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.”).

\(^{173}\) Yoshino, supra note 3, at 748.

\(^{174}\) 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 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).
employees who can speak English.\textsuperscript{175} 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.\textsuperscript{176} 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.\textsuperscript{177} 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.\textsuperscript{178} Congress disagreed, passing the Pregnancy Discrimination Act.\textsuperscript{179} The line of cases beginning with Price Waterhouse v. Hopkins\textsuperscript{180} recognizes that failure to conform to sex stereotypes is a cognizable claim; such cases often incorporate consideration of “conduct” explicitly.\textsuperscript{181} 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.”\textsuperscript{182}

\textsuperscript{175} 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). \textit{But see} Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (denial to re-hear 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”).

\textsuperscript{176} See, e.g., \textit{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 . . . .”).

\textsuperscript{177} I have discussed these issues in the context of disparate impact challenges to criminal background checks. \textit{See} Deborah A. Widiss, Griggs at Midlife, 113 MICH. L. REV. 993, 1014–15 (2015).

\textsuperscript{178} The focus on voluntariness was partly due to the fact that early cases challenged the exclusion of pregnancy from otherwise comprehensive disability policies. \textit{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).


\textsuperscript{180} 490 U.S. 228 (1989).

\textsuperscript{181} \textit{See, e.g.}, \textit{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).

\textsuperscript{182} \textit{See} Victoria Schwartz, \textit{Title VII: A Shift from Sex to Relationships}, 35 HARV. J.L. & GENDER 209, 213–34 (2012); \textit{see also}, \textit{e.g.}, Bob Jones Univ. v. United States, 461
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.\footnote{183} 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. Part 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\footnote{184} 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.\footnote{185}

When Griswold announced constitutional protections for private decisions about sexual intimacy, gay rights activists understood that comparable arguments could be deployed to challenge antisodomy 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.\footnote{186} The 1986 decision Bowers v. Hardwick,\footnote{187} which held that there was “no fundamental right” for homosexuals to “engage in

\footnote{183. 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).

\footnote{184. 561 U.S. 661 (2010).


\footnote{186. See Cain, supra note 185, at 1589–91.

\footnote{187. 478 U.S. 186 (1986).}
sodomy,” seemed to foreclose a due process–based focus on the liberty interests at stake.188

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.189 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.190 This was sometimes successful, particularly where there was no evidence of prohibited conduct.191 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.192

In Lawrence, the petitioners took on Bowers more directly.193 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.194 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 of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”195 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.”196

188. Id. at 186.
189. 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).
190. See id. at 1572–79.
191. 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 “unparticluarized and unsubstantiated conclusion that such possible embarrassment threatens the quality of the agency’s performance is an arbitrary ground for dismissal”).
192. 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.
194. Id. at 577–78 (explicitly overruling Bowers).
195. Id. at 575.
196. Id. at 583 (O’Connor, J., concurring in judgment).
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.\(^{197}\) The applicable policy specifically precluded discrimination on the basis of sexual orientation, as well as religion.\(^{198}\) 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.”\(^{199}\) 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.”\(^{200}\)

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.”\(^{201}\) This assertion was supported with citations to portions of the majority opinion and Justice O’Connor’s concurrence in *Lawrence v. Texas*,\(^{202}\) the example in *Bray* concluding that a “tax on wearing yarmulkes is a tax on Jews,”\(^{203}\) and an amicus brief submitted by the gay rights group Lambda Legal Defense and Education Fund.\(^{204}\) 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

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197. *Id.* at 668.
198. *Id.* at 670.
199. *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 nonmarital sex. *Id.*
200. *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.”.”).
202. *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.”).
204. *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).*).
or association with groups associated with specific national origins. 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.” 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. Each of these contexts makes private intimate choices “visible” to the external world. Nonetheless, corporate 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). This Part discusses and critiques this case law.

205. Id. (citing Brief for Lambda Legal Defense and Education Fund, supra note 204, at 7–20.
206. Brief for Lambda Legal Defense and Education Fund, supra note 204, at 13 n.5.
207. There are, of course, many other scenarios that may lead to adverse actions against an individual for exercising intimate liberties. For example, antinepotism policies, under which marriage to a coworker 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 antinepotism 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 antinepotism policies). There are also many cases in which employees allege they were fired for engaging in nonmarital 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 nonmarital 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).
208. Although these cases advance under distinct provisions of antidiscrimination law (i.e., housing, public accommodations, and employment), courts typically
A. Cohabitation

As sexual mores around cohabitation and nonmarital 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. 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. Recent commentary, however, has been quite limited, beyond a generalized assertion that there is little protection for unmarried couples who face discrimination. There has been almost no consideration of how the dramatic changes in the constitutional landscape—which make clear that nonmarital intimacy implicates 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.

209. 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).


211. 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 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.
fundamental rights—should affect the interpretation of these statutory provisions.\textsuperscript{212}

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.\textsuperscript{213} 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.\textsuperscript{214} This is correct, but this summation fails to emphasize that only slightly more state supreme courts have ruled the other way.\textsuperscript{215} In other states

\textsuperscript{212} Joslin mentions this point in passing. See Joslin, \textit{supra} note 13, at 815 (briefly noting that it “seems odd” that, even after \textit{Lawrence}, employers can penalize employees for engaging in constitutionally-protected intimate conduct).

\textsuperscript{213} 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”); \textit{see also} Clarke, \textit{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, \textit{Housing Discrimination Against Unmarried Couples}, Nolo, http://www.nolo.com/legal-encyclopedia/free-books/living-together-book/chapter5-2.html [https://perma.cc/TS5K-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 . . . .”).

\textsuperscript{214} These states are Alaska, California, Massachusetts, and Michigan. See Swanner \textit{v. Anchorage Equal Rights Comm’n}, 874 P.2d 274, 276 (Alaska 1994); Smith \textit{v. Fair Emp’t & Hous. Comm’n}, 913 P.2d 909, 929–31 (Cal. 1996); Att’y Gen. \textit{v. Desiletts}, 636 N.E.2d 233, 235 (Mass. 1994); McCready \textit{v. Hoffius}, 586 N.W.2d 723, 729, \textit{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 \textit{McCready}, in that it emphasized that \textit{McCready} did not create a “right to cohabit” and that disapproval of such conduct did not state an antidiscrimination claim. See Veenstra \textit{v. Washtenaw Country Club}, 645 N.W.2d 643, 647 (Mich. 2002). However, the \textit{Veenstra} court did not overrule \textit{McCready}. In a case where the only conduct at issue is cohabitation of unmarried individuals (as opposed to \textit{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.

\textsuperscript{215} These states are Maryland, Minnesota, North Dakota, Washington, and Wisconsin. See Comm’n on Human Relations \textit{v. Greenbelt Homes}, 475 A.2d 1192, 1198 (Md. 1984); Cooper \textit{v. French}, 460 N.W.2d 2, 7 (Minn. 1990); N.D. Fair Hous. Council, Inc. \textit{v. Peterson}, 2001 ND 81, ¶ 37, 625 N.W.2d 551, 562; Waggner \textit{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 housing context); Ct. of Dane \textit{v. Norman}, 497 N.W.2d 714, 714 (Wis. 1993). Connecticut’s statute specifically defines marital status not to cover such situations. See \textit{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
that have relevant statutory provisions on the books, 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 nonmarital sex that are unconstitutional after Lawrence.216 This would directly benefit unmarried couples, heterosexual and homosexual alike, who may still face discrimination when they try to rent apartments or homes.217 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.218 Thus, cohabiting couples who face discrimination have no claim under federal law. About half of the states also do not address marital status in their housing antidiscrimination laws.219 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.220 This language was typically added

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216. Cf. Jasniowski 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 antifornication 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. Jasniowski v. Rushing, 685 N.E.2d 622 (Ill. 1997) (mem.).

217. Living together without being married has become quite common, but since one-third of Americans still disapprove of nonmarital 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 [https://perma.cc/S2FU-U91L] (describing Michigan fair housing agency’s use of “testers” to establish that owners of condominium complex routinely refused to rent to unmarried couples).

218. 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.

219. See sources cited supra note 56.

220. Id.
to state codes during the 1970s and 1980s.\textsuperscript{221} 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.”\textsuperscript{222} 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.”\textsuperscript{223} To the extent there is any ambiguity, it tilts in favor of coverage under a general principle of statutory interpretation that remedial statutes are to be interpreted broadly.\textsuperscript{224}

These courts deemed the plain meaning controlling, notwithstanding antifornication provisions that existed when the marital status provisions were added to the antidiscrimination statutes. In Alaska, the criminal prohibition on nonmarital sex had been repealed prior to the state supreme court’s decisions on the cohabitation question.\textsuperscript{225} The

\begin{itemize}
\item \textsuperscript{221} Joslin, \textit{supra} note 13, at 806. Courtney G. Joslin, \textit{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.”).
\item \textsuperscript{223} 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”), \textit{partially vacated on other grounds}, 593 N.W.2d 545 (Mich. 1999).
\item \textsuperscript{224} See, e.g., McCready, 586 N.W.2d at 724 (“Being that the act is remedial, we construe it liberally.”).
\item \textsuperscript{225} See \textit{Foreman}, 779 P.2d at 1202 (stating that legislature repealed its antifornication law in 1978).
\end{itemize}
landlord in the case, nonetheless, argued that the statutes should be inter-
preted restrictively so as not cover conduct that was technically illegal
when it was enacted.\textsuperscript{226} 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 re-
ference to an outdated criminal statute that had been [subsequently]
repealed.”\textsuperscript{227} In Michigan, the state’s antifornication statute remained
on the books when the court interpreted its marital status provision.\textsuperscript{228}
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).\textsuperscript{229}

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 antifornication 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,\textsuperscript{230} and that the legislature had not discussed the cohabitation
statute when it enacted the prohibition on marital status discrimination
as part of a more general human rights act in 1983.\textsuperscript{231} It concluded that
because repeals by implication are disfavored, the marital status provi-
sions cannot be read to sanction conduct that would be prohibited by
the cohabitation statute.\textsuperscript{232} The Minnesota Supreme Court’s reasoning

\textsuperscript{226} 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.

\textsuperscript{227} Foreman, 779 P.2d at 1202; see Jasniowski v. Rushing, 678 N.E.2d 743, 747
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.).

\textsuperscript{228} McCready, 586 N.W.2d at 730.

\textsuperscript{229} Id. at 726–28.

\textsuperscript{230} N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶¶ 10–12, 625 N.W.2d
551, 555–56.

\textsuperscript{231} Id. at ¶ 13, 625 N.W.2d at 556.

\textsuperscript{232} Id. at ¶ 37, 625 N.W.2d at 562. (“The cohabitation statute and the discrimi-
natory housing provision are harmonized by recognizing that the cohabitation statute
regulates conduct, not status. The opposite interpretation would render the prohibi-
tion against cohabitation meaningless.”).
was similar; it focused on the need to harmonize the marital status provision with the antifornication statute and thereby protect the “institutions which have sustained our civilization, namely marriage and family life.”

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.

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.” The Wisconsin Supreme Court reasoned similarly that “[l]iving together is ‘conduct,’ not ‘status.’” 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.

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, antifornication 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 antifornication statute as relatively unimportant (in Susan Appleton’s words, merely

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233. Cooper v. French, 460 N.W.2d 2, 5–6, 8 (Minn. 1990).
235. Peterson, 2001 ND 81, ¶ 37, 625 N.W.2d at 562.
236. Norman, 497 N.W.2d at 718.
237. 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) and not their marital status when their marital status (unmarried) is what makes their conduct immoral in his opinion”).
a “data point”\textsuperscript{238}, 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.\textsuperscript{239} 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.\textsuperscript{240} 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.\textsuperscript{241}

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 for-profit housing market.\textsuperscript{242} For example, the California Supreme Court suggested that

\textsuperscript{238} Appleton, \textit{supra} note 43, at 17.

\textsuperscript{239} Eisenstadt \textit{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.”).

\textsuperscript{240} See Patterson \textit{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., \textit{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”).

\textsuperscript{241} Smith \textit{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.

\textsuperscript{242} See Swanner \textit{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 \textit{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 \textit{McCready \textit{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 \textit{McCready \textit{v.}}
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.” The Minnesota Supreme Court reasoned similarly in a case concerning the application of the prohibition on marital status discrimination in employment. 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.

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.” 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 discriminating on the basis of marital status.” 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.” 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, as did a panel of the Ninth Circuit in a subsequent

Hoffius, 593 N.W.2d 545 (Mich. 1999).
243. 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.”).
244. 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).
245. McClure, 370 N.W.2d at 853.
247. Id. at 238–39.
248. Id. at 247 (O’Connor, J., dissenting) (emphasis added).
federal constitutional challenge to Alaska’s law250 (although the panel decision was subsequently vacated by the full circuit).251

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.252 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.253 A federal district court considering a challenge to the Affordable Care Act rules requiring businesses to provide contraception relied extensively on the Ninth Circuit panel’s analysis regarding Alaska’s law.254

(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).

250. 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”).

251. 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).


254. 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).
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. 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.

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 nonmarital 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. 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. These new cases are similar to the cohabitation cases. As 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

256. *Id.* at 2783 (majority opinion).
petitioner’s rights of free speech and religion. 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. 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, 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. The store emphasized that it was happy to take “portrait photographs” of gay or lesbian customers, but simply refused to take any photographs that it understood as “endorsing” same-sex marriage. 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.”

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

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259. 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.
261. 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).
263. Id. at ¶ 14, 309 P.3d at 61.
264. Id. at ¶ 16, 309 P.3d at 61 (emphasis added).
that she had previously hired a gay employee.\textsuperscript{265} Similar arguments were made in the lower court decisions of \textit{Masterpiece Cakeshop}\textsuperscript{266} and other cases challenging denial of services.\textsuperscript{267}

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.”\textsuperscript{268} 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.\textsuperscript{269} It suggests that a pluralistic society depends on “being able to distinguish between conduct of which they disapprove and persons who engage in that conduct.”\textsuperscript{270}

This argument is flawed. When a business or individual refuse 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


\textsuperscript{266}. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 30, 370 P.3d 272, 280, \textit{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’”).

\textsuperscript{267}. \textit{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’’); \textit{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’’).

\textsuperscript{268}. Brief for Legal Scholars in Support of Equality and Religious and Expressive Freedom as Amicus Curiae in Support of Appellants at 15, \textit{Arlene’s Flowers}, 389 P.3d at 543 (No. 91615–2).

\textsuperscript{269}. 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.” \textit{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 distinction between “status” and “conduct” makes the florist’s actions acceptable. \textit{See id.} at 17–19.

\textsuperscript{270}. \textit{Id.} at 19.
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.

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.”

The Colorado Court of Appeals employed similar reasoning in the Masterpiece Cakeshop case, as did the Bureau of Labor and Industries in Oregon.

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, which had held that discrimination against individuals for interracial marriage or dating was a form of race discrimination.

272. Arlene’s Flowers, 389 P.3d at 553.
273. 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 midlevel appellate division, because the Colorado Supreme Court refused to hear an appeal.
274. 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).
276. 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,
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. More optimistically, these precedents should be used to challenge the similarly flawed distinctions between status and conduct that courts have accepted in cases addressing the visibility of nonmarital 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. Corporate defendants have premised claims on the First Amendment and state constitutional analogues, as well on state statutes analogous to the federal RFRA. 

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

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).

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).

Arlene’s Flowers, 389 P.3d at 556. 

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 . . . .”).

279. Arlene’s Flowers, 389 P.3d at 556.
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.\textsuperscript{280} 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.\textsuperscript{281} 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 Alaska and Minnesota decisions concerning cohabiting couples discussed above—that the State’s interest in eradicating discrimination is compelling.\textsuperscript{282} 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.”\textsuperscript{283}

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


\textsuperscript{281} 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.

\textsuperscript{282} 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)).

\textsuperscript{283} Id. at 566 (quoting Brief for Appellants at 32, supra note 265 (No. 91615–2)).
A similar hierarchy of interests was suggested by the Court in *Hobby Lobby*. 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 the Equal Protection Clause. 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.

C. Nonmarital Pregnancy

There have also been several recent cases brought by women who were fired for being pregnant without being married. 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.”

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 nonmarital 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. In the unmarried pregnancy context, by contrast, it is clear that federal law does prohibit discrimination against employees on the basis of pregnancy. (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.). 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 nonmarital sex (or used reproductive technology), which courts contend is not prohibited by Title VII or other applicable laws.

that courts are misinterpreting Title VII as applied in this context.

290. See sources cited supra note 56.
294. 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 Subpart III.C.3. My research however located surprisingly few reported cases making this argument.
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.\footnote{Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1317 (11th Cir. 2012).} Her supervisor justified terminating her by claiming “there are consequences for disobeying the word of God.”\footnote{Id. at 1317–18.} 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.”\footnote{Id. at 1319–20 (citations omitted).} 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.”\footnote{Cline, 206 F.3d at 658.} This same distinction has been applied by a number of district courts addressing claims of discrimination against unmarried pregnant women.\footnote{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 nonmarital 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.\footnote{Hamilton, 680 F.3d at 1320–21.} But the court made clear that if the employer had simply expressed opposition to the nonmarital sex, it would not constitute a violation of Title VII.\footnote{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.”).}

Importantly, courts have held that a policy of firing employees who engage in nonmarital intimacy does violate Title VII if it is not applied evenly to men and women.\footnote{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
is pregnant without being married has engaged in nonmarital 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. 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 adverse action that is motivated, even in part, by pregnancy is illegal. 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. 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

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303. Even if one believes it is possible, as an analytic matter, to distinguish between disapproval of nonmarital sex and disapproval of a pregnancy that was caused by nonmarital 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.

304. 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).

305. See, e.g., Complaint and Demand for July 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 nonmarital 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).
had instructed her principal to fire her “before her pregnancy began to show.” 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 nonmarital 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.\footnote{306. 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.”).}

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 nonmarital 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.\footnote{307. For this reason, even evidence that a policy against nonmarital sex is sometimes enforced against nonpregnant 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 . . . . ”).} 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.\footnote{308. 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.”).} 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

\footnote{309. 42 U.S.C. § 2000e-1(a).}
is that women are being treated unequally, even under ostensibly sex-neutral rules regarding nonmarital intimacy, they concern sex discrimination rather than religious discrimination. Thus, the general exception for religious organizations does not apply.\textsuperscript{310}

More recent cases typically include separate consideration of whether the position involved fits within the “ministerial” exception. As explained in Part 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.\textsuperscript{311} 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.\textsuperscript{312} 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 above was brought by a cook at a community child care center,\textsuperscript{313} 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.\textsuperscript{314}

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 nonmarital intimacy.\textsuperscript{315} 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,

\textsuperscript{310} 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.

\textsuperscript{311} See supra notes 129–32 and accompanying text.

\textsuperscript{312} See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012).

\textsuperscript{313} Complaint at 2, supra note 135.

\textsuperscript{314} 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”).

\textsuperscript{315} See supra notes 134–35 and accompanying text.
rather than scrutinizing such policies to determine whether they are effective.\textsuperscript{316} These findings suggest that courts might likewise rubberstamp a morals clause policy as sufficient to show an evenhanded opposition to nonmarital sex, without determining whether it is really enforced in an evenhanded manner.\textsuperscript{317} 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.

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 Part III.A and the gay rights cases discussed in Part III.B.\textsuperscript{318} Coty Richardson was an exercise science professor at Northwest Christian University (NCU).\textsuperscript{319} 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.”\textsuperscript{320} Richardson sued, alleging both pregnancy discrimination and violation of Oregon’s law prohibiting marital status discrimination, along with tort and contract based claims.\textsuperscript{321} First, the court concluded that the ministerial exception did not apply, reasoning, correctly, that even though she, like all faculty at the school, “was

\textsuperscript{316} See generally Lauren B. Edelman et al., \emph{When Organizations Rule: Judicial Deference to Institutionalized Employment Structures}, 117 Am. J. Soc. 888 (2011).

\textsuperscript{317} 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”).


\textsuperscript{319} \textit{Id.} at 1139.

\textsuperscript{320} \textit{Id.} at 1140–41.

\textsuperscript{321} \textit{Id.} at 1138.
expected to integrate her Christianity into her teaching and demonstrate a maturing Christian faith . . . any religious function was wholly secondary to her secular role.”

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.” 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. Accordingly, even though NCU could—rather unusually—identify two nonpregnant employees (one male, one female) who had been told they would lose their job if they did not marry a cohabiting partner, the court denied NCU’s motion for summary judgment on the pregnancy discrimination claim. The court opined that a reasonable jury could conclude that the school’s “chosen enforcement method will necessarily and obviously lead to 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.”

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

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322. Id. at 1145.
323. 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)).
324. Id. at 1148 (emphasis added).
325. 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 nonmarital intimacy. Id.
326. Id. at 1149.
327. 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’”).
single, but not if she remained single and continued to live with her partner. The court reviewed the split in the case law discussed in Part III.A and concluded that the text of the statute was ambiguous as to whether it applied in this context. 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 antifornication or cohabitation statutes, but that Oregon lacked comparable criminal prohibitions on intimate conduct. (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 Parts II.C and III.B, concluding that although they did not directly resolve the question, they helped underscore that “conduct and status are often inextricably linked.”

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.

Because the case subsequently settled, there was never a jury determination of whether the school’s policy actually did discriminate against women. 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

328. 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).
329. Id.
330. Id. at 1151.
331. 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)).
332. Id. at 1152 (quoting Veenstra v. Washtenaw Country Club, 645 N.W.2d 643, 650 (Mich. 2002) (Cavanaugh, J., dissenting)).
333. Id.
334. See Docket, Richardson 242 F. Supp. 3d at 1132 (No. 6:15-cv-01886).
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. 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. But the deeper, broader point is that criminalization denotes moral disapproval, and thus it actually encourages discrimination more generally throughout society.

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. Looked at through this lens, the allegations in the pregnancy discrimination cases discussed in Part 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. 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.” 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.

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335. See Lawrence, 539 U.S. at 575 (discussing how criminalizing sodomy invites discrimination).
337. 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.”).
338. 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’l & Hous. Comm’n, 913 P.2d 909, 925 (Cal. 1996) (noting that requiring Sabbatarian to avoid conflict 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”).
340. See Sandomir, supra note 289.
In the *Richardson* case, the school’s defense on the pregnancy discrimination claim relied in large part on identifying two nonpregnant employees who had also been told that they would lose their jobs if they continued a cohabiting relationship.\textsuperscript{342} Rather than sue, each of those individuals had simply complied with the demand, getting married within a few days.\textsuperscript{343} This evidence clearly helped bolster the school’s claim that its policy against nonmarital 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.\textsuperscript{344} 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,”\textsuperscript{345} 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.

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.”\textsuperscript{346} And there are situations where the denial

\begin{itemize}
\item \textsuperscript{342} *Richardson*, 242 F. Supp. 3d at 1142.
\item \textsuperscript{343} *Id.*
\item \textsuperscript{344} Id. 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.*
\item \textsuperscript{345} Obergefell v. Hodges, 135 S. Ct. 2584, 2594, 2599 (2015).
\item \textsuperscript{346} Douglas Laycock, *Afterword* to *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 169 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wison 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.
\end{itemize}
of services could have more devastating consequences, such as a Catholic hospital providing emergency care that could refuse to recognize a same-sex marriage.\textsuperscript{347}

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 . . . .\textsuperscript{348}

This theme has been echoed and developed by courts applying and enforcing statutory laws precluding discrimination in public accommodations.\textsuperscript{349} Just as it 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.\textsuperscript{350}

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

\textsuperscript{347} 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. Dept’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).


\textsuperscript{350} 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”).
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 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, and there is important expressive value in laws proclaiming certain kinds of discrimination to be impermissible and unacceptable.

351. 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://perma.cc/82NZ-SHF5].
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. 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. It would also 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/

352. 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.”).

353. 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 choices regarding personal intimacy. My thanks to Naomi Schoenbaum for identifying this issue.
pregnancy discrimination). 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 nonmarital 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. 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. In one sense, I wholeheartedly agree. 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) nonmarital families. This

354. 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 [https://perma.cc/DFT9-77ME] (describing St. Louis ordinance adding reproductive health decisions to city’s antidiscrimination ordinance); see also U.S. EQUAL EMP. OPPORTUNITY COMM’N, No. 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015) (“It 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.”).

355. 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.

356. 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.”).

357. This phenomenon may appear in the unmarried pregnancy context, where lesbian women fired for nonmarital 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/
aspect of the decision is deeply troubling. It reflects the extent to which nonmarital intimacy, and particularly nonmarital childbearing, remains stigmatized, even as it has become increasingly prevalent in many sectors of society.358

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 nonmarital 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 nonmarital 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.359 There is a danger, however, that the 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 nonmarital intimacy and nonmarital 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.360 If courts adopt the hierarchy suggested by Obergefell—privileging and protecting married same-sex couples while disparaging

358. See supra Part I.B.


360. See supra notes 108–11 and accompanying text.
nonmarital 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 nonmarital families face discrimination. Given the stark racial and class-based disparities in nonmarital birthrates, such discrimination would be especially harmful to minority communities whose interests have long been at the heart of the antidiscrimination project more generally.

CONCLUSION

In the culture wars raging around religious objections to same-sex marriage, claims of autonomy—backstopped 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—backstopped 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 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.

361. See supra note 98 and accompanying text.

362. Cf. Joslin, supra note 13, at 822–23 (suggesting discrimination against nonmarital 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.
Unaccompanied Youth and Private-Public Order Failures*

JORDAN BLAIR WOODS**

ABSTRACT

Each year, approximately 1.7 million “unaccompanied youth” under the age of 18 live on their own in homelessness or in other unstable living conditions. Many of these youth ran away or were kicked out of their families or child welfare placements. Others became homeless upon or soon after being released from juvenile detention.

As this Article describes, the government responds to unaccompanied youth through a complex web of family-centered interventions in both the child welfare and the juvenile justice systems. Child welfare responses adopt a view of unaccompanied youth as victims of negative family circumstances and respond by altering their family environments—first through attempting to repair the biological family relationship, and when that is not possible, by providing youth substitute families through foster care and adoption. When those family-centered approaches are not working, juvenile justice laws and law enforcement policies and practices pressure unaccompanied youth to reunite with their families (whether

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biological, foster, or adoptive) and allow for their arrest and detention. In this regard, the government adopts a very different view of unaccompanied youth as delinquent offenders when they do not fit into family systems. This Article shows that unaccompanied youth whose needs are not served under family-centered child welfare responses are ultimately left vulnerable to entering a destructive cycle of homelessness and involvement in the juvenile and criminal justice systems. It further argues that the experiences of unaccompanied youth, and unaccompanied LGBTQ youth in particular, demonstrate the limits of the family-centered approach as a wholesale or comprehensive solution to the child welfare needs of adolescent youth. The shortcomings of this approach illustrate a need for a paradigm shift in child welfare law and policy (and relatedly, juvenile justice law and policy) that places greater emphasis on non–family centered approaches to serve vulnerable youth in need of help from the state, especially late-adolescent youth. Under this new framework, child welfare law and policy responses would conceptualize the agency and autonomy of unaccompanied youth in positive and empowering terms, and provide greater space for support systems, skills, and resources outside of family systems to help them achieve self-reliance and self-actualization as adults.

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INTRODUCTION

Consider the story of a teenager named Jack. During his senior year of high school, Jack told his family that he was gay. At the time, Jack was living with his mother and her new boyfriend, who became abusive and did not accept Jack’s sexuality. Jack’s mom was not ready to end the relationship, but wanted to find a safe home for him. She discovered a transitional living program, which provided a supervised community living environment to youth between the ages of 16 and 22 who were homeless or at risk of becoming homeless. The program also helped youth build necessary life skills to live independently as adults. Jack entered the program, stayed in school, maintained a GPA in the top ten percent of his graduating class, and got accepted to college.

Jack’s success story, however, is rare. A teenager in Jack’s situation is more likely to follow a path like Tracey’s. After Tracey told his family that he was gay, he was sent to live in a group home. He bounced between four group homes in six months. At each group home, he was teased, tormented, and harassed because he was gay. After he could

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
9. Id.
10. Id.
11. Id.
no longer take the abuse, Tracey left his last group home to live on the streets. He lived with friends, slept on people’s sofas, and sold his body for sex to survive. At one point, he “lived in an abandoned trailer truck with ten other people, [and] slept in railroad tunnels.” As bad as it got on the streets, Tracey found the group homes to be much worse.

Although Jack and Tracey’s stories follow very different trajectories, their shared separation from their families is not uncommon. Each year, approximately 1.7 million youth under the age of 18 live on their own in homelessness or other unstable living arrangements for some amount of time. Over 130,000 “unaccompanied youth” endure these inadequate living conditions for one month or longer, and many never return home. Many of these unaccompanied youth were kicked out of their homes or ran away from abusive families. Others left or were pushed out of foster homes, or became homeless upon or soon after being released from juvenile detention.

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12. Id.
13. Id.
14. Id.
15. Id.
17. In this Article, the term “unaccompanied youth” refers to youth who are not in the physical custody of a parent or legal guardian and live on their own in homelessness or other unstable living arrangements. It does not include youth who live in homelessness or other unstable living conditions with their parents, legal guardians, or an adult relative. E.g., 34 U.S.C.A. § 11279(3)(B)–(C) (West 2018) (formerly 42 U.S.C. § 5732a(3)(B)–(C) (2012)) (defining “[h]omeless [y]outh” as youth “for whom it is not possible to live in a safe environment with a relative” and “who ha[ve] no other safe alternative living arrangement”). For a discussion on theories of homelessness involving children in homeless families, see generally Jessica Dixon Weaver, Beyond Child Welfare—Theories on Child Homelessness, 21 Wash. & Lee J.C.R. & Soc. Just. 17 (2014) (discussing connections between family poverty and child homelessness).
21. See id.
Existing scholarship on unaccompanied youth is fairly limited in scope. Two issues largely shape this literature: (1) the reasons why youth leave or are driven out of their families, and (2) the experiences of unaccompanied youth while they are living on the streets or in other unstable living arrangements.\(^{22}\) Less attention has been paid to the broader theoretical and conceptual issues that the experiences of unaccompanied youth reveal about the structure, foundation, and functioning of the U.S. child welfare system.\(^{23}\)

This Article is part of a larger project that examines how the government approaches child welfare issues concerning adolescent youth. As this Article explains, the current child welfare framework is oriented toward families.\(^{24}\) This framework places primacy on how swiftly the government can repair existing biological families, and when that is not possible, how quickly it can provide youth and children temporary or permanent substitute families (often, that match the traditional family model).\(^{25}\) My scholarship leads me to be increasingly skeptical of this family-centered approach as a wholesale or comprehensive solution to the child welfare needs of adolescent youth. The research underlying this Article leads me further in this direction.

In this Article, I argue that the common challenges of unaccompanied youth illustrate the limits of family-centered models of child welfare. I further contend that when family-centered approaches define the scope of responses in the child welfare system, then unaccompanied youth whose needs are not served by those responses are left vulnerable to entering a destructive cycle of homelessness and involvement in the juvenile and criminal justice systems. This cycle implicates both youth who are at risk of becoming unaccompanied as well as youth who are already unaccompanied.

In light of these shortcomings, I contend that there is a need for a paradigm shift in child welfare law and policy (and relatedly, juvenile justice law and policy) that places greater normative and practical emphasis


\(^{23}\) Casey Holtschneider, A Part of Something: The Importance of Transitional Living Programs Within a Housing First Framework for Youth Experiencing Homelessness, 65 CHILD. & YOUTH SERVICES REV. 204, 204 (2016) (“This focus has resulted in a knowledge base almost entirely dedicated to understanding the characteristics of homeless youth rather than the service sector’s efforts to respond to their needs.”).

\(^{24}\) See infra Part II.A.2.

\(^{25}\) See infra Part II.A.2.
on non–family centered approaches, especially for late-adolescent youth. Unlike the current regime, these alternative approaches would conceptualize unaccompanied youth’s agency and autonomy in positive and empowering terms, and provide support systems, skills, and resources outside of family systems to help them achieve self-reliance and self-actualization as adults. Moreover, the government would recognize that family-centered approaches do not serve all youth who seek or need help from the state, and soften its reliance on criminalization measures when family-centered approaches cannot reach, or fail, vulnerable youth.

My analysis in this Article draws largely, although not exclusively, on the experiences of unaccompanied lesbian, gay, bisexual, transgender, and queer (LGBTQ) youth. Unaccompanied LGBTQ youth are positioned in ways that make their experiences a promising lens to examine the limits of the current family-centered approach in the child welfare system. To begin, LGBTQ youth (and LGBTQ youth of color in particular) are a large and identifiable segment of the unaccompanied youth population. Recent studies have found that LGBTQ youth account for as high as 20–40 percent of the U.S. homeless youth population.

26. For possible ideas of how this nonfamily-centered approach might take shape, see infra Part IV.

27. Self-actualization is defined in different ways, but as Abraham Maslow described, it generally involves “acceptance and expression of the inner core or self.” A.H. Maslow, Some Basic Propositions of a Growth and Self-Actualization Psychology, in PERCEIVING, BEHAVING, BECOMING: A NEW FOCUS FOR EDUCATION 34, 36 (Arthur W. Combs ed., 1962). I include self-actualization here because youth may need more to live successfully as adults than simply achieving financial and housing stability. Scholars in the field of social work have recognized this very point and have advocated for evaluating the success of government interventions for unaccompanied youth based on additional criteria than simply whether those programs help unaccompanied youth achieve self-reliance. See, e.g., Casey Holtschneider, From Independence to Interdependence: Redefining Outcomes for Transitional Living Programs for Youth Experiencing Homelessness, 97 FAMILIES SOC’Y: J. CONTEMP. SOC. SERVICES 160, 166 (2016).

28. See infra Part IV.


As this Article will discuss, LGBTQ youth leave or are forced out of their families for both LGBTQ-specific and non-LGBTQ-specific reasons.31 This range of reasons allows me to draw conclusions from the LGBTQ youth context that are relevant at times to unaccompanied youth more generally. At the same time, the most prevalent reason why LGBTQ youth leave or are forced out of their homes is because their families reject them on the basis of their sexual orientation or gender identity.32 Therefore, I recognize and discuss more specifically in different parts of this Article that some experiences of unaccompanied LGBTQ youth might not map neatly onto the experiences of unaccompanied non-LGBTQ youth.

Moreover, LGBTQ youth (and LGBTQ youth of color in particular) are a hidden, yet overrepresented, population in both the child welfare and the juvenile justice systems.33 Importantly, LGBTQ youth are also overrepresented among “dually involved” or “crossover youth”—i.e., youth in the juvenile justice system who have had prior involvement with the child welfare system.34 As this Article will discuss, LGBTQ youth face widespread discrimination and abuse in foster families, adoptive families, group homes, and homeless shelters.35 For these reasons, LGBTQ youth are a salient example of an especially marginalized

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32. Id.
34. Irvine & Canfield, supra note 33, at 244.
35. See infra Parts II.A.2, II.B.
group that the child welfare system leaves behind, both before and after they have had contact with the juvenile justice system.

This Article proceeds as follows. Part I draws on historical and current perspectives from multiple disciplines (including law, social work, criminology, sociology, and psychology) to sketch two major categories of theories that attempt to explain how youth become unaccompanied. The first category is structural theories, which focus on environmental causes for why youth leave or are forced out of their families only to find themselves homeless or living in other unstable conditions. Examples include family conflict, poverty, lack of affordable housing, and discrimination. The second category is deficient-agency theories, which explain unaccompanied youth status in terms of individual-level factors, such as the irresponsible decisions, personal failures, or personal inadequacies of unaccompanied youth. In blaming youth for their unaccompanied status, deficient-agency theories conceptualize the agency of unaccompanied youth in negative terms—a view that I later critique.

I then draw on this theoretical foundation to critique government responses to unaccompanied youth. I show how the government has responded to unaccompanied youth through a complex web of family-centered public reordering in both the child welfare and the juvenile justice systems. I conceptualize responses in the child welfare system as discussed infra Part I., these theories also shape the literature and public and political discourse on the causes of homelessness more generally. See, e.g., Joanne Neale, Homelessness and Theory Reconsidered, 12 HOUSING STUD. 47, 49 (1997) (discussing how two theoretical explanations—agency and structural explanations—have shaped debates on the causes of homelessness); Suzanne Speak, Degrees of Destitution: A Typology of Homelessness in Developing Countries, 19 HOUSING STUD. 465, 468 (2004) (discussing how the causes of homelessness have been associated with either individual or structural factors).

36. As discussed infra Part I., these theories also shape the literature and public and political discourse on the causes of homelessness more generally. See, e.g., Joanne Neale, Homelessness and Theory Reconsidered, 12 HOUSING STUD. 47, 49 (1997) (discussing how two theoretical explanations—agency and structural explanations—have shaped debates on the causes of homelessness); Suzanne Speak, Degrees of Destitution: A Typology of Homelessness in Developing Countries, 19 HOUSING STUD. 465, 468 (2004) (discussing how the causes of homelessness have been associated with either individual or structural factors).

37. See infra Part I.A.

38. See infra Part I.B.

39. See infra Part III.B.

40. In this Article, I use the term “private-order failures” to refer to failures with roots in the individual actions or capacities of unaccompanied youth, or in private family disagreements. In addition, I use the term “public-order failures” to refer to failures with roots in public systems, such as lack of access to public assistance programs that help individuals and families obtain basic necessities (for example, affordable housing, food, and income). It is important to stress that my arguments in this Article do not rest on a strict division between the private and the public order. See generally Anne L. Alstott, Private Tragedies? Family Law as Social Insurance, 4 HARV. L. & Pol’y Rev. 3 (2010) (noting exaggerated distinctions between the public and private in family law).

41. In this regard, my analysis fits into a broader body of legal scholarship that examines important intersections between family law and criminal law. See, e.g., Andrea L. Dennis, Criminal Law as Family Law, 33 GA. ST. U. L. REV. 285, 290 (2017) (“[C]riminal law has rewritten family law and family life, especially for Black families.”); Melissa Murray, Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life, 94 IOWA L. REV. 1253, 1256 (2009) (discussing “the relationship between criminal law and family law in the regulation of marriage, sex,
as more in line with structural theories, and responses in the juvenile justice system as more in line with deficient-agency theories, outlined above.

Part II focuses on family-centered public reordering in the child welfare system. Consistent with structural theories, I discuss how dominant child welfare responses view unaccompanied youth as victims of negative family circumstances and respond by altering their family environments. Organized around the concept of permanency planning, child welfare responses assume that families are necessary and optimal environments for a child’s growth and development. Permanency goals require the government to act swiftly and decisively to keep youth and children within their own families, and when that is not possible, to place youth and children in temporary or permanent substitute families through foster care and adoption.

I then advance two criticisms of these family-centered responses based on how they apply to unaccompanied youth. First, I contend that these responses rest on assumptions about youth agency and autonomy that are often out of touch with the realities of unaccompanied youth status. Many unaccompanied youth—out of necessity—have had to learn to survive on their own. Research suggests that unaccompanied youth commonly reject narratives that portray them as powerless victims of negative family circumstances, and are hesitant to seek social services that may jeopardize their agency and control. Critically, in order to receive government support, the child welfare framework leaves unaccompanied youth with little option but to revert back to a state of dependence on family systems—whether on biological parents who may


42. See Justeen Hyde, From Home to Street: Understanding Young People’s Transitions into Homelessness, 28 J. Adolescence 171, 172 (2005) (“Service providers and child welfare advocates often depict homeless young people as victims, emphasizing complex histories of child abuse and neglect, domestic violence, substance abuse and poverty.”); infra Part II.A.


45. Pecora et al., supra note 44, at 44–45.

46. See infra Part II.B.1.

47. See Hyde, supra note 42, at 173 (presenting the findings of one study which showed that many unaccompanied youth participants recalled leaving home “in a way that allowed them to feel empowered”); infra Part II.B.1.
not care for them or on foster or adoptive parents who unaccompanied youth may not trust.\textsuperscript{48} For many unaccompanied youth in late adolescence, this transition might be impossible or take longer than the amount of time that they have left before aging out of the child welfare system.\textsuperscript{49}

Second, I argue that tensions between prevailing normative conceptions of “family” and youth agency and autonomy can not only harm youth, but ultimately facilitate their exclusion from the child welfare system.\textsuperscript{50} These tensions and exclusions are acutely visible in the LGBTQ youth context. Heteronormative conceptions of “family” can encourage LGBTQ youth who come into contact with the child welfare system to experience rejection or mistreatment on the basis of their sexual orientation or gender identity—features that may very well lie at the core of their agency.\textsuperscript{51} As scholars and advocates have described, LGBTQ youth are commonly rejected from or abused in foster families and group homes, are more likely to experience multiple out-of-home placements, and are often unfairly deemed “unadoptable,” because of their sexual orientation or gender identity.\textsuperscript{52} These challenges cause many LGBTQ youth to run away from or be kicked out of child welfare placements and take to the streets,\textsuperscript{53} and inhibit them from accessing government support once they are living on their own.\textsuperscript{54}

Part III then shifts gears to examine public reordering in the juvenile justice system. I show that these responses reflect inconsistent views of unaccompanied youth as both delinquent offenders and crime victims. On one hand, consistent with deficient-agency theories, juvenile justice laws and law enforcement practices have historically pressured and still compel unaccompanied youth to reunite or stay within their families.\textsuperscript{55}

\begin{itemize}
  \item[48.] See infra Part II.B.1.
  \item[49.] See infra Part II.B.1.
  \item[50.] See infra Part II.B.2.
  \item[51.] See infra Part II.B.2.
  \item[52.] See infra Part II.B.2.
  \item[53.] See infra Part III.A.1.
\end{itemize}
When youth do not, juvenile justice laws and policies allow for them to be arrested, charged, and confined in juvenile detention or correctional facilities.\textsuperscript{56} On the other hand, public funding for programs and services specifically targeting unaccompanied youth is largely channeled through juvenile justice laws and policies that are primarily concerned with their criminal victimization.\textsuperscript{57} As explained, those programs and services are mostly geared toward addressing immediate and short-term needs so that unaccompanied youth can get off the street before becoming victims of crime.\textsuperscript{58}

I then critique these juvenile justice responses.\textsuperscript{59} Specifically, I argue that the short-term outlook of these responses leaves the responsibility for meeting the long-term needs of unaccompanied youth to family systems that have likely already failed them, making it doubtful whether those long-term needs are ever met.\textsuperscript{60} I further explain that the crime-control orientation of these responses does little to foster the long-term living stability of unaccompanied youth, and ultimately leaves them vulnerable to a destructive cycle of homelessness (or other unstable living arrangements) and involvement in the juvenile and criminal justice systems.\textsuperscript{61} Unaccompanied youth whose needs cannot be served by the family-centered approach of the child welfare system are especially vulnerable to entering or continuing in the cycle.

Finally, Part IV discusses the broader implications of my analysis and preliminary insights for reform. My analysis shows how the combined public reordering in the child welfare and the juvenile justice systems adopts a view of unaccompanied youth as victims insofar as they are able to fit into families (whether biological, foster, or adoptive), but then shifts to treat unaccompanied youth as delinquent offenders when they cannot fit into family systems.\textsuperscript{62} I discuss how these shifting constructions rest on oversimplified victimization and offending narratives of unaccompanied youth. Specifically, these constructions neglect unaccompanied youth’s multiple layers of victimization—and especially victimization within families, which my analysis suggests can render family-centered government responses to their situations unworkable and ineffective.

\textsuperscript{56} See infra Part III.A.1.

\textsuperscript{57} See infra Part III.A.2.

\textsuperscript{58} See infra Part III.A.2.

\textsuperscript{59} See infra Part III.B.

\textsuperscript{60} See infra Part III.A.2.

\textsuperscript{61} See Cray et al., supra note 29, at 13 (noting the cyclical relationship between homelessness and interactions with the juvenile justice system); see also infra Part III.B.

\textsuperscript{62} Cf. Suzanne McKenzie-Mohr et al., Responding to the Needs of Youth Who Are Homeless: Calling for Politicized Trauma-Informed Intervention, 34 Child. & Youth Services Rev. 136, 137 (2012) (“[T]here has often been an implicit assumption that youth who are homeless are somehow to blame for their situations . . . .”).
I then describe how this Article’s analysis illustrates a need for a paradigm shift in child welfare law and policy, and relatedly, juvenile justice law and policy. As a normative matter, this shift would embrace a child welfare regime that is not so strictly organized around family-centered permanency goals and that adopts a positive and empowering conception of unaccompanied youth’s agency and autonomy. As a practical matter, this shift would inspire greater investment in alternative approaches that provide unaccompanied youth with support systems, skills, and resources outside of family systems to achieve self-reliance and self-actualization. Under this new public ordering, the government would recognize that family-centered responses do not serve all youth who seek or need help from the state, and soften its reliance on criminalization measures when those family-centered responses are failing to serve vulnerable youth. In support of these points, I reference an emerging body of empirical research on a very limited number of existing programs that house and help unaccompanied youth to achieve self-reliance and self-actualization outside of the family setting.

At the outset, two caveats are in order. First, to be clear, I am not arguing that family-centered child welfare approaches should be abandoned, and I am not advancing a wholesale critique of these approaches. I fully recognize that there is ample room to improve family-centered responses in the child welfare system and that these approaches are successful for many youth and children, whether they identify as LGBTQ or not. Rather, this Article challenges the dominant assumption that child welfare law and policy interventions based on family models (and in particular, the traditional model of the nuclear family) are nec-

63. It is important to recognize here that these skills are also important for youth who are successfully living in the foster care system and are transitioning to adulthood. See generally Child Welfare Info. Gateway, Helping Youth Transition to Adulthood: Guidance for Foster Parents (2013), https://www.childwelfare.gov/pubPDFs/youth_transition.pdf (discussing the challenges for youth exiting foster care and available laws and programs to support transitioning youth).

64. Martha Albertson Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 Utah L. Rev. 387, 390 (describing “the idealized nuclear family form” as “husband/father, wife/mother, and child”). Here, it is important to acknowledge the important work of family law scholars who for decades have pushed for expanding the legal conception of “family” beyond biological and traditional family models. See, e.g., Paula L. Ettelbrick, Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law, 10 N.Y. L. Sch. J. Hum. Rts. 513, 548–49 (1993) (advocating for a functional approach to parenthood for the law to recognize the “functional lesbian parent”); Douglas NeJaime, The Nature of Parenthood, 126 Yale L.J. 2260, 2268 (2017) (“urg[ing] greater emphasis on parenthood’s social dimensions”); Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 459, 573 (1990) (“[C]ourts should redefine parenthood to include anyone in a functional parental relationship that a legally recognized parent created with the intent that an additional parent-child relationship exist.”).
ecessary and optimal for youth in need of help from the state. Drawing on
the experiences of unaccompanied youth, especially in late-adolescence,
this Article urges greater investment in a more pluralistic vision of child
welfare that can serve youth whose needs may not be met under a fami-
ly-centered approach.

Second, the term “youth” is inconsistently understood and open for
debate. There are different takes in scholarship, law, and legislation on
the age range that the word “youth” describes. Although this Article
does not resolve this definitional debate, my analysis below is especially
concerned with late-adolescent youth between the ages of 15 and 17 who
are unaccompanied or at risk of becoming unaccompanied. Late-adoles-
cent youth who are removed from their homes are generally much less
likely to be reunited with their families than are young teenagers or chil-
dren in the child welfare system. Late-adolescent youth are also below
the age of majority in most jurisdictions, and therefore must rely on the
child welfare system to receive government support.

I. Theories of Unaccompanied Youth Status

This Part draws on historical and current perspectives from mul-
tiple disciplines, including law, social work, criminology, sociology, and
psychology, to briefly outline two categories of theories that attempt to
explain why youth become unaccompanied. Subpart A discusses struc-
tural theories, which largely account for unaccompanied youth status in
terms of environmental factors that influence youth to leave or be forced

65. This definitional issue has sparked debate in the child welfare domain be-
cause many youth “age out” of the child welfare system (often at the age of 18) with-
out completing school, with no place to live, and without a job or other means of sup-
port. See generally Kimberly Bender et al., Experiences and Needs of Homeless Youth
with a History of Foster Care, 55 CHILD. & YOUTH SERVICES REV. 222, 222 (2015) (“[Y]
outh exiting care . . . by aging out of care at the age of 18 . . . are often unprepared to
enter adulthood.”).

66. Betty Boyle-Duke, Black Adolescent Girls in Foster Care, in BLACK GIRLS
AND ADOLESCENTS: FACING THE CHALLENGES 183, 193 (Catherine Fisher Collins ed.,
2015) (“In general, teens in [foster] care are less likely to reach permanency goals of
reuniting with birth parents as compared to younger children.”).

67. Although not a per se rule, I also acknowledge that the younger that youth
are below this range, the less likely that they will achieve self-reliance and self-
actualization on their own outside of families. Although I focus on youth between
the ages of fifteen and seventeen in this Article, I am also concerned with youth between
the ages of eighteen and twenty-four who have aged out of the child welfare system
without proper means of support to live on their own. “[B]etween 750,000 and 2 mil-
lion young adults between the ages of 18 and 24 experience homelessness each year.”
CRAY ET AL., supra note 29, at 3. Notably, the U.S. Department of Housing and Urban
Development distinguishes between unaccompanied youth under the age of eighteen
and unaccompanied youth between the ages of eighteen and twenty-four. See U.S.
DEPT OF HOUS. & URBAN DEV., THE 2016 ANNUAL HOMELESS ASSESSMENT REPORT
(AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 44 (2016),
out of their families. Subpart B then describes deficient-agency theories, which explain unaccompanied youth status in terms of individual-level factors. As will be discussed later, government responses to unaccompanied youth rest on assumptions that appear in both categories of theories.

A. Structural Theories

Structural theories of unaccompanied youth status primarily focus on environmental factors that contribute to youth leaving or being forced out of their families. As explained below, these theories largely view unaccompanied youth as victims of environmental circumstances that are beyond their individual control. Three major types of environmental factors are discussed in the literature: (1) family factors; (2) economic factors; and (3) social or cultural factors.

1. Family Factors

Scholars identify family conflict as one of the most common reasons why youth leave or are forced out of their homes. Family conflict can take several forms. For instance, there is a high prevalence of both family rejection and family neglect among unaccompanied youth, which contributes to separation from home. Abuse—whether physical, sexual, or emotional—is also common. Other types of family conflict may include frequent arguments between family members (including exposure to intimate partner violence between parents) and parent-youth disagreements about parental control. In addition, substance abuse can spur family disagreements that result in youth leaving or being kicked out of their homes.

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68. Factors under more than one category may contribute to unaccompanied youth status.


70. See Morewitz, supra note 69, at 11 (discussing studies examining homeless youth’s prior experiences of family abuse and neglect).

71. Edidin et al., supra note 22, at 356 (“Homeless youth experience high rates of trauma and abuse prior to their experience of homelessness. . . . Abuse may be verbal, emotional, physical, or sexual in nature.”).


73. Morewitz, supra note 69, at 12.
2. Economic Factors

Unaccompanied youth are more likely to come from poor and low-income families and communities.\textsuperscript{74} Parental unemployment, low wages, and poverty place stress on family relationships, which in turn contributes to youth leaving or being kicked out of the home.\textsuperscript{75} This stress may encourage family conflicts discussed above that ultimately result in family separation; youth may run away to escape the stress associated with family poverty; or parents who cannot provide adequate financial support may expect youth to live on their own.\textsuperscript{76} Many of these economic challenges also result in youth being placed into foster families or group homes\textsuperscript{77} where discrimination and mistreatment can cause youth to leave or be forced out of child welfare placements, after which they have no place to live.\textsuperscript{78}

These economic challenges are discussed in more detail later and are described by scholars and advocates as connected to a broader weakening of the welfare state in the past several decades.\textsuperscript{79} Declines in public assistance, affordable housing, and social service programs have resulted in a large increase in the number of individuals and families who experience homelessness.\textsuperscript{80} These declines have had significant racialized consequences, especially for poor and low-income single mothers of color and their children.\textsuperscript{81} This rollback of the welfare state relates

\textsuperscript{74} Id. at 2–3; Edidin et al., \textit{supra} note 22, at 356; Marie Robert et al., \textit{Factors Associated with Homelessness of Adolescents Under Supervision of the Youth Protection System}, 28 \textit{J. Adolescence} 215, 218 (2005).

\textsuperscript{75} Morewitz, \textit{supra} note 69, at 2–3 (discussing studies on the connection between low socioeconomic status and future unaccompanied youth status).

\textsuperscript{76} Id. at 2 (discussing studies finding that a majority of runaways are from lower socioeconomic groups and that attribute this trend to youth attempting to escape their families’ problems).

\textsuperscript{77} \textit{Street Kids—Homeless and Runaway Youth: Hearing Before the S. Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human R.}, 101st Cong. 28 (1990) (statement of Della M. Hughes, Executive Director, National Network of Runaway and Youth Services, Inc.) (“Many young people . . . . may be forced from their homes when their parents cannot deal with their own economic situations . . . .”); \textit{Lennette Azzi-Lessing, Behind from the Start: How America’S War on the Poor Is Harming Our Most Vulnerable Children} 91 (2017) (“[T]he majority of the children placed into foster care come from poor families . . . .”).

\textsuperscript{78} See infra notes 94–96 and accompanying text.

\textsuperscript{79} See generally Bender et al., \textit{supra} note 65. Discrimination and maltreatment will be discussed in more detail infra Part I.A.3.

\textsuperscript{80} See generally William T. Armaline, \textit{(Re)Conceptualizing Adolescent Homelessness: Misdirection of the State and Child Welfare, in 4 Child Poverty in America Today} 1, 2–3 (Barbara A. Arrighi & David J. Maume eds., 2007) (discussing connections between the weakening of social welfare programs in the United States and the rise in homelessness among families and children).

\textsuperscript{81} Dorothy E. Roberts, \textit{Prison, Foster Care, and the Systemic Punishment of Black Mothers}, 59 \textit{UCLA L. REV.} 1474, 1485 (2012) (“As neoliberal policies strip poor African American neighborhoods of needed services, poor and low-income black
to demography and challenges of unaccompanied youth because many unaccompanied youth separate from families that cannot financially support them.\textsuperscript{82}

Residential instability is another relevant economic factor. For many unaccompanied youth, homelessness is part of a broader pattern of unstable living arrangements over the course of their lives. Many unaccompanied youth have experienced multiple prior residential moves with their biological parents or relatives.\textsuperscript{83} They are also more likely to have had repeated contacts with child welfare placements, mental health institutions, and juvenile detention and correctional facilities.\textsuperscript{84} Data suggests that “as many as 70 percent of homeless [youth] have spent time in . . . foster [care], [a] group home, or [an]other residential facility . . . .”\textsuperscript{85} Youth homelessness is also commonly preceded by living in “doubled-up” housing, where youth are temporarily taken in by others when they have no other place to go.\textsuperscript{86}

School-related difficulty is a final relevant factor. Prior to running away or becoming homeless, many unaccompanied youth have interrupted school histories.\textsuperscript{87} These interruptions are often due to housing instability which causes youth to move between schools.\textsuperscript{88} Data lends support to the notion that excessive school mobility is a risk factor for academic failure.\textsuperscript{89} Other potential school-related challenges involve

\textsuperscript{82} See Street Kids, supra note 77.
\textsuperscript{84} Jan Moore, Nat’l Ctr. for Homeless Educ., Unaccompanied and Homeless Youth Review of Literature (1995–2005), at 8 (2005), https://files.eric.ed.gov/fulltext/ED489998.pdf (“An increasing number of homeless youths have spent time in foster care or treatment facilities.”): Thompson et al., supra note 69, at 200 (“Homeless youths are more likely to have spent time in juvenile detention centers . . . .”).
\textsuperscript{85} Moore, supra note 84, at 8.
\textsuperscript{86} See generally Bradley R. Entner Wright et al., Factors Associated with Doubled-Up Housing—A Common Precursor to Homelessness, 72 SOC. SERV. REV. 92 (1998) (noting that doubled-up housing often paves the way for homelessness and potentially raises the probability of homelessness).
\textsuperscript{87} See Yvonne Rafferty et al., Academic Achievement Among Formerly Homeless Adolescents and Their Continuously Housed Peers, 42 J. SCH. PSYCHOL. 179, 180–81 (2004).
\textsuperscript{88} Id.
\textsuperscript{89} Jelena Obradović et al., Academic Achievement of Homeless and Highly Mobile Children in an Urban School District: Longitudinal Evidence on Risk, Growth, and Resilience, 21 DEV. & PSYCHOPATHOL. 493, 512–15 (2009) (noting that achievement gaps between highly mobile students and nonmobile students can manifest as early as the second grade).
bullying and learning disabilities that school administrators and teachers ignore or mishandle.\textsuperscript{90}

3. Social and Cultural Factors

Discrimination on the basis of race, ethnicity, and gender contributes to youth leaving or being forced out of their homes. For instance, criminal and family law scholars have documented how the government has scaled back its welfare institutions over the past several decades and replaced them with measures that rely on surveillance and criminalization to control members of marginalized communities.\textsuperscript{91} In the child welfare context, this shift has inspired laws and policies that monitor and blame parents for not being able to provide for their children and remove their children from the home.\textsuperscript{92} Scholars have discussed how these laws and policies are rooted in structural racial inequality and recreate racial disparities that especially harm poor and low-income single mothers of color.\textsuperscript{93}

One major consequence of these surveillance and criminalization measures is the influx of youth and children of color into out-of-home child welfare placements.\textsuperscript{94} After entering the child welfare system, racial inequality and discrimination in the system can pose difficulties for them. Youth of color are more likely to experience multiple placement moves and less likely to be adopted or find permanent families—instability.


\textsuperscript{92} See, e.g., Roberts, supra note 81, at 1484.

\textsuperscript{93} See id.

\textsuperscript{94} See id.

\textsuperscript{95} Wendy B. Smith, YOUTH LEAVING FOSTER CARE: A DEVELOPMENTAL, RELATIONSHIP-BASED APPROACH TO PRACTICE 13 (2011) (noting that children of color in the child welfare system “are less likely to be returned home to their families, less likely to be adopted, and more likely to leave care without a permanent connection to a caring adult” (citation omitted)); Reiko Boyd, AFRICAN AMERICAN DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE: TOWARD A COMPREHENSIVE CONCEPTUAL FRAMEWORK, 37 CHILD. & YOUTH SERVICES REV. 15, 23 (2014) (“Compared to children of other backgrounds . . . African American children . . . are far less likely to be adopted.” (citations omitted)); E. Michael Foster et al., EXPLAINING THE DISPARITY IN PLACEMENT INSTABILITY AMONG AFRICAN-AMERICAN AND WHITE CHILDREN IN CHILD WELFARE: A BINDER—OAXACA
ties that can destabilize and put them at greater risk of homelessness.96 Youth of color are also aging out of the child welfare system at increasing frequencies without adequate resources to survive on their own, which increases the risk of adult homelessness.97

In addition, a growing body of literature describes how discrimination on the basis of sexual orientation and gender identity places LGBTQ youth at greater risk for homelessness. As noted previously, studies have found that LGBTQ youth (and LGBTQ youth of color in particular) are highly overrepresented among unaccompanied youth, and may account for as high as 20–40 percent of homeless youth nationwide.98 Many of these youth were kicked out of their homes or ran away after suffering family rejection or abuse because of their sexual orientation or gender identity.99 As will be discussed later, research suggests that the current epidemic100 of LGBTQ youth homelessness is connected to anti-LGBTQ discrimination and mistreatment in the child welfare system as well as homeless youth shelters.101

* * *

Although structural theories of unaccompanied youth status may focus on one or more of these environmental factors, an important commonality is that they account for unaccompanied youth status in terms of different failures in the private and the public order. To clarify this point, we can place private and public order failures along a spectrum. At one end, private-order failures have roots in private system breakdowns (such as the family) or an individual youth’s actions or capacities. Closer to this end of the spectrum are structural theories of unaccompanied youth status that place primacy on private family disagreements to account for why youth leave, or are forced out of their homes, only to

Decomposition,33 CHILD & YOUTH SERVICES REV. 118, 118 (2011) (“African Americans in foster care experience more frequent placement changes.” (citations omitted)).

96. See, e.g., Carrie Lippy et al., King County Youth of Color Needs Assessment: The Experiences, Strengths, and Needs of Homeless & Unstably Housed Youth of Color 16 (2017), https://static1.squarespace.com/static/566c7f0e2399a3bdab-b57553/t/597fd3ed893fc098807bb872/1501549553222/Youth+of+Color+Needs+Assessment_Final+Report.pdf (discussing the destabilizing nature of repeated moves in the foster care system for youth of color that the youth perceived “set them on a path towards homelessness”).


98. See supra note 33.


101. See infra Part II.B.
wind up homeless or living in other unstable arrangements. On the other end of the spectrum are public-order failures which have their roots in breakdowns in societal structures or public systems. Closer to this end of the spectrum are structural theories of unaccompanied youth status that stress inadequacies in the public welfare system (for instance, lack of access to affordable housing, income, or food) as the major reasons why youth leave, or are kicked out of their homes, only to find themselves on the streets or living in other unstable arrangements.

To be clear, this is not to imply that structural accounts or specific environmental factors can be neatly placed at either end of this spectrum. Consider the example of parental abuse. On one hand, parental abuse can be conceptualized as a private-order failure in the sense that the abuse embodies a parent’s personal failure that erodes the parent-child relationship. On the other hand, studies show that parental abuse can be linked to social and economic marginalization, which places stress on family relationships and facilitates conditions that trigger parental abuse.

Therefore, the purpose of thinking about structural theories in these terms is to consider how the range of potential causes of unaccompanied youth status may involve different failures in the private and the public order. This sets the stage to evaluate how government responses to unaccompanied youth in the child welfare and the juvenile justice systems address those failures. The same logic applies to deficient-agency theories of unaccompanied youth status.

**B. Deficient-Agency Theories**

Unlike structural theories, which largely stress environmental factors, deficient-agency theories focus on individual-level factors that result in unaccompanied youth leaving or being forced out of their homes. Deficient-agency theories presume that youth have a role in shaping their life

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102. As noted previously, scholars have criticized exaggerated distinctions between the public and private order in family law. See, e.g., Alstott, supra note 40, at 3.

circumstances and thus explain unaccompanied youth status in terms of the irresponsible decisions, personal failures, or personal incapacities of unaccompanied youth. By placing the blame on unaccompanied youth, deficient-agency theories conceptualize their agency and autonomy in negative terms—a view that I will later critique and argue that government responses to unaccompanied youth should avoid.

Granted, many scholarly accounts in line with deficient-agency theories have lost popularity in recent decades. Nonetheless, it is important to describe these accounts because contemporary government responses to unaccompanied youth often rest on assumptions that are consistent with deficient-agency theories—a point I will argue in more detail later. As discussed below, deficient-agency theories can be divided into three strands. Although these strands are not mutually exclusive, each strand is tailored to a specific narrative of unaccompanied youth—namely, that they are “bad kids,” “carefree kids,” or “sick kids.”

1. “Bad Kids”

The first strand of deficient-agency theories depicts unaccompanied youth as “bad kids.” These accounts tend to assume that unaccompanied youth are runaways who voluntarily chose to leave home without their parents’ permission, usually for insignificant reasons. They further characterize running away in ways that negatively define the agency and autonomy of unaccompanied youth. For instance, some accounts define runaway activity as a behavioral problem or deviant act. Others consider running away an early warning sign that youth may be on a path to more serious delinquency or criminal behavior.

Scholars have described how this “bad kids” narrative places the blame on unaccompanied youth for their family separation and unstable living conditions, rather than blaming the youth’s home environment. They have further argued that this victimblaming narrative fosters stereotypes of unaccompanied youth as delinquents or deviants.


105. See generally David Farrugia, The Symbolic Burden of Homelessness: Towards a Theory of Youth Homelessness as Embodied Subjectivity, 47 J. Soc. 71 (2010) (discussing how agency theory and irresponsibility are the primary lenses through which youth homelessness is understood and that this framework shapes young people’s subjective experiences of homelessness).

106. See infra Parts III.A.1, IV.


108. Id. at 21.


110. David Farrugia, Youth Homelessness and Individualised Subjectivity, 14 J.
turn, these stereotypes encourage law enforcement, juvenile justice, and criminal justice responses that treat unaccompanied youth as threats to public order and security.\textsuperscript{111}

Scholars have also discussed how this victimblaming narrative can negatively affect how unaccompanied youth construct their identities and view themselves.\textsuperscript{112} Research shows that some unaccompanied youth internalize ideas that they are homeless because of their own personal failures, which damages their self-esteem and self-worth.\textsuperscript{113} This is one of many problems flowing from government responses that rely on negative conceptions of unaccompanied youth’s agency and autonomy—a point that I will discuss later in more detail in the conclusion.

2. “Carefree Kids”

The second strand of deficient-agency theories depicts unaccompanied youth as “carefree kids.” These accounts usually assume that unaccompanied youth run away from home without their parents’ permission in order to gain independence, pleasure, or adventure.\textsuperscript{114} They further conceptualize unaccompanied youth status as a product of youth’s immature and irresponsible choices to leave home.\textsuperscript{115}

Depictions of unaccompanied youth as “irresponsible” and “carefree” have deep historical roots. For instance, such depictions are prominent in popular historical fiction characters, such as Mark Twain’s Huck Finn.\textsuperscript{116} They are also associated with youth counterculture movements of the 1960s, during which youth across different economic classes

\textsuperscript{111}. See infra Part III.A (describing those responses).

\textsuperscript{112}. See, e.g., Farrugia, \textit{ supra} note 105, at 84–85; Farrugia, \textit{ supra} note 110, at 771–72.


\textsuperscript{115}. \textsc{Jan van der Ploeg & Evert Scholte}, \textit{Homeless Youth} 66 (1997).

\textsuperscript{116}. Debbie B. Riley et al., \textit{Common Themes and Treatment Approaches in Working with Families of Runaway Youths}, 32 AM. J. FAM. THERAPY 139, 140 (2004) (noting how runaway “youth are usually not fortune or thrill seekers who were once glamorized in fiction writing”).
left or ran away from home to pursue “hippie” lifestyles as alternatives to living under the strict rules of their parents.117

Similar to the “bad kids” narrative, scholars have characterized this “carefree kids” narrative as victim blaming.118 They have further described the ways in which this victimblaming narrative has negatively shaped popular perceptions of unaccompanied youth119 and fostered stereotypes of unaccompanied youth as lazy and irresponsible.120 Studies have found that many unaccompanied youth internalize these stereotypes, which negatively affects their self-esteem and self-confidence.121

3. “Sick Kids”

The third strand of deficient-agency theories depicts unaccompanied youth as “sick kids.” Early empirical studies of runaway youth came from clinical mental health research, causing runaway behavior to be viewed and defined through a medical lens.122 Specifically, mental health professionals characterized running away as a reflection of deeper psychological problems, including impulsivity, low self-esteem, and depression.123

The historical acceptance of this pathological view is illustrated by the prior inclusion of “runaway reaction” as a behavioral disorder in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-II) between 1968 and 1980.124 According to the DSM-II, children and adolescents with this disorder were typically timid, reclusive, immature, felt rejected at home, lacked self-confidence,

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118. See infra note 120.
119. See infra note 120.
120. See, e.g., Morewitz, supra note 69, at 43; Theresa Rogers et al., Public Pedagogies of Street-Entrenched Youth: New Literacies, Identity and Social Critique, in 1 EVERYDAY YOUTH LITERACIES: CRITICAL PERSPECTIVES FOR NEW TIMES 47, 57 (Kathy Sanford et al. eds., 2014); Charis Romilly, Services for Street Youth: Do They Reproduce, Contribute to, and Perpetuate Oppression?, in EMERGING PERSPECTIVES ON ANTI-OppRESSIVE PRACTICE 121, 135 (Wes Shera ed., 2003).
123. Adams & Munro, supra note 122, at 360–61; Helm Stierlin, A Family Perspective on Adolescent Runaways, 29 ARCHIVES GEN. PSYCHIATRY 56, 56 (1973) (describing running away as a “surface manifestation[] of complex psychosocial conditions and developments”).
and were inclined toward stealing.\textsuperscript{125} Medical professionals at the time advanced the idea that effective treatment required either changing the conditions within adolescents’ and children’s home environments or removing adolescents and children from their homes, followed by a substantial period of socialization “in an accepting but firm environment.”\textsuperscript{126}

Although this pathological view has lost popularity over time,\textsuperscript{127} more recent studies have identified connections between mental illness and running away. Studies have found that unstable and abusive family environments can trigger or accelerate the development of various psychological problems before youth run away from home.\textsuperscript{128} Examples include trauma, depression, anxiety, and emotional reactivity.\textsuperscript{129} As will be discussed later, the multiple layers of potential family victimization that unaccompanied youth experience can undermine the utility and effectiveness of family-centered child welfare responses.\textsuperscript{130} Studies have also found that depression is a predictive factor for running away from home,\textsuperscript{131} and that runaway behavior is correlated with a greater likelihood of suicide attempts and suicidal thoughts.\textsuperscript{132}

\textit{\textasteriskcentered \textasteriskcentered}

In sum, deficient-agency theories of unaccompanied youth status stress individual-level factors that contribute to youth leaving or being forced out of their families, only to end up without a home or stable living arrangement. Given their focus on individualized explanations, deficient-agency theories mostly account for unaccompanied youth status in terms of private order failures. Private order failures may involve unaccompanied youth’s alleged personal failures (for instance, youth’s bad or irresponsible decisions to leave home without permission) or their alleged personal incapacities (such as mental health problems).


\textsuperscript{126.} Jenkins, supra note 125, at 173.

\textsuperscript{127.} “Runaway reaction” was removed from the DSM-III, released in 1980. Melson, supra note 122, at 24.

\textsuperscript{128.} Michael D. McCarthy & Sanna J. Thompson, \textit{Predictors of Trauma-Related Symptoms Among Runaway Adolescents}, 15 J. Loss & Trauma 212, 213 (2010).

\textsuperscript{129.} Id.

\textsuperscript{130.} See infra Conclusion.


The analysis now turns to examine how government responses to unaccompanied youth address the private and public order failures described above. As discussed below, the government has responded to unaccompanied youth through a complex web of family-centered public reordering in both the child welfare and the juvenile justice systems. The analysis shows that whether unaccompanied youth can successfully fit into family systems largely guides when government responses to unaccompanied youth embrace or reject the victimblaming assumptions within these bodies of theory.

II. CHILD WELFARE SYSTEM RESPONSES TO UNACCOMPANIED YOUTH

This Part examines family-centered government responses to unaccompanied youth in the child welfare system. Subpart A explains how, in line with structural theories of unaccompanied youth status, child welfare responses view unaccompanied youth as victims of negative family circumstances and are geared toward altering their family environments. Those changes may take the form of reuniting and improving the relationship between unaccompanied youth and their biological parents or adult relatives, or, when that is not possible, providing unaccompanied youth with substitute families through foster care and adoption.

Subpart B then advances two related criticisms of this family-centered approach. First, I explain how this approach rests on assumptions about the agency and autonomy of unaccompanied youth that are often inconsistent with the realities of unaccompanied youth status. Second, I discuss how tensions between prevailing normative conceptions of “family” (i.e., the traditional model of the nuclear family) and youth’s agency and autonomy can harm youth, and ultimately facilitate their exclusion from the child welfare system. These tensions and exclusions are acutely visible in the LGBTQ youth context, where traditional family concepts can facilitate the rejection or mistreatment of LGBTQ youth on the basis of their sexual orientation or gender identity in the child welfare system.

As a preliminary matter, it is important to note that unaccompanied youth can come into contact with the child welfare system at multiple different points. For instance, unaccompanied youth can come into contact with the child welfare system for the first time while they are homeless, after their parents kicked them out of their homes. Other times, unaccompanied youth who had prior involvement with the child

133. Many state laws require homeless youth shelters to refer youth to child welfare services if their parents cannot be reached. See, e.g., N.H. REV. STAT. ANN. § 170-E:27-a (2017) (noting that if a youth’s guardian cannot be reached, the shelter must notify the New Hampshire Department of Health and Human Services within 30 days).
welfare system can come into contact with the system again after leaving or being kicked out of foster families or group homes, or upon release from juvenile detention. 134

A. Family-Centered Public Reordering in the Child Welfare System

This Subpart begins with historical background on the child welfare system’s role in handling unaccompanied youth. 135 This background provides necessary context for more recent family-centered practices and trends in the child welfare system, which the analysis turns to next. 136 That analysis shows how prevailing methods of child welfare interventions assume that families are necessary and optimal environments for youth to succeed as adults, and based on this assumption, are geared toward improving youth’s family settings (consistent with structural theories of unaccompanied youth status). This orientation leaves little space for child welfare responses that provide unaccompanied youth support systems outside of family systems to help them achieve self-reliance and self-actualization as adults.

1. Historical Background

Until the late 19th century, to the extent that legislatures and courts regulated family life, they protected the authority of husbands and fathers to govern the household. 137 Based on the idea that the household was a private domain, the law rarely became involved with issues concerning child abuse and neglect. 138 No public regulatory framework served dependent or neglected youth, including unaccompanied youth. 139 Rather, private entities and philanthropic organizations assumed the role of assisting those youth. 140

Outside of child labor laws, the federal government’s first major activity in the area of child welfare occurred in 1935 with the enactment of the Social Security Act. 141 This federal law created the Aid to Depen-
dent Children (ADC) program, which was modeled after states’ existing mothers’ pension programs. 142 The ADC program provided financial assistance to certain widows and single mothers (“primarily . . . white mothers, who were not expected to work”) 143 so that they could care for their children without sacrificing caregiver roles by seeking or holding a job. 144 The goal of the ADC program was to prevent youth and children from being pressured to leave their homes for an orphanage because of poverty. 145 In grounding eligibility for public assistance on the circumstances of parents (and single mothers in particular), 146 this early reform neither recognized nor provided help to unaccompanied youth who were living on their own.

The ADC program, and subsequent amendments to that program, shaped the extent of the federal government’s involvement in the child welfare domain 147 until Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA) in 1974. 148 Proponents of CAPTA stressed

Deal and the Social Security Act of 1935 . . . ”). For the purpose of the historical analysis in this Subpart, I am primarily focusing on developments in federal child welfare law, which are critical to understanding existing child welfare responses to unaccompanied youth at both the federal and state levels today. See infra Part II.A.2.

142. Hasday, supra note 137, at 357–58.


146. As explained later, this changed in 1961 when Congress expanded the ADC program to pay for the maintenance of children in foster care who were eligible for ADC. An Act to Amend Title IV of the Social Security Act to Authorize Federal Financial Participation in Aid to Dependent Children of Unemployed Parents, and for Other Purposes, Pub. L. No. 87–31, 75 Stat. 75 (1961) (codified in scattered sections of 42 U.S.C.).


that state and local efforts to combat child abuse and neglect were inadequate. 149 CAPTA made a number of significant changes that dramatically increased the federal government’s role in the area of child welfare. 150 CAPTA instituted a minimum definition of child abuse, mandated the development of infrastructure to compile nationwide data on child abuse, created a federal office responsible for administering the federal law, and authorized research into the frequency, causes, and treatment of child abuse. 151 CAPTA also allocated funds to help states respond to child abuse, and conditioned receipt of federal funds on the enforcement of CAPTA’s investigation and reporting mandates. 152 These funding conditions helped to create substantial uniformity in state legislation that addressed child abuse. 153

In the same period that Congress tackled child abuse, it also turned its attention to an emerging crisis in the foster care system. Between the 1960s and 1970s, the number of youth and children in the foster care system nearly doubled to almost 500,000. 154 Experts at the time attributed this surge to significant changes that Congress made to the ADC program in the early 1960s. They argued that these changes provided financial incentives for states to remove children from their homes and place them in foster care. 155 Specifically, the revised ADC program allocated ample federal funds that followed youth and children into foster care placements, but allocated significantly less funds for services to focus on the child abuse, and state legislatures responded swiftly. *Id.* at 455–56. By 1967, every state had enacted a law requiring the reporting of suspected child abuse to appropriate authorities (mostly physicians and other health care professionals). *Id.* at 456.

149. THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFE-GUARDING AMERICA’S CHILDREN 5–6 (2014), https://www.acf.hhs.gov/sites/default/files/cb/capta_40yrs.pdf (“[S]tate and local efforts in both the public and private sectors to combat child abuse and neglect were widely deficient.”).

150. See Myers, supra note 148, at 456 (“Prior to 1974, the federal government played a useful but minor role in child protection.”); *id.* at 457 (outlining the changes that CAPTA authorized resulting in Congress assuming a leadership role in child welfare).


152. *Id.* § 4, 88 Stat. at 5–7.


to prevent foster care placements or to reunite children with their biological families after being placed in foster care.156

With new pressures on the foster care system, child welfare agencies and private organizations in the 1970s started to explore different options to tackle the foster care crisis—including the treatment of LGBTQ youth who were difficult to place or had no viable placement options in the child welfare system.157 A select number of private organizations and state-based child welfare agencies started to openly place lesbian and gay homeless youth who had been rejected from their biological families, foster families, or group homes with openly lesbian and gay foster parents.158 These placements, however, were not always welcome. Some parents opposed them,159 some judges denied them,160 and backlash against lesbian and gay foster parenting motivated a wave of legislation and child welfare agency policies that prohibited or restricted lesbian and gay adults from becoming foster or adoptive parents.161

156. Guggenheim, supra note 155, at 142.
157. See, e.g., Lucinda Franks, Homosexuals as Foster Parents: Is New Program an Advance or Peril?, N.Y. TIMES, May 7, 1974, at 47 (discussing early efforts to match homeless gay teenagers with no other viable options in the child welfare system with openly gay and lesbian foster parents).


159. See, e.g., Nancy D. Polikoff, Resisting “Don’t Ask, Don’t Tell” in the Licensing of Lesbian and Gay Foster Parents: Why Openness Will Benefit Lesbian and Gay Youth, 48 HASTINGS L.J. 1183, 1183–84 (1997) (describing a case from 1976 in which parents opposed the placement of a gay teenager who had been kicked out of his home and placed into foster care with an openly gay foster parent).

160. See, e.g., George, supra note 158, at 377–78 (describing a case from 1975 in which a Washington state judge removed a gay teenager from the foster care of a gay couple, even though the teenager had been rejected from multiple group homes because of his sexual orientation).

161. Id. at 384–95 (describing early bans on lesbian and gay adoption through
As foster care placements surged, legal scholars and commentators in the 1970s also advanced a full-throated critique of the foster care system.\textsuperscript{162} In particular, these critics challenged the vast discretion that the law afforded judges to remove children from their parents and place them in foster care.\textsuperscript{163} Critics further stressed that such vast discretion opened doors for judges to impose their own personal and moral judgments over parents' values in deciding what was best for their children.\textsuperscript{164}

In response to these concerns, Congress held several hearings on how to manage the foster care crisis in the late 1970s.\textsuperscript{165} Experts and witnesses testified that youth and children were being unnecessarily placed into foster care, and that those youth and children could have remained in their homes if there had been greater government investment in programs and services to keep families together.\textsuperscript{166} Critics further stressed that the substantial amount of federal funding to help states pay for foster care created a heavy financial incentive for states to rely on foster care as the first response rather than as a last resort when intervening in family life.\textsuperscript{167}

Congress responded to the hearings by enacting the Adoption Assistance and Child Welfare Act of 1980 (AACWA).\textsuperscript{168} AACWA was

\begin{itemize}
  \item[163.] \textit{See, e.g.,} Mnookin, \textit{supra} note 162, at 630 (noting that “the court's wide discretion” is “the fundamental fault in the system”); Wald, \textit{Standards for Removal, supra} note 162, at 641 (“If I am correct that judges frequently apply broader standards unwisely, the interests of most children will be protected by limiting, rather than promoting, the decisionmaker’s discretion.”).
  \item[164.] \textit{See, e.g.,} Mnookin, \textit{supra} note 162, at 618 (“By necessity, a judge is forced to rely upon personal values to determine a child’s best interests.”).
  \item[165.] Guggenheim, \textit{supra} note 155, at 141–42 (“Beginning in 1977, Congress started paying serious attention to these criticisms.”).
  \item[167.] Guggenheim, \textit{supra} note 155, at 142.
  \item[168.] Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96–272, 94 Stat. 500, \textit{amended by} Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). Here, it is important to recognize that the AACWA was not the first legislative response that Congress made to growing concerns in the 1970s surrounding foster care and adoption. In the mid-1970s, evidence mounted supporting allegations of abusive practices in child welfare agencies that resulted in high rates of unwarranted separation of Native American
intended to reduce public spending on foster care by increasing federal investment in programs and services to keep families together, and to find permanent homes for youth and children who were removed from their homes for neglect and abuse. As discussed below, this emphasis on permanency shapes the current child welfare framework and how it responds to unaccompanied youth today.

2. Contemporary Child Welfare Responses to Unaccompanied Youth

Since the 1980s, two major pieces of federal legislation have molded the child welfare framework across states. The AACWA, introduced above, was the first major federal legislation. AACWA conditioned federal funds for states’ child welfare programs on compliance with the federal law. In so doing, AACWA came to shape philosophy and practice in child welfare agencies nationwide.

A key feature of AACWA was that it embraced the concept of permanency planning. The permanency planning movement emerged in the 1970s as a response to the criticisms discussed above that the child welfare system was too quick to remove children from their homes, and that too many children were drifting between foster care placements...
without finding stability in the system. As a concept, permanency planning rests on the premise that families are necessary and optimal environments for a child’s growth and development. Based on this idea, disrupting the biological family “is a major decision” and “must be based on evidence that” leaving the child in the home will cause the child serious harm.

Permanency goals further demand that if children are removed from their biological families, then the government must provide children with the least detrimental family-centered alternative to separation from the biological family. This alternative initially takes the form of placing youth and children in a short-term substitute family while the government simultaneously attempts to repair the relationship with the biological parents. If those attempts are unsuccessful, then the government has a duty to place youth and children in long-term or permanent substitute families so that they can develop new parental ties.

AACWA implemented permanency goals by allocating federal funds to states’ child welfare programs along the following hierarchy of options: (1) preventing out-of-home child welfare placements through services geared to keep families together; (2) reuniting children with their biological parents or legal guardians as soon as possible after a short time in foster care; and (3) encouraging adoption or long-term foster care placements for children who cannot return to their biological families. By stressing permanency goals, the success of this framework was then, and still is, measured by how swiftly and decisively the government can intervene to help keep children within their own families, and when that is not possible, place them in long-term substitute families.

Until the late 1990s, this menu of family-centered options under AACWA largely defined child welfare responses to youth and children. In 1997, however, Congress made significant changes to AACWA by enacting the Adoption and Safe Families Act (ASFA)—the second major piece of federal child welfare legislation. The ASFA responded to the high level of bureaucracy in the child welfare system and funding

176. Pecora et al., supra note 44, at 43–44.
178. Id.
179. Id.
180. Id.
181. Pecora et al., supra note 44, at 318 (describing the hierarchy under AACWA based on permanency goals).
182. Godsoe, supra note 43, at 1126 (noting that the current permanency “framework follows a strict hierarchy”).
obstacles that stood in the way of executing AACWA’s reforms. The ASFA’s proponents further stressed ongoing problems surrounding “foster care drift.” Although the foster care population dropped in the early 1980s after AACWA passed, it began to increase again in the late 1980s, and eventually hit record levels in 1996. “The median stay in foster care had also grown from fifteen months in 1987 to more than two years in 1994.”

Scholars and commentators attributed this growth to a rolling back of the welfare state and to broader structural problems involving homelessness, poverty, unemployment, and lack of affordable housing. In the 1960s and 1970s, there was a vast decrease in government spending on low-income housing. In the 1980s, Congress slashed or capped federal funding for an array of social programs (including public housing subsidies). These reforms contributed to “the highest rate of homelessness among families since the Great Depression.” Between 1982 and 1987, the homeless population in the United States doubled. Families and children were “[t]he fastest growing group[s] within the homeless” population. Poverty, unemployment, lack of affordable housing, and law and order crime-control policies left marginalized families (and in particular low-income single mothers of color) with no choice other than


184. Godsoe, supra note 43, at 1115–16; Gordon, supra note 183, at 648; Johan Strijker et al., Placement History of Foster Children: A Study of Placement History and Outcomes in Long-Term Family Foster Care, 87 CHILD WELFARE 107, 108 (2008) (defining “foster care drift” as “when a child moves from one placement to the other without the prospect of a permanent residence (i.e., return home, adoption or in kinship foster care”)”.

185. See Gustavsson & Segal, supra note 154, at 92 (noting that the foster care population “dropped in the early 1980s and began climbing again in the late 1980s”); Gordon, supra note 183, at 648 (noting that caseloads “reach[ed] a record of 502,000 in 1996”).

186. See Gordon, supra note 183, at 648.


190. Gustavsson & Segal, supra note 154, at 125 (citation omitted).

191. da Costa Nunez, supra note 188, at 18.

192. Gustavsson & Segal, supra note 154, at 125.
to comply with government orders removing their children and placing them in foster care.\textsuperscript{193}

In this political and social context, ASFA pushed at least two major reforms which further strengthened the child welfare system’s emphasis on permanency goals.\textsuperscript{194} First, ASFA attempted to reduce foster care drift by enabling children to return to their homes or move to other permanent placements more quickly.\textsuperscript{195} To accomplish this task, ASFA sped up permanency hearings by requiring them “to be held no later than 12 months after a child entered foster care (6 months earlier than . . . under the [previous] law).”\textsuperscript{196} Moreover, ASFA required states to initiate proceedings to terminate parental rights when a child had been a ward of the state “for 15 of the previous 22 months.”\textsuperscript{197}

Second, ASFA provided new financial incentives for states to promote adoption over reuniting foster youth and children with their biological families.\textsuperscript{198} Specifically, “[s]tates that increase[d] their adoptions over an established baseline [were] eligible for $4,000 for each child . . . adopted from foster care and $6,000 for each child with special needs . . . adopted from foster care.”\textsuperscript{199} In 2003 and 2008, Congress revised and extended these incentives.\textsuperscript{200}


\textsuperscript{194.} Godsoe, supra note 43, at 1115–19; Dorothy E. Roberts, Is There Justice in Children’s Rights?: The Critique of Federal Family Preservation Policy, 2 U. Pa. J. Const. L. 112, 112 (1999). In addition to these two reforms, proponents of ASFA testified that in attempting to comply with federal law, child welfare agencies were sending foster children back to abusive and threatening family environments. Gordon, supra note 183, at 646–47. Accordingly, “ASFA codified th[e] policy . . . that a child’s health and safety [was] paramount in any decision” about child placement “and provided examples of when efforts to . . . reunify families [would] be ‘unreasonable’” (for example, returning foster children to dangerous households). Mary Lee Allen & Mary Bissell, Safety and Stability for Foster Children: The Policy Context, 14 CHILD. FAMS. & FOSTER Care 49, 62 (2004). ASFA also “require[d] states to develop standards to protect the health and safety of children in foster care and . . . [to] check the criminal records of both foster and adoptive parents as a condition of federal funding.” Id. at 53.

\textsuperscript{195.} Gordon, supra note 183, at 650.

\textsuperscript{196.} Allen & Bissell, supra note 194, at 52; Gordon, supra note 183, at 650–51.

\textsuperscript{197.} Allen & Bissell, supra note 194, at 52–53. Scholars have critiqued this length-of-time standard on the grounds that it can apply to potentially terminate parental rights and harm youth and children in cases when parents are responding to child welfare services. Naomi R. Cahn, Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 OHIO ST. L.J. 1189, 1201–02 (1999).

\textsuperscript{198.} Allen & Bissell, supra note 194, at 54; Gordon, supra note 183, at 651–52.

\textsuperscript{199.} Allen & Bissell, supra note 194, at 54; Gordon, supra note 183, at 651–52.

Since ASFA was enacted in 1997, the annual rate of children adopted from foster care has doubled, and the number of youth and children adopted from foster care each year has increased from approximately 30,000 to more than 50,000. The average length of time it takes to adopt a child in the foster system has also decreased from four years to less than three years.

At the same time, it is important to recognize that some scholars do not view ASFA as an unequivocal success in fostering adoption. Professor Elizabeth Bartholet, for instance, argues that ASFA’s goal to place children in adoptive families promptly “if they cannot safely stay” within their biological families is undercut “by a series of [statutory] exceptions and loopholes.” In particular, she stresses that ASFA’s focus on a child’s safety as opposed to a child’s wellbeing leaves the many cases involving child neglect—including severe, chronic neglect—beyond ASFA’s purview.

Nonetheless, today the federal government spends almost $7 billion each year on family-centered child welfare programs (for example, foster care, adoption, and guardianship)—a figure expected to rise “to $8.5 billion by 2023.” These programs largely define the menu of available options for unaccompanied youth seeking help under the child welfare framework. As discussed later, this multibillion-dollar figure far exceeds the amount of federal funding allocated for programs and services that specifically target unaccompanied youth, such as homeless youth shelters. Notably, the funding for those programs is largely channeled through juvenile justice laws—illustrating the government’s tendency to frame unaccompanied youth and their challenges as criminal concerns, rather than child welfare issues.

B. Criticisms of Family-Centered Public Reordering in the Child Welfare System

The analysis below advances two related criticisms of the family-centered public reordering in the child welfare system based on its


For a more detailed description of adoption incentives under federal law see id. at 4–13.

201. Id. at 2.
202. Id. at 3.
203. Id. at 4.
204. Bartholet, supra note 103, at 27.
205. Id.
207. See infra Part III.A.2.
208. See infra Part III.A.2.
application to unaccompanied youth (and in particular, unaccompanied LGBTQ youth). First, I argue that this family-centered approach rests on assumptions about the agency and autonomy of unaccompanied youth that are often inconsistent with the realities of unaccompanied youth status. Second, I discuss how tensions between normative conceptions of “family” (i.e., the traditional model of the nuclear family) and youth agency and autonomy can harm youth, and ultimately facilitate their exclusion from the child welfare system.

As a preliminary matter, it is necessary to explain how these criticisms relate to existing critiques of permanency planning. At least two lines of critique appear in legal scholarship. The first line focuses on families of origin, and explains how permanency planning disadvantages certain families in the child welfare system on the basis of race, gender, and class. As Professor Dorothy Roberts has powerfully demonstrated, permanency goals have encouraged laws and policies that make it easier to terminate the parental rights of poor and low-income single mothers of color and place their children in adoptive families. She has further documented how family substitution often serves as an improper response to deeper problems of racism, poverty, and sexism that place marginalized families at risk for state intervention in the first place. Scholars attribute these child welfare inequalities at the intersection of race, class, and gender to several structural problems, including: (1) structural discrimination in the labor and housing markets that result in poor and low-income families of color, and especially poor and low-income single mothers of color, having disproportionate child welfare needs; and


210. Roberts, supra note 194, at 119–20. Paradoxically, however, youth and children of color are less likely to be adopted and more likely to remain in foster care when taken from their parents’ custody. Id. at 120; see also Roberts, supra note 81, at 1477 (“About one-third of children in foster care are black, and most have been removed from black mothers who are their primary caretakers.”).


(2) discrimination by child welfare professionals and agencies on the basis of race, class, and gender.\textsuperscript{213}

The second line of criticism focuses on new or reworked family arrangements. These perspectives argue that permanency goals rest on rigid and narrow definitions of “family,” which encourage child welfare laws and policies that prioritize certain family forms that are more in line with the traditional family model over others.\textsuperscript{214} As Professor Cynthia Godsoe has thoroughly documented, the types of family arrangements that permanency goals recognize and prioritize are not necessarily the family relationships that provide youth and children psychological permanency and stability.\textsuperscript{215} For instance, a foster child may have connections to multiple adults\textsuperscript{216} and not simply two biological or adoptive parents. Scholars have also called attention to how permanency goals have shaped laws and policies that only allow for traditional adoption that severs a child’s legal relationship to their biological parents, even when evidence suggests that nonexclusive adoptions\textsuperscript{217} may provide a more viable path for many youth and children to leave foster care through adoption.\textsuperscript{218} Scholars have further documented how permanency goals encourage laws and policies that prioritize adoption over guardianship and push families to choose adoption when they prefer guardianship.\textsuperscript{219}

Both lines of criticism raise important challenges to how permanency goals are currently defined and executed in the child welfare system. I am not discounting these critiques, and I fully recognize that opening space for child welfare responses that avoid these family-centered harms and adopt more flexible definitions of “family” can benefit many parents, youth, and children. At the same time, these accounts still maintain a focus on families in the sense that they call attention to which families permanency goals advantage and to which families they disadvantage and harm. My analysis illustrates how family-centered approaches—even improved ones—may not serve the needs of certain vulnerable youth who seek or need help from the state. Accordingly,

\begin{itemize}
\item 216. Godsoe, \textit{supra} note 43, at 1126.
\item 218. See id. at 720–21 (proposing that child welfare law should permit the nonexclusive adoption of foster children who cannot reunify with their parents).
\end{itemize}
my analysis broadens the scholarly conversation beyond marginalized families to scrutinize permanency goals from the more individualized perspectives of unaccompanied youth.

1. Assumptions About the Agency and Autonomy of Unaccompanied Youth

My first criticism of the family-centered public reordering in the child welfare system is that it rests on assumptions about the agency and autonomy of unaccompanied youth that are often inconsistent with the realities of unaccompanied youth status. Permanency goals assume that families (whether biological, foster, or adoptive) are necessary and optimal environments for youth and children to achieve self-reliance and self-actualization as adults. In emphasizing permanency goals, child welfare responses treat unaccompanied youth as victims of negative family circumstances (consistent with structural theories of unaccompanied youth status) and, as argued below, respond by altering their family environments.

This victimization mindset overlooks important contextual differences with regard to how unaccompanied youth develop and exercise their agency and autonomy compared to other youth. Although more research is necessary, existing studies describe how victimization narratives are often inconsistent with how many unaccompanied youth who decided to leave home in light of family problems perceive their family separation. For instance, many unaccompanied youth recount leaving home as an affirmative act of self-protection and a positive decision in which they took control over their negative family situations.

For many unaccompanied youth, this sense of agency and independence becomes stronger once they separate from their families. After being kicked out, pushed out, or running away from home, many unaccompanied youth—out of necessity—have had to exercise control over their lives by learning how to survive on their own. While doing so, many unaccompanied youth develop a sense of pride in becoming

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220. See Pecora et al., supra note 44, at 44–45.
221. Hyde, supra note 42, at 172–73.
222. See, e.g., Bender et al., supra note 65, at 225; Hyde, supra note 42, at 172–73; Eric Rice et al., Homelessness and Sexual Identity Among Middle School Students, 85 J. SCH. HEALTH 552, 556 (2015) (“The experience of multiple living situations and the lack of a permanent residence put homeless youth on a trajectory toward early independence.”).
223. See, e.g., Sanna J. Thompson et al., Insights from the Street: Perceptions of Services and Providers by Homeless Young Adults, 29 EVALUATION & PROGRAM PLAN. 34, 41 (2006).
224. Hyde, supra note 42, at 175.
225. Id. at 180–81.
resilient and self-reliant in spite of the hardships that they may endure while living on the streets or in other unstable living arrangements.\textsuperscript{226}

Based on these insights, child welfare researchers and social workers warn that adopting a one-dimensional narrative of unaccompanied youth as powerless victims ignores many of their strengths, skills, and capacities.\textsuperscript{227} For example, researchers have stressed the personal strengths and problem-solving skills that unaccompanied youth develop to survive on their own can become assets for these youth in adulthood.\textsuperscript{228} Those skills include the ability to identify and avoid dangerous situations, and to navigate formal and informal systems for resources.\textsuperscript{229} Other important skills include knowing when and how to develop relationships with others who can provide support, as well as knowing how to avoid developing relationships with exploitative people.\textsuperscript{230}

Of course, these points do not discount the fact that the harsh realities of street life lead many unaccompanied youth to gain life skills through unsafe or illegal means.\textsuperscript{231} Some unaccompanied youth protect themselves by carrying weapons\textsuperscript{232} or by associating with criminally involved adults and youth who can offer resources and protection.\textsuperscript{233} Many unaccompanied youth also resort to illegal behaviors, such as sex work and theft, to survive.\textsuperscript{234} My point is that despite these challenges, the reality of unaccompanied youth status is more complex than dominant victimization narratives suggest.

Another important set of issues surrounding agency and autonomy involves potential cultural differences between unaccompanied youth in urban and rural areas.\textsuperscript{235} Scholars have described how the public discourse on homelessness is infused with urban stereotypes and

\begin{itemize}
  \item \textsuperscript{226} Don Schweitzer et al., Asking for Directions: Partnering with Youth to Build the Evidence Base for Runaway and Homeless Youth Services 12 (2013), http://commons.pacificu.edu/cgi/viewcontent.cgi?article=1053&context=casfac; Sean A. Kidd, Street Youth: Coping and Interventions, 20 Child & Adolescent Soc. Work J. 235, 255 (2003); Thompson et al., supra note 223, at 37.
  \item \textsuperscript{227} Kimberly Bender et al., Capacity for Survival: Exploring Strengths of Homeless Street Youth, 36 Child Youth Care F. 25, 39 (2007).
  \item \textsuperscript{228} See, e.g., id. at 38.
  \item \textsuperscript{229} Id. at 32.
  \item \textsuperscript{230} Id. at 30 & tbl.2.
  \item \textsuperscript{231} Kristin M. Ferguson et al., Predicting Illegal Income Generation Among Homeless Male and Female Young Adults: Understanding Strains and Responses to Strains, 63 Child. & Youth Services Rev. 101, 103 (2016).
  \item \textsuperscript{232} Id. at 107.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id. at 101.
  \item \textsuperscript{235} See, e.g., Mark Evan Edwards et al., Paradoxes of Providing Rural Social Services: The Case of Homeless Youth, 74 Rural Soc. 330, 336–37 (2009) (discussing how the “individuation of social problems” in rural places influences the cultural dimensions in how rural communities respond to youth homelessness).
\end{itemize}
experiences that do not necessarily apply in rural contexts. Consistent with this idea, existing studies on unaccompanied youth largely focus on youth in cities and urban neighborhoods. A major reason for this urban focus is that unaccompanied youth in rural areas are more dispersed and difficult to reach.

Although more research is needed, scholars have examined how there is a greater cultural emphasis on individualism, self-sufficiency, and privacy in rural communities. In those communities, cultural values may lead members to view homelessness as the product of a person’s idleness and laziness. Consistent with this idea, research shows that unaccompanied youth in rural areas are often hesitant to admit that they need help—and often refuse to seek help—from the government or private organizations for fear of being perceived as lazy or idle. In addition, because many rural communities are small, unaccompanied youth in rural areas are often reluctant to let others know about their situation by seeking or receiving services. Rather than face potential judgment and ostracism within their communities, many of these youth prefer to remain invisible.

A limited body of research has also called attention to special considerations surrounding the agency and autonomy of unaccompanied LGBTQ youth. Today, LGBTQ youth in the United States “come out” (meaning they disclose their sexual orientation or gender identity to others) at earlier ages than did previous generations. Recent survey data suggests that the median age at which individuals begin to self-identify as lesbian, gay, bisexual, or transgender falls squarely in late adolescence. Taking control over one’s life circumstances can be linked

236. See Yvonne M. Vissing, Out of Sight, Out of Mind: Homeless Children and Families in Small-Town America 12 (1996). Here, it is important to note that sexuality scholars have also called attention to problems involving urban bias and the treatment of sexual minorities in rural communities under the law. See generally Luke A. Boso, Urban Bias, Rural Sexual Minorities, and the Courts, 60 UCLA L. Rev. 562 (2013) (describing how public opinion of sexual minorities is shaped by urban biases and how the legal system perpetuates these biases). This point also fits into a broader critique in legal scholarship involving misunderstandings of rurality and livelihood in the law and legal institutions. See generally, e.g., Lisa R. Pruitt, Rural Rhetoric, 39 Conn. L. Rev. 159 (2006) (investigating the law’s constitutive rhetoric about rural people, places, and livelihoods).

238. Id. at 344–45.
239. Id. at 336.
240. Id. at 336–37.
241. See, e.g., id. at 345–46.
242. See, e.g., id.
243. See id. at 346–47.
244. Rice et al., supra note 222, at 553.
to an important process in which unaccompanied LGBTQ youth are defining and exploring their sexual orientation or gender identity. This process may be an especially formative and sensitive period for unaccompanied LGBTQ youth who suffered rejection because of their sexual orientation or gender identity by their families, communities, or other institutions, such as schools and places of worship.

To illustrate these points, consider one study of homeless LGBTQ youth of color who lived on the streets of the Castro District in San Francisco.\(^{246}\) In spite of the harsh realities of being homeless, LGBTQ youth participants viewed public spaces in the Castro (such as the subway station) as places where they felt safe to be themselves and to express their LGBTQ identities, especially as LGBTQ youth of color.\(^{247}\) Youth participants perceived the Castro as a neighborhood in which they could seek safety, community, and resources when needed.\(^{248}\) Conversely, they reported feeling unsafe to express their sexual orientation or gender identity in other public and private spaces, as well as in family and community settings.\(^{249}\)

Given these different sets of issues, it is not surprising that many unaccompanied youth place primacy on their autonomy\(^{250}\) and are hesitant to seek social services that may jeopardize their independence and control.\(^{251}\) In order to receive long-term support, however, the child welfare framework leaves those youth with little option but to revert back to a state of dependence on family systems—whether on biological adult family members who may not want to care for them, or foster or adoptive parents who they may not trust. For unaccompanied youth in late adolescence, this transition might be impossible or take longer than the amount of time they have left before aging out of the child welfare system.

Lending support to these ideas, research describes how unaccompanied youth are often distrustful of adults—including their adult family members, adults in out-of-home child welfare placements, and adult

\(^{246}\) See generally Jen Reck, Homeless Gay and Transgender Youth of Color in San Francisco: “No One Likes Street Kids”— Even in the Castro, 6 J. LGBT Youth 223 (2009) (showing the extent of the societal and economic problems faced by LGBT youth of color). The Castro has had a large concentration of LGBT residents and has been a hub of LGBT activism and social life for decades. See generally Winston Leyland, Out in the Castro: Desire, Promise, Activism (2002) (detailing the history of the Castro and its role as an LGBT neighborhood). It is important to recognize, however, that scholars have called attention to the ways in which race, gender, and class biases pervade mainstream gay neighborhoods and communities. See, e.g., Russell K. Robinson, Marriage Equality and Postracialism, 61 UCLA L. Rev. 1010, 1038–39 (2014).

\(^{247}\) Reck, supra note 246, at 232–35, 239.
\(^{248}\) Id. at 231, 234–35.
\(^{249}\) Id. at 229–32.
\(^{250}\) See Thompson et al., supra note 223, at 41.
\(^{251}\) See id.; Hyde, supra note 42, at 173.
caseworkers and staff in the child welfare system. As explained later in this Article, this tension has led some child welfare researchers to challenge the appropriateness and effectiveness of government responses that are modeled after traditional parent-child relationships in which agency providers or caretakers act as “parents” or “quasi-parents” for unaccompanied youth. Critically, those models largely define available child welfare responses to unaccompanied youth.

2. The “Traditional” Family and Child Welfare Exclusions

My second criticism is that tensions between traditional conceptions of “family” and the realities of unaccompanied youth status can harm and ultimately facilitate the exclusion of unaccompanied youth from the child welfare system. As explained previously, unaccompanied youth can come into contact with the child welfare system at different and multiple points in their lives. Guided by permanency goals, the child welfare system’s first line of defense is to try to reunite unaccompanied youth with their families.

We learn from the experiences of unaccompanied LGBTQ youth that family reunification is often not a feasible option when youth are kicked out of their homes because of their sexual orientation or gender identity. And even when practically feasible, family reunification might put LGBTQ youth at risk of further violence, harassment, or rejection. Those harmful family conditions—which initially drove LGBTQ youth out of their homes—then push LGBTQ youth back into homelessness or other unstable living arrangements.

These barriers to family reunification, however, are not unique to the LGBTQ context. Some studies have reported that nearly half of homeless youth are “throwaway youth”—meaning youth who are thrown out of their homes and not welcome back. Although different factors contribute to youth being kicked out of their homes, studies have found that throwaway youth experience greater levels of prior family conflict and family violence compared to other unaccompanied youth.

When family reunification fails, the child welfare system’s next line of defense is to provide unaccompanied youth with a substitute family through foster care or adoption. Family rejection for being LGBTQ is a common reason why LGBTQ youth enter out-of-home child welfare

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252. Thompson et al., supra note 223, at 35.
253. See infra Part IV.
254. Bender et al., supra note 227, at 39.
255. See supra notes 133–34 and accompanying text.
256. Thompson et al., supra note 69, at 194.
258. Moore, supra note 84, at 9.
placements.\textsuperscript{259} Other LGBTQ youth enter the child welfare system when the state discovers that they have been kicked out of their homes with nowhere to go, or when the state removes them from their homes after reports of suffering family abuse for being LGBTQ.\textsuperscript{260}

Once they enter the child welfare system, LGBTQ youth face several systemic challenges, which contrary to permanency goals, result in low placement stability and multiple out-of-home placements.\textsuperscript{261} For instance, child welfare agencies often have few or no staff with adequate training on the specific challenges and needs of LGBTQ youth.\textsuperscript{262} Currently, only nine states require LGBT-inclusive competency training for child welfare staff or foster parents.\textsuperscript{263} Lack of cultural competence can shape caseworkers’ placement decisions as well as the extent of resources available to help foster and adoptive parents sensitively handle the needs and concerns of LGBTQ youth.\textsuperscript{264} In addition, LGBTQ youth commonly face discrimination by caseworkers, which can negatively affect placement decisions and how key actors (i.e., child welfare placement agencies or frontline caseworkers) in the child welfare system treat them.\textsuperscript{265}

LGBTQ youth are difficult to place through foster care and adoption because they are often unwanted by foster and adoptive families and are therefore more quickly sent to group homes and other congregate care facilities used to house youth with behavioral problems or multiple failed foster care placements.\textsuperscript{266} Many LGBTQ youth are rejected by foster families or group home staff on the basis of their sexual orientation or gender identity, and as a result, leave or are kicked out of foster placements for the streets.\textsuperscript{267} In addition, LGBTQ youth are at much

\begin{itemize}
\item \textsuperscript{259} See Cray et al., supra note 29, at 12; Wilson et al., supra note 33, at 11.
\item \textsuperscript{260} See Cray et al., supra note 29, at 12; Wilson et al., supra note 33, at 11.
\item \textsuperscript{261} See Wilson et al., supra note 33, at 11–12; Gallegos et al., supra note 52, at 228.
\item \textsuperscript{262} Gallegos et al., supra note 52, at 227–28.
\item \textsuperscript{264} Gallegos et al., supra note 52, at 228.
\item \textsuperscript{265} See Wilson et al., supra note 33, at 11–12; Love, supra note 52, at 2275–80.
\item \textsuperscript{266} See Amy Dworsky, The Economic Well-Being of Lesbian, Gay, and Bisexual Youth Transitioning Out of Foster Care 2 (2013), https://www.acf.hhs.gov/sites/default/files/opre/opre_lgbt_brief_01_04_2013.pdf (“A shortage of LGB-friendly foster homes also means that many youth who identify as LGB are placed in more restrictive group care settings rather than with families . . . .”); Mallon, supra note 8, at 53 (noting that some youth who enter group homes “are troubled, others are delinquent, and many simply have no families available to care for them”); Wilson et al., supra note 33, at 6 (noting that “LGBTQ youth have a higher average number of foster care placements and are more likely to be living in a group home”); Love, supra note 52, at 2274–75 (discussing how transgender youth are often placed in congregate care facilities for reasons that are rooted in transphobia).
\item \textsuperscript{267} Mallon, supra note 8, at 110–11 (discussing the results of a study on LGBT youth in the foster care system and noting that “[y]oung people who fled to
greater risk for mistreatment and physical, sexual, and verbal abuse than are non-LGBTQ youth in foster families and group homes. Caretakers are also more likely to discipline LGBTQ youth for age-appropriate conduct that would likely go unpunished if it occurred between opposite-sex youth. These challenges and rejections can exacerbate LGBTQ youth’s housing instability in the child welfare system and contribute to their homelessness.

Moreover, many LGBTQ youth who come into contact with the child welfare system and have experienced prior family rejection for being LGBTQ prefer to be placed in child welfare settings that are supportive of their sexual orientations and gender identities (i.e., foster homes with LGBTQ caretakers or LGBTQ-affirming group homes or transitional living programs). These preferences, however, can go ignored when out-of-home placements adhere to rigid and traditional conceptions of family—a practice documented in existing critiques of permanency planning. For instance, Nebraska courts only recently decided that the state’s policy of excluding “persons who identify themselves as homosexuals” from being foster parents or from adopting a child in foster care was unconstitutional. In addition, many state adoption and foster care laws allow officials to give preference to married couples, which can disadvantage single individuals and unmarried cohabitants during the adoption and foster care process. Although marriage equality raises new questions about how adoption and foster care laws apply to same-sex married couples, these preferences and restrictions

the streets . . . were those who were no longer willing to tolerate the poor fit that was manifest in [their group home or foster home]”); Shelley L. Craig & Ashley Austin, Childhood and Adolescence, in TRAUMA, RESILIENCE, AND HEALTH PROMOTION IN LGBT PATIENTS: WHAT EVERY HEALTHCARE PROVIDER SHOULD KNOW 57, 60 (Kristen L. Eckstrand & Jennifer Potter eds., 2017) (noting connections between the challenges that LGBTQ youth face in the child welfare system as a result of their sexual orientation or gender identity and the increased risk of “being kicked out of foster homes or becoming homeless”).

268. Wilson et al., supra note 33, at 11–12.
269. Id.
270. See, e.g., Gallegos et al., supra note 52, at 231. Here, I am not arguing that all LGBTQ youth in the child welfare system prefer placements with LGBTQ caretakers. In fact, studies have found that many LGBTQ youth in the child welfare system do not have a preference regarding the sexual identities of their caretakers. Id.
272. Stewart v. Heineman, 892 N.W.2d 542, 547, 568 (Neb. 2017) (citation omitted) (holding that it was not an abuse of discretion for a trial judge to enjoin the state from enforcing a memorandum banning lesbian and gay couples and individuals from being licensed as foster parents or to adopt a ward of the state).
274. These questions are especially pertinent in states that have adopted laws or
have disadvantaged and continue to disadvantage many suitable prospective LGBTQ parents during the foster care and adoption process.\textsuperscript{275} The recent proliferation of religious exemption laws that attempt to mediate conflicts between religious liberty and LGBTQ equality adds another layer of challenges to LGBTQ identity in the child welfare system.\textsuperscript{276} Several states have recently enacted religious exemption laws that allow the religious views of child welfare actors (for instance, private child placement agencies or foster parents) to guide the nature of the services they provide, even if those views denounce LGBTQ people.\textsuperscript{277} Critics contend that these broad religious exemption laws permit religionally motivated discrimination against LGBTQ youth who come into contact with those agencies.\textsuperscript{278} Child welfare providers may turn away introduced bills providing religious exceptions that allow private and public entities involved in foster care, as well as prospective foster and adoptive parents, to discriminate on the basis of sexual orientation and gender identity when such discrimination is grounded in a sincerely held religious belief or moral conviction. See infra notes 275–77.


\textsuperscript{276} In a forthcoming article entitled Religious Exemptions and LGBTQ Child Welfare, 103 MINN. L. REV. (forthcoming 2019), I discuss in more detail how the recent push for broad religious exemptions involving LGBTQ child welfare affects the treatment of LGBTQ youth in the child welfare system. For a more comprehensive discussion of complicity-based conscience claims in the context of religious exceptions from laws concerning sex, reproduction, and marriage, see generally Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 YALE L.J. 2516 (2015).


LGBTQ youth and children in need of support, including those who have been kicked out of their families because of their sexual orientations or gender identities. Alternatively, LGBTQ youth and children could be forced to stay in foster homes that denounce their sexual orientations or gender identities and be forced to act in ways that are inconsistent with their LGBTQ identities. In more extreme cases, foster parents could pressure LGBTQ youth and children to undergo damaging conversion therapies that try to change a person’s sexual orientation or gender identity.

These challenges surrounding sexual orientation and gender identity in the child welfare system result in many LGBTQ youth leaving or being forced out of child welfare placements, after which they find themselves living on the streets or in other unstable living arrangements. Unaccompanied LGBTQ youth, however, face additional challenges when they seek help from shelters and other service providers to get off the streets. Many youth shelters are unequipped and lack staff with adequate cultural competence to handle the specific needs of unaccompanied LGBTQ youth. Moreover, in many localities, lack of public funding for homeless and runaway youth services results in private faith-based entities providing the bulk of available services to unaccompanied youth. LGBTQ youth may feel unwelcome, be turned away, or face discrimination when those entities openly denounce or are hostile toward LGBTQ people.

279. Id.
280. Id.
281. Id. at 2.
283. Cray et al., supra note 29, at 12.
284. The specific funding schemes for programs and services available to unaccompanied youth will be discussed infra Part III.A.2.
285. See Movement Advancement Project, supra note 278, at 5–6 (discussing the harms of religiously motivated discrimination against LGBTQ youth in the child welfare system and the harms of protecting those instances of religiously motivated discrimination through religious exemption laws); Deborah Lolai, “You’re Going to be Straight or You’re Not Going to Live Here”: Child Support for LGBT Homeless Youth, 24 Tul. J.L. & Sexuality 35, 53 (2015) (noting that many homeless youth shelters “are run by religious organizations that are openly hostile to LGBT youth generally
These issues, however, are not limited to purely privately funded entities. Studies document how unaccompanied LGBTQ youth commonly face discrimination, harassment, and abuse when they seek or obtain services from programs that receive public funds to assist homeless and runaway youth. Many LGBTQ youth hide, or feel pressure to hide, that they identify as LGBTQ when receiving services. Faced with these obstacles, unaccompanied LGBTQ youth may be deterred from seeking services, which prolongs their unaccompanied youth status.

These points illustrate how tensions between maintaining traditional family models and the realities of unaccompanied youth status can harm unaccompanied youth and facilitate their exclusion from the child welfare system. My analysis now turns to how these child welfare harms and exclusions interact with responses to unaccompanied youth in the juvenile justice system.

III. JUVENILE JUSTICE SYSTEM RESPONSES TO UNACCOMPANIED YOUTH

This Part examines government responses to unaccompanied youth in the juvenile justice system. Subpart A describes the ways in which the public reordering in the juvenile justice system is not only family-focused but also adopts inconsistent views of unaccompanied youth as both delinquent offenders and crime victims. Subpart B then critiques this public reordering. I argue that family-centered juvenile justice responses

and transgender youth specifically”); see also Quintana et al., supra note 30, at 18 (discussing the lack of faith-based homeless shelters that are supportive of LGBTQ youth).


287. See Ray, supra note 100, at 94 (discussing the challenges that LGBT youth face in homeless shelters and noting that “[y]outh continue to hide in the system by denying their sexual orientation or gender identity, and as a result do not get the help they need”).

288. Quintana et al., supra note 30, at 18 (“Studies have found that many homeless gay and transgender youth choose to sleep on the streets rather than go to a service provider that is perceived to be homophobic or transphobic.”); Ray, supra note 100, at 94 (“If an LGBT youth receives the message—implicit or explicit—that he or she is not welcome because of his or her sexual orientation or gender identity, the youth will be less likely to use the agency’s services.”); Maccio & Ferguson, supra note 286, at 50 (noting the results of one study in which interviewed staff from organizations that offered services to LGBTQ homeless and runaway youth commented that “the discrimination, harassment, and violence that occur in general shelters often contribute to LGBTQ [runaway and homeless youths’] desire to remain on the streets or in precarious housing situations”).
facilitate a destructive cycle in which unaccompanied youth bounce between homelessness (or other unstable living arrangements) and the juvenile and criminal justice systems. Youth who have been harmed by, or excluded from, the child welfare system for the reasons discussed in the previous Part are especially at risk of entering this cycle.

A. Family-Centered Public Reordering in the Juvenile Justice System

This Subpart examines two types of family-centered public reordering in the juvenile justice system. The first type is juvenile justice laws and law enforcement policies and practices that allow for unaccompanied youth to be arrested, charged, and confined in secure detention facilities when they leave or fail to stay within families (whether biological, foster, or adoptive). I explain that these measures adopt a view of unaccompanied youth as delinquent offenders and place the blame on them for their family separation, consistent with deficient-agency theories of unaccompanied youth status. The second type is public funding for programs and services that specifically target unaccompanied youth. I explain that this funding is largely channeled through juvenile justice laws and primarily concerned with unaccompanied youth’s criminal victimization. I argue that as a result of their victimization focus, these programs and services assume a short-term outlook by granting just enough resources for unaccompanied youth to get off the streets before they become victims of crime, leaving the responsibility to provide for their long-term needs to family systems that likely have already failed them.

1. Unaccompanied Youth as Delinquent Offenders: Arrest, Institutionalization, and Other Sanctions

The history of handling unaccompanied youth in the juvenile justice system through arrest and institutionalization dates back to the creation of the first juvenile court in 1899. An understanding of this history provides meaningful context for the ways in which the government has historically portrayed unaccompanied youth as delinquent offenders, and why many unaccompanied youth are funneled into the juvenile and criminal justice systems today.


290. See infra Part III.A.2.


292. See Flowers, supra note 114, at 66.
i. Historical Background

Professor Barry Feld has described how the juvenile court emerged at a time of great social change in the late-nineteenth and early-twentieth centuries. Modernization inspired massive industrialization, urbanization, and immigration. The transition from an agricultural to an industrial society reshaped the family as women moved into the new industrial work force. These changes helped to cement a cultural view of childhood that idealized children as innocent and fragile persons in need of protection.

The Progressive social reformers who created the juvenile court intended for it to have a nonadversarial and therapeutic mission, unlike courts in the criminal justice system. These reformers further intended for the juvenile court to reach a broad range of youth who faced trouble in their social and family lives and not just youth who violated the law. The idea that youth pauperism, if left unattended, could “ripen into criminality” motivated this convergence between “dependency” and “delinquency” concepts. Thus, the broad mission of the juvenile court enabled the government to act as parens patriae with the dual purposes of reforming youth and protecting society.

Even the earliest juvenile courts placed primacy on families when handling dependent and neglected youth, including unaccompanied youth. The Illinois Juvenile Court Act of 1899, which created the first juvenile court, reflects this emphasis. This statute provided that the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child be placed in an

294. Id.
296. Feld, supra note 293, at 1454.
298. Feld, supra note 293, at 1458–59.
299. SEALANDER, supra note 138, at 21.
302. Fox, supra note 310, at 1211–12.
improved family home and become a member of the family by legal adoption or otherwise.\textsuperscript{303}

Put simply, government intervention on behalf of dependent and neglected youth was supposed to model traditional family life.

At this point in time, the law differentiated between youth who needed help from the government and youth who violated the law. This gap narrowed as expanding legal definitions of “delinquent child” appeared in juvenile justice laws soon after the earliest juvenile courts appeared. The initial definition of “delinquent child” under the Illinois Juvenile Court Act of 1899 was fairly narrow in the sense that it was limited to any child who violated a state law or local ordinance.\textsuperscript{304} In the early 1900s, however, the legislature amended this definition to include “status offenses,”\textsuperscript{305}—acts considered illegal only because nonadults committed them.\textsuperscript{306} Critically, status offenses included the very behaviors that unaccompanied youth were likely to engage in due to their unaccompanied status, such as running away, being incorrigible, truancy, and violating curfew.\textsuperscript{307}

This expanded definition soon appeared in the juvenile justice laws of other states,\textsuperscript{308} making dependency and delinquency concepts virtually

\textsuperscript{303}. Illinois Juvenile Court Act of 1899, § 21, 1899 Ill. Laws 131, 137 (1899) (repealed 1965). At the time, most adoptions took place through private agreements rather than public or nonprofit agencies. D. Marianne Brower Blair, Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption, 67 Notre Dame L. Rev. 851, 859 (1992). Until the 1850s, there were no state statutes “requir[ing] judicial supervision over the adoption process.”\textsuperscript{Id.}

\textsuperscript{304}. Illinois Juvenile Court Act of 1899, § 1 (“The words delinquent child shall include any child under the age of 16 years who violates any law of this State or any city or village ordinance.”).

\textsuperscript{305}. Act of May 11, 1901, § 1, 1901 Ill. Laws 141, 142 (“The words ‘delinquent child’ shall include any child under the age of sixteen (16) years who violates any law of this State or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly frequents a house of ill fame; or who knowingly patronizes any policy shop or place where any gaming device is or shall be operated.”).

\textsuperscript{306}. Jyoti Nanda, Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System, 59 UCLA L. Rev. 1502, 1528 (2012) (“Status offenses are acts that are not deemed criminal when committed by adults but carry juvenile court sanctions for youth because of their legal status as minors.”).

\textsuperscript{307}. Illinois Juvenile Courts Amendment Act 1907, § 2, 1907 Ill. Laws 70, 71 (defining status offender as a youth who “violates any law of this State; or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without that [the] consent of its parents, guardian or custodian absents itself from its home or place of abode, or is growing up in idleness or crime . . . or wanders about the streets in the night time without being on any lawful business or lawful occupation” (alteration in original)).

\textsuperscript{308}. Anthony M. Platt, The Child Savers: The Invention of Delinquency 139 (2d ed. 1977) (“The Illinois act was considered a prototype for legislation in other states . . . .”); W. Vaughan Stapleton & Lee E. Teitelbaum, In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts 22–23 (1972); see, e.g.,
interchangeable across much of the United States. The justification for this expanded definition rested on two ideas. First, the noncriminal behaviors defined as status offenses were likely warning signs of a youth’s future criminal involvement. Second, the government had a duty to intervene in the family and social lives of youth who appeared to be on a path to criminal offending. This new role of the government contradicted earlier legal and social norms that safeguarded the family as a private domain free from state interference.

As a consequence of this blurred distinction between dependency and delinquency concepts, unaccompanied youth regularly came into contact with the police simply on the basis of their unaccompanied status. If unaccompanied youth were petitioned to the juvenile court, then judges could institutionalize them in secure detention facilities alongside other juvenile delinquents who committed serious crimes. Historical data shows that juvenile courts institutionalized status offenders (including unaccompanied youth) at high rates in the first half of the 20th century. In addition, indeterminate sentencing allowed for status offenders to be institutionalized for long periods of time. This was possible because remedies in the juvenile justice context were then (and are still intended to be) based on principles of individualized justice that


309. Lora Lee Pederson, 29 Tex. L. Rev. 576, 577 (1951) (reviewing Sheldon & Eleanor Glueck, Unraveling Juvenile Delinquency (1950)) (“The philosophy of the juvenile court, as embodied in the statute which established the Juvenile Court of Cook County, Illinois, in 1899, provided that the delinquent child should be treated like the neglected or dependent one.”).

310. Lee Teitelbaum, Status Offenses and Status Offenders, in A Century of Juvenile Justice 158, 162 (Margaret K. Rosenheim et al. eds., 2002) (“Proponents of the juvenile court viewed deviance as a developmental process, and the central premise of the juvenile court movement was the use of judicial authority to identify and rehabilitate, rather than punish, children whose acts or conditions bespoke the likelihood of future antisocial behavior.”).

311. Id. at 162–63.

312. See supra Part II.A.1.


314. Teitelbaum, supra note 310, at 163.


316. Jay D. Blitzman, Gault’s Promise, 9 Barry L. Rev. 67, 75 (2007) (noting “indeterminate commitments until adulthood for minor offenses and status offenses became publicized” pre-Gault); Barry C. Feld, The Transformation of the Juvenile Court, 75 Minn. L. Rev. 691, 700 (1991) (“Historically, juvenile court sentences were discretionary, indeterminate, and nonproportional to achieve the offender’s ‘best interests.’”).
focused on rehabilitation, and not principles of retribution that focused on the reprehensibility of their conduct.317

Before describing more recent juvenile justice responses involving unaccompanied youth, it is important to acknowledge that this interlacing of dependency and delinquency concepts had (and still has) a distinct gendered effect, especially on female youth of color.318 Female youth were (and still are) more likely to be arrested and funneled into juvenile courts for status offenses, whereas male youth were (and still are) more likely to be arrested and funneled into juvenile courts for delinquent conduct.319 The bulk of status offense arrests and adjudications for female youth involved sexual misconduct, including promiscuity.320 Scholars argue that this disparity reflected the intent of the juvenile court’s creators to use juvenile courts as a means to enforce dominant norms of sexual morality in addition to idealized notions of childhood innocence.321

ii. Contemporary Juvenile Justice Responses to Unaccompanied Youth

In the 1960s, skepticism grew over whether juvenile courts were more beneficial than harmful for youth and children.322 Scholars and practitioners argued that juvenile courts were arbitrary and punitive,323 which contradicted their intended purposes of being therapeutic and nonadversarial. In light of these concerns, critics called for extending due process protections to minors in juvenile court.324 In 1967, these calls culminated in the U.S. Supreme Court’s groundbreaking decision in In re Gault.325 Gault extended a host of procedural protections into juvenile proceedings that were previously only available to defendants in criminal courts.326 Those protections included the right to notice of charges,

317. Teitelbaum, supra note 310, at 162.
321. Feld, supra note 319, at 1064; Godsoe, supra note 318, at 1109.
322. Feld, supra note 293, at 1448.
324. Feld, supra note 293, at 1448 (noting the “[s]ystematic and critical re-examination of the juvenile court’s cultural and legal premises [that] emerged . . . in the 1960s”).
326. See generally id.
the right to counsel, the right to confrontation and cross-examination of witnesses, and the privilege against self-incrimination.327

Scholars and practitioners also challenged the legitimacy of institutionalizing status offenders alongside juvenile delinquents, especially those who committed violent crimes. Professor Barry Feld explains that critics raised several concerns, including that the status jurisdiction of the juvenile court ultimately harmed youth, damaged relationships between youth and their families, inundated juvenile courts with high case volumes, and overburdened government agencies and schools which regularly referred status offenders to juvenile courts.328 Several states revised their delinquency laws in response to these concerns.329 These reforms created new lines between status offenses and delinquent acts and moved status offenders into newly created non-delinquent categories with acronyms like JINS, CHINS, or FINS “(juveniles, children, [or] families in need of supervision).”330

This growing skepticism eventually shaped influential legislation at the federal level with the enactment of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA)331—which is still the main piece of federal legislation that sets national standards and allocates funds in the area of juvenile justice.332 When first enacted, the JJDPA required states to deinstitutionalize and divert status offenders from secure detention facilities in order to receive federal funding for their juvenile justice programs.333 States responded by amending their juvenile justice laws to formally comply with the JJDPA.334

Notwithstanding this compliance, several loopholes allow states to circumvent the JJDPA’s deinstitutionalization mandate today. At least

327. See generally id.
330. Id.
four loopholes are relevant to unaccompanied youth. First, federal regulations implementing the JJDPA include a monitoring policy under which both accused status offenders and nonoffenders can be held in a secure detention facility for up to 24 hours prior to, and for an additional 24 hours after, an initial appearance in juvenile court. This monitoring policy opens opportunities for police officers to arrest and detain unaccompanied youth, even if those youth are not adjudicated delinquent and ultimately returned back to their families. For instance, police officers come into contact with unaccompanied youth either while on patrol or while investigating missing persons reports—often filed by an unaccompanied youth’s parents. In many cases, parents request that police officers find, arrest, and detain unaccompanied youth so that the youth can be brought home. Most states permit police officers to take unaccompanied youth into custody without a warrant, and return them to their parents or legal guardians against their wishes.

The second loophole involves subsequent amendments to the JJDPA that created an exception allowing states to detain youth who violate valid court orders (VCOs). This VCO exception applies to unaccompanied youth as follows: A juvenile court judge can issue an order prohibiting youth from engaging in behaviors associated with unaccompanied youth status (for example, running away, truancy, vagrancy, or violating curfew). When youth engage in those behaviors, a judge can send them to juvenile detention for violating the VCO. “Each year the VCO exception contributes to the [confinement] of thousands of youth status offenders in secure detention facilities.” Gaps in available data make it impossible to tell exactly how many of these youth are unaccompanied youth, although advocates have criticized the use of the

335. For a general discussion of these four loopholes circumventing the JJDPA’s deinstitutionalization mandate, see Rayna Hardee Bomar, Note, The Incarceration of the Status Offender, 18 MEM. ST. U. L. REV. 713, 731–36 (1988) (discussing the four loopholes: relaxed monitoring standards, the valid court order exception, discretion in labelling offenders, and noncorrectional placements).


337. MOREWITZ, supra note 69, at 175.

338. See id.


VCO exception to criminalize homeless, runaway, and other unaccompanied youth.  

The third loophole involves how key actors in the juvenile justice system exercise their discretion when categorizing youth as status offenders or juvenile delinquents. Scholars have argued that in order to circumvent the JJDPA's deinstitutionalization mandate, law enforcement and juvenile intake officers are more willing to label youth as delinquent offenders who they may have otherwise labeled status offenders. For instance, consider a teenager who takes $30 from her parents to buy a bus ticket and uses that bus ticket to run away from home. Under this loophole, law enforcement and juvenile intake officers would categorize the teenager as a delinquent offender (a “thief”) as opposed to a status offender (a “runaway”).

As a consequence of this relabeling process, unaccompanied youth are at greater risk of arrest and confinement. This is especially so given that with few or no legal means to survive, unaccompanied youth often turn to theft, survival sex, and other forms of crime to obtain money, food, and shelter. The next Subpart will explore these connections between unaccompanied youth status and criminality in more detail.

The fourth loophole is that the JJDPA only requires the deinstitutionalization of status offenders from secure detention or correctional facilities. It does not prohibit juvenile courts from referring youth to mental health institutions. Data after the JJDPA took effect shows that the number of youth status offenders referred voluntarily or involuntarily to mental health care facilities surged.

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342. For instance, in 2008, the American Bar Association (ABA) wrote a letter to the Committee on the Judiciary of the United States Senate to support legislation banning the confinement of youth status offenders in juvenile facilities. The ABA stressed that “runaway and homeless youth are also criminalized by the VCO exception.” Letter from Thomas M. Susman, Dir., Am. Bar Ass’n, to Patrick J. Leahy, Chairman, U.S. Senate Judiciary Comm., and Arlen Specter, Ranking Member, U.S. Senate Judiciary Comm. 3 (July 14, 2008), http://www.americanbar.org/content/dam/aba/events/aba-day/2008juvjusticeletter.authcheckdam.pdf.

343. Bomar, supra note 335, at 735 (“Some experts think that juvenile justice practitioners are, in fact, circumventing the intent of the Act by using their discretion to label as delinquent many youths who once would have been categorized as status offenders.”).

344. HAGAN & McCARTHY, supra note 22, at 89–90; Ferguson et al., supra note 231, at 101. Estimates of homeless and runaway youth who engage in survival sex range from 10 percent to 50 percent. See DANK ET AL., supra note 282, at 7.

345. See infra Part III.B.

346. 28 C.F.R. § 31.303(f)(2) (2017) defines a “secure detention or correctional facility” as “any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or nonoffenders, or used for the lawful custody of accused or convicted adult criminal offenders.”

347. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 131 (1989); Feld, supra note 316, at 700.
proceedings may intersect with juvenile status offense proceedings, ultimately resulting in the confinement of unaccompanied youth in psychiatric institutions and other mental health facilities. Although many unaccompanied youth have mental health challenges, not all of them have challenges that warrant institutionalization, and many others simply have nowhere else to go.

Beyond arrest and confinement, unaccompanied youth face other harsh sanctions for status offenses that relate to their family separation (for example, running away, being “ungovernable,” and violating curfew). Common sanctions include suspending driver’s licenses, imposing monetary fines, ordering youth to attend counseling or education programs, and placing youth in out-of-home placement programs (for example, group homes). As discussed later, these sanctions can interfere with unaccompanied youth’s employment and school attendance by restricting their mobility. Moreover, unaccompanied youth are at risk for future detention and criminal histories when they cannot afford to pay the fines imposed for status offenses, which further restricts their educational and employment opportunities.

Having sketched the ways in which family-centered public reordering in the juvenile justice system adopts a view of unaccompanied youth as delinquent offenders, the analysis now turns to describe the ways in which this public reordering can adopt a different view of unaccompanied youth as crime victims.

349. Godsoe, supra note 318, at 1098 (noting that “[m]any children are removed from their homes for status offenses”—including running away and curfew violations—and placed into psychiatric hospitals, among other out-of-home placements).
350. Gary B. Melton et al., NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS 82 (1998) (noting that commitment has served and will continue to serve as a public safety net to provide shelter for homeless youth and adults).
352. See infra Part III.B.
353. Beth A. Colgan, Reviving the Excessive Fines Clause, 102 CALIF. L. REV. 277, 290–94 (2014) (outlining the various collateral consequences for juvenile adjudicants who are unable to pay economic sanctions imposed on them); see also Mae C. Quinn, In Loco Juvenile Justice: Minors in Munis, Cash from Kids, and Adolescent Pro Se Advocacy—Ferguson and Beyond, 2015 B.Y.U. L. REV. 1247, 1292 (“The practical effect—unpaid fines, court fees, and then arrest warrants—is that such kids are passed over for jobs, turned away from housing, and civilly disabled in other ways as they try to become young adults.”).
2. Unaccompanied Youth as Crime Victims: Public Funding for Unaccompanied Youth Programs and Services

The second relevant type of public reordering in the juvenile justice system involves public funding for programs and services that target unaccompanied youth. As explained below, government funding for these programs and services is largely channeled through juvenile justice laws and is thus separated from the multibillion-dollar funding structure that child welfare laws set in place to support adoption, foster care, and guardianship. The analysis shows how this division results in significantly less public funding for programs and services that directly target unaccompanied youth than family-centered child welfare programs. It further shows how this division influences available programs and services to be oriented toward the immediate and short-term needs of unaccompanied youth so that they can get off the street before becoming victims of crime. This short-term outlook leaves the responsibility for the long-term needs of unaccompanied youth to family systems that may have already failed them, raising questions of whether those needs are ever met.

The Runaway and Homeless Youth Act (RHYA) is the primary public, and only federal, funding source for programs that target unaccompanied youth. Importantly, most states do not have laws that allocate funding for programs and services that address the particular needs of unaccompanied youth. Unlike the various financial incentives that child welfare laws create to support foster care and adoption, the RHYA includes no financial incentives for states to allocate funds for programs that target unaccompanied youth. Moreover, the private funding sources for these programs and services are limited. For these reasons, the RHYA has come to shape the philosophy, practice, and availability of programs and services that target unaccompanied youth in many localities.

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The RHYA was originally entitled “The Runaway Youth Act,” and was enacted as part of the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1974. As explained below, Congress enacted the law against the backdrop of several empirical, social, and cultural developments involving runaway youth. These developments provide meaningful context for how the law came to assume a crime-control focus.

In the 1960s and early 1970s, the number of reported runaways surged, which spawned critical conversations about the ability of law enforcement and the juvenile justice system to handle the growing problem. New data from the Federal Bureau of Investigation’s Uniform Crime Reporting (UCR) Program was one development that contributed to these growing public concerns. The 1964 UCR report offered the first aggregate snapshot on the number of runaway youth, reporting 70,517 arrests for runaway activity that year. This figure increased to 149,052 arrests in 1968 and 204,544 arrests in 1971. Researchers at the time estimated that only one in six runaways were ever arrested, meaning that this data likely underestimated the true extent of the problem.

Increasing national press coverage surrounding runaways also inspired the Runaway Youth Act. In particular, media reports called attention to runaways who became victims of violent crime while living on the streets. The “Houston Mass Murders” were perhaps the most notorious example. In 1973 (only a year before Congress enacted the Runaway Youth Act), Houston police officers discovered the graves of 27 persons.

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359. Moses, supra note 357, at 228.
360. Id. at 230.
362. See Moses, supra note 357, at 228–30.
363. Id. at 228.
364. Id.
365. Robert Shellow et al., Suburban Runaways of the 1960’s, 32 MONOGRAPHS SOC’Y FOR RES. CHILD DEV. 1, 22 (1967); see Moses, supra note 357, at 228.
366. Moses, supra note 357, at 231–32.
367. Id. at 232.
368. Albert R. Roberts, Runaways and Non-Runaways in an American Suburb 5 (1981) (“The dangers of the runaway problem were gruesomely and emphatically brought to the attention of the entire nation by the mass murders in Houston which were uncovered in August, 1973.” (citation omitted)); Texan Said to Admit Role in 25 Killings, N.Y. TIMES, Aug. 10, 1973, at 1.
male youth, the youngest of which was 13 years old. The victims had likely been tortured to death, and many were runaway youth. The mass murders gained national media coverage because it was one of the worst serial killings in the United States up until that point. The murders inspired the Houston Police Department to issue a public statement on the number of estimated runaway youth in the area each year (approximately 5,000 youth at the time).

In light of these broader currents, the Runaway Youth Act of 1974 narrowly conceptualized unaccompanied youth as runaways, as the title of the law reflected. Congressional findings explicitly characterized runaway youth as leaving home without their parents’ permission, which overlooked unaccompanied youth who were forced out of their homes against their will. The findings also illustrated the law’s early focus on the criminal victimization of unaccompanied youth. For instance, the findings stated that the “alarming” increase in runaways “significantly endanger[ed]” youth who lacked resources to survive on their own and “creat[ed] a substantial law enforcement problem” for communities.

To address these concerns, the Runaway Youth Act created its first major funded program: the Basic Center Grant Program. Basic Centers are designed to address runaway youth’s immediate basic needs (shelter, food, etc.) for no more than 15 days so they can get off the streets and return to their families as soon as possible — conceivably before becoming victims of crime and in turn a community crime problem. Congress initially allocated $10 million to fund Basic Centers. Although this

369. Moses, supra note 357, at 232; Texan Said to Admit Role in 25 Killings, supra note 368, at 44.
370. Texan Said to Admit Role in 25 Killings, supra note 368, at 44.
372. Roberts, supra note 368, at 5.
374. Id. § 302(1) (“[T]he number of juveniles who leave and remain away from home without parental permission has increased to alarming proportions . . . .”).
375. The legislative history to the 1977 amendments to the Runaway Youth Act supports this point. That history emphasizes how Congress intended for those amendments to clarify the law’s focus on youth “who have no home from which to run, the few who are so abused or neglected that leaving was a rational alternative, or those who leave home involuntarily.” S. Rep. No. 95–165, at 65 (1977) (Conf. Rep.), as reprinted in 1977 U.S.C.C.A.N. 2556, 2607.
378. See supra Part III.A.2.
amount is now just under $50 million,380 thousands of unaccompanied youth are still turned away from Basic Centers every year.381

By design, Basic Centers were not (and still are not) intended to meet the long-term needs of runaway youth. The various ways in which the law placed primacy on family reunification382 lends support to the idea that Congress viewed families as responsible for runaway youth's long-term care. For instance, to qualify for funding, a local agency had to develop adequate plans for contacting a runaway youth's parents or relatives and for assuring the youth's safe return according to his or her best interests.383 In addition, the law measured the success of Basic Centers in part by their effectiveness in strengthening family relationships, reuniting runaway youth with their families, and encouraging the resolution of intrafamily problems through counseling and other services.384 Critically, many of these provisions remain in the current version of the statute,385 illustrating the law's emphasis on family reunification and the short-term outlook of Basic Centers today.

In 1977, Congress renamed the Runaway Youth Act to its current title, the Runaway and Homeless Youth Act.386 The new title reflected how Congress expanded the scope of the law to formally include homeless youth.387 Congress amended the RHYA again in 1988 to create its second federally funded program for unaccompanied youth: the Transitional Living Grant Program.388 This new program represented an important shift in federal youth homelessness policy in that

382. Michael Glassman et al., The Problems and Barriers of RHYA as Social Policy, 32 Child. & Youth Services Rev. 798, 800 (2010) (noting that the focus of the RHYA was family reunification).
384. Id. § 315(1)–(3), 88 Stat. at 1131.
385. See, e.g., 34 U.S.C.A. § 5712(b)(3) (West 2017) (noting that providers “shall develop adequate plans for contacting the parents or other relatives of the youth and ensuring the safe return of the youth according to the best interests of the youth”); id. § 5712(b)(5) (noting that providers “shall develop an adequate plan for providing counseling and . . . for encouraging the involvement of their parents or legal guardians in counseling”).
387. Id.
started to recognize the long-term needs of unaccompanied youth who could not reunite with their families. Congressional supporters stressed that the program was necessary because family reunification was not always a safe or a viable option for unaccompanied youth.\textsuperscript{389}

The Transitional Living Grant Program allocates funds and provides technical assistance to both public and private nonprofit organizations to establish and run transitional living programs (TLPs).\textsuperscript{390} TLPs were designed to offer long-term shelter (up to 18 months) for a maximum of 20 unaccompanied youth between the ages of 16 and 21 who cannot return home and who have “no other safe alternative living arrangement.”\textsuperscript{391} Importantly, TLPs provide resources and skills outside of families to help unaccompanied youth transition to adulthood and achieve self-sufficiency (for example, through “services relating to basic life skills, interpersonal skill building, educational advancement, job attainment skills, mental and physical health care, parenting skills, financial planning, and referral to sources of other needed services”).\textsuperscript{392}

In Part IV, I will discuss in more detail how TLPs are a promising alternative to help unaccompanied youth achieve self-reliance and self-actualization outside of families.\textsuperscript{393} Here I want to briefly highlight that TLPs face several challenges that compromise their full potential. One major challenge is funding. The average annual cost to operate a TLP is more than three times the maximum available individual grant.\textsuperscript{394} Moreover, the total amount of funding that the RHYA authorizes for TLPs is less than one percent of the over $7 billion that the federal government spends annually on family-focused child welfare programs (for instance, foster care, adoption, and guardianship assistance).\textsuperscript{395} Every

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389. See, e.g., 134 CONG. REC. 13,077, 1988 WL 1091397 (daily ed. June 1, 1988) (statement of Rep. Leland) (“In an ideal world, adolescents live with their families until they reach adulthood and are able to venture out on their own. In the real world, however, this is not always the case. Many young people do not have access to a safe environment with relatives and have no alternative to life on the streets.”).


393. See infra Part IV.

394. Chiamulera, supra note 354 (“[T]he cost to operate a . . . (TLP) is $600,000, but the maximum grant for a TLP [under the RHYA] is [only] $200,000.”).

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year, thousands of unaccompanied youth are unable to access TLPs due to lack of available space and funding.\footnote{396. Fernandes-Alcantra, supra note 386, at 19 & tbl.1; Page, supra note 29, at 26–27 (“[M]any youth are routinely denied housing under the Transitional Living Program due to the lack of available housing.”).}

In 1994, Congress further strengthened the RHYA’s focus on unaccompanied youth’s criminal victimization by creating its third and most recent program called the Street Outreach Program.\footnote{397. The Street Outreach Program was first created under the Violence Against Women Act of 1994, which amended the Runaway and Homeless Youth Act to include the program. Violence Against Women Act of 1994, Pub. L. No. 103–322, § 40155, 108 Stat. 1903, 1922.} This new program funds private nonprofit organizations to conduct street outreach and provide services to prevent and address unaccompanied youth’s sexual exploitation and abuse.\footnote{398. Family & Youth Servs. Bureau, Street Outreach Program: Fact Sheet 1–2 (2018), https://www.acf.hhs.gov/sites/default/files/fysb/street_outreach_program_fact_sheet_jan_2018.pdf.} Examples of services include “[s]treet-based education,” “[t]rauma-informed treatment and counseling,” “[p]revention and education activities,” “[i]nformation and referrals,” “[c]risis intervention,” and “[f]ollow-up support.”\footnote{399. Id. at 2.} Initially, Congress authorized $7 million in federal funds to support the program, which has increased to over $15 million today.\footnote{400. Violence Against Women Act § 40155, 108 Stat. at 1922; Family & Youth Servs. Bureau, supra note 398, at 2.} Nonetheless, this third program narrowly focuses on preventing and responding to unaccompanied youth’s sexual victimization.\footnote{401. See Family & Youth Servs. Bureau, supra note 398 (listing services of the Street Outreach Program).} As a result, the program does little outside of the sexual victimization context to narrow the RHYA’s gap in addressing the long-term needs of unaccompanied youth to achieve self-reliance and self-actualization as adults.

In sum, public funding for programs and services that target unaccompanied youth are largely channeled through juvenile justice laws and concerned with preventing their criminal victimization. As a result, available programs and services are primarily geared toward addressing the immediate and short-term needs of unaccompanied youth so that they can get off the streets before becoming victims of crime.

B. Criticisms of Family-Centered Public Reordering in the Juvenile Justice System

Having sketched these two types of family-centered public reordering in the juvenile justice system—one which adopts a view of unaccompanied youth as delinquent offenders and the other as crime victims—this Subpart draws on the unaccompanied LGBTQ youth context to advance two critiques. First, I argue that this public reordering...
incorrectly places the blame on unaccompanied youth for their living situations when they do not fit into family systems (whether biological, foster, or adoptive). Second, I contend that the short-term outlooks of programs and services that target unaccompanied youth leave them vulnerable to entering a destructive cycle of homelessness and involvement in the juvenile and criminal justice systems.

Before lodging these criticisms, it is important to underscore the significant overlap with involvement in the juvenile justice and the child welfare systems. Studies conclude that running away from foster care is a significant risk factor for entry into both the juvenile and criminal justice systems. These trends apply to both non-LGBTQ and LGBTQ youth. In the LGBTQ context, however, “leaving home as a result of family rejection is the greatest predictor of future involvement with the juvenile justice system.” LGBTQ youth are also more likely than non-LGBTQ youth to enter the juvenile justice system if they ran away from home or from a child welfare placement. Critically, LGBTQ youth are overrepresented among “‘dually involved’ or ‘crossover’ youth” — terms that describe youth in the juvenile justice system who have had prior or current involvement in the child welfare system.

Problems with the family-centered public reordering in the juvenile justice system are especially apparent when considering the different challenges that unaccompanied youth may face while living on their own. One set of challenges involves the range of victimization (sexual, physical, and verbal) that many unaccompanied youth face while living on the streets or in other unstable arrangements. On one hand, the funding conditions in juvenile justice laws result in the bulk of available programs and services that target unaccompanied youth to focus on these victimization concerns. On the other hand, many homeless youth do not report when they are victims of crime to the police. Distrust of authorities and fear of arrest, criminalization, and police mistreatment may deter

405. Irvine & Canfield, supra note 33, at 244.
406. Edidin et al., supra note 22, at 360–64.
407. See supra Part II.A.2.
408. NELL BERNSTEIN & LISA K. FOSTER, CAL. RESEARCH BUREAU, VOICES FROM THE STREET: A SURVEY OF HOMELESS YOUTH BY THEIR PEERS 5 (2008), http://www.issuelab.org/resources/11579/11579.pdf (reporting the results of one study involving a survey of 208 currently and formerly homeless youth in California that found that “[d]espite the reality that homeless youth are frequently the victims of crime while on the streets, not a single respondent described turning to police for help or reporting being victimized”).
unaccompanied youth from telling others, including law enforcement, when they are victims of crime.\footnote{409. Cray et al., supra note 29, at 14 (“In one survey, half of the youth surveyed were afraid to access services because they were uncertain whether they would be turned over to the police, their parents, or to child and family services if they attempted to get help . . . .”); id. at 15 (“LGBT youth also experience more frequent, and sometimes more hostile encounters with police, potentially fueling distrust of authorities who are supposed to help them”); Nusrat Ventimiglia, LGBT Selective Victimization: Unprotected Youth on the Streets, 13 J.L. & Soc’y 439, 449–50 (2012) (discussing that LGBT homeless youth may not report being victims of crime for reasons that include “fear of prosecution, retaliation, and finally fear of outright victimization”).}{unaccompanied youth from telling others, including law enforcement, when they are victims of crime.\footnote{409. Cray et al., supra note 29, at 14 (“In one survey, half of the youth surveyed were afraid to access services because they were uncertain whether they would be turned over to the police, their parents, or to child and family services if they attempted to get help . . . .”); id. at 15 (“LGBT youth also experience more frequent, and sometimes more hostile encounters with police, potentially fueling distrust of authorities who are supposed to help them”); Nusrat Ventimiglia, LGBT Selective Victimization: Unprotected Youth on the Streets, 13 J.L. & Soc’y 439, 449–50 (2012) (discussing that LGBT homeless youth may not report being victims of crime for reasons that include “fear of prosecution, retaliation, and finally fear of outright victimization”).}{unaccompanied youth from telling others, including law enforcement, when they are victims of crime.\footnote{409. Cray et al., supra note 29, at 14 (“In one survey, half of the youth surveyed were afraid to access services because they were uncertain whether they would be turned over to the police, their parents, or to child and family services if they attempted to get help . . . .”); id. at 15 (“LGBT youth also experience more frequent, and sometimes more hostile encounters with police, potentially fueling distrust of authorities who are supposed to help them”); Nusrat Ventimiglia, LGBT Selective Victimization: Unprotected Youth on the Streets, 13 J.L. & Soc’y 439, 449–50 (2012) (discussing that LGBT homeless youth may not report being victims of crime for reasons that include “fear of prosecution, retaliation, and finally fear of outright victimization”).}{unaccompanied youth from telling others, including law enforcement, when they are victims of crime.\footnote{409. Cray et al., supra note 29, at 14 (“In one survey, half of the youth surveyed were afraid to access services because they were uncertain whether they would be turned over to the police, their parents, or to child and family services if they attempted to get help . . . .”); id. at 15 (“LGBT youth also experience more frequent, and sometimes more hostile encounters with police, potentially fueling distrust of authorities who are supposed to help them”); Nusrat Ventimiglia, LGBT Selective Victimization: Unprotected Youth on the Streets, 13 J.L. & Soc’y 439, 449–50 (2012) (discussing that LGBT homeless youth may not report being victims of crime for reasons that include “fear of prosecution, retaliation, and finally fear of outright victimization”).}}

Although all unaccompanied youth are at risk of victimization, research suggests that unaccompanied LGBTQ youth are at higher risk than are unaccompanied nonLGBTQ youth.\footnote{410. Shannan Wilber, Juvenile Det. Alts. Initiative, Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System 10 (2015).}{Although all unaccompanied youth are at risk of victimization, research suggests that unaccompanied LGBTQ youth are at higher risk than are unaccompanied nonLGBTQ youth.\footnote{410. Shannan Wilber, Juvenile Det. Alts. Initiative, Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System 10 (2015).}} The tense historical relationship between law enforcement and LGBTQ communities, as well as the negative treatment of LGBTQ identity under the criminal law,\footnote{411. See generally Jordan Blair Woods, LGBT Identity and Crime, 105 Calif. L. Rev. 667 (2017) (discussing the negative treatment of LGBTQ communities under the criminal law).}{The tense historical relationship between law enforcement and LGBTQ communities, as well as the negative treatment of LGBTQ identity under the criminal law,\footnote{411. See generally Jordan Blair Woods, LGBT Identity and Crime, 105 Calif. L. Rev. 667 (2017) (discussing the negative treatment of LGBTQ communities under the criminal law).}} adds another dimension to why unaccompanied LGBTQ youth may fear reporting when they are victims of crime to others, including law enforcement. Thus, for both LGBTQ and nonLGBTQ youth, juvenile justice responses that facilitate the criminalization of unaccompanied youth may undercut the effectiveness of other juvenile justice responses that are intended to address their victimization.

Another set of challenges involves legal restrictions that, while generally appropriate, make it difficult for unaccompanied youth to meet their basic human needs. For instance, minors cannot legally enter into valid contracts in most states, making it impossible for unaccompanied youth to sign residential leases to obtain shelter.\footnote{412. Nat’l Law Ctr. on Homelessness & Poverty, supra note 339, at 119 (listing legal restrictions on minors to enter into contracts).}{Another set of challenges involves legal restrictions that, while generally appropriate, make it difficult for unaccompanied youth to meet their basic human needs. For instance, minors cannot legally enter into valid contracts in most states, making it impossible for unaccompanied youth to sign residential leases to obtain shelter.\footnote{412. Nat’l Law Ctr. on Homelessness & Poverty, supra note 339, at 119 (listing legal restrictions on minors to enter into contracts).}} Child labor laws also preclude most unaccompanied youth from relying on the formal labor market to make ends meet.\footnote{413. See Armaline, supra note 80, at 1, 4.}{Child labor laws also preclude most unaccompanied youth from relying on the formal labor market to make ends meet.\footnote{413. See Armaline, supra note 80, at 1, 4.}} These problems are exacerbated by the fact that many unaccompanied youth struggle in school (or drop out or fail out),\footnote{414. Yumiko Aratani & Janice L. Cooper, The Effects of Runaway-Homeless Episodes on High School Dropout, 47 Youth & Soc’y 173, 192 (2015).}{These problems are exacerbated by the fact that many unaccompanied youth struggle in school (or drop out or fail out),\footnote{414. Yumiko Aratani & Janice L. Cooper, The Effects of Runaway-Homeless Episodes on High School Dropout, 47 Youth & Soc’y 173, 192 (2015).}} which further restricts their job prospects. In approximately one-third of the states, there is no explicit statutory process available for unaccompanied youth to become emancipated from their parents.\footnote{415. Nat’l Law Ctr. on Homelessness & Poverty, supra note 339, at 10.}{Another set of challenges involves legal restrictions that, while generally appropriate, make it difficult for unaccompanied youth to meet their basic human needs. For instance, minors cannot legally enter into valid contracts in most states, making it impossible for unaccompanied youth to sign residential leases to obtain shelter.\footnote{412. Nat’l Law Ctr. on Homelessness & Poverty, supra note 339, at 119 (listing legal restrictions on minors to enter into contracts).}} Financial and procedural barriers also make it difficult for unaccompanied youth from telling others, including law enforcement, when they are victims of crime.

409. Cray et al., supra note 29, at 14 (“In one survey, half of the youth surveyed were afraid to access services because they were uncertain whether they would be turned over to the police, their parents, or to child and family services if they attempted to get help . . . .”); id. at 15 (“LGBT youth also experience more frequent, and sometimes more hostile encounters with police, potentially fueling distrust of authorities who are supposed to help them”); Nusrat Ventimiglia, LGBT Selective Victimization: Unprotected Youth on the Streets, 13 J.L. & Soc’y 439, 449–50 (2012) (discussing that LGBT homeless youth may not report being victims of crime for reasons that include “fear of prosecution, retaliation, and finally fear of outright victimization”).


412. Nat’l Law Ctr. on Homelessness & Poverty, supra note 339, at 119 (listing legal restrictions on minors to enter into contracts).

413. See Armaline, supra note 80, at 1, 4.


youth to obtain emancipation in states where the process is at least conceivably available.\textsuperscript{416}

To reiterate, loopholes in the JJDPA facilitate the arrest and confinement of unaccompanied youth for various status offenses that relate to them separating from or disobeying their families (for example, running away, being “ungovernable,” and violating curfew).\textsuperscript{417} Beyond these status offenses, unaccompanied youth (both LGBTQ and nonLGBTQ) with few or no legal means to survive turn to survival sex, theft, and other forms of criminality to obtain money, food, and shelter.\textsuperscript{418} Many also use drugs and other illegal substances in order to cope with their harsh living conditions.\textsuperscript{419} Therefore, what begins as a status offense can quickly turn into a serious criminal offense.

As discussed previously, unaccompanied youth are potentially subject to a broad array of sanctions for status offenses and survival crimes. Beyond arrest and confinement, possible sanctions include suspending an unaccompanied youth’s driver’s license, imposing monetary fines, ordering youth to attend counseling or education programs, and placing youth in out-of-home placement facilities (for example, group homes).\textsuperscript{420} In restricting their mobility and means of travel, these sanctions can interfere with unaccompanied youth’s work and school. Moreover, when unaccompanied youth cannot afford to pay imposed fines, they are at risk for future detention or criminal records that further restrict their educational and employment opportunities.\textsuperscript{421}

In addition, unaccompanied youth are the invisible victims of an expanding set of legal measures that criminalize homelessness generally.\textsuperscript{422} An increasing number of municipalities have passed ordinances that prohibit activities that are necessary for homeless people to survive.\textsuperscript{423} These “quality of life” offenses include prohibitions on camping, sleeping, and begging in public; loitering; loafing; vagrancy; sitting or lying down in public; living in vehicles; food sharing; and storing personal belongings in public.\textsuperscript{424} It is almost impossible for unaccompanied youth who live on their own and have no place to go to avoid violating these ordinances.

\textsuperscript{416} Id. at 105.
\textsuperscript{417} See supra Part III.A.1.ii.
\textsuperscript{418} Hagan & McCarthy, supra note 22, at 89–90; Ferguson et al., supra note 231, at 101.
\textsuperscript{419} Hyde, supra note 42, at 181.
\textsuperscript{420} See generally Coal. for Juvenile Justice, supra note 341 (providing a national survey of status offenses and penalties attached to them).
\textsuperscript{421} Colgan, supra note 353, at 292; see also Quinn, supra note 353, at 1300–02.
\textsuperscript{422} See Nat’l Law Ctr. on Homelessness & Poverty, supra note 339, at 7; Alexandra Natapoff, Gideon’s Servants and the Criminalization of Poverty, 12 Ohio St. J. Crim. L. 445, 446 (2015).
\textsuperscript{423} Nat’l Law Ctr. on Homelessness & Poverty, supra note 339, at 7.
\textsuperscript{424} Id.
These criminalization measures facilitate unaccompanied youth’s interactions with law enforcement, which contribute to their sense of hypervigilance and perception of danger on the streets. Homeless LGBTQ youth (and in particular homeless LGBTQ youth of color) commonly experience illegitimate practices of police profiling, “indiscriminate stops and searches . . . and arrests for ‘quality of life’ offenses.”

These negative experiences of police profiling, however, are by no means specific to the LGBTQ context. Unaccompanied youth generally—and unaccompanied youth of color in particular—commonly experience negative interactions with the police, including police profiling.

These different criminalization measures are major sources of instability for unaccompanied youth. For instance, one study found that a majority of homeless youth participants had been ticketed for quality-of-life offenses, and that most of those youth did not pay the tickets because they could not afford to. Warrants issued and subsequent convictions for inability to pay then led to restrictions on driver’s licenses, employment, and the ability to secure housing—all obstacles that make it more difficult for unaccompanied youth to get off the streets or out of other unstable living arrangements.

After being funneled into the juvenile justice system, however, the challenges that unaccompanied LGBTQ youth specifically face may continue. Similar to professionals and staff in the child welfare system, many professionals and staff in the juvenile justice system lack the cultural competence to handle LGBTQ youth fairly and appropriately. Some professionals and staff do not have a basic understanding of sexual orientation or gender identity concepts. Others equate LGBTQ identities, same-sex sexual conduct, and gender nonconforming behavior with deviance or mental illness. Juvenile detention facilities might also lack

425. Bernstein & Foster, supra note 408, at 53.
426. Wilber, supra note 410, at 11; see also Dank et al., supra note 282, at 32; Majd et al., supra note 33, at 61.
429. Id. at 57.
430. Id.
431. Wilber, supra note 410, at 12.
433. Id.
434. Id.; Shannan Wilber et al., CWLA Best Practice Guidelines 30–31 (2006), http://www.f2f.ca.gov/res/2798_BP_LGBTQ.pdf (noting that practices in the child welfare and juvenile justice systems that pathologize, punish, or criminalize LGBT youth for appropriately exploring or expressing their sexual orientations and gender identities sends the message to those youth that they are “deviant, immoral, or
mental health and other services with professionals that are aware of the hardships that LGBTQ juvenile justice-involved youth commonly suffer—such as homelessness, family rejection, and school bullying.

While in secure detention, LGBTQ youth (whether unaccompanied or not) are at an increased risk for verbal, physical, and sexual abuse than are nonLGBTQ youth. For instance, recent data from the National Survey of Youth in Custody conducted by the U.S. Bureau of Justice Statistics reported that nonheterosexual youth were almost seven times more likely to suffer sexual assault by another youth than were heterosexual youth (10.3 percent versus 1.5 percent). Nonheterosexual youth also reported higher rates of sexual victimization by both youth and staff (14.3 percent versus 8.9 percent). Studies have also found that custodial staff often ignore, minimize, and even perpetuate these different forms of abuse and mistreatment.

How LGBTQ youth are classified and housed while in juvenile custody is an additional source of stigma and harm. Many juvenile detention facilities house transgender youth according to their birth sex, which discounts their gender identity and increases risks for victimization. In addition, LGBTQ youth (and transgender youth in particular) are more likely to be placed in solitary confinement for their alleged protection. Such isolation greatly increases risks for psychological harm, self-mutilation, and suicide—especially for adolescents who are still in the midst of psychological development.

(mentally ill”). It is important to note here that this conflation between sexual/gender identities and practices and concepts of deviance also occurs in adult correctional facilities. Gabriel Arkles, Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress, 87 N.Y.U. L. REV. 859, 911 (2012).

435. RUMMELL & POIRIER, supra note 432, at 3.
436. See generally HUMAN RIGHTS WATCH, supra note 90 (dedicating specific chapters and sections to various forms of bullying, harassment, and rejection/exclusion suffered by LGBT youth in U.S. schools).
437. MAJD ET AL., supra note 33, at 102; WILBER, supra note 410, at 11–12.
439. Id.
440. MAJD ET AL., supra note 33, at 86, 112; WILBER, supra note 410, at 12.
441. MAJD ET AL., supra note 33, at 106; RUMMELL & POIRIER, supra note 432, at 3; Dean Spade, Documenting Gender, 59 HASTINGS L.J. 731, 779 (2008).
442. MAJD ET AL., supra note 33, at 106; RUMMELL & POIRIER, supra note 432, at 3; Tamar R. Birckhead, Children in Isolation: The Solitary Confinement of Youth, 50 WAKE FOREST L. REV. 1, 20 (2015) (“Some facilities place lesbian, gay, bisexual, or transgender teenage inmates in protective solitary confinement as a matter of policy, rather than in response to their own requests.”).
444. Birckhead, supra note 442, at 10–16 (outlining the psychological, physical,
Many youth who are released from juvenile custody “do not have a stable home to return to,” putting them at risk for homelessness where they are at risk for arrest and criminalization again. To the extent that unaccompanied youth were attending school or had jobs before confinement, juvenile detention interrupts that schooling and employment. Youth who are released from juvenile detention and find themselves homeless or living on their own in other unstable arrangements have difficulties finding employment or community programs to help them reenter society. Thus, the destructive cycle of homelessness and involvement in the juvenile and criminal justice systems continues.

This destructive cycle reveals the limits of family-centered government responses to unaccompanied youth. As discussed in the analysis to follow, this cycle illustrates a need for a paradigm shift in how public systems—and in particular, the child welfare and the juvenile justice systems—respond to unaccompanied youth.

IV. IMPLICATIONS AND FUTURE DIRECTIONS

This Part discusses the broader implications of my critical analysis and preliminary insights for reform.

To recap, my analysis shows that family-centered responses to unaccompanied youth in the child welfare and juvenile justice systems rest on shifting and inconsistent views of unaccompanied youth as delinquent offenders and as crime victims. At first, consistent with structural theories, child welfare responses recognize unaccompanied youth as victims of negative family circumstances and attempt to improve their family environments—whether by fixing the relationship with their biological families or by providing substitute families through foster care or adoption. When those family-centered child welfare approaches appear to not be working, the government resorts to arrest and criminalization in order to pressure unaccompanied youth to stay within family systems (whether biological, foster, or adoptive), and punish them when they do not. In


this regard, the government abandons the victimization mindset to treat unaccompanied youth as delinquent offenders who threaten public order and security. Consistent with deficient-agency theories, these punitive measures ultimately place the blame on unaccompanied youth for their family separation and inadequate living situations.

These shifting constructions reflect how current child welfare and juvenile justice responses to unaccompanied youth rest on oversimplified narratives of unaccompanied youth both as victims and as offenders. These shifting constructions neglect how unaccompanied youth's multiple layers of victimization—and in particular their prior victimization within families—can undermine the effectiveness of family-centered responses to their situations. The stakes are high for late-adolescent youth who will soon emancipate (or “age out”) from the child welfare system upon reaching adulthood.

Nonetheless, in the absence of a robust nonfamily-centered approach, government responses continue to ignore the complexities of the victimization experiences of unaccompanied youth, and further stigmatize and harm them through child welfare exclusion and criminalization. Critically, these punitive measures embrace a negative conception of unaccompanied youth's agency and autonomy in order to preserve the centrality of family systems in law and policy responses to their situations. The previously evaluated experiences of unaccompanied LGBTQ youth reveal the acute problems of this approach.

Accordingly, there is a need for a paradigm shift in child welfare law and policy, and relatedly juvenile justice law and policy, that moves away from this negative conception of youth agency and autonomy toward a more positive view. Future theorization and research are necessary to work out the details of a child welfare regime that is organized around a more comprehensive positive agency model.448 In terms of overarching principles, however, this new vision of child welfare would be more pluralistic and broaden the orientation of the child welfare system beyond family-centered approaches. It would also reconstitute the agency and autonomy of unaccompanied youth in an empowering way. Put differently, the system would place less exclusive emphasis on family-centered permanency goals, and invest significantly more in programs that provide unaccompanied youth with support systems, skills, and resources outside of family systems to achieve self-reliance and self-actualization as adults. Unlike the current regime, the government would acknowledge that family-centered approaches do not work for many vulnerable youth, and

448. In future work, I intend on pursuing this inquiry. To be clear, however, I am not rooting positive conceptions of youth agency and autonomy in a rights-based approach. Clare Huntington has discussed the limitations of a rights-based framing of children’s interests and needs, and called attention to the ways in which this framing underserves both children and parents. See, e.g., Huntington, supra note 103.
soften its reliance on criminalization measures when those approaches cannot meet their needs.

Some other important questions to consider are when should youth have access to a nonfamily-centered program, and who should decide whether they should have access. My preliminary intuition is that youth should not be required to suffer the harms of multiple failed foster family or group home placements in order to enter such programs. Moreover, youth should have a say in whether they prefer either nonfamily-centered programs or family-centered approaches. The specific details of a youth’s situation might determine how much say a youth should have, and whether that say should be prioritized above any relevant countervailing rights of family members or interests of the state. At the same time, the experiences of unaccompanied LGBTQ youth illustrate that in some situations, the stakes for youth agency are too high to force them to go back to their own families or enter substitute families that may mistreat or exclude them for reasons that are so central to their core identity, such as sexual orientation or gender identity. In these situations, I would argue that positive agency principles should override any (or at the very least most) countervailing considerations, and allow youth to enter non-family-centered programs if they prefer.

There might already be support for this position in new mandates surrounding the treatment of LGBTQ youth in the Illinois child welfare system. In June 2017, Illinois adopted statewide agency policies that impose obligations on foster care providers, caseworkers, staff, and foster parents to provide “LGBTQ-affirming” services to LGBTQ youth and children. The policies impose a range of affirmative duties on these key actors, including: (1) requiring that all LGBTQ youth and children be placed in affirming safe housing and receive adequate medical and mental health services; (2) requiring all staff, providers, and foster parents to treat LGBTQ youth and children in an affirming manner and to proactively work to create respectful space for them; and (3) requiring LGBTQ competency training for all staff, providers, and foster parents, including the challenges that LGBTQ youth and children commonly face in the child welfare system. In addition, the Illinois policies acknowledge that the child welfare system has a major role in recognizing and supporting a LGBTQ youth or child’s self-determination in developing and expressing their sexual orientations and gender identities. Critically, the policies stress that LGBTQ youth and children’s perceptions of where they would feel safest should guide placement decisions.

450. Id. at app. A.
451. Id. at app. E.
452. Id. at app. H.
Another relevant question is how to best execute a paradigm shift in child welfare law and policy toward positive agency principles. One potential approach is to significantly increase investment in TLPs. As explained previously, TLPs house up to twenty youth and are designed to provide unaccompanied youth between the ages of sixteen and twenty-two long-term shelter and life skills outside of families to help them achieve self-reliance as adults. TLPs typically provide housing in supervised settings, but some programs offer unsupervised housing for youth residents who are closer to achieving self-sufficiency.

Although the RHYA authorizes funding for TLPs, these programs have faced, and continue to face, several obstacles. In recent years the federal TLP program has only been able to serve between 3,300 and 4,400 youth annually. Official statistics report that more youth are turned away at TLPs every year than are served. Funding is one major obstacle. Currently, the amount of annual federal funding allocated to the TLP amounts to less than one percent of the $7 billion that the federal government spends each year on family-focused child welfare programs (for example, foster care, adoption, and guardianship). In spite of the high demand for TLPs, the maximum available grant award under the RHYA covers only one-third of the average cost to operate a TLP.

The currently lopsided funding scheme leaves several states with only one federally funded TLP, which could be the only TLP in the entire state. The location of TLPs is also clustered in urban and suburban areas, making it difficult for unaccompanied youth in rural areas to access these programs. One recent cross-sectional study of federally funded TLPs found that 66.9 percent of programs were located in urban areas, 31.5 percent were in suburban areas, and only 1.6 percent were located...
in rural areas.461 As noted previously, most states do not have laws that specifically allocate funding for services or programs that serve homeless and runaway youth.462 Unlike the various financial incentives that child welfare laws set into place to support foster care and adoption, the RHYA lacks financial incentives for states to allocate funds for programs that target unaccompanied youth.

Moreover, many TLPs are restricted to youth who are 18 or older463 and thus exclude late-adolescent unaccompanied youth. These exclusions arise from state prohibitions against housing programs that place individuals under the age of 18 in the same structures as individuals over the age of 18.464 In many states, housing contracts entered into by minors are also legally unenforceable.465

Granted, more research is necessary to determine how many and to what extent unaccompanied youth would benefit from TLPs if they had access. Although there is a need for more empirical research on their outcomes and predictors of success, existing studies illustrate the promise of TLPs.466 For instance, Casey Holtschneider’s recent study analyzed the outcomes of 32 youth who previously resided at a TLP in Chicago at some point between the years of 2003 and 2013.467 Importantly, 97 percent of the youth participants identified as youth of color and 34 percent identified as lesbian, gay, or bisexual.468 The study found that the TLP had a significant and a positive overall impact on youth participants’ lives.469 When asked about the benefits of the TLP, one of the most commonly identified benefits was the bonds they formed with other staff and youth residents.470 Many of those relationships persisted years after the youth left the TLP, and several youth responded that they turned to one another for support when they faced challenges after leaving the TLP.471

463. Glassman et al., supra note 382, at 802 (“[F]or a number of [TLP] programs the actual age range is 18 to 21.”).
464. Id.
466. Glassman et al., supra note 382, at 802 (noting that the structure of TLPs has “the greatest chance for success” for dealing with youth who spend a significant amount of time on the streets because the programs are “geared toward[] independent, responsible living”).
467. Holt Schneid er, supra note 23, at 206. The study was conducted in 2014 to ensure that participants had exited the TLP for at least one year. Id.
468. Holt Schneid er, supra note 23, at 206. One male-identified participant also identified as transgender. Id.
469. Holt Schneid er, supra note 27, at 162.
470. Id. at 163–64.
471. Id. at 164.
As discussed previously, many unaccompanied youth are hesitant to seek help from emergency shelters or child welfare services because they fear that their autonomy and independence will be stripped away. Lending support to the promise of nonfamily-centered models, an overwhelming majority of the youth participants in Holtschneider’s study “discussed the role of the [TLP] in their journey of personal development.” For instance, youth described how the TLP strengthened their empathy by helping them understand the struggles of others in relation to their own circumstances. Youth also explained that the TLP influenced them to change their values and priorities in a productive way, including having less motivation to engage in criminal activity (such as theft and substance abuse) and more motivation to attend school and to make new friends who were positive influences. Moreover, youth participants described connections between the TLP and self-actualization. Many youth stressed that the TLP helped them move closer to the person that they wanted to, and knew they could, be.

Notably, many of these benefits were the result of unaccompanied youth being able to share their experiences with one another in a supportive and a collective living environment. Unaccompanied youth cannot build off of one another in the same way when they are placed into separate foster families, adoptive families, or juvenile detention facilities. Holtschneider’s study also found that many youth “described a sense of home and family while [living] in the TLP.” This is consistent with a prior 2013 study of a different TLP, which found that youth gained a sense of belonging and referred to other residents as “family.” Critically, however, many youth participants in that 2013 study also expressed that they were “not looking for new ‘parents.’”

Therefore, the limited research available on TLPs lends support to the idea that many unaccompanied youth welcome and need systems of support, but they are hesitant to seek programs or services modeled on the traditional parent-child relationship. Put another way, many of these youth seek networks and forms of support that look different from what is currently offered under family-centered child welfare models. This disjoint underscores a need for greater investment in alternative nonfamily-centered approaches that meet unaccompanied youth where they actually are as opposed to where society thinks they should be based on idealized notions of the “family.”

473. Holtschneider, supra note 27, at 165.
474. Id.
475. Id. at 165–66.
476. Id. at 166.
477. Id.
479. Id.
Despite these potential benefits, it is important to acknowledge that the limited available research on TLPs has also called attention to various challenges that youth face after leaving TLP. For instance, Holtschneider’s study found that one-third of the youth participants were not living in stable housing at the time of the study and that most of the other two-thirds living in stable housing had experienced an unstable living situation since leaving the TLP. Moreover, many youth participants reported financial stress after leaving the TLP, including struggling to find employment and earning low wages. In spite of these challenges, most youth participants still reported being “overwhelmingly grateful for the support they received in the TLP” and expressed wishes for other unaccompanied youth to benefit from the same experience that they had received. Many of the youth participants credited the TLP with saving their lives.

Therefore, there is much room for improving how TLPs operate. Child welfare researchers and social workers have brainstormed some potential ideas. One idea they have discussed is enhancing aftercare support for former TLP residents and reevaluating the role of TLP staff to be a guide both during and after residents are housed in TLPs. Moreover, researchers and social workers have stressed the importance of not losing sight of the fact that many challenges that TLP residents face after leaving the programs are connected to broader structural problems of poverty, discrimination, unemployment, and lack of affordable housing that no single TLP can solve on its own. Those structural problems require a more comprehensive set of law and policy interventions.

**Conclusion**

This Article has demonstrated that the experiences of unaccompanied youth—and unaccompanied LGBTQ youth in particular—show a need for a new vision of child welfare with a different set of underlying values and assumptions. Unlike the existing regime, a new public reordering must recognize that family systems (especially those based on the traditional model of the nuclear family) do not serve the needs of all youth who need or seek help from the state, and that vulnerable youth should not be punished when family-centered responses cannot address their situations. Many questions about how to best execute this

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480. Holtschneider, *supra* note 27, at 162. As explained *supra* note 467, the study was conducted in 2014 to ensure that participants had exited the TLP for at least one year. Holtschneider, *supra* note 23, at 206.
482. *Id.*
483. *Id.* at 165.
484. *Id.* at 162–63.
485. *Id.* at 168.
486. *Id.* at 167.
paradigm shift remain to be explored, and future research is necessary to provide the answers. This Article, however, made the important first step by revealing the problems of family-centered law and policy interventions as a wholesale approach to meet the needs of unaccompanied youth, particularly in late-adolescence. Moving away from this approach could be the difference between whether youth follow Jack’s path, and find a supportive living environment and finish college in spite of experiencing family rejection for being LGBTQ, or Tracey’s path, and live on the streets and engage in sex work to survive.

487. See Success Stories, supra note 1.
488. See Mallon, supra note 8, at 111.
Preserving the Possibility of a Future Biological Family: State-Mandated Insurance Coverage of Fertility Preservation for Youth Patients When Primary Treatment Causes Sterility

ALLISON SMITH*

Abstract
This Note urges state policymakers to address the needs of youth patients who face infertility due to the medical treatment they receive for their primary diagnosis. By mandating insurance coverage of and physician-provided information on fertility preservation for this population, legislators can help ameliorate a current dilemma for many young patients: sterility that results from treatment. This Note examines youth patients being treated for gender dysphoria as a case study.

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INTRODUCTION

Jenny always knew she was a girl, though her sex assigned at birth was male. She had been feeling distressed, being shuffled in and out of doctors’ offices with her parents many times over the years, and was unsure what normal felt like anymore. Luckily, her latest doctors had answers, and at age twelve, Jenny was finally diagnosed with gender dysphoria (GD). Additionally, the doctors confirmed there was treatment available for her condition: a gender transition with phased hormone therapy. After years of uncertainty and concern, Jenny and her family could finally breathe a sigh of relief.

Jenny began phase one of her treatment plan, which involved the use of puberty-suppressing hormones, and she immediately felt better. After four years of such treatment, Jenny’s doctors moved her onto phase two of her treatment plan: hormone replacement therapy (HRT). A seamless transition between the two phases of hormone therapy promised the best outcomes, and was presented to Jenny and her parents as the ideal approach. Phase two proceeded, again with no complications; Jenny was still living happily and healthily. Jenny continued her treatment over the next few years, attending college and marrying in the process. She and her spouse began trying to start a family, but after a year of unsuccessfully trying to conceive, Jenny learned from a new doctor that she was sterile. How? Jenny had been in doctors’ offices for most of her adoles-

1. Gender dysphoria is defined by the American Psychiatric Association as the distress, and resulting problems functioning, felt by individuals experiencing an incongruence between their experienced/expressed gender and their assigned gender. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 451–60 (5th ed. 2013) [hereinafter DSM-5]; see also Ranna Parekh, What is Gender Dysphoria?, Am. Psychiatric Ass’n (Feb. 2016), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/MTG4-V8D2].

ence: how did no one catch this? As it turns out, Jenny’s condition did not sterilize her. Her treatment did. No one told her of this all but certain side effect until now, once it was far too late to address the issue and preserve her ability to have children.

Jenny’s experience is, unfortunately, not unique. Certain treatments for GD, like treatment for other types of conditions, can carry a high likelihood of sterility and can occur specifically when administered as Jenny’s was: in seamlessly processioning phases. Jenny’s doctors followed standard procedure, but her ability to produce children could have been saved had she been informed in time and given access to fertility preservation options prior to moving to phase two of her hormone treatment.

This Note focuses on minor GD patients and the added difficulty they are likely to face in assessing the risk of sterility that can result as a side effect of their medical treatment. It proposes new measures to ensure these minors are given relevant and necessary medical information and options in a timely fashion during treatment, something that is currently left entirely to the judgment of individual doctors rather than being required for all patients as part of this otherwise standardized treatment process. In the midst of many life-altering decisions, transgender youth receiving hormone therapy are faced with yet another enormous task because of the risk of sterility: family planning while still being teenagers. In particular, HRT, the pinnacle of primary treatment for transgender youth diagnosed with GD, carries a high risk of sterility. However, medical providers do not always inform young patients of this possible side effect, and the resulting sterility or infertility is not likely to be reversible once treatment proceeds. And even if informed, youth patients may find it difficult to utilize fertility preservation services without appropriate insurance coverage due to exceedingly high costs. Most insurers do not cover fertility preservation, even in instances where sterility is a side effect of GD treatment.

This Note will use the terms “sterility” and “infertility” interchangeably to express the barriers that transgender youth face in reproduction and achieving pregnancy.


5. Id.

6. See Endocrine Soc’y, supra note 3.

7. See Endocrine Soc’y, supra note 3, at 3878.


9. See Lisa Campo-Engelstein, For the Sake of Consistency and Fairness: Why Insurance Companies Should Cover Fertility Preservation Treatment for Iatrogenic
During preadolescence and adolescence, most individuals are focused on doing well in school and being accepted by their peers. However, patients with GD have the additional concern of focusing on their treatment options and addressing their diagnoses. Families, friends, classmates, and others are not always accepting of transgender youth, which can make academic and other achievements more difficult than they otherwise would be for children their age without GD. Additionally, according to the National Center for Transgender Equality, one in five transgender individuals experience homelessness at some point. “Family rejection and discrimination and violence have contributed to a large number of transgender and other LGBQ-identified youth who are homeless in the United States—an estimated 20–40% of the more than 1.6 million homeless youth.” A lack of familial support and homelessness that can result lessen the financial and emotional resources available to many transgender youth. Without these resources, these teens may find it impractical to attempt fertility preservation, assuming they are lucky enough to be informed of the need and possibility of such treatment in the first place.

Though some transgender youth may hesitate to proceed with HRT if and when they learn of the high likelihood of sterility they face, many are unlikely to be deterred. Instead, it is reasonable to expect that many transgender youth will likely forego the choice of one day forming a biological family as a necessary sacrifice of receiving life-affirming medical care through GD treatment. This unfortunate dilemma is a reality for thousands of youths, but could be mitigated if options to preserve fertility are both explained to them by their doctors and also covered by their insurance.

Three states are already addressing this issue. Connecticut, Rhode Island, and Maryland have enacted legislation that specifically

11. Id.
13. See Almendrala, supra note 8 (“trans people are more likely to be low-income and lacking health insurance coverage compared to the average American”).
requires insurers to cover fertility preservation for patients whose medically necessary treatment causes sterility or infertility. These pioneering states’ laws will serve as a blueprint for this Note’s argument in favor of state-mandated insurance coverage and fully informed patients. Specifically, this Note argues that state law should require that: (1) health insurers provide coverage for fertility preservation for minor patients whose treatment causes infertility or sterility; and (2) medical professionals inform minor patients of the sterility and infertility risks inherent in GD treatment, along with information on fertility preservation options. Such laws should be applied to patients of all ages facing a variety of conditions, but this Note focuses specifically on minors because sterility risks present a unique challenge for that population. Further, this Note focuses on transgender youth, who are particularly affected by this dilemma and who, like all individuals, hold a fundamental right to procreate.

I. TREATMENT FOR GENDER DYSPHORIA

A. A Standardized Medical Treatment Process

Transgender men are “individuals who were assigned female at birth but identify as men,” while transgender women are “individuals who were assigned male at birth but identify as women.” Transgender individuals are often diagnosed with GD. The Diagnostic and Statistical Manual of Mental Disorders (DSM-5) defines GD as “the distress that may accompany the incongruence between one’s experienced gender and one’s assigned gender.” The DSM-5 requires that this distress last at least six months in children, adolescents, and adults alike, and that various criteria be present for a formal GD diagnosis.

18. See DSM-5, supra note 1 (noting that transgender individuals “transiently or persistently identify with a gender different from their natal gender . . . . Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available.”). While there is fervent debate around the diagnosis and treatment of transgender individuals, this Note assumes the legitimacy of both and deals specifically with the issue of insurance coverage for fertility preservation, an established side effect of GD treatment. This is consistent with the positions on GD taken by a number of medical professionals, including the American Medical Association, and various courts. See infra notes 50–52 and accompanying text.
19. Id.
20. For adolescents and adults, the “marked incongruence between [their] experienced/expressed gender and assigned gender” must manifest by at least two of the following:
   (1) a marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics;
   (2) a strong desire to be rid of existing primary and/or secondary sex characteristics;
Upon diagnosing an individual with GD, physicians are advised to refer to the Standards of Care created by the World Professional Association for Transgender Health (WPATH), as well as the clinical practice guidelines promulgated by the Endocrine Society, to develop an effective individualized treatment plan for their patient. Said plan generally involves some combination of “triadic therapy” methods, including a social transition, various types of hormone therapy, and/or gender-affirming surgery.

A “social transition” is generally the first step recommended for GD patients, particularly for youth, as it is an easily reversible form of intervention for their dysphoria. A social transition allows individuals to live “partially or completely in the[ir] preferred gender role by adapting hairstyle, clothing, pronouns, and possibly assuming a new name. Social transition also may include wearing make-up or clothing modification to hide the effects of puberty . . . and using devices that permit urination while standing (for affirmed males).” Of course, a social transition may not sufficiently relieve the distressing effects of GD on an individual, and in some cases can lead them to further assert a need for a more permanent form of treatment.

(3) a strong desire for the primary and/or secondary sex characteristics of another gender;
(4) a strong desire to be of another gender;
(5) a strong desire to be treated as another gender; and
(6) a strong conviction that one has feelings and reactions typical of that other gender.

Id.
Prior to initiating gender-affirming surgery, seen as the most permanent form of intervention, GD patients are advised to undergo hormone therapy. Two types of hormone therapy are generally utilized: the first seeks to suppress pubertal development with relation to the patient’s assigned gender, while the second works to affirm the patient by facilitating the development of primary and secondary sex characteristics traditionally associated with their expressed gender. While hormone therapy for youth patients with GD has become fairly standardized, the specifics of treatment—namely, whether one will begin with pubertal suppression or will skip straight to gender affirmation via HRT—change based on the patient’s pubertal development, gender identity, and life circumstances.

Pubertal development is measured by “Tanner staging,” a classification system that tracks the “development and sequence of secondary sex characteristics of children during puberty.”\(^\text{28}\) Tanner stages from 1 (no development) through 5 (full development commonly associated with adulthood) exist to measure the development of (1) public hair in all children, (2) breast development for assigned females, and (3) external genitalia development for assigned males.\(^\text{29}\) Reaching Tanner stage 5 means that an individual has developed certain irreversible sex characteristics, including “breasts, female body habitus, and in some cases, relative short stature[]” for assigned females and “a prominent Adam’s apple; low voice; male bone configuration, such as a large jaw, big feet and hands, and tall stature; and male hair pattern on the face and extremities[]” for assigned males.\(^\text{30}\) For transgender individuals, the development of these characteristics can mean a lifetime of continued dysphoria that even continued hormone therapy and gender-affirming surgery may be unable to address. As such, for many youth, beginning GD treatment before or during the onset of puberty via puberty-suppressing hormone therapy is an essential step of the transition process.

For those who do begin their therapy with puberty-suppressing hormones, it is important to note that such treatment provides only a temporary solution for GD by design. The Endocrine Society currently recommends that long-acting analogues of gonadotropin-releasing hormone (GnRH) agonists\(^\text{31}\) be utilized to suppress the naturally occurring


\(^{29}\) See id.

\(^{30}\) Endocrine Soc’y, supra note 3, at 3881.

\(^{31}\) Agonists are chemical substances capable of combining with a specific receptor on a cell and initiating the same reaction or activity typically produced by the binding endogenous substance. Agonist, Merriam-Webster, https://www.merriam-webster.com/dictionary/agonist [https://perma.cc/QFS4-B6NZ].
pubertal hormones of GD patients. Such analogues are a “class of drugs, which, when chronically administered, result in marked reductions in blood levels of testosterone and estrogen.” These puberty blockers allow patients and their families to initiate and maintain gender-affirming care without the development of distressing secondary sex characteristics, allowing additional time to evaluate the gravity of and appropriate time for proceeding with more permanent treatment. Additionally, the use of GnRH analogues is seen as an ideal intervention for GD youth because of the treatment’s reversibility; upon ceasing their use, “spontaneous pubertal development [consistent with the patient’s assigned gender] has been shown to resume.” However, GnRH analogues are not without their drawbacks. Specifically, this form of treatment not only blocks the development of distressing sex characteristics, like facial hair and breasts, but also maturation of the brain and bone growth. This means that, inherently, patients can only rely on puberty-suppressing hormone therapy as a temporary solution for their GD.

The more permanent form of hormone therapy is known as HRT. Traditionally, physicians were advised to begin this treatment only after patients reached their respective Tanner stage 2 (i.e., upon having begun some form of pubertal development) and after reaching 16 years of age, when most are considered to have the capacity for informed consent. However, the Endocrine Society has since modified its guidelines, citing “compelling reasons[]” to allow the use of gender-affirming hormones before an individual reaches this point. Therefore, it is important to consider the needs of children younger than age 16 when developing policy related to HRT and GD treatment generally.

HRT differs for transgender boys and girls. Exogenous testosterone is given to transgender boys to induce the development of male physical sex characteristics, and to “suppress feminizing characteristics.” Notably, “the hormone regimen for transgender females is more

32. See Endocrine Soc’y, supra note 3, at 3881.
34. See WPATH, supra note 21, at 12.
35. Endocrine Soc’y, supra note 3, at 3881–82.
36. See id. Other possible side effects include arterial hypertension, hot flashes, fatigue, and mood alterations, with “no consensus on treatment of these side effects in this context.” Id. at 3882.
37. See Endocrine Soc’y, supra note 3, at 3886.
38. See id. at 3869–70.
39. See id. at 3883. Similarly, the Endocrine Society now also allows the use of GnRH analogs to suppress puberty in GD-diagnosed children before they reach Tanner stage 2 and begin their pubertal development, but beginning such treatment at Tanner stage 2 is still seen as the “optimal time” to start pubertal suppression. See id. at 3881.
40. Unger, supra note 17.
complex than the transgender male regimen[].”

For transgender girls, “exogenous estrogen is used to help feminize patients, and anti-androgens [and occasionally, GnRH agonists] are used as adjuncts to help suppress masculinizing features.”

HRT ultimately aims to “make [GD patients] more comfortable” with themselves, decreasing the mental distress that they face by allowing them to bring their bodies more in line with their expressed gender.

For example, HRT for transgender boys generally leads to “increased muscle mass and decreased fat mass, increased facial hair and acne, male pattern baldness . . . increased sexual desire . . . deepening of the voice . . . and a significant increase in body hair[].” Similarly, HRT for transgender girls can lead to “decreased sexual desire, decreased spontaneous erections, decreased facial and body hair (usually mild), decreased oiliness of skin, increased breast tissue growth, and redistribution of fat mass[].”

Physicians therefore consider the administration of HRT medically necessary for many transgender GD patients because of this significant impact.

Medical necessity is “a technical term used by the insurance industry describing treatment that a physician considers to be vital for a particular patient.”

Insurance policies generally cover treatments considered “medically necessary.”

The medical community has long recognized the effectiveness of the aforementioned GD treatment protocol; the

41. Endocrine Soc’y, supra note 3, at 3887.
42. Id.
43. Unger, supra note 17.
45. Endocrine Soc’y, supra note 3, at 3887.
46. Id. at 3888.
47. See WPATH, supra note 21, at 8; see, e.g., Corporate Medical Policy—Gender Confirmation Surgery and Hormone Therapy, BLUECROSS BLUESHIELD OF N.C. 4, 6, https://www.bluecrossnc.com/sites/default/files/document/attachment/services/public/pdfs/medicalpolicy/gender_confirmation_surgery_and_hormone_therapy.pdf (last updated June 2019) (outlining the criteria that need to be met for hormone treatment for GD patients to be covered as medically necessary under one specific insurer’s policy); Know Your Rights: Medicare, NAT’L CTR. FOR TRANSGENDER EQUALITY, https://transequality.org/know-your-rights/medicare [https://perma.cc/SET2-DDQW] (noting that Medicare covers medically necessary hormone therapy and gender-affirming surgery for GD patients).
48. LAMBDA LEGAL, supra note 24; see also BARRY D. ALEXANDER ET AL., FUNDAMENTALS OF HEALTH LAW 1, 25 (5th ed. 2011) (defining medical necessity as a “[t]erm used by insurers to describe medical treatment that is appropriate and rendered in accordance with generally accepted standards of medical practice.”).
50. These treatment protocols are outlined in the Standards of Care published by WPATH. See WPATH, supra note 21; see also LAMBDA LEGAL, supra note 24.
American Medical Association’s 2008 resolution recognized that “an established body of medical research demonstrates the effectiveness and medical necessity” of this triadic therapy method of care for GD.51 Beyond the medical community’s consensus, numerous courts have ruled that GD treatments are medically necessary, and have recognized GD as a legitimate medical condition constituting a “serious medical need.”52

As a result, insurers have little argument against the coverage of treatment for GD, and generally, they do cover GD primary treatment. Major insurers such as Aetna, BlueCross BlueShield, and Tricare all provide coverage for hormone therapy.53 However, coverage for primary GD treatment addresses only part of the issue: coverage for fertility preservation would attend to a common side effect of treatment for GD.


52. Fields v. Smith, 653 F.3d 550, 555 (7th Cir. 2011) (noting that, at the district court level, it was held that GD constitutes a “serious medical need”); see, e.g., Flack v. Wis. Dep’t. of Health Servs., No. 18-cv-309-wmc, 2019 U.S. Dist. LEXIS 139388, at *44 (W.D. Wis. Aug. 16, 2019) (“the medical consensus is that gender-confirming treatment, including surgery, is accepted, safe, and effective in the treatment of gender dysphoria, meaning that the denial of Medicaid benefits for needed medical treatment completely fails to protect the public health.”); Boyden v. Conlin, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018) (finding that the state’s exclusion of GD-related care for its employees will lead “some portion of that population [to] suffer from profound and debilitating gender dysphoria without the necessary medical transition.”); Good v. Iowa Dep’t of Human Servs., No. CV/054956, slip op. at 28 (Iowa Dist. June 6, 2018), aff’d, 924 N.W.2d. 853 (Iowa 2019) (holding that “the medical consensus has shifted since . . . 1995 . . . the medical consensus now holds that sex reassignment surgery is sometimes medically necessary and addresses far more than just the psychological aspects of Gender Dysphoria.”).

B. The Fertility Implications of Gender Dysphoria Treatment

HRT carries high risks of infertility.\textsuperscript{54} For example, research has suggested that transgender women are at risk of testicular damage resulting from prolonged estrogen exposure, a component of HRT for these women.\textsuperscript{55} Likewise, their ability to restore sperm production is left uncertain.\textsuperscript{56} Similarly, in transgender men, the resulting fertility decline from HRT is rarely reversible.\textsuperscript{57} An additional complication arises when a GD patient seamlessly moves onto HRT after having been treated with GnRH analogues to suppress puberty: they may have never sufficiently developed any of the reproductive material associated with their assigned gender in the first place (depending on whether they began GnRH before or during Tanner stage 2), leaving them with nothing to reverse or preserve.\textsuperscript{58}

“Currently, no studies address whether fertility can be gained, either naturally or with exogenous gonadotropins, in transgender individuals who underwent pubertal suppression in adolescence, followed directly by gender-affirming hormone therapy.”\textsuperscript{59} This is of special concern to the youth patients at the center of this Note, given that many will have undergone such a course of treatment. And while “[f]ertility can be gained in those who undergo pubertal suppression and then discontinue GnRH agonists to allow endogenous puberty to progress [before commencing HRT] . . . there may be negative psychosocial implications of this process for some youth who may progress through puberty incongruent with their affirmed gender identity.”\textsuperscript{60}

Due to a high likelihood of infertility, professionals in the field recommend that transgender youth and their guardians be informed of and counseled about options for fertility preservation prior to the initiation of pubertal suppression and HRT.\textsuperscript{61} However, “[i]n current practice . . . there remain[s] . . . infrequent counseling about fertility preservation.”\textsuperscript{62} Some transgender patients and their physicians have determined that sterility is the “price to pay” for transition upon

\begin{footnotesize}
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\item \textsuperscript{54} See Endocrine Soc’y, supra note 3.
\item \textsuperscript{55} Paula Amato, Fertility Options for Transgender Persons, CTR. OF EXCELLENCE FOR TRANSGENDER HEALTH, http://transhealth.ucsf.edu/trans?page=guidelines-fertility [https://perma.cc/SPRO-LPKC].
\item \textsuperscript{56} See Nahata et al., supra note 4 (noting that “[f]ew studies specific to the transgender community exist to guide conversations about the long-term effects of gender-affirming hormones on testicular function and fertility.”).
\item \textsuperscript{57} Id. at 266.
\item \textsuperscript{58} Id. at 266–67; see also Olson-Kennedy & Forcier, supra note 26.
\item \textsuperscript{59} Nahata et al., supra note 4.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} See Endocrine Soc’y, supra note 3, at 3871; see also WPATH, supra note 21, at 42.
\item \textsuperscript{62} Emilie K. Johnson & Courtney Finlayson, Preservation of Fertility Potential for Gender and Sex Diverse Individuals, 1 Transgender Health 41, 43 (2016).
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discussing the matter.\textsuperscript{63} However, many do not have these discussions. A 2005 guide for GD treatment providers noted that “many transmen report little or no discussion by their providers” about the preservation of their reproductive potential.\textsuperscript{64} Well over a decade later, this has seemingly not changed.\textsuperscript{65} As fertility is impacted by GD treatment, providers should always inform patients that medically transitioning while retaining reproductive potential is possible, and that the risk of losing that potential is inherent in certain GD treatments.\textsuperscript{66}

II. FERTILITY PRESERVATION FOR TRANSGENDER YOUTH

A. The Consequences of Physician Silence on Youth GD Patients

For transgender youth seeking hormone treatment, it is extremely important that fertility effects are discussed early on, as an otherwise “seamless” transition between pubertal suppression and HRT, or generally, the introduction of HRT, could cause the patient to miss their window of opportunity for fertility preservation and leave them permanently infertile.\textsuperscript{67} With such a heavy permanent change looming and only narrow windows within which to act, reproductive decisions in this arena should not be left to chance and variance. Doing so diminishes or destroys GD patients’ option of biological parenthood and helping, in this way, with the creation of our next generation. Youth patients should be informed about and aided in preserving their fertility should they so choose, allowing them to save the decision of whether or not to have biological children for a time later in life when they may be in a better position to make such a judgment.

Moreover, for youth on puberty-suppressing hormones, there is an increased risk of missing the fertility preservation window due to a likely desire for a seamless transition into HRT, along with the aforementioned lack of information.\textsuperscript{68} A study from the TransYouth Project found that trans children as young as five years old respond to psychological

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\item \textsuperscript{64} Id.
\item \textsuperscript{65} For example, a 2017 study of 156 transgender and gender-nonconforming adolescents found that only 21 of them (13.5 percent) had discussed the effects of hormone therapy on their reproductive potential with their GD treatment provider. See Diane Chen et al., Attitudes Toward Fertility and Reproductive Health Among Transgender and Gender-Nonconforming Adolescents, 63 J. Adolescent Health 62, 65 (2018).
\item \textsuperscript{66} Such an approach would also be consistent with WPATH and Endocrine Society guidelines. See supra note 61 and accompanying text.
\item \textsuperscript{67} See Nahata et al., supra note 4.
\item \textsuperscript{68} Id.
\end{itemize}
gender-association tests in a way that “show[s] a strong implicit identification with their expressed gender . . . the data from transgender girls showed the same pattern as the data from cisgender girls and the data from transgender boys showed the same pattern as data from cisgender boys.”

Puberty’s initiation varies from person to person, but has been documented as occurring as early as age ten.

This means that transgender youth may live for years before their physicians deem them ready for medical intervention for their GD. And, many transgender youth will begin hormone treatment as early as medically allowed.

The Endocrine Society’s guidelines suggest starting puberty blockers for transgender children between ten and twelve years old, and starting HRT around sixteen years old, but as noted above, they now allow physicians to exercise their judgment in allowing transgender children to begin HRT even earlier. Evidence suggests that GD patients are in fact electing to take advantage of this option when it is presented, as “more and more children are starting hormones at 13 or 14 once their doctors, therapists[,] and families have agreed that they are mentally and emotionally prepared.” Of course, it is important to note that in addition to a desire to be free from the distressing effects of GD, there are health concerns such as decreased bone strength and affected neurological development with the extended use of puberty blockers in children that may be contributing to this trend of transgender children moving onto HRT at younger ages.

At such a young age, it may be difficult for patients to articulate or grasp whether they have or may one day have a stronger desire to have biological children that outweighs their desire to receive immediate hormone treatment for their GD. However, arguing that GD youth patients should wait until they are older to seek HRT is also medically problematic: GD puts psychological strain on the patient and makes normal daily activities uncomfortable and unnecessarily burdensome at a minimum.


71. See Endocrine Soc’y, supra note 3, at 3881–83; see also Priyanka Boghani, When Transgender Kids Transition, Medical Risks are Both Known and Unknown, PBS (June 30, 2015), https://www.pbs.org/wgbh(frontline/article/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown [https://perma.cc/87S6-JCXV].

72. Boghani, supra note 71.

73. For example, “[s]ome children may refuse to attend school because of teasing and harassment or pressure to dress in attire associated with their assigned sex . . . Gender dysphoria . . is associated with high levels of stigmatization, discrimination, and victimization, leading to negative self-concept, increased rates of mental disorder comorbidity, school dropout, and economic marginalization, including
If transgender youth are aware of the disconnect between their sex and affirmed gender as early as three or five years old, this unempathetic approach would ask that they wait until adulthood before receiving proper and necessary treatment. And, for some youth, they have found themselves unable to consider whether they wish to be parents until their transition is complete, meaning even waiting until adulthood to make that consideration would be useless for them. The option to reproduce should therefore be preserved whenever possible for these youth in conjunction with their GD treatment, sparing them what could be a difficult decision between medical care and having future biological children.

B. Fertility Preservation Options Available to Youth Patients

The effects of sterility do not have to be an inevitable reality for youth GD patients seeking hormone treatment, as fertility preservation options exist. In children who have begun puberty, fertility preservation options include sperm, egg, and embryo cryopreservation. While sperm cryopreservation most often involves collection via masturbation, doctors may extract the sperm via needle, electroejaculation, or other methods. Regardless, sperm preservation can be accomplished with only a day of the patient’s time and is a “safe, established, and cost-effective fertility preservation method.” Egg and embryo cryopreservation both involve a procedure to remove the gonadal tissue from the patient’s body. Doctors treat patients with synthetic hormones to stimulate egg

unemployment with attendant social and mental health risks, especially in individuals from resource-poor family backgrounds.” See DSM-5, supra note 1.

74. See, e.g., Diane Chen et al., Fertility Preservation for Transgender Adolescents, 61 J. ADOLESCENT HEALTH 120, 121 (2017) (noting that “our team has documented several interactions with youth who noted that after medical transition with hormones and exploration of romantic relationships when more comfortable in their bodies, they felt more emotionally capable of considering future parenting desires.”).

75. However, as previously noted, this may not be the case for youth patients who seamlessly transition from puberty-suppressing hormones to HRT before having advanced sufficiently in their assigned gender’s pubertal development, leaving them with nothing to preserve. See supra notes 58–59 and accompanying text.

76. See Endocrine Soc’y, supra note 3, at 3880; see also E. Charles Osterberg et al., Current Practices in Fertility Preservation in Male Cancer Patients, 6 UROLOGY ANNALS 13 (2014). Egg cryopreservation is likely preferable to embryo preservation for youth patients as embryo preservation would require locating a sperm donor. Just as the decision to reproduce generally may be uncertain for these adolescents, so too would be the identity of a potential sperm donor.

77. See Nahata et al., supra note 4. It is important to note that masturbation (and even other methods of sperm collection) may trigger dysphoric distress in patients, presenting another barrier in GD patients’ access to fertility preservation. See Nahata et al., supra note 4; see also Leena Nahata et al., Low Fertility Preservation Utilization Among Transgender Youth, 61 J.ADOLESCENT HEALTH 40, 41 (2017).

78. Id.

and embryo production; the entire process may delay primary treatment, such as for GD, by two or three weeks, and can trigger significant feelings of dysphoria in GD patients specifically. Each of the fertility preservation procedures available to youth GD patients can be utilized after the onset of puberty. As this stage in development varies from person to person, candid and continued communication between health care providers and patients is vital to ensure satisfactory, proper care.

Technology for fertility preservation is available for patients facing sterility from treatment, but the associated costs present a significant barrier. First, it is important to note that hormone therapy for GD—among other expenses related to treating GD—is expensive, though, as noted above, is generally covered by insurance if the person has coverage. Puberty blockers cost “approximately $1,200 per month for injections and can range from $4,500 to $18,000 for an implant.” The least expensive form of estrogen can cost anywhere from $4 to $30 a month, while testosterone costs range between $20 to $200 a vial. The prices for these hormones will vary by delivery method “with oral estrogen costing $20 monthly, injectable estrogen roughly $150 to $200 monthly, and accompanying spironolactone $10 to $20 monthly.” And “[f]or transgender men’s hormone therapies, testosterone injections typically cost $80 monthly (but may vary based on state supply regulations), testosterone patches more than $300 monthly, and testosterone gels between $300 to $350 monthly.” Further, hormone therapy is a lifelong treatment.

[https://perma.cc/6U4P-VEMA].
80. “Notably, while invasiveness of oocyte cryopreservation is an oft-cited barrier to [fertility preservation] among other patient populations, we would assert that it poses unique challenges among transgender men, who often experience significant body dysphoria related to their genitals and reproductive organs. [Fertility preservation] for transgender men requires 10–14 days of daily hormone injections to stimulate follicular development, monitoring via transvaginal ultrasounds, and oocyte retrieval using ultrasound-guided transvaginal aspiration of follicular fluid.” Chen et al., supra note 74; see also id.
81. See supra notes 58–59 and accompanying text.
82. See supra notes 28–29 and accompanying text.
83. Boghiani, supra note 71.
84. Id.
86. Id.
In addition, GD patients face the costs of fertility preservation, if they seek it. For example, harvesting eggs from ovaries costs a minimum of $500 a year. In addition to costs for the preservation of eggs, each time eggs are thawed, fertilized, and transferred to the uterus with IVF, it costs approximately $5,000, and many people assigned female at birth will have to undergo the process multiple times. Further, egg and embryo storage can cost between $500 to $1,000 per year depending on where the patient lives. For sperm preservation, the costs generally average below $1,000 for collection, testing, and freezing. The costs depend on the number of samples, and storage fees are on average an additional $150 to $300 per year. “Some sperm banks offer discounts for cancer patients or reduced rates for long-term storage[,]” meaning GD patients could potentially qualify for discounted rates, but this is not guaranteed. All patients should be informed that these costly assisted reproductive options are often not covered by insurance. With such a costly if not cost-prohibitive path being the only available option to many patients facing sterility-inducing treatments, a lack of insurance coverage may limit their ability to have biological children. Such high costs would likely create a barrier for anyone seeking fertility preservation, but minor patients experience a greater disadvantage given that, inherent in their age, they are likely to lack sufficient financial resources of their own.

Though insurance coverage for gender therapy is improving, the costs of addressing health concerns that stem from treating GD are often overlooked. As gender therapy and treatment for GD generally have been recognized as medically necessary, insurers should work to ensure that they are offering policies that appropriately match patient needs, including fertility preservation treatments. Indeed, as explained below, states should mandate that insurers cover fertility preservation for youth patients facing sterility as a result of GD treatment, and doctors should be required to inform patients of these fertility risks and their preservation options.

permanent—they are likely to go away if [patients] stop taking the medicines.”).  
89.  See id.
92.  See id.
93.  Id.
94.  Id.
95.  See supra note 55.
96.  See supra note 47 and accompanying text.
III. INSURANCE COVERAGE OF SIDE EFFECTS

With high costs, fertility preservation may prove unattainable for many youth patients without the aid of insurance coverage. Based on the medical community’s consensus over the need for GD treatment and its effects on fertility, insurers should be made to cover the costs of fertility preservation for youth GD patients. As previously stated, insurers currently rarely cover fertility preservation treatments, even when they are needed to fully combat a medical diagnosis directly jeopardizing a patient’s fertility. Though insured GD patients may receive HRT without shouldering great expense, insurers leave these patients to fend for themselves when addressing its resulting sterility.

When considered a side effect of necessary treatment, fertility preservation coverage clearly falls into current, recommended care models as a form of tertiary prevention. Tertiary prevention seeks to address secondary conditions via the “reduction of complications, prevention of further dysfunction, and the reduction of long-term sequelae.” Government agencies, such as the Centers for Disease Control and Prevention, recognize the importance of such care for secondary conditions. “Healthy People 2020,” a government overview of national health objectives created by the Office of Disease Prevention and Health Promotion at the U.S. Department of Health and Human Services, directly addresses secondary conditions and seeks to “provide a comprehensive set of recommendations for primary and secondary preventive services for all Americans—from infancy to old age.” As a valid form of tertiary prevention, fertility preservation for youth GD patients should be covered by insurers as a part of GD treatment consistent with these national health objectives.

In some instances, patients have claimed that insurers force them to wait for side effects to manifest before approving coverage. An example of such a policy has been noted with respect to high cholesterol patients.

97. See Campo-Engelstein, supra note 9; Amato, supra note 55.
Statins are highly effective at treating high cholesterol in many people, but approximately one in five users will experience no change in their cholesterol with painful side effects. For this fifth of the patient pool, doctors can prescribe another drug that has been proven to be effective, but despite its success in these patients, insurers often will not cover it unless side effects, such as a heart attack, occur. Though this alternative drug prevents heart attacks, insurers will only cover it once that terrible outcome and risk to their life actually occurs. The same is the case here. Denying preemptive coverage of fertility preservation in GD patients can deny them the opportunity to preserve fertility: for many patients, there is no turning back in terms of preserving reproductive material once HRT proceeds. Thus, the best way to address sterility is with proactive fertility preservation as an insured option.

In non-GD cases, courts have ruled in favor of patients seeking coverage for side effects. In Hertan v. Unum Life Insurance Company of America, where a patient claimed headaches following the surgical removal of her brain tumor prevented her from working, the court ruled that the claim administrators in that case must consider the side effects or the remaining disability resulting from the primary diagnosis in their coverage evaluations, as the initially insured condition has not been fully resolved. Because sterility stems directly from the medical care provided to GD patients (i.e., the primary treatment), it is a side effect. Based on the Hertan ruling, other courts should consider requiring that treatment for side effects be included in insurers’ coverage evaluations.

Because fertility preservation has not been deemed medically necessary, and it is not lifesaving care, it may be classified as elective care by insurers. However, such a classification is inappropriate because the need for fertility preservation inherently arises from the medically necessary treatment of GD. As an analogy, many consider breast reconstructive surgery to be an elective procedure, but when serving as treatment for a medical condition, it becomes medically necessary. Through its insurance


appeals system, the California Department of Managed Health Care held in 2015 that “breast reconstructive surgery can be medically necessary for transgender people” and that individualized care considerations are required for GD patients. This decision “serve[s] as a national model and makes clear that individualized assessment for patients is in line with evidence-based medicine practices.” Though fertility preservation may not always be medically necessary, it becomes so when sterility is understood as a likely side effect of GD treatment.

Insurers do cover side effects in some instances. By statute, veterans’ insurance covers illnesses and injuries that did not directly result from service, but are “proximately due to or the result of a service-connected disease or injury[.]” These types of claims are known as secondary service connection claims and include the side effects of medications needed to treat service-related conditions. This type of coverage follows the reasoning in Hertan. Insurance coverage of fertility preservation extending from the coverage of primary GD treatment as proposed by this Note would follow the rationale mandated by Congress and implemented by these veterans’ health providers. “Medically necessary” treatment parallels the standard of “service-related” treatment as the initial benchmark to coverage. The need for secondary service claims stemming from the service-related injuries or treatments emulates how fertility preservation stems as treatment of a side effect from the medically necessary GD treatment for transgender youth. The veteran health care system recognizes that the cause of an ailment extends beyond the moment of emergence, and thus, that such a timeline should not be the primary factor in insurance coverage decisions. If a medical treatment is necessary due to a condition that is covered, the secondary treatment of side effects should be covered alongside the primary treatment that caused it.

Not only does medicine aim to treat present conditions and illnesses, but it seeks to prevent the worsening of a patient’s condition or the creation of new harms to the patient. Where a treatment or illness puts a


108. 38 C.F.R. § 3.310(b) (2018); see also Secondary Service Connection for Side Effects of Medications, BERRY L. FIRM (Feb. 12, 2016), http://www.jsberrylaw.com/blog/2016/february/three-most-common-claims-left-on-the-side-second [https://perma.cc/2SWS-LCZR].

109. See BERRY L. FIRM, supra note 108.
patient at risk of further injury or harm, medicine treats them as a whole, rather than simply focusing on the first issue to present itself. Medical providers generally work toward this end, but coverage denials by insurers serve as a barrier. The science exists for transgender youth patients to preserve their fertility while being treated for GD and to no longer accept sterility as a determined outcome of their necessary healthcare. States should therefore require insurers to cover fertility preservation in support of this progress.

One response from the insurance industry may be concern over the cost of covering such care. Even supporters of this Note’s proposed mandate may share concerns that lumping GD into an insurance analysis could lead to its classification as a preexisting condition, increasing the premiums that GD patients would have to pay for insurance coverage. The Affordable Care Act nearly eliminated insurance exclusions related to preexisting conditions, but some exceptions for insurers do remain. If insurance coverage of fertility preservation for patients treated for GD is mandated, insurers may charge those diagnosed with GD higher premiums in an effort to offset costs. This is a valid concern, as the structure of the insurance industry is based on shared risks and insurers would have a strong argument for increasing premiums for a population that is more prone to claims. Despite this argument, however, the focus should remain on the fact that GD treatment and fertility preservation would be covered by insurers even if this were the case. The premium system allows patients to obtain care that they would otherwise not be able to afford, and implementing higher premiums here would still classify as a victory for GD patients who currently generally lack coverage for fertility preservation procedures at all, as the cost of a premium would more than likely be lower than the cost of paying for fertility preservation out-of-pocket. The choice between receiving medical treatment and preserving the possibility of future offspring is hardly a choice when the two may coexist, but denial of coverage for fertility preservation frustrates that reality for many patients. Insurers currently force an unnecessary dichotomy on GD patients where there is no need for such a limitation, but state intervention can ensure that this practice ceases and that GD youth have access to all forms of care needed to manage every aspect and side effect associated with their GD treatment.

110. Specifically, “grandfathered plans don’t have to cover pre-existing conditions[,]” requiring that those with such plans turn to a Marketplace plan should they experience denials of coverage based on preexisting conditions. Health Benefits & Coverage: Coverage for Pre-existing Conditions, HealthCare.gov, https://www.healthcare.gov/coverage/pre-existing-conditions [https://perma.cc/WB9H-BGA8].

111. See supra note 18 and accompanying text.
IV. State Legislation Addressing Fertility Preservation

States can address both of the problems described in this Note through legislation. Such legislation should require that doctors inform minors seeking GD treatment—HRT in particular—about its side effects that may affect fertility, and should also mandate that insurance companies provide coverage for fertility preservation in such cases. A two-pronged approach is necessary to ensure that youth patients both know about fertility preservation options and can actually utilize them.

Some states already require insurers to provide infertility coverage, but are unclear as to whether that includes fertility preservation specifically.\(^{112}\) Fifteen states, including “Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, Texas, and West Virginia, have passed laws requiring insurers to either cover or offer coverage for infertility diagnosis and treatment.”\(^{113}\) Thirteen of those states require actual coverage for infertility treatments, while two (California and Texas) only require that coverage be offered.\(^{114}\) Some states have parameters on the infertility coverage contemplated by their mandates.\(^{115}\) Louisiana and New York, for example, prohibit the denial of insurance coverage for a medical condition otherwise covered by the insurer solely because the condition results in infertility.\(^ {116}\) Most of the states with laws requiring insurance coverage for infertility include in vitro fertilization in their mandates, but California, Louisiana, and New York have laws that specifically exclude coverage for such a procedure.\(^{117}\)

Most of these laws speak to a need for medical intervention once infertility already exists, but a more proactive stance is necessary for GD patients. A small minority of states affirmatively require insurers to cover fertility preservation: Rhode Island, Connecticut, and Maryland.\(^{118}\) Their legislation—which I describe in the next Part—serves as a blueprint for the model advocated by this Note.

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113. Id.
114. Id.
115. Id.
116. Id.
117. Id.
V. Recommendations

States should mandate insurance coverage for, and informed decisions about, fertility preservation for youth patients undergoing treatment for GD. Such a mandate would ensure the protection of this young population’s rights and hold two powerful industries, medicine and insurance, accountable to their industries’ own standards.¹¹⁹

After scientific study and legislative reform, GD treatment has been recognized as medically necessary care and is widely covered by insurers.¹²⁰ A determination of medical necessity allows patients access to insurance coverage for their medical treatment.¹²¹ Infertility, as a side effect of GD, and fertility preservation, as a treatment for that side effect, should be covered by the insurance plans that cover GD primary treatment. States should recognize the causal relationship present between the two and require insurers to provide coverage for both aspects of GD care.

Recognizing the importance of procreation for many people, legislature, medical providers, and insurers should think proactively. As stated throughout this Note, insurance coverage alone is not the entire solution. States should also require that medical providers inform their GD patients of the risk of sterility from hormone therapy and that fertility preservation options are available.¹²²

A few East Coast states have recognized the need for legislation in this area, and their laws provide a roadmap for addressing the dilemma facing GD patients described in this Note. Though this Note cannot cover every concern and address every counterargument, it does aim to address potential debates over larger issues stemming from enactment of this proposal.

A. Pioneering Guidance From the East Coast

A few states have acted to address the need for mandated insurance coverage of fertility preservation in patients who suffer sterility from treatment. In 2017, Rhode Island became the first to pass a law explicitly requiring fertility preservation coverage prior to treatments


¹²¹ Id.

¹²² As previously noted, such an approach would also be consistent with WPATH and Endocrine Society guidelines. See supra note 61 and accompanying text.
toxic to the gonads that could “directly or indirectly cause infertility.”

In the same year, Connecticut expanded its infertility coverage mandate to include fertility preservation. That law provides coverage of “cryopreservation of eggs, sperm, or embryo for all patients facing a threat to fertility” and amends the state’s definition of infertility, extending it to include those for whom fertility services are medically necessary. Nine states introduced iatrogenic infertility insurance mandate bills by 2017. However, only Rhode Island’s and Connecticut’s passed. In May 2018, Maryland became the third state to pass fertility preservation legislation. Maryland law already mandated infertility coverage: its new legislation now requires insurers to provide coverage for “standard” fertility preservation procedures necessitated by the effects of “medically necessary” procedures to prevent “iatrogenic infertility.” All states should follow the example of these pioneers and protect patients’ abilities to have their own future biological families.

States legislating in this area may either “establish[] a new mandate defining fertility preservation as an extension of . . . treatment, or revis[e] a current infertility coverage mandate” to include fertility preservation. Rhode Island implemented the first approach, explicit legislation, while Connecticut and Maryland opted for the second: legislative expansion. Both approaches work to realize the goal of requiring insurers to cover fertility preservation, but explicit legislation may be preferable to address the nuances present in this area. For this reason, this Note’s blueprint for state legislation will primarily focus on Rhode Island’s legislation.

B. Recommended State Legislation

1. Insurance Coverage Mandate

To ensure patients receive complete coverage, state legislation should define fertility preservation as medically necessary for youth facing sterility as a side effect of medically necessary treatment. Rhode Island’s legislation “allows for explicit coverage of fertility preservation for iatrogenic infertility as part of medical treatment, without risking

123. Cardozo et al., supra note 118.
125. Martz Smith, supra note 14.
128. Id.
129. Care New Eng., supra note 15.
130. See supra note 112 and accompanying text.
interpretation as an elective infertility benefit.” By including the link between the primary treatment and the side effect (the risk to fertility), Rhode Island’s law highlights the need for extension of medically necessary status to fertility preservation. Most insurers require a determination of medical necessity before approving coverage for treatment or care. As a benchmark for insurance coverage, meeting the medically necessary standard is vital for fertility preservation mandates. States should adopt similar language to that in Rhode Island’s bill to ensure that compliance with this standard is evident.

Rhode Island’s bill also serves as an example of how to zealously and wholly protect patients facing iatrogenic infertility. The bill applies to those that could face infertility directly or indirectly from treatment. By wording the legislation this way, Rhode Island’s legislature has avoided inviting scientific debates about the likelihood or severity of patient infertility from specific treatments as an eligibility distinguisher between patients. Regardless of the diagnosis, this bill covers treatments that endanger fertility. Likewise, states drafting legislation should aim to broadly protect similarly situated patients facing this conundrum. Considering the urgent and narrow timelines involved in medical care, insurance battles causing delays in the process could inhibit fertility preservation while primary treatment takes precedence and moves forward.

Connecticut’s bill, by contrast, is stifled by its specificity. The bill covers three major types of fertility preservation: a limiting list of procedures. The major drawback to a list of covered procedures is that it moves us back into the scientific realm. Fertility preservation options evolve, and legislatures should draft laws that will survive modern innovation serving the same interest that the law currently covers. In an effort to avoid multiple amendments, legislators should build from the broad language of Rhode Island’s law, covering fertility preservation in general, to draft an expansive and thorough mandate that covers fertility preservation more generally.

Rhode Island has provided the framework for other states to bridge the gap between sterility-inducing treatment resulting in sterility and fertility preservation insurance coverage. The recognized need for such a framework boasts support from the medical community. Where infer-


132. See supra notes 35–36 and accompanying text.

133. Care New Eng., supra note 15.


135. See, e.g., About Us, ALLIANCE FOR FERTILITY PRESERVATION, https://www.allianceforfertilitypreservation.org/about-the-alliance [https://perma.cc/8LNP-XJ4R] (detailing the mission, which includes advocating “for expanded, equitable access to fertility preservation services[,]” of an alliance “made up of a team of professionals
tility coverage has not been mandated prior, states will need to enact legislation that specifically addresses this patient population and fertility preservation. Explicit iatrogenic fertility preservation mandates allow states the ability to tailor language to the needs of this population.

2. Informed Patients Mandate

In order to ensure patients are informed, states should require that physicians inform patients facing infertility or sterility from treatment of the specific risk and available options. Part of a physician’s duty of care includes informing patients of the benefits and risks of treatments, as well as alternatives, in order to ensure that patients are empowered to make informed decisions about their care.\textsuperscript{136} Infertility risks, as a possible blow to a person’s quality of life, must be shared with patients. Fertility preservation is an alternative to accepting infertility or sterility caused by a treatment, and as such, physicians should disclose that option to patients. The lack of information sharing has been traced from behaviors like biased assumptions, such as that those in the transgender community are not interested in having children,\textsuperscript{137} to the scarcity of information on best practices and the workability of fertility preservation in teens.\textsuperscript{138} Physicians are expected to make every effort to ensure that patients are not only told about risks, benefits, and alternatives to treatment, but that they understand them.\textsuperscript{139} These expectations are extinguished typically only during emergency situations where a patient is unconscious.\textsuperscript{140} This is an unlikely scenario for GD patients who undergo years of consultations and therapy sessions prior to initiating permanent treatment. The applicability of the informed consent requirement is based on a risk/benefit analysis.\textsuperscript{141} Physicians must consider if patients risk severe injury or trauma and whether alternatives exist that provide the same benefit who have chosen to join together to advance the field of fertility preservation. Our members are recognized leaders with expertise in all aspects of fertility preservation including, oncology, reproductive endocrinology, urology, psychology, oncology nursing, and reproductive law.

\textsuperscript{136} See supra note 119 and accompanying text.


\textsuperscript{138} See For Future Offspring, Docs Save Eggs From Teen Transitioning Female-to-Male, COOPER INSTITUTE FOR ADVANCED REPRODUCTIVE MED. (Feb. 27, 2019), https://www.healthbanks.com/PatientPortal/MyPractice.aspx?UAID=%7B832D2D7D-4DD7-11D4-94C8-0010830391AB%7D&TabID=%7BX%7D&ArticleID=743200 [https://perma.cc/M9ET-P4LV].


\textsuperscript{140} Id.

\textsuperscript{141} Id.
or outcome. States must ensure that the interests and reproductive choices of patients are protected. Mandating that physicians inform patients about iatrogenic infertility minimizes the risk of minor patients unknowingly becoming infertile or sterile from their GD treatment.

Informed consent laws treat minors differently than the average adult patient. Physicians are at times allowed to only inform the parents of the minor patient as to the associated risks of treatment, rather than informing the patients themselves, and consent is generally given by parents: not the minor patients. With regard to minor patients, the question arises of whether these patients are mature enough to decide what the best path of treatment is. Even when dealing with minor patients however, physicians are always expected to involve the patient in care decisions where possible, regardless of age. Additionally, in this specific patient pool, the patients tend to at least be preteens and would therefore be more than capable of understanding general concepts about their care. In the case of a more substantial permanent side effect like infertility, youth patients should be trusted to be involved in their care decisions and at the very least that they be informed. Legislators should ensure that protection by mandating information sharing for true informed consent.

C. How Long Should Insurers Be Required to Store Gonadal Tissue?

Mandates on insurance coverage for fertility preservation and required physician disclosures spark a series of further questions and considerations. Though this Note does not purport to answer every lingering question in this area, it offers guidance in considering one important issue: how long should gonadal tissue be stored after it is removed from a patient for preservation? Insurers surely cannot be asked to store the material in perpetuity. Perhaps setting an automatic safety period up to a certain, defined age best addresses the issue. Age twenty-six may be an appropriate age at which time insurers would be relieved of their obligation to store a patient’s gonadal tissue. Reaching twenty-six years allows a person time to complete most types of higher education programs, is a reasonable age at which a person may look to begin a family, and is the age at which minors currently are removed from their parents’ insurance.

142. Id.
144. See id. Minors are allowed to consent to their own treatment only in limited situations, including for mental health care and birth control, but not always for GD treatment. Id.
146. See Rae Ellen Bichell, Average Age of First-Time Moms Keeps
At twenty-six, or any other age chosen by a legislature, patients whose fertility preservation was covered by insurance would take over the costs of storage themselves if they wish to continue preserving their tissue. Of course, states may opt out of such a provision or write legislation that does not target minor patients, in which case this matter would involve further considerations. State-specific data related to family planning and other relevant information could help legislators determine when and if an insured storage cutoff is desirable.

**Conclusion**

Many transgender youth face sterility as a medical side effect of a necessary treatment for GD. Beyond GD, others face a similar dilemma, as well. Caroline Bailey experienced the trauma that childhood sterility caused by an illness can bring. Due to a bacterium, she became the youngest female to ever undergo a hysterectomy. She recalls vividly the moment she was told of her infertility:

> I was 11-years-old when I woke up in a haze from surgery. My doctor stood over me and said these words, ‘You can always make love, but you will never be able to have children.’ I barely had an idea what they were talking about. Being 11-years-old, I had not started my period and was just beginning to learn about where babies come from. I had no idea what a lifetime of barrenness would bring. I was just happy to be alive.

Later, Caroline’s view of her condition grew more complicated. She writes, “[d]o you know what it is like to be entering puberty and learn that you will never have children? I can tell you it is devastating and confusing.” She shares that infertility not only affected her self-esteem, but also impacted her romantic relationships. Caroline is incredibly thankful to be alive, but the loss from her surgery became a permanent scar and source of torment. Coverage of and information about fertil-

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147. Caroline Bailey, “I was 11-years-old when I woke up in a haze from surgery. My doctor said, ‘You can always make love, but you will never have children.’”, Love What Matters (Mar. 6, 2019, 8:01 PM), http://www.lovewhatmatters.com/i-was-11-years-old-when-i-woke-up-in-a-haze-from-surgery-my-doctor-stood-over-me-and-said-you-can-always-make-love-but-you-will-never-have-children [https://perma.cc/RAK3-K6AV].

148. Id.

149. Id.

150. Id.
ity preservation options for youth patients facing sterility would spare thousands of these youth from experiencing what Caroline and numerous others have faced already.

Many who suffer from infertility had no opportunity to prevent it. That is not the case with GD patients. With so many of these patients receiving treatment in their youth, state laws should protect their ability to one day choose to have biological children. GD treatment is medically necessary, but can carry with it the permanent side effect of infertility. The effects of infertility are preventable, but prevention methods are expensive. Patients also may not know of the infertility risks associated with their treatment until it is too late. State legislatures should therefore mandate that insurers cover fertility preservation in youth patients whose treatment causes infertility. Insurers cover medically necessary treatment and insurers cover GD treatment, so insurers should also be required by law to cover fertility preservation as a piece of the GD medical treatment process for overall GD medical care. States will not have to step blindly into this territory; three states have already enacted legislation that targets iatrogenic infertility and mandates insurance coverage for fertility preservation. Other states need only to build upon existing efforts as outlined in this Note.

Informed consent laws protect patients from unknowingly accepting risks and making treatment decisions while ill-informed. Accordingly, state laws should also include information-sharing mandates for physicians regarding GD and sterility to maximize patient protection.

Having children can be among one of the greatest joys of life. The centrality of the family in American culture and general human nature is undisputed. Not all people will choose to have children, but each person should have the ability to make that choice. Mandating that insurers cover fertility preservation for minors and that physicians disclose fertility risks is not only the smart thing to do, but also the right thing to do in preserving that right to choose. State legislators and insurers should not wait to be confronted with lawsuits and the consequences of inaction; rather, they should work to protect these patients now.