UNCOVERING THE HISTORY OF MARITAL STATUS NONDISCRIMINATION

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[Dear reader: As you will see, this project is in its infancy. I look forward to your thoughts and comments. Best, Courtney]

Introduction

Today, approximately half of all adults in the U.S. are unmarried. Not only is the number of unmarried adults continuing to grow, but also marital status is increasingly correlated with race and class. As Naomi Cahn and June Carbone explain, "Marriage, once universal, … has emerged as a marker of the new class lines remaking American society. Stable unions have become a hallmark of privilege."[1] But despite these demographic developments, marriage continues to serve as a prerequisite to hundreds of rights and responsibilities.[2] Or, to use the words of Serena Mayeri, "marital supremacy endures."[3]

Among LGBT rights supporters, there is an ongoing debate about the extent to which the marriage equality movement derailed earlier attempts to destabilize the privileged place the marriage continues to hold in our society.[4] Some scholars and activists argue that the marriage equality movement undermined, or even thwarted, previous work by LGBT activists, feminists, and others to obtain greater recognition and protection for a wider array of nonmarital family forms.[5] To bolster this narrative, scholars cite a range of developments during the second half of the twentieth century. These developments include but not limited to: the emergence of newly recognized rights regarding procreative freedom; court decisions invaliding laws that discriminated against nonmarital children and their parents; no-fault divorce laws that made it easier to exit marriage; and case law protecting the property rights of nonmarital partners upon the dissolution of their relationships.

Other scholars, including Doug NeJaime and Serena Mayeri, push back against this linear description and present a more complex view of the role and view of marriage in earlier reform efforts. While it is surely true that attitudes about nonmarital sex and cohabitation were changing during the second half of the twentieth century, these scholars contend that marriage continued to hold a central and privileged place in the narrative. As NeJaime argues, "[e]ven if advocates wished

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[1] JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19 (2014). *See also id.* at 20 ("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 also* Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, -- CALIF. L. REV. – (forthcoming) (manuscript on file with author).

[2] *See, e.g.,* CITATION. To be clear, however, it is sometimes financially beneficial for a couple to remain unmarried. *See, e.g.,* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1270, 1290 (2014); Courtney G. Joslin, *Family Support and Supporting Families*, 68 VANDERBILT L. REV. EN BANC 153, 170 (2015).

[3] Serena Mayeri, *Marital Supremacy and the Constitution of the Non-Marital Family*, -- CALIF. L. REV. – (forthcoming) (manuscript on file with author).

[4] Katherine Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2688 (2008) ("At present, the debate within the gay community has largely been framed as between those who favor marriage rights and those who regard the marriage equality movement as regressive, unenlightened, and far too traditional.").

[5] *Cf.* Franke, *supra* note __, at 2701 ("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.).

to destabilize marriage—and certainly some did—they were constrained by a legal, policy, and cultural framework that prioritized marriage[.]"[6]

To further flesh out the historical record, this Article provides a close look at a previously undocumented history of one piece of the puzzle—the movement to prohibit discrimination on the basis of marital status. During the 1970s and 1980s, approximately twenty-one states and the federal government enacted statutes prohibiting this form of discrimination in a variety of areas.[7] On first glance, these statutes seem to lend support to the claim that a core purpose of this earlier advocacy was to destabilize marriage. A closer look at the previously unexplored history of these statutes tells a more nuanced account both with regard to what these statutes actually do, and, critically, with regard to how advocates pressed for their enactment and how these laws were perceived by policymakers and by the public.

I. TREATMENT OF NONMARITAL COUPLES: A BRIEF REVIEW

Historically, marriage was the only legal form of a relationship between adults. The law criminalized not only sex outside of marriage, but also living together, or "cohabitation," outside of marriage.[8] 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."[9] Moral disapproval and negative stigma regarding nonmarital relationships were expressed through other laws as well, including laws that subjected nonmarital children to more harsh treatment as compared to marital children.[10] At common law, the penalties were particularly harsh; nonmarital children were considered *filius nullius*, literally the child of no one.[11] They had no right to inherit, or to be supported by either parent.[12] And while the legal treatment of children born outside of marriage was slightly less harsh in this country,[13] states continued to discriminate against nonmarital children throughout most of our history.[14]

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[6] Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

[7] *See, e.g.,* Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 15 (2000) ("Twenty-one states and the District of Columbia protect against marital status discrimination."); Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 808 (2015).

[8] *See, e.g.,* CYNTHIA BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 12 (2010) ("Although they were not illegal at common law, the early American colonies quickly passed statutes criminalizing adultery and fornication (sexual intercourse between unmarried persons." (footnote omitted)). *See also id.* at 13 ("Virtually every state had criminal sanctions against cohabitation." (footnote omitted)).

[9] CYNTHIA BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 13 (2010).

[10] *See, e.g.,* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346 (2011) ("No one would dispute that for most of U.S. history, 'illegitimate' children suffered significant legal and societal discrimination." (footnote omitted)).

[11] *See, e.g.,* Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 803 (2015).

[12] *Id.*

[13] *See, e.g.,* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 11-14 (1971) (noting that, contrary to the common law, many states established mechanisms to "legitimate" nonmarital children and that many states treated children born to an invalid marriage as legitimate).

[14] There were some exceptions to this statement. Arizona and North Dakota are frequently described as having been the first U.S. states to eliminate the distinctions between legitimate and "illegitimate" children. *See, e.g.,* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 297 (1971).

There is no question that the legal and social treatment of nonmarital families has improved greatly since that time. The Supreme Court has declared that women—married and unmarried—have a constitutionally protected to decide "whether to bear and beget a child."[15] This protected liberty interest includes the rights to access contraception[16] and abortion (within certain, ever increasing limits).[17] Fornication (when done in a private, noncommercial setting) and cohabitation are no longer subject to criminal sanctions.[18] Contracts between nonmarital partners are now enforceable in most states.[19] And in a few states, sufficiently committed nonmarital partners are entitled to automatic property and intestacy protections. In terms of the children born into these relationships, many (although certainly not all) of the legal disabilities imposed on nonmarital children have been removed or at least mitigated.[20]

But while nonmarital relationships are no longer criminal, and while the civil and social penalties imposed on their families are far less than they once were, it remains open to debate the extent to which these developments were a direct challenge to marriage's privileged place in our law and culture. In recent years, a few other scholars have sought to shed more light on this question. For example, Doug NeJaime explores the history of domestic partnership schemes. Contrary to the dominant narrative that domestic partnership "pushed against marriage," NeJaime concludes that these registries were premised on "marriage's centrality even before marriage became a formal part of the movement's agenda."[21] Serena Mayeri and Melissa Murray offer comprehensive examinations of the illegitimacy litigation of the 1960s and 1970s. Mayeri focuses on the litigation itself. Murray offers a more in-depth analysis of the Court's decisions in these cases. Both scholars conclude that the outcomes were less radical than they could have been and that they had a less radical impact than some people attribute to them.[22] This Article seeks to add to this conversation by exploring another piece of the puzzle—statutes prohibiting marital status discrimination.

II. MARITAL STATUS NONDISCRIMINATION STATUTES: AN OVERVIEW

And, indeed, the differential treatment of nonmarital children has not been entirely eliminated. See, e.g., Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011) (exploring the ways in which the law continues to discriminate against nonmarital children).

[15] 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.").

[16] *See, e.g., Eisenstadt*, 405 U.S. at 453.

[17] *See, e.g.,* Roe v. Wade, _____ (1973).

[18] *See, e.g.,* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down law that criminalized same-sex sodomy). *See also* Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) (relying on Lawrence and holding unconstitutional state fornication law).

[19] Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1383 (2001) ("[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)).

[20] *See, e.g.,* Maldonado, *supra* note __, at __.

[21] Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CALIF. L. REV. 87, 90, 91 (2014).

[22] 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 decisions 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 the marital norm.") (citing Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC POL'Y & L. 387, 393-399 (2012)).

Today, approximately twenty-one 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.[23] All of these statutes were passed in the 1970s and 1980s; no state has added statutory protections against marital status discrimination since the late 1980s.[24]

For many today, these existence of these decades-old statutes prohibiting marital status discrimination may appear to serve as strong evidence in support of the narrative that there was a concerted and at least partially successful campaign in the 1970s and 1980s to unseat marriage from its privileged position.[25] This might be so, for example, if one assumes (as I had when I started my research) that these statutes prohibit the government and private parties from treating marital families more favorably than nonmarital families. And this understanding is common. For example, Lynn Kohm recently wrote: "Generally, state prohibitions against marital status discrimination have played a major role in protecting the rights of unmarried couples."[26]

But, contrary to this description, most statutes prohibiting marital status have not been interpreted to protect the "rights of unmarried couples." Instead, most of the state statutes prohibiting marital status discrimination have been interpreted to prohibit only discrimination against individual people because of their status of being a single, married, divorced, separated, or widowed person.[27] Or, to state it another way, most courts have held the relevant statute does not prohibit discrimination or less favorable treatment of unmarried couples (as compared to married couples). There, of course, are a few exceptions, but they are the exception rather than the rule.[28] And, despite claims to the contrary, this is also generally understood to be true with regard to the federal statutes.[29]

This much has been documented in the past and has received some (although still limited) attention in the legal scholarship. But what has been largely unexplored is what the advocates, policymakers, and the public at the time thought these statutes were designed to address. Given that many today would view these statutes as a piece of the campaign to unseat or destabilize marriage, is that how these laws were seen at the time?

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[23] *See, e.g.,* Porter, *supra* note __, at 15.

[24] *See, e.g.,* Joslin, *supra* note __, at __.

[25] *See, e.g.,* Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. 489, 501 (1996) (listing statutes prohibiting marital status, along with a 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").

[26] Lynne Marie Kohm, *Does Marriage Make Good Business? Examining the Notion of Employer Endorsement of Marriage*, 25 WHITTIER L. REV. 563, 577 (2004) (footnote omitted); *see also* Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. 489, 501 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." (citation omitted)); John C. Beattie, Student Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1416 (1991) ("[B]y prohibiting marital status discrimination in employment, housing, public accommodations, and credit, state legislators intended to forbid certain businesses from differentiating among individuals on the basis of their choice to be married or unmarried.").

[27] *See, e.g.,* Joslin, *supra* note __, at __.

[28] *See, e.g.,* Joslin, *supra* note __, at __.

[29] *Fairing 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 *status of an applicant*; Congress did not mean to preclude creditors from considering the marital *relationship between co-applicants*." (emphasis in original)).

To be clear, regardless of the original intent of the enacting legislatures, today these statutes surely offer one contemporary legal means of addressing discrimination against nonmarital families, including nonmarital couples. In documenting this history I do not mean to suggest otherwise. As the Court itself has clearly explained, particularly in the realm of remedial legislation, "ultimately the provisions of our laws rather than the principal concerns of our legislatures"[30] is what governs current court interpretation. Accordingly, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[31] And, I strongly support the adoption and use of laws that prohibit discrimination against couples because they are unmarried.[32] That said, there is much we can learn by gaining a more accurate and deep understanding of the history and impetus behind these decade old laws.

Rather than attempt in one paper to uncover the history of statutes in twenty-one states and at the federal level, this Article focuses on marital status nondiscrimination provisions in two jurisdictions – the federal government and California. Looking at federal legislation gives a window in to the national conversation at the time. California is a fruitful jurisdiction for exploration because there was a lot of activity on this issue in the 1970s.

A. Federal Legislation

Although this is rarely if ever discussed in detail in articles discussing marital status nondiscrimination, in most jurisdictions, marital status discrimination was first prohibited in the area of credit.[33] This was also the case at the federal level. And, indeed, at the federal level, the protections never made it past this context.[34]

1. ECOA Advocacy

The fact that the protections were first enacted in the context of credit makes sense from a historical perspective. During this period, much of the focus of the mainstream women's rights movement concerned economic independence for women.[35] At the federal level, the Equal Pay Act,

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[30] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

[31] *Id.*

[32] Joslin, *supra* note __, at __.

[33] Articles discussing marital status discrimination typically focus on prohibitions in the area of housing and employment. CITATIONS.

[34] Federal law does not prohibit marital status discrimination in the areas of employment or housing. While the federal Fair Housing Act does prohibit discrimination on the basis of "familial status," this is generally understood to prohibit only discrimination based on the presence of at least one minor child. See, e.g., 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 see* Hann v. Hous. Auth. of Easton, 709 F. Supp. 605, 610 (E.D. Pa. 1989) ("I hold today that the practice of categorically excluding unmarried couples from eligibility for low-income housing programs violates USHA. The defendants cannot arbitrarily exclude all applicants who are not related by blood, marriage or adoption from low-income housing. They are required to make individual determinations concerning whether applicants constitute a family unit.").

[35] *See, e.g.,* Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 268-69 (2013) (noting that the six priority issues identified by the National Organization for Women 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" (footnote omitted)).

assuring that women received pay comparable to their male co-workers was passed in 1963. The next year, Congress passed the Civil Rights Act of 1964, which, among other things, prohibited employment discrimination on the basis of sex. The Act opened up job opportunities to women that previously had been closed to them. The Equal Rights Amendment was also being considered. At the state level, activists not only sought to enact state analogues to these federal statutes, but their also sought to reform marital property rules to better recognize women's contributions to the family and to better protect them financially during marriage and after divorce.[36] Other proposed but never enacted legislation sought to address concerns about unfairness in the areas of pensions and Social Security benefits.[37] For example, during this period, legislation—the so-called Housewives Pension Plan—was introduced that would permit "any married individual or head of household who is not otherwise covered by an employer's pension plan to establish a qualified pension plan for himself or herself in the same manner as if he were a self-employed individual."[38]

Statutes prohibiting discrimination in the area of credit fit into this model of advocacy. In order to be able to buy homes, to purchase the things they needed for themselves and their families, to be able to get loans to open small businesses, and generally to be seen as autonomous, equal beings, women needed to be treated equally in the area of credit. Or, as Margaret Gates, co-Director of the Center for Women's Policy Studies, put it: "The availability of credit to women [wa]s 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."[39]

Campaigns pushing for equal access to credit were not new. In the late 1960s, the National Welfare Rights Organization (NWRO) spearheaded a campaign around getting poor people, particularly poor urban blacks, access to credit.[40] "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."[41]

"The plight of women in credit markets became the focus of a social and political campaign in 1972."[42] These efforts ultimately culminated in the passage of the Equal Credit Opportunity Act (ECOA) in 1974. As originally enacted, the ECOA prohibited discrimination in credit on the bases of sex and marital status.[43] Like the vast majority of the state statutes, although the statute prohibits

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[36] *See, e.g.,* CITATION.

[37] Economic Problems of Women, Hearings Before the Joint Economic Committee, 93d Congress, First Session, Part 3 of Statements for the Record, p. 444 ("Not only are housewives discriminated against in the extension of credit, and in the general societal regard for the worth of their labors, but they suffer an added discrimination in their retirement years, because of certain inherent inequalities in the Social Security system.").

[38] Economic Problems of Women, Hearings Before the Joint Economic Committee, 93d Congress, First Session, Part 3 of Statements for the Record, p. 443.

[39] Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VANDERBILT L. REV. 409 (1974). See also Statement of Hon. Herbert S. Denenberg, Commission of Insurance, State of Pennsylvania, included in Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part I, at 153 ("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.").

[40] GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICAN: CREDIT AND WELFARE 168 (2014).

[41] GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICAN: CREDIT AND WELFARE 173 (2014).

[42] GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICAN: CREDIT AND WELFARE 179 (2014).

[43] CITATION. The statute was amended two years later to add additional bases of prohibited discrimination.

"marital status" discrimination, it is understood to prohibit discrimination against individual people because of their marital statuses, not discrimination against couples because they were unmarried.[44]

Again, this much is known and fairly well documented. But, again, what has been largely ignored are what advocates said these laws would do, what problems they were intended to address, and how the public understood these provisions at the time. That is, if the provision wasn't intended to prohibit discrimination against unmarried couples (which is of particular concern today), what was the statute intended to do? What problem did proponents seek to solve with this law? Interestingly, while there are many books documenting other statutes passed during this period, including the earlier passed Equal Pay Act, and the Civil Rights Act of 1964, there is almost no contemporary work documenting the history of this statutory provision.

As was true of many of the state law analogues prohibiting marital status discrimination in credit, the campaign to enact the federal ECOA was spurred in part by the receipt by *Ms. Magazine* of thousands of letters from women documenting the discrimination their faced when trying to access to credit.[45] As noted above, many today think of statutes prohibiting marital status as evidence of a concern for unmarried couples. But, interestingly enough, the primary focus of the complaints both to *Ms. Magazine*, and as presented to Congress, was the treatment of *married women*. "The largest share of complaints concerned the credit plight of married women, who faced a series of discriminatory and degrading lending practices."[46]

After attention was brought to the issue, the National Commission on Consumer Finance undertook to study the issue. Following the release of the Commission's report in December 1972,[47] Congress then held a series of hearings to further explore problems related to access to credit for women. "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."[48] Of the thirteen problems identified by the Senate Report, ten related specifically to

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[44] *See, e.g.,* Resolution Trust Corp. v. Townsond Assocs. L.P., 840 F. Supp. 1127, 1141 (E.D. Mich. 1993) (stating that the 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 v. Linch, 829 F. Supp. 163, 168 (E.D. Va. 1993) (stating that the ECOA was "implemented to prevent this discriminatory practice of forcing women to have their husbands guarantee any loan they wished to receive"); Anderson v. United Fin. Co., 666 F.2d 1274, 1277 (9th Cir. 1982) (stating 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").

[45] GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICAN: CREDIT AND WELFARE 179 (2014) (noting that the campaign for the ECOA was "stimulated initially by a wave of letters sent in response to an editorial in Ms. Magazine, in which the author described her experience applying for an American Express card").

[46] GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICAN: CREDIT AND WELFARE 180 (2014).

[47] 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.

Morrigene Holcomb, Equal Credit Legislation in the 93rd Congress, Analysis of the Major Bills, included in Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 446.

[48] Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655, 659-60 (1981).

the experiences of marriage, separated, or divorced women. None concerned the treatment of nonmarital couples.[49] Thus, to again use the words of Margaret Gates, co-Director of the Center for Women's Policy Studies: "It [wa]s the married, or formerly married, women who appears to be the prime victim of sex discrimination in credit."[50]

So what were these problems? 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 in their own names. The 1972 Commission Report included the following example, which it found to be common:

> 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. What'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 me ability to pay my own bills.[51]

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, at the time, advised customers that "BankAmericards are issued in the name of the husband," and that their "policy allows card [sic] in the husband's name only."[52] The subsequent report of the Congressional Research Service explained the problem this way: "One of the largest difficulties

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[49] 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.
(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.

Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655, 659-60 (1981).

[50] Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VANDERBILT L. REV. 409 (1974).

[51] Consumer Credit in the United States, Report of the National Commission on Consumer Finance 152 (1972). This Report is included in Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, House of Representatives, 93rd Congress, Second Session, Part 2, at 498.

[52] Consumer Credit in the United States, Report of the National Commission on Consumer Finance 153 (1972). This Report is included in Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, House of Representatives, 93rd Congress, Second Session, Part 2, at 499.

which [married] women seem to confront is their ability to obtain credit in the name of their choosing."[53] 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."[54]

The second major hurdle facing married women was the very common policy of discounting a wife's income. This 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. Thus, young working wives were more likely to have their incomes excluded or discounted.[55] "Besides the factors of age and children, the type of job the wife h[e]ld [wa]s considered in the loan decision."[56] A working wife's income was more likely to be considered 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, Inc., for example, found that of the 40 lenders surveyed, "only 27 count[ed] 100% of a woman's income if she is 'professional,' and 13 if she is 'nonprofessional.'"[57] The official loan policy of the Veterans' Administration 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."[58]

A third hurdle married working wives faced related to the second. Some banks took the position that they would only consider the income of a working young 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." "The 'baby letter' [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."[59] "In one case … a couple was required by the mortgage company to submit not only the standard physician's statement on birth control, but also affidavits signed by both the husband and wife in which they each agreed

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[53] Women and Credit: Synopsis of Protective Findings of Study on Availability 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 (Draft copy, 1974), Congressional Research Service, included in Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, House of Representatives, 93rd Congress, Second Session, Part 2, at 660-61.

[54] Women and Credit: Synopsis of Protective Findings of Study on Availability 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 (Draft copy, 1974), Congressional Research Service, included in Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking and Currency, House of Representatives, 93rd Congress, Second Session, Part 2, at 661.

[55] Statement of Frankie M. Freeman, Member of the U.S. Commission on Civil Rights, on the Economic Problems of Women, included in Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 549.

[56] Statement of Frankie M. Freeman, Member of the U.S. Commission on Civil Rights, on the Economic Problems of Women, included in Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 549.

[57] Report of the D.C. Commission on the Status of Women, included in Economic Problems of Women, Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 530.

[58] Report of the D.C. Commission on the Status of Women, included in Economic Problems of Women, Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 533. *See also* Margaret J. Gates, *Women and Credit*, 27 VANDERBILT L. REV. at 424 (noting that the 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").

[59] Report of the D.C. Commission on the Status of Women, included in Economic Problems of Women, Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 548.

to abortion and/or vasectomy should their method of birth control fail."[60] Ellen Sheer wrote a letter to NOW documenting particularly egregious example. When Ellen and her husband applied for a loan guarantee from the Veterans Administration, 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 gynaecologist [sic] – one stating that I was under his supervision in birth control. The other had to state that because of the condition of my ovaries, it would be difficult for me to get pregnant even without birth control; 2) My husband's notarized statement that if I should become pregnant, he would agree to have an abortion. And if for some reason I had to stop taking the pill, that he would have a vasectomy performed; 3) My notarized statement that if I should become pregnant, I would agree to have an abortion. And if for some reason I had to stop taking the pill, that I would agree to my husband's vasectomy.[61]

Another set of the identified challenges concerned formerly married women. First, because they were unable to maintain credit in their own names during the marriage (because all loans had to be held in their husband's names), they had little to no established credit history after they divorced.[62] As one expert explained, "After 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 was in his name."[63]

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 assumptions that these women were not likely to have long-term employment *because* they would soon marry, have children, and leave their 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 crease working outside the home."[64]

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 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 regarding to having to re-do the accounts of married couples to include the names of

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[60] Report of the D.C. Commission on the Status of Women, included in Economic Problems of Women, Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 548-49.

[61] TRUMBULL, *supra* note __, at 183 (quoting NOW, box 45, file 19, Letter from [name omitted for confidentiality] to Ami Scupi, NOW, Washington, DC).

[62] CITATION.

[63] Symposium of Women and the Law, "Credit: Are Women Treated Differently," cited in *The Discredit American Woman: Sex Discrimination in Consumer Credit*, 6 U.C. DAVIS L. REV. 61, 64 n.21 (1973).

[64] *Credit for Women in California*, 22 UCLA L. REV. 873, 880 (1974-1975):

both the wife and the husband. For example, after the ECOA was enacted into law, 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.[65]

Another concern voiced by banking officials related to concerns related to their ability to enforce a judgment against a wife, especially a nonworking wife,[66] and their right under existing state family and property laws to allow married women to maintain separate accounts. Banking officials pointed out that in some states at the time (including California),[67] state property laws provided that only the husband had management and control over marital property.[68]

Today, much of the concern regarding the growing marriage divide, and the continued differential treatment of married and unmarried couples related to the race and class impacts of these patterns. Unmarried couples continue to be denied access to hundreds of rights and benefits extended to married couples. And people of color, and people in lower-income brackets are disproportionately likely to be in his group of unmarried couples.

With regard to the ECOA, there was some focus at the time (in the early 1970s) on the race and class aspects of these discriminatory lending practices. But even this part of the conversation was focused primarily on the race and class effects of credit discrimination against *married* women. So, for example, a number of experts who testified before Congress noted that the practice of discounting wives' incomes had a disproportionately negative impact on black women. Thus, as William L. Taylor, Director for the Center for National Policy Review explained, the practice of discounting or excluding the wife's income "ha[d] a racial impact as well, because in minority families the income of the wife often represents a significant contribution to the family's income and standard of living."[69] Bureau of Labor data at the time showed that for women aged 25-34, "nonwhite wives ha[d] a 59.4% labor force participation rate, as contrasted with 38.0% for white wives."[70] Not only were nonwhite women 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.[71] This disparity was compounded by the practice of granting even less consideration to the incomes of "nonprofessional" wives. "Whereas 2/3 of the responding lenders said they would count 100% of a

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[65] *Ban on Creditor Sexism Opposed*, L.A. TIMES, May 28, 1975, A1.

[66] *See, e.g.,* Margaret J. Gates, *Women and Credit*, 27 VANDERBILT L. REV. at 429 (noting that under laws that gave only the husband management and control over marital property, a "creditor might refuse a woman credit because se could not expect to obtain a judgment against the community").

[67] California amended its law regarding management and control of marital property in 1975, in conjunction with additional amendments to its credit nondiscrimination provision. *See, e.g., The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 U.C. DAVIS L. REV. 61 (1973).

[68] *See, e.g.,* Margaret J. Gates, *Women and Credit*, 27 VANDERBILT L. REV. at 415 (discussing asserted concern).

[69] Prepared Statement of William L. Taylor, Director, Center for National Policy Review, School of Law, Catholic University, included in Economic Problems of Women, Hearings before the Joint Economic Committee, 93rd Congress, First Session, Part I, at 195.

[70] Prepared Statement of William L. Taylor, Director, Center for National Policy Review, School of Law, Catholic University, included in Economic Problems of Women, Hearings before the Joint Economic Committee, 93rd Congress, First Session, Part I, at 195.

[71] Statement of Frankie M. Freeman, Member of the U.S. Commission on Civil Rights, on the Economic Problems of Women, included in Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 550 ("It is racially discriminatory in effect because of its impact on the large number of minority families who rely on wives' incomes."). *See also* 38 Fed. Reg. 34653 (1973) (noting that "a larger proportion of minority group families rely on the wife's income to afford housing and other necessities").

wife's income if she were a professional, only 1/3 would fully count the income of a nonprofessional wife."[72] Minority women were more likely than white women to be in so-called "nonprofessional" positions.

A few speakers discussed the impact on female-headed households, but even these speakers were typically talking about homes in which only one adult – there 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." She went on to note that discrimination targeted against such families disproportionately affected minority women because "53% of minority women fall into that category."[73] Even this speaker, however, went on to focus on the types of discrimination faced by married women.

And, to be clear, even this discussion was in the distinct minority. Very few speakers focused on any form of families in which the adults were not and never had been married.

2. Why The Focus on Married Women?

There are a variety of reasons why the focus at the time was primarily on married and formerly married women, and why there was little public discussion about nonmarital couples. Certainly part of the reason that there was little public discussion about protection nonmarital couples was because, in many states at the time, those couples were in violation of criminal fornication and cohabitation laws. As Cynthia Bowman points out, as late as 1978, "many states still had statutes against both fornication and/or cohabitation."[74] Advocacy explicitly on behalf and for people engaging in criminal conduct likely would not have been as persuasive as advocacy on behalf of married women.

Moreover, because the conduct was still criminal in many places, there were many fewer nonmarital couples during this period. In 2012, there were estimated to be 15.3 million unmarried heterosexual individuals living in nonmarital, cohabiting relationships.[75] By contrast, in 1960, there were fewer than 500,000 unmarried heterosexual couples.[76] To be clear, however, while there were

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[72] Prepared Statement of William L. Taylor, Director, Center for National Policy Review, School of Law, Catholic University, included in Economic Problems of Women, Hearings before the Joint Economic Committee, 93rd Congress, First Session, Part I, at 196.

[73] Testimony of Arline Lotman, Executive Director, Pennsylvania Commission on the Status of Women, included in in Hearings Before the Joint Economic Committee, 93rd Congress, First Session, Part 3, at 484. *See also* testimony of Aileen Hernandez, former member, Equal Employment Opportunity Commission, included in Hearings before the Joint Economic Committee, 93rd Congress, First Session, Part 1, at 129 ("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 'indiscretion' while men, similarly indiscrete, gained stature in the eyes of their employers."); Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VANDERBILT L. REV. 409 (1974) ("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 __ n. __ (pointing out that "27 percent of women heading households are black.").

[74] CYNTHIA BOWMAN, UNMARRIED COUPLES, LAW, AND POLICY 15 (2010) (noting that at the time, fornication was a "crime in fifteen states and the District of Columbia and cohabitation was a crime in sixteen states").

[75] Sharon Jayson, *Living Together Not Just for the Young, New Data Show*, USA TODAY (Oct. 17, 2012), http://www.usatoday.com/story/news/nation/2012/10/17/older-couples- cohabitation/1630681/.

[76] BOWMAN, *supra* note __, at 97.

many fewer unmarried couples during this period, these couples were not invisible or unknown to policymakers. Indeed, the 1960s and 1970s was a time of relatively active policy change with regard to nonmarital families – both for good and for ill. In the courts, some (although not all) laws discriminating against nonmarital children and their parents were being struck down.[77] Going in the other direction, some states were passing laws and policies resulting in the termination of welfare benefits if a woman was caught with a "man in the house."[78]

And by the mid-1970s, there was organized opposition to the ERA. Among other attacks, ERA opponents asserted that feminists and the ERA were an attack on the traditional family.[79] "The proposed amendment, [Phyllis] Schlafly insisted, was 'anti-family' and would harm women by devaluing their important caregiver role."[80] For example, in an early piece condemning the ERA, Schlafly wrote that "Women's lib is a total assault on the role of the American woman as wife and mother, and on the family as the basic unit of society."[81] Many feminists responded simply by "denying these connections."[82]

Focusing on the challenges faced by *married women* with regard to credit access proved to be a persuasive one. The federal ECOA "sailed through the U.S. Senate in July with not a single dissenting vote."[83] The bill then passed in the House by a vote of 355 to 1.[84] Activists also had much success at the state level during this period. By the end of 1974, twenty-two "states and the District of Columbia ha[d] passed laws banning discrimination on the basis of sex or marital status in the areas of credit and housing."[85]

Thus, there certainly were strategic reasons why it wouldn't have made sense to focus advocacy in the 1970s on unmarried couples. That said, there is reason to believe that it was not simply a matter of strategic choices about which groups and which types of discrimination to foreground.

Many (although certainly not all) of the mainstream feminist advocates at the time primarily focused on reforms that would improve the economic independence of women, particularly married women.[86] Thus, their campaigns included seeking to value married women's contributions to the

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[77] *See, e.g.,* Weber; Glona; Levy. *See also* Mayeri, *supra* note __.

[78] *See, e.g.,* ELIZABETH PLECK, NOT JUST ROOMMATES 50-55 (2012) (discussing "bed check" raids and "man in the house" rules). Some of these provisions were also struck down by courts. *See, e.g.,* King v. Smith. Although determined states found ways around these decisions. *See, e.g.,* PLECK, *supra*, at 59-62 (discussing the California MARS ("Man Assumed to be a Responsible Spouse") rule).

[79] *See, e.g.,* NeJaime, *Before Marriage*, *supra* note __, at 98.

[80] NeJaime, *Before Marriage*, *supra* note __, at 98.

[81] *Phyllis Schlafly Report 5*, no. 7 (February 1972): 3, 4.

[82] NeJaime, *Before Marriage*, *supra* note __, at 98

[83] Lynn Lilliston, *Push for a Federal Equal Credit Law*, L.A. TIMES, Oct. 19, 1973. *See also id.* ("'The bill had tremendous support in the Senate and no one opposed it publically, Dr. Card said. 'So far it has been the only legislation in the whole Congress this year dealing solely with the problems of women.'").

[84] DAVIS, *supra* note __, at 150.

[85] Claudia Levy, *Women Still Treated Like Economic Minors*, L.A. TIMES, Dec. 29, 1974, E2.

[86] JANE J. MANSBRIDGE, WHY WE LOST THE ERA 103 (1986) ("The founders of NOW and the early proponents of the ERA were a good deal more staid than the Feminists, WITCH, or even Pat Mainardi, and they were seldom as hostile to the [marital] family"). While this piece focuses primarily on advocacy with regard to credit discrimination, a focus on married women is also evident in campaigns with regard to marital status discrimination in the context of employment. For example, a famous piece by Alice Ross, published in The Atlantic Magazine in 1970 explained that the primary reason why Title VII needed to be amended to include marital status was to address "[r]ules against the hiring of married

home through pension and Social Security reform, to ensure access to paid child care, and to reform marital property laws to better protect the rights of women during marriage and after divorce. This was illustrated by NOW's original 1966 purpose statement: "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."[87]

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 images of male supremacy, there would be no way for women to achieve equality in a marriage.[88] So, for example, some radial feminists took the position that marriage "must be destroyed."[89] The solution that one such group – The Feminists – advocated, however, was not to encourage individuals to enter into nonmarital, cohabiting relationships. Instead, they recommended "raising children communally." Other activists at the time urged women sought to protect the rights of women to raise children without men. And there certainly were some activists with a particular focus on protections for lesbian women.[90]

[More to come]

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women whose husbands work in the same school or department of a college or university." Such rules, she explained were "the greatest barriers to career opportunity and advancement among women teachers." Alice S. Rossi, *Job Discrimination and What Women Can Do About It*, THE ATLANTIC, March 1970. From a litigation perspective, one target was the airline rules that stewardess to be not only female and young, but also single. "[T]hey were fired the minute they married." DAVIS, *supra* note __, at 16.

Similarly, an op-ed urging the addition of marital status to California's housing discrimination law also focused on divorced and single people. Op-Ed, *Rent and the Single Person*, L.A. TIMES, March 20, 1975 ("Younger's, [the California Attorney General] office receives many complaints every year from divorced women with children who are unable to rent apartments in buildings where married couples with children are welcome. Single women or two single women or two single men also have more difficulty finding rentals because of landlord preference for married tenants.").

[87] MANSBRIDGE, *supra* note __, at 99 (citing Hole and Levine, p. 85).

[88] JANE J. MANSBRIDGE, WHY WE LOST THE ERA 101 (1986).

[89] FLORA DAVIS, MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICAN SINCE 1960 90 (1991).

[90] CITATION.