NOTE

CLOSING THE DOOR ON ANTI-COHABITATION POLICIES: MARITAL STATUS PROTECTIONS FOR UNMARRIED COUPLES

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In *County of Dane v. Norman*, the Wisconsin Supreme Court held that a landlord's refusal to rent to unrelated individuals did not constitute marital status discrimination. Relying on the conduct-status distinction, the court reasoned that the landlord's policy did not discriminate on the basis of the prospective renters' status, but rather on the basis of the renters' conduct. The conduct at issue? Living together.

This Note argues that the Wisconsin Supreme Court incorrectly decided *Norman* in 1993. Nonetheless, *Norman* remains good law. This Note further argues that the Wisconsin Supreme Court must reexamine *Norman* in light of changes in statutory law, United States Supreme Court jurisprudence, and social mores. In the end, this Note argues that the Wisconsin Supreme Court should overturn *Norman* and rule that anti-cohabitation policies in housing and employment constitute marital status discrimination.

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INTRODUCTION

In 1989, Dwight and Patricia Norman refused to rent an apartment to two groups of prospective renters.[1] The Normans first refused Joyce Anderton, who intended to share the apartment with two other single women.[2] Then, the Normans refused Deb Dana and her two children, who intended to live with another woman.[3] The reason cited for these rejections? The Normans do not rent to groups of unrelated individuals.[4]

Dane County filed a complaint against the Normans in the Dane County Circuit Court.[5] The complaint alleged that the Normans violated Dane County's fair housing ordinance[6] when they refused to rent to the Anderton group and the Dana group.[7] The county argued that the Normans' refusal constituted marital status discrimination.[8] The trial court denied Dane County's motion for summary judgment and granted the Normans' cross motion for summary judgment.[9] The county appealed,[10]

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1. *County of Dane v. Norman*, 497 N.W.2d 714, 714 (Wis. 1993) (4–3 decision).

2. *Id.* at 715.

3. *Id.*

4. *Id.*

5. *Id.* at 714.

6. DANE COUNTY, WIS., ORDINANCES § 31.10 (1993).

7. *Norman*, 497 N.W.2d at 714–15.

8. *Id.* at 714–15. The fair housing ordinance defined "[d]iscriminate" as "to segregate, separate, exclude or treat any person or class of persons unequally because of . . . marital status of the person maintaining the household . . . ." DANE COUNTY, WIS., ORDINANCES § 31.03(2) (1993). The ordinance defined "[m]arital status" as "being married, divorced, widowed, separated, single or a cohabitant." DANE COUNTY, WIS., ORDINANCES § 31.03(5) (1993). It did not define "cohabitant." The ordinance went on to declare:

> It shall be unlawful for any person to discriminate: (1) By refusing to sell, lease, finance or contract to construct housing or by refusing to discuss the terms thereof; (2) By refusing to permit inspection or exacting different or more stringent price, terms or conditions for the sale, lease, financing or rental of housing . . . .

DANE COUNTY, WIS., ORDINANCES § 31.10 (1993).

9. *Norman*, 497 N.W.2d at 715.

10. *County of Dane v. Norman*, 484 N.W.2d 367, 368 (Wis. Ct. App. 1992).

and the Wisconsin Court of Appeals reversed.[11] The Wisconsin Supreme Court granted the Normans' petition for review.[12]

On April 13, 1993, Justice Donald Steinmetz delivered the opinion of the Wisconsin Supreme Court, reversing the Court of Appeals in dramatic fashion. The Wisconsin Supreme Court first struck down the fair housing ordinance's express protection for "cohabitants."[13] The court reasoned that the protection was inconsistent with Wisconsin's public policy of promoting the stability of marriage and family.[14] As such, the county did not have the authority to enact the protection.[15] The court then turned its attention to the term "marital status."[16] The court reasoned that the Normans' refusal was not based on the prospective tenants' marital status, but rather on the tenants' conduct.[17] The conduct in which the prospective tenants engaged? "[L]iving together."[18] Thus, the Normans' policy did not violate the fair housing ordinance.[19]

This Note examines the continued propriety of *Norman*'s conduct-status distinction for unmarried cohabitants. In particular, this Note considers whether the Wisconsin Supreme Court should overturn *Norman.* This Note argues that the Wisconsin Supreme Court should overturn *Norman* and rule that anti-cohabitation policies in housing and employment constitute marital status discrimination.

In Part II, this Note first surveys the two Wisconsin Supreme Court cases on marital status discrimination preceding *Norman*. These cases laid the foundation for *Norman*'s conduct-status discrimination analysis. This Note then looks beyond Wisconsin to states that have also considered *Norman*'s central question: whether a landlord's anti-cohabitation policy constitutes marital status discrimination. From this state survey, this Note argues that two factors determine whether a state supreme court will hold that a landlord's refusal to rent to unmarried couples constitutes marital status discrimination. First, whether the state's antidiscrimination statute uses singular or plural language. Second, whether the state has a public policy against cohabitation or fornication, normally expressed in the criminal law. Thus, at the end of Part II, this Note argues that state supreme courts extend marital status protections to unmarried cohabitants when their state's antidiscrimination statutes use plural language and when their state does not have a public policy against cohabitation or fornication.

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11. *Id.* at 370.
12. *Dane County v. Norman*, 490 N.W.2d 21 (Wis. 1992).
13. *Norman*, 497 N.W.2d at 715–16.
14. *Id.* at 716.
15. *Id.*
16. *Id.* at 717.
17. *Id.*
18. *Id.*
19. *Id.* at 717–18.

Conversely, that state supreme courts rely on the conduct-status distinction and do not extend marital status protections to unmarried couples when their antidiscrimination statutes use singular language and their state has a public policy against cohabitation or fornication.

In Part III, this Note examines the Wisconsin Supreme Court's reasoning in *Norman*. This Note then applies the interpretive framework created in Part II to *Norman*. The Wisconsin Supreme Court's reasoning does not follow the expected pattern described in Part II. Therefore, this Note applies the interpretive framework to the facts of *Norman* to demonstrate how the Wisconsin Supreme Court could and should have held that the Normans' policy constituted marital status discrimination.

But *Norman* is nonetheless good law. Accordingly, in Part IV, this Note argues that *Norman* is ripe for overturning. This Note argues that the most likely vehicle for such a decision is in the employment context—that is, a challenge to an employer's anti-cohabitation policy. This Note uses the facts of *Richardson v. Northwest Christian University*,[20] a recent federal district court case that considered whether an employer's anti-cohabitation policy constituted marital status discrimination, as a template for an ultimate challenge to *Norman*. In addition to the interpretive errors identified in Part III, this Note argues that the Wisconsin Supreme Court should overturn *Norman* for three reasons. First, the United States Supreme Court's decisions on gay rights since *Norman* provide a more nuanced understanding of the conduct-status distinction than the bright-line rule in *Norman*. Second, the Madison General Ordinances now have a protection for associational rights that calls the *Norman* court's logic into question. Third, social attitudes on cohabitation and the family have changed significantly since *Norman*. Taken together, these three changes—jurisprudential, statutory, and societal—should motivate the Wisconsin Supreme Court to overturn *Norman*. In doing so, the Wisconsin Supreme Court should rule that anti-cohabitation policies in housing and employment constitute marital status discrimination.

I. BACKGROUND

This Section begins with an overview of the Wisconsin case law on marital status discrimination preceding *Norman*. These cases are limited in number, and the reasoning the Wisconsin Supreme Court applies is not robust. In both of these decisions, the Wisconsin Supreme Court discusses the distinction between conduct and status. Therefore, before the Wisconsin Supreme Court decided *Norman*, it was clear the case would come down to the conduct-status distinction. But it still remained unclear how exactly the Wisconsin Supreme Court would use this doctrine. In light

20. 242 F. Supp. 3d 1132 (D. Or. 2017).

of that uncertainty, this Note then surveys a number of other state supreme court decisions that have confronted the issue in *Norman*: whether a landlord's anti-cohabitation policy constituted marital status discrimination. Based on these non-Wisconsin cases, this Note argues that state supreme courts extend marital status protections to unmarried cohabitants when their state's antidiscrimination statutes use plural language and when their state does not have a public policy against cohabitation or fornication. Conversely, state supreme courts rely on the conduct-status distinction and do not extend marital status protections to unmarried couples when their state's antidiscrimination statutes use singular language and when their state has a public policy against cohabitation or fornication.

A. The Development of Wisconsin's Conduct-Status Distinction

Marital status first entered Wisconsin's state antidiscrimination lexicon in 1980. That year, the Legislature amended the state's open housing statute to protect individuals from discrimination because of the "marital status of the person maintaining a household."[21] The Legislature also prohibited an employer from asking about an individual's "marital relationship" while conducting an honesty test (e.g., a polygraph test).[22] Then, in 1982, the Legislature added "marital status" to the state's fair employment statute.[23] Four years later, the Wisconsin Supreme Court first construed "marital status" in a discrimination case in *Federated Rural Electric Insurance Co. v. Kessler*.[24]

Starting with *Kessler*, the conduct-status distinction has played a central role in the development of Wisconsin's marital status discrimination jurisprudence. In *Kessler*, Federated Rural Electric Insurance Company prohibited employees of one sex from romantically associating with a married employee of the opposite sex.[25] The company terminated William Kessler because he allegedly violated the rule, among other things.[26] Kessler filed a complaint against Federated with the

21. WIS. STAT. § 101.22(1m)(b) (1979–80). The Legislature did not define "marital status of the person maintaining a household." *See id.*

22. WIS. STAT. § 11.326(3)(c) (1979–80). The Legislature did not define "marital relationship." *See id.* Until 1979, a property owner could lawfully seek information regarding the marital status of a prospective renter. WIS. STAT. § 101.22(4n) (1977–78).

23. WIS. STAT. § 111.321 (1981–82). The Legislature defined "[m]arital status" as "the status of being married, single, divorced, separated or widowed." WIS. STAT. § 111.32(12) (1981–82).

24. 388 N.W.2d 553 (1986) (6–1 decision).

25. *Id.* at 553.

26. *Id.* at 555.

Madison Equal Opportunities Commission, arguing that the company's rule discriminated against employees on the basis of marital status.[27]

Justice Donald Steinmetz delivered the opinion of the Wisconsin Supreme Court, which held that Federated's rule did not discriminate on the basis of marital status but rather proscribed certain conduct.[28] The majority framed the rule as a prohibition on extramarital affairs,[29] and so merely defined certain conduct that all employees, regardless of marital status, were bound to avoid.[30] The court found this significant for two reasons. First, an employee only triggered sanction under the rule when the employee engaged in an extramarital affair with a co-employee.[31] Thus, the offending employee's marital status did not trigger the sanction. Second, neither the Madison Common Council nor the Wisconsin Legislature intended to create a right to engage in an extramarital affair when the two enacted marital status protections.[32] Thus, even though the burden of the rule fell more heavily on married employees—a married employee could not romantically associate with a single co-employee while a single employee could—the rule was consistent with public policy.[33] Therefore, as a rule that prohibited non-protected conduct, Federated's rule did not discriminate on the basis of marital status.[34]

In her dissent, Justice Shirley Abrahamson found the majority's conduct-status distinction unpersuasive.[35] Justice Abrahamson framed the rule as a prohibition on married employees' ability to associate with any co-employees of the opposite sex outside of work-related matters.[36] Under this framing, only single employees could associate with co-employees of the opposite outside of work-related matters.[37] As such, the rule classified employees into two groups: one for which associating is permitted (single), the other for which associating is not (married).[38] The trigger for

27. *Id.* at 554.

28. *Id.* at 553, 560.

29. *Id.* at 560 (agreeing with the analysis of the circuit court, which characterized the rule as "prohibit[ing] all employees, regardless of marital status, from being party to an extramarital affair").

30. *Id.*

31. *Id.*

32. *Id.* at 562. The court declared that "the protection against marital status discrimination . . . encompass[es] the very personal decision of an employee to marry, to remain single, or to divorce. An employer's rule which pressures a person to make a particular choice about marriage intrudes into an area where the Madison ordinance prohibits employer interference." *Id.*

33. *Id.*

34. *Id.* at 560.

35. *Id.* at 564 (Abrahamson, J., dissenting).

36. *Id.* at 563.

37. *Id.*

38. *Id.* at 564.

classification is marital status.[39] Because the rule classifies people and treats them differently based on that classification, the majority's focus on the subject of the prohibition—conduct or status—missed the point.[40] So, in Justice Abrahamson's view, as a rule that classified individuals by marital status and sanctions employees based on that classification, Federated's rule discriminated on the basis of marital status.[41]

The conduct-status distinction was next litigated before the Wisconsin Supreme Court in *Braatz v. Labor & Industry Review Commission*.[42] In *Braatz*, the Maple School District required married employees with employed spouses to choose between the district's health insurance policy or the spouse's employer's policy.[43] The plaintiffs—married teachers with employed spouses—filed a complaint against the school district with the Labor and Industry Review Commission (LIRC).

Justice Donald Steinmetz again delivered the unanimous opinion of the Wisconsin Supreme Court, which held that the school district's rule discriminated on the basis of marital status.[44] LIRC framed the rule as one triggered by the conduct of an employee's spouse (i.e., working for the employer and accepting the employer's health insurance policy).[45] The court disagreed with LIRC's characterization.[46] The court framed the rule as one that only required married employees with duplicate health insurance to choose between the district policy and the non-district policy.[47] Single employees with duplicate coverage, on the other hand, were not required to make that choice.[48] Without any further discussion on the distinction between conduct and status, the court held that such a policy constituted marital status discrimination.[49]

The rule that emerges from these cases is simple: a rule triggered by the conduct of an employee does not constitute status discrimination. However, drawing the line between conduct and status is anything but simple, and the cases do not offer much guidance—one Justice's status is another Justice's conduct. In *Kessler*, the majority framed the rule as a prohibition on extramarital affairs,[50] while the dissent framed the rule as a classification and penalization based on status.[51] Similarly, in *Braatz*, the

39. *Id.*
40. *Id.*
41. *Id.*
42. 496 N.W.2d 597 (1993) (unanimous decision).
43. *Id.* at 598.
44. *Id.*
45. *Id.* at 599.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 600.
50. *Federated Elec. Rural Ins. Co. v. Kessler*, 388 N.W.2d 553, 560 (Wis. 1986).
51. *Id.* at 564.

court framed the rule as a denial of benefits based on status,[52] while LIRC framed the rule as a denial of benefits based on a spouse's acceptance of employer-sponsored health insurance.[53]

Several theories might explain how courts distinguish between conduct and status. The distinction might rest on whether the rule requires the employer to classify the offending employee. For example, to enforce the rule in *Braatz*, the employer needed to determine whether an employee had duplicate coverage *and* whether the employee was married.[54] Only married individuals could violate the rule.[55] And conversely, to enforce the rule in *Kessler*, the employer only needed to determine whether the offending employee engaged in an extramarital affair.[56] Both single and married employees could violate the rule.[57] However, as the dissent noted, in the case of an offending employee who is single, the employer in *Kessler* needed also to determine whether the other employee was married.[58] Perhaps, then, courts also consider whether the conduct is socially acceptable.[59] The conduct of working and accepting employer-sponsored health insurance is socially condoned, whereas the conduct of engaging in an extramarital affair is socially condemned.[60] Finally, the distinction might also rest on whether the triggering conduct is directly controlled by the offending employee. In *Kessler*, an employee's own conduct triggered the rule,[61] whereas an employee's spouse's conduct triggered the rule in *Braatz*.[62]

Thus, before *Norman*, the Wisconsin Supreme Court had only contemplated marital status discrimination in the employment context. The Wisconsin Supreme Court analyzed these cases by distinguishing between employment actions based on an employee's conduct and those based on an employee's status. However, the line between conduct and status remained blurry, and the Wisconsin Supreme Court failed to provide a more robust explanation of the distinction.

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52. *Braatz*, 496 N.W.2d at 599.

53. *Id.*

54. *Id.* at 598.

55. *Id.*

56. *Kessler*, 388 N.W.2d at 560.

57. *Id.*

58. *Id.* at 564 (Abrahamson, J., dissenting).

59. Rita M. Neuman, *Closing the Door on Cohabitants Under Wisconsin's Open Housing Law*, 1995 WIS. L. REV. 965, 972.

60. *Id.* In fact, adultery is a Class I felony in Wisconsin. WIS. STAT. § 944.16 (2017–18).

61. *Kessler*, 388 N.W.2d at 560.

62. *Braatz v. Lab. & Indus. Rev. Comm'n*, 496 N.W.2d 597, 599 (Wis. 1993).

B. Other States' Conduct-Status Distinction for Unmarried Couples in Housing Disputes

Like Wisconsin, nearly half of the states have enacted marital status protections in housing and employment.[63] A number of those states' supreme courts have confronted the central issue of *Norman*: whether a property owner's anti-cohabitation policy constitutes marital status discrimination. Four answered in the affirmative,[64] while two answered in the negative.[65] In each of these cases, the property owners argued that they refused to rent to the prospective renter because of the individual's conduct (i.e., living together).[66]

The differing opinions reached by these courts are best explained by the language of the antidiscrimination statute in question and the state's criminal laws on cohabitation or fornication. The courts that found marital status discrimination interpreted statutory language that used both singular and plural forms to define the scope of its protections.[67] From this fact, the courts construed marital status to include the status of the couple, not just the individual.[68] For example, in *Worcester Housing Authority v. Massachusetts Commission Against Discrimination*,[69] the antidiscrimination statute at issue declared that it was unlawful to "refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold *from any person or group of persons* . . . accommodations [and

63. Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1406 (2015) (identifying employment protections in twenty-two states and the District of Columbia and housing protections in twenty-four states).

64. *Foreman v. Anchorage Equal Rts. Comm'n*, 779 P.2d 1199 (Alaska 1989); *Swanner v. Anchorage Equal Rts. Comm'n*, 874 P.2d 274 (Alaska 1994); *Worcester Hous. Auth. v. Mass. Comm'n Against Discrimination*, 547 N.E.2d 43 (Mass. 1989); *Att'y Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *Smith v. Fair Emp. & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996); *McCready v. Hoffius*, 586 N.W.2d 723, 725 (Mich. 1998), *opinion vacated in part*, 593 N.W.2d 545 (Mich. 1999) (vacating on other grounds).

65. *State ex rel. Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, 625 N.W.2d 551.

66. *Foreman*, 779 P.2d at 1202; *Swanner*, 874 P.2d at 278 n.4; *Desilets*, 636 N.E.2d at 235; *Smith*, 913 P.2d at 915; *Hoffius*, 586 N.W.2d at 726; *Peterson*, 2001 ND 81, 625 N.W.2d at 560; *French*, 460 N.W.2d at 6.

67. *Hoffius*, 586 N.W.2d at 726 (quoting MICH. COMP. LAWS § 37.2502 (1998)) (using "marital status of a person or a person residing with that person" to define the scope of protection); *Worcester Hous. Auth.*, 547 N.E.2d at 45 (quoting MASS. GEN. LAWS ch. 151B, § 4 (1973)) ("any person or group of persons"); *Smith*, 913 P.2d at 915 n.7 (quoting CAL. GOV'T CODE § 12925 (West 1996)) (defining "person" to "include[] one or more individuals"); *Foreman*, 779 P.2d at 1201 (quoting ALASKA STAT. § 18.80.300 (1987)) ("[B]oth the state statute and the municipal code define 'person' to include 'one or more individuals.'").

68. *Foreman*, 779 P.2d at 1201–02; *Smith*, 913 P.2d at 915; *Worcester Hous. Auth.*, 547 N.E.2d at 45; *Desilets*, 636 N.E.2d at 235; *Hoffius*, 586 N.W.2d at 726.

69. 547 N.E.2d 43.

assistance] because of the . . . *marital status of such person or persons*."[70] The *Worcester* court explained:

> The use of the plural signifies a legislative determination that two persons cannot be denied housing accommodations or benefits solely because the owner or administering authority prefers not to deal with certain kinds of people based on, inter alia, their race, sex, age, or marital status. The statute thus reaches, and prevents, discrimination in housing against, among others, unmarried couples, interracial couples, younger couples, older couples, and couples who hold different religious beliefs.[71]

Once these courts established that marital status protections extend to cohabitants as "unmarried couples," the courts could easily dismiss the conduct-status distinction for cohabitants. As the court in *Attorney General v. Desilets*[72] explained:

> [A]nalysis of the defendants' concerns shows that it is marital status and not sexual intercourse that lies at the heart of the defendants' objection. If married couple A wanted to cohabit in an apartment owned by the defendants, they would have no objection. If unmarried couple B wanted to cohabit in an apartment owned by the defendants, they would have great objection. The controlling and discriminating difference between the two situations is the difference in the marital status of the two couples.[73]

Conversely, the courts that did not find marital status discrimination interpreted statutory language that used only the singular form.[74] Because the respective legislatures chose the singular form, these courts construed marital status to extend only to the individual, not the couple.[75] For

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70. *Id.* at 45 (quoting MASS. GEN. LAWS ch. 151B, § 4 (1973)).

71. *Id.* at 45. In *Worcester*, the court considered whether the government could deny public housing benefits to unmarried couples solely because they were not married. *Id.* at 44. The Massachusetts Supreme Judicial Court extended *Worcester*'s reasoning with respect to private property owners in *Desilets*. *Desilets*, 636 N.E.2d at 235.

72. 636 N.E.2d 233.

73. *Id.* at 235. The courts in *Hoffius* and *Smith* both quote this analysis. *Hoffius*, 586 N.W.2d at 727; *Smith*, 913 P.2d at 915 n.9.

74. *State ex rel. Cooper v. French*, 460 N.W.2d 2, 6 (Minn. 1990) (quoting MINN. STAT. § 363.01 (1988)) ("'Marital status' means whether *a person* is single, married, remarried, divorced, separated, or a surviving spouse . . . ."); *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, 625 N.W.2d 551, 555 (quoting N.D. CENT. CODE § 14-02.4-12 (1995)) ("It is a discriminatory practice . . . to . . . [d]iscriminate against a person . . . .").

75. *French*, 460 N.W.2d at 6; *Peterson*, 2001 ND 81, 625 N.W.2d at 562.

example, in *State ex rel. Cooper v. French*,[76] the antidiscrimination statute at issue defined marital status as "whether *a person* is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse."[77] The *French* court explained that "[t]he plain language of this . . . definition shows that, in non-employment cases, the legislature intended to address only the status of an *individual*, not an individual's relationship with a spouse, fiancé, fiancée, or other domestic partner."[78]

Once these courts determined that marital status protections attached only to the individual, the courts then turned to whether the conduct of cohabitation was protected, which implicated the state's anti-fornication or anti-cohabitation laws ("morality laws").[79] In both instances, the courts held that the anti-fornication and anti-cohabitation statutes were valid expressions of the state's public policy of censuring certain non-marital sexual conduct.[80] Because the state legislatures did not repeal the older morality laws when they enacted the antidiscrimination laws, the courts were obligated to "harmonize" the two statutes.[81] Harmonizing the morality laws and the antidiscrimination laws called for the conduct-status distinction.[82] For example, the court in *North Dakota Fair Housing Council, Inc. v. Peterson*[83] explained: "The cohabitation statute and the discriminatory housing provision are harmonized by recognizing that the cohabitation statute regulates conduct, not status."[84]

For the courts that found marital status discrimination, the states' morality laws did not compel such a distinction.[85] These courts refused to

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76. 460 N.W.2d at 6.

77. MINN. STAT. § 363.01 (1988) (emphasis added).

78. *Id.*

79. *Id.* at 5 (anti-fornication statute); *Peterson*, 2001 ND 81, 625 N.W.2d at 559 (anti-cohabitation).

80. *French*, 460 N.W.2d at 5; *Peterson*, 2001 ND 81, 625 N.W.2d at 560.

81. *Peterson*, 2001 ND 81, 625 N.W.2d at 562; *see also French*, 460 N.W.2d at 5.

82. *Peterson*, 2001 ND 81, 625 N.W.2d at 562; *French*, 460 N.W.2d at 5.

83. 2001 ND 81, 625 N.W.2d 551.

84. *Id.* at 562; *see also French*, 460 N.W.2d at 5 ("This court, in construing the term 'marital status' has consistently looked to the legislature's policy of discouraging the practice of fornication and protecting the institution of marriage.").

85. *Foreman v. Anchorage Equal Rts. Comm'n*, 779 P.2d 1199, 1202 (Alaska 1989) (anti-cohabitation statute); *McCready v. Hoffius*, 586 N.W.2d 723, 727 (Mich. 1998) (statute prohibiting lewd and lascivious behavior by unmarried couples). In *Smith*, the court did not consider the effect of any morality laws because the state had repealed laws criminalizing sexual conduct between consenting adults three months before it enacted the antidiscrimination law. *Smith v. Fair Emp. & Hous. Comm'n*, 913 P.2d 909, 918 (Cal. 1996). In *Desilets*, the court did not address the state's anti-fornication law head on. *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 240 (Mass. 1994). In dicta, the *Desilets* court questioned the law's constitutionality. *Id.* Nonetheless, the *Desilets* court suggested the anti-

harmonize older morality laws with the modern, remedial antidiscrimination statutes.[86] The court in *Foreman v. Anchorage Equal Rights Commission*[87] relied on a state senate resolution to conclude that the anti-cohabitation law was "vastly out of step with constitutional and social developments of recent decades."[88] Consequently, the antidiscrimination statute controlled.[89] Similarly, the court in *McCready v. Hoffius*[90] noted that "[t]he lewd and lascivious behavior statute has not been used to successfully prosecute unmarried couples who were cohabitating for nearly sixty years."[91] The *Hoffius* court refused to find that the anachronistic law implicated mere cohabitation.[92]

In light of the preceding analysis, two distinct approaches to anti-cohabitation rules in housing appear. These two approaches are informed by the language of the antidiscrimination statute at issue and the existence of anti-cohabitation or anti-fornication laws. Thus, state supreme courts extend marital status protections to unmarried cohabitants when their state's antidiscrimination statutes use plural language and when their state does not have a public policy against cohabitation or fornication. Conversely, state supreme courts rely on the conduct-status distinction and do not extend marital status protections to unmarried couples when their antidiscrimination statute uses singular language and their state has a public policy against cohabitation or fornication. Given the Wisconsin Supreme Court's failure to clearly define its conduct-status approach to marital status discrimination, whether the *Norman* court would take a similar approach to these courts was an open question.

II. WAS *NORMAN* PROPERLY DECIDED?

This Section first reviews the language of Dane County's antidiscrimination statute and the status of Wisconsin's morality laws at the time of *Norman*. It then analyzes the Wisconsin Supreme Court's reasoning in *Norman*. This Note argues that the court's decision is inconsistent with the framework defined in the foregoing section and thus was wrongly decided. Even though the Dane County antidiscrimination statute used the plural form and the state's morality laws were repealed,[93]

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fornication law could mean that the state had less of an interest in eradicating marital status discrimination in housing than other types of discrimination. *Id.*

86. *Foreman*, 779 P.2d at 1202; *Hoffius*, 586 N.W.2d at 728.

87. 779 P.2d 1199 (Alaska 1989).

88. *Id.* at 1202.

89. *Id.*

90. 586 N.W.2d 723 (Mich. 1998).

91. *Id.* at 727.

92. *Id.* at 728.

93. *County of Dane v. Norman*, 497 N.W.2d 714, 716 (Wis. 1993); Assemb. B. 250, 1983 Wis. Sess. Laws 37 (Wis. 1983).

the *Norman* court nonetheless held that the Normans' anti-cohabitation policy did not constitute marital status discrimination.[94] The next section then considers a hypothetical: how should the Wisconsin Supreme Court handle the *Norman* precedent when presented with an employer's anti-cohabitation policy? This Note argues that in such a case, the Wisconsin Supreme Court should not extend the *Norman* decision to the employment context. The Wisconsin Supreme Court should take that opportunity to overturn *Norman* and rule that anti-cohabitation policies in housing and employment constitute marital status discrimination. In reaching such a conclusion, this Note looks to the statutory, jurisprudential, and societal changes that have occurred since *Norman*—all of which counsel toward overturning the decision.

A. Dane County's Antidiscrimination Statute and Wisconsin's Morality Laws in 1993

Before delving into the *Norman* court's reasoning, it is necessary to survey Dane County's antidiscrimination statute and Wisconsin's morality laws at the time of the *Norman* decision. Dane County alleged that the Normans violated Chapter 31 of the Dane County Ordinances.[95] Under the title "Fair Housing," Chapter 31 declared:

> It shall be unlawful for any person to discriminate: (1) By refusing to sell, lease, finance or contract to construct housing or by refusing to discuss the terms thereof; (2) By refusing to permit inspection or exacting different or more stringent price, terms or conditions for the sale, lease, financing or rental of housing.[96]

The county intended Chapter 31 "to render unlawful discrimination in housing. It is the declared policy of the County of Dane that all persons shall have an equal opportunity for housing regardless of . . . [the] marital status of the person maintaining a household . . . ."[97] The ordinance defined "discriminate" and "discrimination" to mean "to segregate, separate, exclude or treat any person or class of persons unequally because of . . . [the] marital status of the person maintaining a household . . . ."[98] The ordinance then defined "marital status" to mean "being married, divorced, widowed, separated, single or a cohabitant."[99]

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94. *Norman*, 497 N.W.2d at 714.
95. *Id.* at 714–15.
96. DANE COUNTY, WIS., ORDINANCES §§ 31.10(1), (2) (1987).
97. DANE COUNTY, WIS., ORDINANCES § 31.02 (1987).
98. DANE COUNTY, WIS., ORDINANCES § 31.03(2) (1987).
99. DANE COUNTY, WIS., ORDINANCES § 31.03(5) (1987).

By the time Dane County filed suit against the Normans, the Wisconsin Legislature had repealed a number of its morality laws. Prior to 1983, Wisconsin's "Crimes Against Sexual Morality" statute defined the crimes of "fornication" and "lewd and lascivious behavior."[100] An individual committed "fornication" when he or she had "sexual intercourse with a person not his or her spouse."[101] An individual committed "lewd and lascivious behavior" when that person, among other things, openly cohabitated with a person whom he or she knew was not his or her spouse under circumstances that implied sexual intercourse.[102] Both Class A misdemeanors,[103] the offenses carried penalties consisting of a fine of up to $10,000 and/or a jail sentence of up to nine months for those found guilty.[104] Then, in 1983, the Legislature repealed these anti-fornication and anti-cohabitation laws.[105] However, that same year, the Legislature declared the intent of the "Crimes Against Sexual Morality" statute for the first time as follows:

> The state recognizes that it has a duty to encourage high moral standards. Although the state does not regulate the private sexual activity of consenting adults, the state does not condone or encourage any form of sexual conduct outside the institution of marriage. Marriage is the foundation of family and society. Its stability is basic to morality and civilization, and of vital interest to society and this state.[106]

For purposes of the interpretive pattern described in Part I.B, the foregoing overview demonstrates that the *Norman* court confronted potentially ambiguous language in both Dane County's antidiscrimination statute and the state's morality laws. While Dane County's antidiscrimination ordinance protected "any person or class of persons" (plural) from discrimination, the ordinance also defined discrimination by "[the] marital status of the person maintaining a household" (singular).[107] Similarly, while the Legislature repealed the state's anti-fornication and anti-cohabitation laws, it nonetheless declared that "the state does not condone or encourage any form of sexual conduct outside the institution of marriage."[108] When considered with the paucity of marital status cases

100. WIS. STAT. § 944.15 (1981–82) (fornication) (repealed 1983); WIS. STAT. § 944.20(3) (1981–82) (lewd and lascivious behavior) (repealed 1983).

101. § 944.15.

102. § 944.20(3).

103. §§ 944.15, 944.20(3).

104. WIS. STAT. § 939.51(3)(a) (1981–82).

105. Assemb. B. 250, 1983 Wis. Sess. Laws 37 (Wis. 1983).

106. *Id.*

107. DANE COUNTY, WIS., ORDINANCES § 31.03(2) (1987).

108. Assemb. B. 250, 1983 Wis. Sess. Laws 37 (Wis. 1983).

preceding *Norman*, these ambiguities further complicate the task of predicting the court's eventual holding.

B. The Reasoning of the Norman *Majority*

When the Wisconsin Supreme Court eventually handed down its decision in *Norman*, it held that Dwight and Patricia Norman's refusal to rent to unrelated individuals did not constitute marital status discrimination under Dane County's fair housing ordinance.[109] In so holding, the court relied on two arguments. The court first concluded that the county's fair housing ordinance was "invalid to the extent that it seeks to protect 'cohabitants.'"[110] To reach this conclusion, the court considered the origin of Dane County's authority to enact fair housing legislation.[111] The Wisconsin Legislature granted municipalities such authority through an enabling statute, Wisconsin Statute Section 66.432(2).[112] Because enabling statutes are grants of power to municipalities,[113] municipal authority derived from enabling statutes is limited to actions consistent with the state's public policy.[114] Put another way, "a municipality may not pass ordinances 'which infringe the spirit of the state law or are repugnant to the general policy of the state.'"[115]

Applying this standard, the court found that Wisconsin had a public policy that "seeks to promote the stability of marriage and family," or, similarly, a "policy of encouraging and protecting marriage."[116] The court found this policy in the preamble to the state's "Family Code."[117] Without

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109. *County of Dane v. Norman*, 497 N.W.2d 714, 714 (Wis. 1993).

110. *Id.* at 716.

111. *Id.*

112. *Id.*

113. *See* WIS. STAT. § 66.433(2) (1981–82) (granting authority to municipalities to pass ordinances).

114. *Norman*, 497 N.W.2d at 716.

115. *Id.* (quoting *Anchor Sav. & Loan Ass'n v. Madison EOC*, 355 N.W.2d 234, 238 (Wis. 1984)).

116. *Id.*

117. *Id.* at 716–17. The Family Code stated:

> (2) INTENT. It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the

further explanation, the court concluded that Dane County's fair housing protection for "cohabitants" was "inconsistent with the public policy of this state which seeks to promote the stability of marriage and family."[118] As such, the ordinance was invalid insofar as it protected "cohabitants."[119]

The court then turned to the conduct-status distinction, concluding that the Normans' refusal to rent to unrelated individuals was triggered by the individuals' conduct, not his or her marital status.[120] The court began by defining "conduct" and "marital status."[121] "Conduct" means "[p]ersonal behavior; deportment; mode of action; [and] any positive or negative act."[122] "Marital status" means "the state or condition of being married, the state or condition of being single, and the like."[123] The court then emphasized that the Normans "would have rented to any of the prospective tenants, regardless of their individual 'marital status,' if they had not intended to live together."[124] From this, the court concluded that "[t]heir living together is 'conduct,' not 'status.'"[125] Therefore, the Normans did not violate the Dane County fair housing ordinance's "marital status" protections by refusing to rent to unrelated individuals.[126]

C. Plural Language and No Morality Laws but Still No Protections for Unmarried Cohabitants

The *Norman* court is an outlier in the group of states that have considered the discriminatory nature of a landlord's anti-cohabitation policy.[127] First, the *Norman* court did not consider the use of the plural form or singular form in the county's antidiscrimination statute. Second, the *Norman* court did not consider the repeal of the state's anti-fornication

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> effect upon the parties immediately concerned. Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.
>
> (3) CONSTRUCTION. Chapters 765 to 768 shall be liberally construed to effect the objectives of sub. (2).

Id. (quoting WIS. STAT. §§ 765.001(2), (3) (1983–84)).

118. *Norman*, 497 N.W.2d at 716.
119. *Id.*
120. *Id.* at 717.
121. *Id.*
122. *Id.* (quoting *Conduct*, BLACK'S LAW DICTIONARY (6th ed. 1990)).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 717–18.
127. *See infra* pp. 1338–39.

and anti-cohabitation statutes when determining the state's public policy toward the unmarried.

This Section undertakes what the Wisconsin Supreme Court failed to do. It analyzes the facts of *Norman* through the interpretive framework discussed in Part II.B and concludes that the Wisconsin Supreme Court wrongly decided *Norman*. Consistent with the interpretive framework discussed above, the Wisconsin Supreme Court should have ruled that the use of the plural form and the repeal of the state's morality laws demonstrate that the Normans' refusal constituted marital status discrimination.

The *Norman* court's reasoning should have included a more in-depth analysis of the language of Dane County's fair housing law.[128] This would have revealed that the antidiscrimination statute used both the singular and the plural form when referring to its protections. From that finding, the court should have held that the ordinance applied to couples, not just individuals. Dane County's fair housing law made it unlawful to "segregate, separate, exclude or treat *any person or class of persons* unequally because of . . . *[the] marital status of the person maintaining the household* . . . ."[129] This language naturally contemplates the application of the marital status protection to an unmarried couple (i.e., a household consisting of two single people dating each other with one of those individuals maintaining the household). The individual maintaining the household is plainly protected; but, so too are the individuals in that household.[130] Interestingly, the individuals in the household are not protected because of his or her own marital status but rather because of his or her relationship with the person maintaining the household.[131] A landlord cannot discriminate against Person B because of the marital status of Person A, who is maintaining Person B's household. Person A could be married to Person B, but Person A could also be single or unmarried to Person B. In other words, the plain language of Dane County's fair housing ordinance protected both married and unmarried couples/households from discrimination, even without looking to the inclusion of "cohabitants" in marital status. Just at this point, the *Norman* court should have stopped its inquiry and held that the Normans' policy violated the fair housing statute.

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128. "[W]e have repeatedly held that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 681 N.W.2d 110, 124 (Wis. 2004) (quoting *Seider v. O'Connell*, 612 N.W.2d 659, 669 (Wis. 2000)).

129. DANE COUNTY, WIS., ORDINANCES §§ 31.02, 31.03(2) (1987) (emphasis added).

130. *See* DANE COUNTY, WIS., ORDINANCES § 31.03(5)–(6) (2015).

131. *See* DANE COUNTY, WIS., ORDINANCES § 31.10(1) (1987).

That, of course, is not what happened in *Norman*. Instead, the court first determined that the state had a public policy of promoting marriage.[132] The *Norman* court then followed in the steps of the *Peterson* court[133] and the *French* court[134] and sought to harmonize the state's public policy with the county's antidiscrimination statute.[135] Through its enabling statute analysis, the *Norman* court concluded that it could not remain faithful to the state's public policy while also recognizing the county's cohabitation protection.[136] Thus, the court could only harmonize the two by concluding that cohabitation was unprotected conduct (i.e., living together), not marital status.[137]

However, the *Norman* court erred in resorting to the conduct-status distinction. The *Norman* court failed to consider the effect of the Legislature's repeal of anti-fornication and anti-cohabitation on the state's public policy toward cohabitation. As noted above, the Wisconsin Legislature repealed the state's anti-fornication and anti-cohabitation statutes a decade before the court decided *Norman*.[138] This fact should have informed the *Norman* court's enabling statute analysis. The repeal of the anti-cohabitation statute is an explicit declaration that cohabitating individuals no longer contravened the state's public policies.[139] The *Norman* court's finding to the contrary essentially reverses the Legislature's own determination of the state's public policy toward cohabitation. To be fair, in repealing the anti-cohabitation and anti-fornication statutes, the Legislature also declared that "the state does not condone or encourage any form of sexual conduct outside the institution of marriage."[140] However, as the California Supreme Court observed, "One can recognize marriage as laudable, or even as favored, while still extending protection against housing discrimination to persons who do not enjoy that status."[141]

When considered alongside the other states that have issued decisions on the discriminatory nature of a landlord's anti-cohabitation

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132. *County of Dane v. Norman*, 497 N.W.2d 714, 716 (Wis. 1993).

133. *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, 625 N.W.2d 551, 562.

134. *See State ex rel. Cooper v. French*, 460 N.W.2d 2, 5 (Minn. 1990).

135. *See Norman*, 497 N.W.2d at 716.

136. *Id.*

137. *See id.* at 717.

138. Assemb. B. 250, 1983 Wis. Sess. Laws 37 (Wis. 1983) (repealing WIS. STAT. §§ 944.15, 944.20(3) (1981–82)).

139. *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 3, 35 (1994).

140. Assemb. B. 250, 1983 Wis. Sess. Laws 37 (Wis. 1983).

141. *Smith v. Fair Emp. & Hous. Comm'n*, 913 P.2d 909, 918 (Cal. 1996).

policy,[142] the Wisconsin Supreme Court's *Norman* decision deviates from the expected pattern. To reiterate that pattern: courts extend marital status protections to unmarried cohabitants when the antidiscrimination statute uses the plural form and the existing or previous morality laws no longer express the state's public policy. Conversely, courts exclude unmarried cohabitants from marital status protections when the antidiscrimination statute uses the singular form and the existing morality laws express the state's public policy. The Wisconsin Supreme Court failed to consider the language of the antidiscrimination statute. A proper assessment would have indicated that the plural form demonstrated the county's intent to include unmarried cohabitants in marital status discrimination.[143] Furthermore, the *Norman* court failed to properly account for the Wisconsin Legislature's appeal of the state's anti-cohabitation and anti-fornication laws when the court reached its holding. A proper accounting of the impact of the state's repeals would have demonstrated that the Legislature no longer considered cohabitation in contravention of the public policy of the state.[144] Taken together, the *Norman* court could have remained faithful to the public policy of the state while also extending the county's marital status protections to unmarried cohabitants.

III. SHOULD *NORMAN* BE EXTENDED TO ANTI-COHABITATION POLICIES IN THE EMPLOYMENT CONTEXT?

The Wisconsin Supreme Court decided *Norman* twenty-seven years ago, and despite the interpretive infirmities discussed above, the decision remains good law. Wisconsin landlords do not commit marital status discrimination when they refuse to rent housing to unrelated individuals, including unmarried cohabitants.[145] That is, in part, because "living together" is conduct, not marital status.[146]

In the twenty-seven years since the Wisconsin Supreme Court decided *Norman*, a number of statutory, jurisprudential, and social changes have further called the court's reasoning into question. Fortunately, the Wisconsin Supreme Court may grant a petition for review if "[t]he court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or

142. *See supra* notes 63–65 and accompanying text (discussing anti-cohabitation policy in Alaska, Massachusetts, California, Michigan, Minnesota, and North Dakota).

143. *See, e.g.*, *McCready v. Hoffius*, 586 N.W.2d 723, 726 (Mich. 1998); *Worcester Hous. Auth. v. Mass. Comm'n Against Discrimination*, 547 N.E.2d 43, 45 (Mass. 1989).

144. *See, e.g.*, *Smith*, 913 P.2d at 918 (Cal. 1996); *N.D. Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, 625 N.W.2d 551, 562.

145. *County of Dane v. Norman*, 497 N.W.2d 714, 716 (Wis. 1993).

146. *Id.* at 717–18.

changing circumstances, such opinions are ripe for reexamination."[147] So, *Norman* is ripe for reexamination. One avenue for reexamination is through challenging an employer's anti-cohabitation policy.

In this Section, this Note considers whether the Wisconsin Supreme Court should extend *Norman* to the employment context. Does an employer's anti-cohabitation policy constitute marital status discrimination? This Note argues that the Wisconsin Supreme Court should not extend *Norman* to the employment context. In fact, if given the chance to rule on an employer's anti-cohabitation policy, the Wisconsin Supreme Court should overturn *Norman* and rule that anti-cohabitation policies in housing and employment constitute marital status discrimination.

This Section begins with an overview of a recent federal district court case that considered an employer's anti-cohabitation policy, *Richardson v. Northwest Christian University*.[148] Taking the facts of *Richardson* as a template for a potential Wisconsin Supreme Court case, this Section then advances three arguments—in addition to the interpretive argument advanced in Part II.C—in favor of overturning *Norman*.

A. Richardson v. Northwest Christian University*: A Template for Overturning* Norman

In *Richardson*, the United States District Court for the District of Oregon considered whether an employer commits marital status discrimination when it terminates an employee for cohabitating with his or her unmarried partner.[149] Defendant-employer, Northwest Christian University (NCU), was a nonprofit Christian university.[150] Plaintiff-employee, Coty Richardson, was employed at NCU from August 2011 to July 2015 as an instructor of exercise science.[151] In that role, Richardson did not teach scripture, nor did she pray in her classroom.[152] Throughout her employment at NCU, Richardson was not married.[153] As a Christian organization, NCU prohibits its employees from "[o]ngoing cohabitation and sexual relations outside of marriage."[154] The university views those practices as "incompatible with the Christian ethic based on [its] understanding of the Holy Scripture."[155]

147. WIS. STAT. § 809.62(1r)(e) (2017–18).
148. 242 F. Supp. 3d 1132 (D. Or. 2017).
149. *Id.* at 1149.
150. *Id.* at 1138.
151. *Id.* at 1138–39, 1141.
152. *Id.* at 1139.
153. *See id.* at 1139–41.
154. *Id.* at 1140.
155. *Id.*

Nearly four years into satisfactory employment, Richardson informed NCU that she was pregnant.[156] In response to that email, an NCU professor met with Richardson.[157] Richardson confirmed to the professor that she was living with the baby's father outside of marriage (i.e., cohabitating).[158] Several days later, NCU's Vice President for Academic Affairs informed Richardson that the university could not continue her employment while she cohabitated with the baby's father.[159] The Vice President presented Richardson with three choices: "marry the baby's father before the start of the academic year in August, admit that she had made a 'mistake' and stop living with the baby's father, or lose her job."[160]

After several weeks of consideration, Richardson refused to marry the baby's father or to stop living with him.[161] NCU terminated her employment.[162] Following the termination, Richardson filed numerous claims against NCU, including a state claim for marital status discrimination.[163] The United States District Court for the District of Oregon granted summary judgment to Richardson on her marital status discrimination claim, ruling that "Oregon's marital status discrimination law makes it illegal for an employer to impose a policy prohibiting . . . cohabitation."[164]

B. Reexamining Norman *with the Facts of* Richardson

This final section considers the statutory, jurisprudential, and social changes that have occurred since the Wisconsin Supreme Court decided *Norman*. This Note argues that, given these changes, the Wisconsin Supreme Court should overturn *Norman*. Thus, if the Wisconsin Supreme Court considers an anti-cohabitation policy in the employment context, similar to the employer's rule in *Richardson*, then the court should overturn *Norman* and rule that anti-cohabitation policies in housing and employment constitute marital status discrimination.

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1138, 1140–41.

160. *Id.* at 1140–41.

161. *Id.* at 1138.

162. *Id.* at 1141.

163. *Id.* at 1143. In relevant part, Oregon's employment discrimination statute provides:

> "It is an unlawful employment practice . . . [f]or an employer, because of an individual's . . . marital status . . . or because of the . . . marital status . . . of any other person with whom the individual associates, . . . to refuse to hire or employ the individual or to bar or discharge the individual from employment."

OR. REV. STAT. § 659A.030(1) (2019).

164. *Richardson*, 242 F. Supp. 3d at 1152, 1156.

1. STATUTORY CHANGE

The first significant change since the Wisconsin Supreme Court decided *Norman* is in the statutory realm. The City of Madison's Equal Opportunities Ordinance now offers more protection than the Dane County fair housing ordinance did in 1989.[165] Thus, if a *Richardson*-like case came before the Wisconsin Supreme Court under the Madison Equal Opportunities Ordinance, the court could rely on these additional protections to reject *Norman*.

In 1998, the Madison Common Council incorporated the right to associate with members of a protected status into the city's Equal Opportunities Ordinance.[166] This came twenty-two years after the events in *Kessler*[167] and nine years after the events in *Norman*.[168] The protection declares: "It shall be an unfair discrimination practice . . . [f]or any person or entity . . . to engage in any acts prohibited in Sec. 39.03 et seq of the Madison General Ordinances against any individual because of the person's association with any member of any protected class membership."[169]

The employers' policies in *Norman* and *Kessler* would both implicate this new protection because they both turn on the marital status of the person with whom the plaintiff is associating.[170] The *Norman* court's own analysis belies this fact. In justifying its decision that living with someone is conduct, the *Norman* court looked to *Kessler*.[171] The *Norman* court characterized the employer's policy in *Kessler* as follows: "The triggering event was associating with a married coemployee."[172] However, this framing clearly implicates the right to associate as defined in the Madison Equal Opportunities Ordinance, for it acknowledges that the employer took an action because of the employee's association with a coemployee because of the coemployee's status. The new protection goes beyond protecting an individual because of his or her protected status; it also protects an individual's conduct (i.e., the individual's association with a member of a protected class). The provision does away with the conduct-

165. *Compare* MADISON, WIS., ORDINANCES § 39.03(2), (4)(a) (2020) (including twenty-one groups under the protected class), *with* DANE COUNTY, WIS., ORDINANCES § 31.03(2) (1987) (including seventeen groups under the protected class).

166. *See* MADISON, WIS., ORDINANCES § 39.03(9)(c).

167. *Federated Rural Elec. Ins. Co. v. Kessler*, 388 N.W.2d 553 (Wis. 1986).

168. *See* MADISON, WIS., ORDINANCES § 39.03(9)(c); *County of Dane v. Norman*, 497 N.W.2d 714 (Wis. 1993).

169. *See* MADISON, WIS., ORDINANCES § 39.03(9)(c).

170. *Norman*, 497 N.W.2d at 717–18 (framing the issue as including the conduct of living with someone who is unmarried); *Kessler*, 388 N.W.2d at 563 (characterizing the policy as associating with a married employee).

171. *Norman*, 497 N.W.2d at 717.

172. *Id.*

status distinction not by directing that cohabitation is a protected status but rather by protecting an individual's associational right. Now, where the *Norman* and *Kessler* courts saw conduct, a court applying the Madison Equal Opportunities Ordinance would see *protected* conduct.

Applied to the facts in *Richardson*, the City of Madison's right to associate provides the Wisconsin Supreme Court a means to reject *Norman* and rule that a Madison employer's anti-cohabitation policy is discriminatory. Similar to the employer's policy in *Kessler*, the triggering event in *Richardson* was the employee's association—i.e., living with—with her unmarried partner. This set of facts calls for a straightforward application of the new right to associate. The employer threatened and eventually took adverse action against the employee because she refused to stop associating with her unmarried partner.[173] As such, the employer engaged in an unlawful discriminatory act.

Given the additional protections that the Madison Equal Opportunities Ordinance provides, an entrepreneurial attorney could force the Wisconsin Supreme Court to reassess *Norman*. The *Norman* court did not consider the associational rights now provided by Madison General Ordinance Section 39.03(9)(c). However, this statutory change provides one means by which the Wisconsin Supreme Court can hold, contrary to *Norman*, that a Madison employer's anti-cohabitation policy constitutes unlawful discrimination.

2. JURISPRUDENTIAL CHANGE

The second significant change since *Norman* occurred in the United States Supreme Court. Until the 1950s, sexual relationships and other intimate life choices were strictly enforced by state criminal and family law.[174] However, ever since the United States Supreme Court decided *Griswold v. Connecticut*,[175] the constitutionality of these state laws governing intimate life choices has steadily been eroded.[176] One must only look to Wisconsin's anti-fornication and anti-cohabitation laws, which were repealed in 1983, for an example.[177] This constitutional revolution provides courts with means to reexamine the conduct-status distinction for unmarried cohabitants—particularly because courts are open to importing

173. *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1142 (D. Or. 2017).

174. Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2089 (2017).

175. 381 U.S. 479 (1965).

176. Widiss, *supra* note 174, at 2091.

177. Assemb. B. 250, 1983 Wis. Sess. Laws 37 (Wis. 1983).

doctrine in the area of government discrimination into private discrimination law.[178]

Since *Norman*, the United States Supreme Court has developed a more nuanced understanding of the relationship between conduct and status: certain conduct is so closely related to a status that sanctioning the conduct is sanctioning the status. Take, for example, Justice Sandra Day O'Connor's concurrence in *Lawrence v. Texas*.[179] In *Lawrence*, Texas argued that its anti-sodomy law discriminated against homosexual conduct, not homosexual individuals.[180] In response, Justice O'Connor noted that "[w]hile 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."[181] Justice O'Connor found this close correlation significant for constitutional concerns, further explaining that "[u]nder such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[182]

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178. Widiss, *supra* note 174, at 2115.

179. 539 U.S. 558 (2003).

180. *Id.* at 583 (O'Connor, J., concurring).

181. *Id.* (O'Connor, J., concurring). In *Richardson*, Judge Aiken relies on Justice O'Connor's reasoning to conclude that the conduct-status distinction is applicable to unmarried couples. *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1152 (D. Or. 2017).

182. *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring). Relatedly, the Court recently held that discrimination because of the employee's gender identity and sexual orientation constitutes sex discrimination under Title VII prohibits. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020). In so holding, Justice Gorsuch provided the following analysis:

> Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

Id. at 1742. Retooled, Justice Gorsuch's analysis translates well to the cohabitation and marital status discrimination context: Imagine an employer who has a policy of firing any employee who cohabitates with their partner outside of marriage. The employer hosts an office holiday party and invites employees to bring those in their household. A model employee arrives and introduces a manager to Susan, the employee's significant other. Will the employee be fired? If the policy works as the employer intends, the answer depends on whether the employee is single or married. To be sure, that employer's ultimate goal might be to discriminate on the basis of whether an employee is cohabiting outside of marriage. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's marital status.

Justice Antonin Scalia made a similar point in both *Bray v. Alexandria Women's Health Clinic*[183] and *Romer v. Evans*.[184] In *Bray*, he noted: "Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed."[185] For example, "[a] tax on wearing yarmulkes is a tax on Jews."[186] Then three years later in his *Romer* dissent: "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[187]

What to make, then, of an employer's policy that prohibits cohabitation? If one accepts the *Norman* court's definition of cohabitation, then the conclusion is evident: a ban on cohabitation is a ban on conduct that is so closely related to unmarried couples that it is a ban on that marital status.[188] The *Norman* court defined cohabitation as "to live together as husband and wife . . . without legal marriage having been performed."[189] Only unmarried couples can live together as husband and wife without legal marriage papers. Understood this way, an employer's policy prohibiting cohabitation is a regulation of conduct that is so closely related to the status of being an unmarried couple that it implicates the status. In other words, a ban on cohabitation is a ban on those who cohabitate, who, by definition, can only be those in an unmarried couple.

Applied to the facts in *Richardson*, this nuanced understanding brings into sharp relief the impropriety of an employer's anti-cohabitation policy and the need to overturn *Norman*. To enforce its anti-cohabitation policy, the employer in *Richardson* demanded that the employee either marry her partner or cease from cohabitating with him.[190] Both demands run afoul of marital status protections.

The first demand falls squarely within the narrow reach of marital status protections defined by *Norman* and its predecessors. The *Kessler* court noted:

> We construe the protection against marital status discrimination to fully encompass the very personal decision of an employee to

183. 506 U.S. 263 (1993).

184. 517 U.S. 620 (1996).

185. *Bray*, 506 U.S. at 270.

186. *Id.*

187. *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (quoting approvingly *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987)).

188. As argued in Part II.C, the plain language of the Dane County antidiscrimination statute extends protections to couples as married or unmarried. *Supra* Part II.C.

189. *See County of Dane v. Norman*, 497 N.W.2d 714, 716 n.1 (Wis. 1993).

190. *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1140–42 (D. Or. 2017).

> marry, to remain single, or to divorce. An employer's rule which pressures a person to make a particular choice about marriage intrudes into an area where the Madison ordinance prohibits employer interference.[191]

The employer's request that the employee marry her partner to keep her job is in direct conflict with this protection. The employer's request blatantly shifts the very personal decision to marry from the employee to the employer in violation of the marital status protections and violates the marital status discrimination protection.

The employer may have thought that providing an alternative—cease from cohabitating—would fare better. However, this, too, violates the marital status discrimination protection once a court rejects the *Norman* conduct-status distinction and adopts the United States Supreme Court's more nuanced understanding of conduct and status. The ultimatum that one must cease cohabitating with their partner to keep their job centers an adverse employment action around conduct closely related to the employee's status as a member of an unmarried couple. As such, the employee's status as a member of an unmarried couple triggers the adverse employment action and violates the marital status discrimination protection.

As demonstrated above, the United States Supreme Court's more nuanced understanding of the relationship between conduct and status provides a future Wisconsin Supreme Court with a means to overturn *Norman*. And the Wisconsin Supreme Court should do just that. When confronted with a case challenging an employer's anti-cohabitation policy, the Wisconsin Supreme Court should adopt the United States Supreme Court's more nuanced understanding of the relationship between conduct and status and reject *Norman*'s conduct-status distinction. Doing so would allow the Wisconsin Supreme Court to rightly hold that an employer's—and for that matter, a landlord's—anti-cohabitation policy constitutes marital status discrimination.

3. SOCIAL CHANGE

The final change that supports a reexamination of *Norman* has occurred in the area of social mores. In striking down Dane County's protection for cohabitants, the *Norman* court assumed that these protections and the state's promotion of marriage were mutually exclusive.[192] To the extent that this assumption came from the Wisconsin Supreme Court's normative assessment of cohabitation, the decision should be reevaluated under contemporary social mores.

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191. *Federated Rural Elec. Ins. Co. v. Kessler*, 388 N.W.2d 553, 562 (Wis. 1986).

192. *Norman*, 497 N.W.2d at 716.

The rate of cohabitation and attitudes toward cohabitation have increased significantly in recent decades. From 1968 to 2018, the cohabitation rates for adults 25 to 34 have increased from 0.2% to 14.8%.[193] Today, for adults 18 to 44, 59% have cohabitated at some point.[194] For unmarried parents, the rate of cohabitation has increased from 20% in 1997 to 35% in 2017.[195]

American society's acceptance of cohabitation has similarly changed. Today, 69% of Americans believe it is acceptable to cohabitate even if the couple does not plan to marry.[196] In 1976, equal portions of high school seniors agreed and disagreed that premarital cohabitation was a good idea.[197] In 2017, 72% of high schoolers agreed with that proposition, while only 15% disagreed.[198]

To the extent the *Norman* court factored bygone social views on cohabitation into its ruling,[199] the decision deserves reexamination. Contemporary rates of cohabitation and societal views on the arrangement demonstrate circumstances have changed with time.[200] Given the social changes from *Norman* to today, the Wisconsin Supreme Court would be perpetuating an anachronistic moral paradigm if it extended the *Norman* rule to an employer's anti-cohabitation policy.

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193. Benjamin Gurrentz, *Living with an Unmarried Partner Now Common for Young Adults*, U.S. CENSUS BUREAU (Nov. 15, 2018), https://www.census.gov/library/stories/2018/11/cohabitaiton-is-up-marriage-is-down-for-young-adults.html [https://perma.cc/63UG-3Y2D].

194. Juliana Horowitz, Nikki Graf & Gretchen Livingston, *1. The Landscape of Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), https://www.pewsocialtrends.org/2019/11/06/the-landscape-of-marriage-and-cohabitation-in-the-u-s/ [https://perma.cc/4M53-VH87].

195. Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/ [https://perma.cc/LV9W-SPES]. Interestingly, the share of unmarried parents who are single mothers has decreased by 35% since 1968. *Id.* Thus, the share of unmarried single mothers has been offset by the trend of cohabitation. *Id.*

196. Horowitz, Graf & Livingston, *supra* note 194. Sixteen percent believe cohabitation is acceptable only if the couple marries. *Id.* Fourteen percent believe it is never acceptable. *Id.*

197. Colette A. Allred, *FP-19-10 High School Seniors' Attitudes Toward Cohabitation as a Testing Ground for Marriage, 2017*, NAT'L CTR. FOR FAM. & MARRIAGE RSCH., https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1192&context=ncfmr_family_profiles [https://perma.cc/MPR5-5DLG] (last visited Oct. 27, 2020).

198. *Id.*

199. *County of Dane v. Norman*, 497 N.W.2d 714, 716 (Wis. 1993) (implying that cohabitation destabilizes marriage and the family). If the court's assumption about the destabilizing effect of cohabitation was informed by prevailing negative social views toward cohabitation, then the assumption should be reexamined in light of changed social views on the issue.

200. *See* WIS. STAT. § 809.62(1r)(e) (2017–18) (providing that both passage of time and change in circumstance are criteria reviewed by the Wisconsin Supreme Court).

4. COUNTERARGUMENTS

Armed with the statutory, jurisprudential, and social changes since *Norman*, the Wisconsin Supreme Court is well-positioned to overturn *Norman* and declare that anti-cohabitation policies constitute marital status discrimination. However, this Section considers two possible counterarguments—one constitutional, the other policy-based—that could cause the Wisconsin Supreme Court to hesitate in overruling *Norman*. While the Wisconsin Supreme Court should give these challenges thoughtful consideration, it should nonetheless dispose of them, overturn *Norman*, and declare that anti-cohabitation policies constitute marital status discrimination.

The first counterargument is constitutional. In many of the cases analyzed throughout this Note, the landlord or employer justified its anti-cohabitation policy on religious grounds.[201] Thus, the Wisconsin Supreme Court would undoubtedly confront free exercise challenges to any case seeking to overturn *Norman*. Fortunately, these challenges do not prevent the Wisconsin Supreme Court from answering the central question of this Note: whether anti-cohabitation policies constitute marital status discrimination. Once the Wisconsin Supreme Court answers this question in the affirmative and overturns *Norman*, trial courts and courts of appeals will be tasked with answering the fact-intensive question of whether the rule as applied violates the defendant's free exercise rights.[202]

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201. *E.g.*, *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1138, 1140 (D. Or. 2017); *State ex rel. Cooper v. French*, 460 N.W.2d 2, 3–4 (Minn. 1990); *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 234–35 (Mass. 1994).

202. The Wisconsin Supreme Court has recognized that the Wisconsin Constitution provides for more free exercise protections than the United States Constitution. *Coulee Cath. Schs. v. Lab. & Indus. Rev. Comm'n*, 768 N.W.2d 868, 886–87 (Wis. 2009). Therefore, this footnote only addresses challenges under the Wisconsin Constitution.

In the housing context, the starting point for an as-applied challenge is "the compelling state interest/least restrictive alternative test." *Cf. id.* at 886 (explaining that the court has generally applied this test when facing a claim that a state law violates one's freedom of conscience). First, the defendant must prove that it has a sincerely held belief and that the state has burdened that belief by applying the state law at issue. *Id.* Then, the state must prove that "the law is based upon a compelling state interest . . . that cannot be served by a less restrictive alternative." *Id.* While the intricacies of these challenges go beyond the scope of this Note, it is worth noting that the contested point will likely be whether eradicating marital status discrimination is a compelling state interest. For a discussion on why this interest is, in fact, compelling, see Widiss, *supra* note 174, at 2143–50.

In the employment context, the starting point is the ministerial exception. *See Coulee*, 768 N.W.2d at 887. The contested issue for this test is whether the employee's position is "important and closely linked to the religious mission of a religious organization." *Id.* at 888. If the court finds that the position is important and closely linked, then the court may not entertain the employee's discrimination suit against the religious employer. *Id.* at 887.

The second counterargument is policy-based. If the Wisconsin Supreme Court recognizes that anti-cohabitation policies constitute marital status discrimination, then what other obligations do businesses have to unmarried cohabitants? For example, must businesses provide health insurance to unmarried employees' partners if they provide health insurance to married employees' spouses?[203] While these questions are legitimate, these fears are unwarranted. In overturning *Norman*, the Wisconsin Supreme Court would be ruling on the narrow issue of whether an anti-cohabitation policy constitutes marital status discrimination. To allay fears, the Wisconsin Supreme Court could explicitly note the reach of its ruling. If a decision did go beyond this narrow question, the Wisconsin Legislature can always correct the Wisconsin Supreme Court and police the bounds of marital status discrimination. The Legislature could explicitly declare that it is discriminatory to fire an employee for cohabitating with an unmarried partner but nonetheless legal to provide benefits to married couples.[204]

CONCLUSION

In *County of Dane v. Norman*, the Wisconsin Supreme Court ruled that a landlord's anti-cohabitation policy did not constitute marital status discrimination.[205] This Note argued that the Wisconsin Supreme Court erred in so concluding. In light of the plain language of the Dane County antidiscrimination statute and the previous repeal of Wisconsin's morality laws, the Wisconsin Supreme Court should have ruled that anti-cohabitation policies in housing constitute marital status discrimination against unmarried couples.

Nonetheless, nearly three decades later, *Norman* remains good law. This Note further argued that the Wisconsin Supreme Court would be within its authority to overturn the *Norman* decision due to the passage of time and changed circumstances. Using the facts of the *Richardson* case, this Note argued that the most likely path to overturning *Norman* is a challenge to an employer's anti-cohabitation policy. In particular, this Note argued that statutory, jurisprudential, and societal changes that have occurred since *Norman* should motivate the Wisconsin Supreme Court to overturn the case. In *Norman*'s place, the Wisconsin Supreme Court should rule that anti-cohabitation policies in housing and employment constitute marital status discrimination.

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203. Widiss, *supra* note 174, at 2148.

204. *Id.*

205. *County of Dane v. Norman*, 497 N.W.2d 714, 717–18 (Wis. 1993).