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# NEGATIVE IDENTITY

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## ABSTRACT

*This Article examines the social and legal status of “negative identity”—identity marked by indifference or antipathy to something that much of society considers fundamental. As examples of negative identity, the Article considers those who identify as atheist, asexual, single, or childfree.*

*The Article begins by giving content to negative identity. Atheist, asexual, single, and childfree identity consists of more than merely the respective lack of religion, sexual attraction, partnership, or children. Rather, these negative identities are meaningful to group members, add value to society, and thus deserve legitimacy and respect. Unfortunately, respect is not always forthcoming: negative identity group members experience significant animus, discrimination, and marginalization.*

*This state of affairs requires legal intervention. I demonstrate that under current law negative identity is under-protected relative to analogous positive identity categories. In many legal contexts, including employment, housing, public benefits, and taxation, members of negative identity groups are treated differently and worse than their positive identity counterparts. Consequently, the Article proposes a broad reevaluation of laws that implicate negative identity. Negative identity deserves the same protection as positive identity against direct discrimination, which I define as worse treatment based purely on hostility to the identity. When negative identity groups indirectly subsidize positive identity groups, legal actors*

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\* Associate Professor, University of Denver Sturm College of Law. For very helpful suggestions, I am grateful to Rebecca Aviel, Alan Chen, Owen Davies, Elizabeth Emens, Ian Farrell, Charlotte Garden, Hava Gordon, César García Hernandez, Sam Kamin, Margo Kaplan, Margaret Kwoka, Justin Pidot, Nancy Reichman, Joyce Sterling, Nelson Tebbe, Eli Wald, and the editors of the Southern California Law Review.

*should undertake a holistic inquiry into all relevant factors in order to determine whether the subsidy is justified.*

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## INTRODUCTION

A majority of society views certain things as fundamental to existence. For example, many people cannot imagine life without religion, sex, partnership, or children. Yet other people find it equally difficult to imagine a life that includes these things.

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The latter group is the focus of this Article, in which I examine the social and legal status of “negative identity.” Such identity is marked by indifference or antipathy to something that much of society views as fundamental. As examples, I discuss people who are atheist, asexual, single, or childfree.<sup>1</sup> In each instance, negative identity arises from a lack of affinity for a widely-held social value: religion, sex, partnership, or children.

An examination of these negative identity groups reveals several important commonalities. Members of negative identity groups often experience alienation from a majority of society. Negative identity is a target for animus, hostility, bias, and discrimination. And in many instances negative identity is under-protected by the law.

Analyzing negative identity also yields important benefits. In particular, it facilitates a better understanding of positive identity. Full comprehension of a given identity—religious, sexual, partnered, parental—requires consideration of people who reject that identity. As a result, negative identity offers important lessons by exposing features of positive identity that are often accepted unquestioningly rather than examined critically. A society that values particular identities and their reciprocals is one that better understands both.

The Article begins by identifying negative identity—that is, by demonstrating that negative identity is more than just the absence of something that a majority of society considers important. There is more to atheist identity than the absence of a god or gods, and more to childfree identity than the absence of children. Exposing this positive dimension reveals the affirmative content present in negative identity.<sup>2</sup>

Given these characteristics of negative identity, the Article argues that protecting any particular identity should entail protecting both its positive and negative iterations. If we believe religious views deserve respect and legal protection, we should also respect and protect the views of those who are not religious. If we believe that gay, lesbian, bisexual, and other queer people should not endure persecution as a result of their sexual orientation, we should feel the same way about asexual people. If we believe that people should not suffer discrimination because they are married or

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1. These identities are not an exhaustive list. For example, negative identity might also include those who do not identify with a particular gender (“agender”), those who have no nationality (“stateless”), those who consider themselves without race (perhaps we would call them “postracial” or “nonracial”), and other groups.

2. I use “negative identity” for lack of a better term, although, as I will argue, such identity is also positive in both senses of the word—that is, both affirmatively defined and socially valuable.

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partnered, we should also guard against discrimination against those who are single. And if we believe that we should protect the interests of parents, so, too, should we protect the childfree.

This Article then turns to law. Negative identity is disadvantaged relative to positive identity in a variety of legal contexts, including employment, housing, public benefits, and taxation. I catalogue this worse treatment and then recommend a reevaluation of laws that bear upon negative identity. My argument is not that the law should always place negative and positive identity on precisely equal footing. Rather, this Article proposes a more nuanced legal framework. Negative identity deserves protection against direct discrimination, defined as worse treatment based purely on hostility to the identity, to the same degree as the relevant positive identity category. When negative identity groups indirectly subsidize positive identity groups, legal actors should undertake a holistic inquiry into all relevant factors in order to determine whether the subsidy is justified.

This Article proceeds in four parts. Part I provides content to negative identity by discussing people who are atheist, asexual, single, or childfree. It then establishes commonalities among those identities to explain the value of discussing negative identity as an overarching concept. Part II documents animus against people with negative identities, relying on social science research, survey data, and popular culture. It further explains why negative identity is a target for animus and suggests reasons that such animus is less examined than animus against positive identity. Part III surveys negative identity in antidiscrimination law, demonstrating that in many instances negative identity is less protected in antidiscrimination law than its positive counterparts. Part IV then suggests several legal interventions that would protect negative identity against discrimination in appropriate circumstances.

A few words about terminology: As with any discussion of identity, no selection of terms is entirely uncontroversial. In keeping with the goal of validating negative identity, I considered adopting terms most consistent with self-definition. For example, some people who do not believe in god have adopted the term “brights” to include atheists, agnostics, and secular humanists.<sup>3</sup> But ultimately, I made my choices based on pragmatic criteria: familiarity of the term in everyday discourse; reliance on the term by group members; and use of the term in other research. Thus, I selected the term

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3. See, e.g., DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* 21 (2006); *The Vision*, THE BRIGHTS, <http://www.the-brights.net/vision/> (last visited Aug. 24, 2015).

“atheist” because much of the research I rely on to demonstrate animus and discrimination uses the term atheist.<sup>4</sup> The terms “asexual”<sup>5</sup> and “single”<sup>6</sup> are commonly used by group members and non-group members alike. The term “childfree” is more controversial. Some take issue on the ground that it implies that children are burdens from which one ought to be emancipated,<sup>7</sup> while others worry that the term is insensitive to those who wished for children and never had them.<sup>8</sup> Yet other terms applied to people who do not have children are also problematic: “childless” or “without children” implies something is missing, a claim that those who identify as childfree would dispute.<sup>9</sup> Because this project aims to legitimize negative identity, I select the word “childfree” as the one favored by the community of people with no children.

### I. DEFINING NEGATIVE IDENTITY

This Part provides content to negative identity.<sup>10</sup> It first discusses atheist, asexual, single, and childfree identities, explaining that each identity may be affirmatively defined by the presence of certain qualities rather than merely the absence of others. It then explores commonalities among these identities to explain the utility of discussing negative identity collectively rather than discussing each instance of negative identity individually.

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4. See *infra* Parts I.A.1, II.A.1. I agree with Nelson Tebbe that the term “nonbeliever” has the advantage of including not only atheists, but also agnostics, secular humanists, freethinkers, and others. Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1117–18 (2011). I settled on “atheist” because my project invokes research about animus and bias that uses that term.

5. The leading asexual advocacy group, Asexual Visibility and Education Network (AVEN), uses the term asexual. See *Overview*, ASEXUAL VISIBILITY & EDUC. NETWORK, <http://www.asexuality.org/home/?q=overview.html> (last visited Aug. 24, 2015).

6. See generally BELLA DEPAULO, *SINGLISM: WHAT IT IS, WHY IT MATTERS, AND HOW TO STOP IT* (2011).

7. See Lisa Belkin, *Your Kids Are Their Problem*, N.Y. TIMES (July 23, 2000), <http://www.nytimes.com/2000/07/23/magazine/your-kids-are-their-problem.html> (“‘Childless’ has connotations of loss or regret; ‘child free’ implies satisfaction and deliberate choice.”).

8. BELLA DEPAULO, *Who Are the Adults Without Children and What’s the Right Word for Them?*, in *SINGLISM*, *supra* note 6, at 148–50.

9. *Id.* (“‘Childless’ makes you sound as though you are ‘less than’ for not having children—that something is lacking.”).

10. A few other scholars have used the term “negative identity” to refer to identity that is viewed as inferior. See, e.g., Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN’S L.J. 76, 105 (2000) (explaining that minorities “have to contend with and respond to negative identity signification”). By contrast, I use the term to refer to an absence—an indifference to something society views as fundamental—rather than as a normative judgment.

### A. IDENTIFYING NEGATIVE IDENTITY

This Section examines four negative identities—atheist, asexual, single, and childfree—and documents the content of each identity. Several caveats are in order. First, I treat membership in a negative identity category as relatively stable: an atheist is not someone who temporarily questions her faith; an asexual is not someone who experiences a period of no sexual desire; a single person is not someone who is pre-married; and a childfree person is not someone who does not yet have a child but wants one. Certainly some people change over time: an atheist might convert; a single person might partner. But acknowledging some fluidity in group membership does not change the stability of the group itself, nor does it change the fact many people maintain a stable negative identity for their entire lives.

I also recognize that the identities I discuss are, in many ways, privileged identities. In some instances, simply claiming the identity is a privilege. Many people might wish to remain childfree, given the option, but cannot afford birth control. Likewise, extolling the benefits of single identity is considerably easier when one is well-educated and well-paid; for those who are not, marriage might on balance ease many burdens. Moreover, all the negative identities I describe offer the opportunity to pass.<sup>11</sup> Certainly passing is a psychic burden, but it is also a choice that is simply unavailable to members of many identity groups. So I stipulate to the privilege implicit in the discussion and acknowledge it explicitly where possible, but view the overall project of examining negative identity as an equality-enhancing one of value to all groups.

Finally, as with any discussion of identity, there is tension between giving content to identity and not essentializing that identity. Individuals experience atheist, asexual, single, and childfree identity in many different ways. I hope to identify common themes in each group's experience while also explicitly acknowledging that there is no single way to be a member of any group and that there are very few absolute criteria for membership.

#### 1. Atheist

While a lack of belief in a god or gods is a basic component of atheist identity, atheism is also more than the absence of religion. Some atheists find meaning in the natural world around them. Richard Dawkins captures the sentiments of many atheists by focusing on the wonder at the natural

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11. That is, one can remain vague about one's religion, sexual identity, and desire to remain single, and, up to a certain age, one's desire to remain childfree.

events that make human life and experience possible.<sup>12</sup> He writes: “After sleeping through a hundred million centuries we have finally opened our eyes on a sumptuous planet, sparkling with color, bountiful with life.”<sup>13</sup> Other atheists, such as A.C. Grayling, focus on the search for an ethical life through intellectual rigor and secular morality.<sup>14</sup> Grayling argues that “humanism is premised on humanity’s best efforts to understand its own nature and circumstances.”<sup>15</sup> Whatever else they may believe, many atheists embrace a rich, reflective, way of life and a range of positive belief systems that simply do not include god.<sup>16</sup>

Atheists are a fluid and diverse group. One researcher describes them as a “small, hard to identify, and disorganized category of persons.”<sup>17</sup> Simply determining the number of atheists includes an element of subjectivity. According to a 2008 survey, only 1.6% of Americans identified themselves as “atheist” when presented with a menu of options<sup>18</sup>; this number increased slightly to 2.4% in 2012.<sup>19</sup> Yet these numbers are somewhat open to interpretation. For instance, a different poll found that 14% of people who call themselves atheists also say that they believe in God<sup>20</sup> or a universal spirit<sup>21</sup>; meanwhile, 7% of people say they do not believe in God or a universal spirit, but not all of them call themselves atheists.<sup>22</sup> Other polls have found somewhat higher numbers.<sup>23</sup> And a considerably larger number of Americans say that they do not consider themselves religious.<sup>24</sup>

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12. RICHARD DAWKINS, *THE GOD DELUSION* (2006).

13. *Id.* at 135–36.

14. A.C. GRAYLING, *THE GOD ARGUMENT: THE CASE AGAINST RELIGION AND FOR HUMANISM* (2013). Both Dawkins and Grayling identify as humanists in addition to atheists, and likely agree with one another on many points, although Dawkins’s orientation is more scientific and Grayling’s is more philosophical.

15. *Id.* at 255.

16. See generally CHRIS JOHNSON, *A BETTER LIFE: 100 ATHEISTS SPEAK OUT ON JOY AND MEANING IN A WORLD WITHOUT GOD* (2014).

17. Penny Edgell et al., *Atheists As “Other”*: Moral Boundaries and Cultural Membership in American Society, 71 AM. SOC. REV. 211, 211–12 (2006).

18. PEW RESEARCH, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (Feb. 2008). An additional 12.1% described their religious views as “[n]othing in particular,” with 6.3% further specifying that they are “[s]ecular unaffiliated.” *Id.*

19. Michael Lipka, *5 Facts About Atheists*, PEW RESEARCH CTR. (Oct. 23, 2013), <http://www.pewresearch.org/fact-tank/2013/10/23/5-facts-about-atheists/>.

20. The word “god” is generally lower case throughout the Article, but I have used upper case in situations when the primary source material I am discussing capitalizes the word, even when my discussion of the primary source does not directly quote the primary source.

21. *Id.*

22. *Id.*

23. Tebbe, *supra* note 4, at 1120–22 (collecting studies).

24. *Growth of the Nonreligious*, PEW RESEARCH CTR. (July 2, 2013),

A number of national and international groups support atheists' interests in law and policy, including Freedom From Religion, American Atheists, and Atheist Alliance International.<sup>25</sup> Many of these groups provide intellectual resources, support networks, and forums for lively engagement and debate.<sup>26</sup> They hold conventions, elect leadership, and give awards.<sup>27</sup>

Some atheists have also formed organizations that function somewhat like churches in the lives of religious people. For example, a group called the Sunday Assembly has initiated meetings in a number of cities internationally, billing itself as "a global network of people who want to make the most of this one life we know we have."<sup>28</sup> The Sunday Assembly aims to provide members with experiences such as community, volunteer opportunities, and music that, for religious people, are often supplied by their church.<sup>29</sup>

As is typical of negative identity groups, atheists hold a range of views regarding religion. Some view religion as largely benign: while it means nothing to them, they are glad it provides others with comfort. Others are simply indifferent to religion and rarely think about it. Still others dislike religion, but largely keep their views to themselves. And for some, the struggle against religion becomes an animating force for their lives, both intellectually and politically.

These examples suggest that, for many atheists, their identity is much more than lack of religion. For some it is an intellectual commitment; for others, a political orientation; for others, a source of values; for others, a source of community. In other words, atheism is in fact not a negative identity at all. Rather than merely the absence of religion, it is a fully developed identity with various customs, practices, political interests, intragroup diversity, and internal disagreement.

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<http://www.pewforum.org/2013/07/02/growth-of-the-nonreligious-many-say-trend-is-bad-for-american-society/>. The percentage of Americans who identify themselves as atheists is smaller than that in many other countries: in China, fully 47% identify as atheist, followed by 31% in Japan, 30% in the Czech Republic, and 29% in France. WIN-GALLUP INT'L, GLOBAL INDEX OF RELIGIOSITY AND ATHEISM 3 (July 27, 2012), <http://www.wingia.com/web/files/news/14/file/14.pdf>.

25. Many national organizations also have active local affiliates; for example, American Atheists has over one hundred such groups. *Local Partners and Affiliates*, AM. ATHEISTS, <http://www.atheists.org/activism/local-partners-affiliates> (last visited Aug. 24, 2015).

26. *Id.*

27. See, e.g., *American Atheist Awards*, AM. ATHEISTS, <http://www.atheists.org/activism/awards> (last visited Aug. 24, 2015).

28. *About*, SUNDAY ASSEMBLY, <http://sundayassembly.com/about/> (last visited Aug. 24, 2015).

29. *Id.*

## 2. Asexual

Identifying asexual identity requires a multifaceted approach because the identity has biological, emotional, and social components, among others.<sup>30</sup> The Asexuality Visibility and Education Network (AVEN) defines an asexual person as “someone who does not experience sexual attraction.”<sup>31</sup> As founder David Jay says, asexuals often feel romantic attraction to other people that does not involve sexual desire.<sup>32</sup> But such attraction is not universal: many asexuals also describe themselves as “aromantic,” meaning that they experience little or no romantic attraction to others.<sup>33</sup> Asexuals sometimes have romantic relationships with each other or with sexual people.<sup>34</sup> Indeed, asexuals sometimes have sex, both with themselves and with other people,<sup>35</sup> and some even describe themselves as having sexual impulses,<sup>36</sup> yet do so without experiencing sexual attraction. Asexuals distinguish asexuality from celibacy: the latter is a choice, while asexuality is a sexual orientation.<sup>37</sup>

Researchers have recognized asexuality as a distinct category. Alfred Kinsey documented asexuals in his research, rather ominously labeling them “Group X.”<sup>38</sup> Several decades later, Michael Storms challenged Kinsey’s categorization by positing asexuality as a “fourth sexual orientation”—arguing that Kinsey’s famed one- to six-point scale, with homosexual and heterosexual at opposite ends, failed to take account of asexuals.<sup>39</sup> Since Kinsey and Storms, research has consistently verified the existence of a small but nontrivial number of asexual people. A 2004 analysis of data from 18,000 people in Great Britain found that 1.05%

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30. Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 307 (2014). My description of asexual identity in this Part, and my examination of animus toward asexuals in the next, is heavily indebted to Emens’s careful research. I indicate my reliance in individual footnotes, but I also wanted to explicitly acknowledge that her project as a whole is so comprehensive that it has served as the basis for much of my analysis.

31. *General FAQ*, ASEXUAL VISIBILITY & EDUC. NETWORK, <http://www.asexuality.org/home/?q=general.html> (last visited Aug 24, 2015).

32. Mary Duenwald, *For Them, Just Saying No Is Easy*, N.Y. TIMES (June 9, 2005), [http://www.nytimes.com/2005/06/09/fashion/thursdaystyles/09asexual.html?pagewanted=2&\\_r=0](http://www.nytimes.com/2005/06/09/fashion/thursdaystyles/09asexual.html?pagewanted=2&_r=0).

33. *Aromantic*, AVENWIKI, <http://www.asexuality.org/wiki/index.php?title=Aromantic> (last updated Jan. 6, 2015).

34. In the latter instance, the parties often work out a compromise with respect to sex. *Relationship FAQ*, ASEXUAL VISIBILITY & EDUC. NETWORK, <http://www.asexuality.org/home/?q=relationship.html> (last visited Aug. 24, 2015).

35. Emens, *supra* note 30, at 319–24.

36. *Id.* at 319–20.

37. *General FAQ*, ASEXUAL VISIBILITY & EDUC. NETWORK, <http://www.asexuality.org/home/?q=general.html> (last visited Aug. 24, 2015).

38. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 35 (1948).

39. See Emens, *supra* note 30, at 308–09.

might be asexual.<sup>40</sup> Asexual identity has increasingly gained attention among researchers in psychology and sociology.<sup>41</sup> And Elizabeth Emens's thorough research provides the first legal analysis to focus on asexuality as an identity category and to consider its treatment within the legal system.<sup>42</sup>

Some of the increased visibility of asexual people has resulted from political mobilization. AVEN, which as of 2014 has over 35,000 registered members, has provided both a political voice for asexuals and a forum for asexuals to connect and share experiences.<sup>43</sup> More generally, the Internet has provided a way for asexuals, who might otherwise have been isolated, to connect with one another.<sup>44</sup> This interaction within the asexual community has made available information about asexuality. While many asexuals are apathetic toward sex, others view sex with more active antipathy: they see it as a waste of time or worse.<sup>45</sup> One twenty-two year old woman on AVEN explains: "I know that I've never experienced sexual attraction. I do have a libido and I find it a rather pointless part of my being—if I lost it . . . I wouldn't miss it."<sup>46</sup> Still others describe themselves as "repulsed asexuals," meaning that they "find sex disgusting or revolting."<sup>47</sup> As one asexual explains, "I'm repulsed by [sex], so much so that I feel physically sick when I see a couple kissing."<sup>48</sup>

One feature uniting many asexual people is the belief that asexual relationships challenge cultural norms or reject them outright. As AVEN puts it: "Many asexuals consider their relationships to be outside the experience of our culture. It's up to us to make up words to describe our bonds with other people."<sup>49</sup> This conscious rejection of prevailing social

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40. Anthony F. Bogaert, *Asexuality: Prevalence and Associated Factors in a National Probability Sample*, 41 J. SEX RES. 279, 281–82 (2004).

41. See, e.g., Anthony F. Bogaert, *The Demography of Asexuality*, in INTERNATIONAL HANDBOOK ON THE DEMOGRAPHY OF SEXUALITY 275, 275 (Amanda K. Baumle ed., 2013); Catherine R.H. Aicken et al., *Who Reports Absence of Sexual Attraction in Britain? Evidence From National Probability Surveys*, 4 PSYCHOL. & SEXUALITY 121, 121–23 (2013); Dudley L. Boston, Jr. & Amanda K. Baumle, *Patterns of Asexuality in the United States*, 23 DEMOGRAPHIC RES. 509, 519 (2010).

42. See Emens, *supra* note 30.

43. *Id.* at 314–16.

44. Duenwald, *supra* note 32.

45. Emens, *supra* note 30, at 322–24 (explaining that asexuals' attitude toward sex range from apathy to repulsion).

46. Acer, *Opening the Door to Self-Discovery*, <http://www.asexuality.org/home/?q=node/41> (last visited Aug. 24, 2015).

47. *Repulsed*, AVENWIKI, <http://www.asexuality.org/wiki/index.php?title=Repulsed>.

48. Shadiya, Comment to *When It Comes to Sex—Are You Repulsed or Indifferent?? For Sexual Partners, Friends and Allies*, ASEXUAL VISIBILITY & EDUC. NETWORK (Feb. 25, 2008, 4:08 PM), <http://www.asexuality.org/en/topic/29262-when-it-comes-to-sex-are-you-repulsed-or-indifferent/page-2>.

49. *Relationship FAQ*, *supra* note 34.

assumptions about sex is central to many asexuals' identity, as is a commitment to questioning assumptions about sex—including the desire to have anything to do with sex at all.

In short, asexuality is a lack of sexual attraction, but for many asexual people it is also more than that. Asexual people often conceptualize their sexual identity as an affirmative challenge to existing understandings of relationships and a commitment to the idea of individual understandings of sex. As one commenter aptly summarizes: “There is no ‘correct’ way to be asexual.”<sup>50</sup>

### 3. Single

For present purposes, “single” identity refers to those who are permanently single by choice—not those who are pre-married or who are single but would like not to be. For a nontrivial percentage of people, singleness is a choice, not just something that happens.<sup>51</sup> Both my identity-based and legal claims about singles are potentially relevant to those who are single or unmarried but who do not yet identify as single by choice or single in a permanent sense. Given that adults spend more time single than married,<sup>52</sup> the implications are in fact quite broad, but for purposes of this paper, I focus on those who are permanently single by choice and reserve broader questions for another time.

Recent research indicates that the number of unmarried people in the United States is both large and growing. For example, the 2010 census revealed that nearly 100 million Americans eighteen and over (43.6%) are unmarried, and of these, 61% were never married.<sup>53</sup> While of course not all unmarried or never married people are single, nor are all of those who are single so by choice, many of them are. For example, a 2006 Pew survey found that 55% of single people are uninterested in finding a partner.<sup>54</sup>

Single people state clearly that their status is more than happenstance. As one commentator explains: “It turns out that many singles enjoy their

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50. Trix, *Question What You Think You Know*, ASEXUALITY VISIBILITY & EDUC. NETWORK, <http://www.asexuality.org/home/node/40> (last visited Aug. 24, 2015).

51. I exclude from the category of “single” those who are single but would like not to be, as well as those who are temporarily single by choice but expect that in the future they will not be—for example, those who are taking a break from dating.

52. Rajiv Garg, *Why Aren't You Single*, in *SINGLISM*, *supra* note 6, at 191.

53. U.S. Census Bureau, *Single Life* (Aug. 26, 2011), [https://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb11ff19.html](https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11ff19.html).

54. Lee Rainie & Mary Madden, *Not Looking for Love: The State of Romance in America*, PEW INTERNET & AMERICAN LIFE PROJECT 3 (2005), [http://www.pewinternet.org/files/old-media/Files/Reports/2006/PIP\\_Romance\\_in\\_America\\_feb06.pdf.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2006/PIP_Romance_in_America_feb06.pdf.pdf).

independence. They're leading full lives. And they're far less lonely and isolated than some may believe."<sup>55</sup> Indeed, the major problem facing many singles is the reaction from society rather than their singleness per se. One commentator describes the typical frustrations facing a person who is single by choice: "She's never been married, has never craved children, and has no interest in settling down with anyone in the foreseeable future. The one thing she would like is for everyone else to just accept that she's happy that way."<sup>56</sup>

In short, single people see significant advantages to their status. The fixation on couplehood, they explain, often crowds out other relationships, resulting in a comparatively impoverished life.<sup>57</sup> Laura Kipnis has called this single-minded investment in coupledom "the tyranny of two."<sup>58</sup> As Stephanie Coontz notes, the priority given to the marital relationship is in fact relatively new,<sup>59</sup> and its consequences are not unequivocally good. That priority downplays the importance of other human relationships. As Kate Bolick summarizes: "We are far more than whom we are (or aren't) married to: we are also friends, grandparents, colleagues, cousins, and so on. To ignore the depth and complexities of these networks is to limit the full range of our emotional experiences."<sup>60</sup>

The emphasis on coupledom has consequences beyond relationships with immediate family and friends. Natalia Sarkisian and Naomi Gerstel argue that married people have become increasingly isolated during the past generation because they focus on their marriages to the exclusion not only of other relationships, but also of investment in the broader community.<sup>61</sup> As they put it, "greedy" marriages have resulted in a "short-circuiting of community ties": contrary to the popular social view of marriage as the pillar of the community, marriage in fact crowds out community involvement.<sup>62</sup> Gerstel and Sarkisian have found that never-

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55. Janelle Nanos, *Single By Choice*, BOSTON MAG. (January 2012), <http://www.bostonmagazine.com/2012/01/single-by-choice-why-more-of-us-than-ever-before-are-happy-to-never-get-married/> (citing research that suggests that singles are "happier, more social, and more active in the community than many of their wedded counterparts").

56. *Id.*

57. See, e.g., BELLA DEPAULO, SINGLED OUT: HOW SINGLES ARE STEREOTYPED, STIGMATIZED, AND IGNORED, AND STILL LIVE HAPPILY EVER AFTER 250–53 (2005).

58. LAURA KIPNIS, AGAINST LOVE: A POLEMIC 35 (2005).

59. STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 229–44 (2005).

60. Kate Bolick, *All the Single Ladies*, ATLANTIC (Nov. 2011), <http://www.theatlantic.com/magazine/archive/2011/11/all-the-single-ladies/308654/>.

61. NATALIA SARKISIAN & NAOMI GERSTEL, NUCLEAR FAMILY VALUES, EXTENDED FAMILY LIVES: THE POWER OF RACE, CLASS, AND GENDER (2012).

62. *Id.* at 87.

married and unmarried people are more politically active, more engaged with their neighbors, and have stronger networks of family and friends.<sup>63</sup>

Moreover, single people more readily adopt and embrace their identity than in the recent past, in part because single identity is no longer exclusively seen as pitiable or questionable, but rather as admirable, even enviable. For example, unmarried women who gain positions of power and prestige gain accolades that perhaps they would not if they had married. As one commenter put it: “Sonia Sotomayor isn’t merely a powerful woman in a black robe—she’s also a stellar example of what it can mean to exercise authority over every single aspect of your personal life.”<sup>64</sup>

For many, the decision to remain unpartnered is at least in part a protest against existing social norms. Researchers such as Marcia Guttentag and Paul Secord posit the romantic coupling environment as a market, and argue that members of the gender in shorter supply are less dependent on their partners because they have a greater number of alternative relationships available to them.<sup>65</sup> In dating pools where women are a minority, this disparity creates an environment that disempowers women.<sup>66</sup> Susan Walsh summarizes: “high-status men . . . maintain an ‘official’ girlfriend as well as a rotating roster of neo-concubines, who service him in the barroom bathroom or wherever the beer is flowing.”<sup>67</sup> In light of these disparities and the culture they enable, many people—both women and men—see single life as affirmatively preferable.

Finally, shaking off cultural assumptions about marriage allows single people to think about relationships without social constraints. At the far end of the spectrum, consider the Mosuo culture of China, within which, as Judith Stacey explains, matriarchal families “own, maintain, and inherit the family property, perform the necessary labor, rear all children born to the women of the household, and care for their aged and dependent members.”<sup>68</sup> Sex is separate from other social structures: “Lovers do not share homes, money, childrearing, daily labor, or relatives” and “may freely pursue exclusive or multiple relationships that are enduring or short-

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63. *Id.*

64. *Id.* at 35–47.

65. MARCIA GUTTENTAG & PAUL F. SECORD, TOO MANY WOMEN? THE SEX RATIO QUESTION (1983).

66. *Id.* See also RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2012) (explaining that black women who wish to marry black men are particularly harmed by this gender-based power disparity due to issues such as incarceration and educational underattainment, which disproportionately affect black men).

67. Bolick, *supra* note 60.

68. JUDITH STACEY, UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA 152–87 (2001).

lived and that cross class, age, religious, and ethnic boundaries, as they prefer.”<sup>69</sup> As a result, sexual relationships among the Mosuo “are governed almost exclusively by mutual desire and affection, unencumbered by other responsibilities.”<sup>70</sup> The result is a high degree of sexual freedom for both men and women, unconstrained by social judgment.<sup>71</sup>

Today, Mosuo culture is changing.<sup>72</sup> But the traditional culture aptly illustrates the socially contingent nature of relationships. Moreover, the culture represents the possibilities open to those who are single by choice. Almost anything is possible if we do not consider ourselves bound by social convention.

#### 4. Childfree

More people are affirmatively choosing a childfree identity than at any time in the past. Among American women nearing the end of their childbearing years—a typical, if not perfect, metric for measuring childlessness—19% now have no children.<sup>73</sup> And of those who do not have children, about half affirmatively chose not to do so.<sup>74</sup> While the precise number is somewhat open to question, it is clear that a nontrivial minority of Americans are opting out of parenthood.

Childfree people offer a range of reasons for not having children.<sup>75</sup> Some rely on research showing that childfree couples are happier, on average, than their counterparts with children,<sup>76</sup> or that the childfree have

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69. *Id.* at 182.

70. *Id.*

71. *Id.* at 156 (“Mosuo women can freely refuse any desired visits [from sexual partners], and they can invite desired ones. Mosuo culture does not venerate female chastity or judge women’s sexual behavior differently from men’s.”).

72. *Id.* at 186–87.

73. Gretchen Livingston, *In Terms of Childlessness, the U.S. Ranks Near the Top Worldwide*, PEW RESEARCH CTR. (Jan. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/01/03/in-terms-of-childlessness-u-s-ranks-near-the-top-worldwide/>. A 2010 Pew poll reported similar findings. Gretchen Livingston & D’Vera Cohn, *Childlessness Up Around All Women, Down Among Women with Advanced Degrees*, PEW RESEARCH CTR. (June 25, 2010), <http://www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/>.

74. See Alanna Vagianos, *The 19 Best Things About Being Childfree*, HUFFINGTON POST (June 25, 2014), [http://www.huffingtonpost.com/2014/06/19/perks-of-being-childfree\\_n\\_5438754.html](http://www.huffingtonpost.com/2014/06/19/perks-of-being-childfree_n_5438754.html).

75. This Article’s discussion of childfree people relies on more online and anonymous sources than the discussion of other negative identities because childfree identity has been less thoroughly addressed in the scholarly literature.

76. See, e.g., DANIEL GILBERT, *STUMBLING ON HAPPINESS* 218–20 (2007) (“[C]ouples generally start out quite happy in their marriages and then become progressively less satisfied over the course of their lives together, getting close to their original levels of satisfaction only when their children leave home.”); Daniel Kahneman & Alan B. Krueger, *Developments in the Measurement of Subjective Well-*

better mental health.<sup>77</sup> Others cite a better standard of living<sup>78</sup> and more personal and professional freedom.<sup>79</sup> Still other reasons are social, ranging from environmentalism to concern for population growth,<sup>80</sup> particularly given recent sophisticated projections that suggest optimal rates of population growth may be lower than previously believed.<sup>81</sup>

Recent years have seen increased cohesion among those who adopt childfree identity and advocacy for their interests. Internet sites and forums allow the formation of online childfree communities.<sup>82</sup> Media figures contest the idea that there is something unnatural or selfish about childfree life.<sup>83</sup> Feminist scholars such as Mary Anne Case and Katherine Franke

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*Being*, 20 J. ECON. PERSP. 3, 13 (2004) (citing a study of 909 women in which happiness associated with childcare was ranked only slightly higher than their evening commute). And a great deal of anecdotal evidence tracks the dissatisfaction associated with parenting. See, e.g., JENNIFER SENIOR, ALL JOY AND NO FUN: THE PARADOX OF MODERN PARENTHOOD (2014); Comment to *Truu Mom Confessions*, THE CHILDFREE LIFE (Oct. 9, 2010), <http://www.thechildfreelife.com/forum/viewtopic.php?f=4&t=8452> (“I love my daughter. So much that I will do everything to make sure she never realizes how much I hate motherhood and wish I remained childfree.”); Comment to *Truu Mom Confessions Part Deux*, THE CHILDFREE LIFE (Jan. 19, 2014), <http://www.thechildfreelife.com/forum/viewtopic.php?f=4&t=8452> (“At least once a day I wish I didn’t have kids. . . . Mommy fail!”).

77. See, e.g., Sonja Lyubomirsky & Julia K. Boehm, *Human Motives, Happiness, and the Puzzle of Parenthood: Commentary on* Kenrick et al., 5 PERSP. ON PSYCHOL. SCI. 327, 330–31 (2010) (summarizing research finding that parenting is associated with decrements in happiness because children interfere with lower level needs); Ranae J. Evenson & Robin W. Simon, *Clarifying the Relationship Between Parenthood and Depression*, 46 J. HEALTH & SOC. BEHAV. 341, 354 (2005) (all categories of parents report more depression than nonparents).

78. See UNITED STATES DEPARTMENT OF AGRICULTURE, EXPENDITURES ON CHILDREN BY FAMILIES, 2012 (Aug. 2013), [http://www.cnpp.usda.gov/sites/default/files/expenditures\\_on\\_children\\_by\\_families/crc2012.pdf](http://www.cnpp.usda.gov/sites/default/files/expenditures_on_children_by_families/crc2012.pdf) (estimating that, in 2012 dollar values, the cost of raising a child through age seventeen would be \$173,490, \$241,080, and \$399,780, for families in the lowest, middle, and highest income groups respectively).

79. See Vagianos, *supra* note 74 (citing freedom to pursue professional goals as a perk of being childfree).

80. See, e.g., Lisa Hymas, *I Decided Not to Have Children for Environmental Reasons*, GUARDIAN (Sept. 27, 2011), <http://www.theguardian.com/environment/2011/sep/27/not-have-children-environmental-reasons> (explaining how not bearing children is a method for creating a cleaner environment).

81. *Quality Time*, ECONOMIST (May 31, 2014), <http://www.economist.com/news/international/21603024-why-shrinking-populations-may-be-no-bad-thing-quality-time> (citing research that suggests education should be taken into account, which makes optimal rates much lower than previously thought).

82. See, e.g., CHILDFREE LIFE, <http://thechildfreelife.com/> (last visited Aug. 24, 2015); WHY NO KIDS?, <http://whynokids.com/> (last visited Aug. 24, 2015); THE NOT MOM, <http://thenotmom.com/> (last visited Aug. 24, 2015).

83. See Caroline A. Miranda, *Childfree Adults Are Not “Selfish.”* TIME (Aug. 1, 2013), <http://ideas.time.com/2013/08/01/no-regrets-why-i-dont-have-children/> (“The idea that women don’t have babies because they are ‘selfish’ is not only reductive, in so many cases, it is simply incorrect.”) Jill Filipovic, *The Choice to Be Childfree Is Admirable, Not Selfish*, GUARDIAN,

have challenged the idea that workplace accommodations should protect childbearing over other family and personal considerations.<sup>84</sup> Both academic and media commentators have argued that life without children can be equally beneficial to society, or perhaps even more so, depending on the child and the activities undertaken instead of childrearing. As one commenter put it: “By not having kids, I can give more of my time, effort and resources, not only to myself but to other people, and society as a whole. I do that through working and getting involved with community activities and charities . . . .”<sup>85</sup> Related to this mobilization, movements to create childfree spaces have gained traction. Some venues simply do not allow children.<sup>86</sup> A restaurant owner at exclusive Alinea in Chicago created controversy after he allowed a couple to bring their crying baby to the restaurant, then vented his frustration on Twitter.<sup>87</sup> Several airlines have developed a range of childfree flying zones, some at no extra cost, some for a small fee.<sup>88</sup>

As with the other negative identities I have discussed, childfree people hold a range of attitudes toward children. Some love them—see, for example, the website Savvy Auntie, which bills itself as “[t]he first community for cool aunts, great-aunts, godmothers, and all women who love kids.”<sup>89</sup> But this attitude is not universal. Other childfree people view

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<http://www.theguardian.com/commentisfree/2013/aug/16/choice-child-free-admirable-not-selfish> (“Contrary to popular media narratives and the critiques of those concerned about the continued supremacy of the white race, women who don’t have children are not selfish, emotionally stunted or inadequately grown-up.”).

84. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1756 (2001) (explaining that the end goal of childcare policies need to be articulated more precisely before determining whether any particular form of state aid for parents will appropriately accomplish such goal); Katherine M. Franke, *Theorizing Yes: An Essay of Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183 (2001) (finding that the feminist legal frame tends to collapse women’s identity into motherhood).

85. Nilufer Atik, *We Aren’t Freaks: Women Who Don’t Want Children Shouldn’t Be Made Outcasts*, MIRROR (June 22, 2012), <http://www.mirror.co.uk/lifestyle/women-are-not-freaks-just-because-905131>.

86. See, e.g., *Common Questions*, CHI. SYMPHONY ORCHESTRA, <http://cso.org/PlanYourExperience/Questions.aspx> (explaining that the symphony welcomes children eight and older).

87. Vicky Ortiz Healy et al., *Crying Baby at Alinea Puts Controversy on Menu*, CHI. TRIB. (Jan. 14, 2014), [http://articles.chicagotribune.com/2014-01-14/features/chi-alinea-crying-baby-20140114\\_1\\_most-acclaimed-restaurants-rpm-italian-crying-baby](http://articles.chicagotribune.com/2014-01-14/features/chi-alinea-crying-baby-20140114_1_most-acclaimed-restaurants-rpm-italian-crying-baby).

88. Ben Mutzabaugh, *Another Airline Rolls Out a “No Kids” Zone*, USA TODAY (Aug. 26, 2013), <http://www.usatoday.com/story/todayinthesky/2013/08/26/another-airline-rolls-out-a-no-kids-zone-scoot/2699209/>.

89. While the forum is not limited to childfree women, many members of the community explicitly identify that way. SAVVY AUNTIE, <http://savvyauntie.com/defaulthome.aspx> (last visited Aug.

children with indifference,<sup>90</sup> or affirmatively dislike them.<sup>91</sup> And some simply find the question incoherent: as one commentator puts it: “I’ve always found the phrase ‘I like kids’ a bit odd. . . . No one ever says, ‘don’t you like adults?’ because that’s a stupid question. Obviously not all adults are likable. It’s the same with kids”<sup>92</sup>

Central to the thinking of many childfree people is the idea that individual decisions about reproduction deserve universal respect. Such validation, they believe, leads to a wider range of acceptable lifestyles that ultimately benefits both parents and the childfree.

#### B. ADDRESSING NEGATIVE IDENTITY COLLECTIVELY

Addressing negative identity collectively yields a number of analytic benefits. While atheist, asexual, single, and childfree people are quite different in the way they define themselves, both in the actual substantive content of the definition and in the criteria they use to arrive at that substantive content, focusing on the similarities helps us to better understand these identities, their positive counterparts, and the root causes of animus toward negative identity more generally.

One way of looking at the uniqueness of negative identity is both philosophical and conceptual. Negative identity is harder to describe. It is arguably more nebulous, less tangible, and as a result, more likely to fall into cracks in discourse and in law. It is easier to point to the significance of identity defined by particular things—gods, sexual desires, partners, children—than to explain the significance of identity characterized by a lack of those same things. This distinction finds purchase in the legal theory literature, and, consequently, our legal discourse.<sup>93</sup> It is easier to

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25, 2015). See also Bolick, *supra* note 60 (“I’ve been wondering if we’ve been witnessing the rise of the aunt.”).

90. See, e.g., kryptogal, Comment in *Does Having Children Ruin Your Life?*, OPEN SALON (March 31, 2009), [http://open.salon.com/blog/kryptogal/2009/03/31/does\\_having\\_children\\_ruin\\_your\\_life](http://open.salon.com/blog/kryptogal/2009/03/31/does_having_children_ruin_your_life) (soliciting remarks from commentators on whether having children ruins your life).

91. Few people will express this sentiment under their own name, without qualifications (such as “not *all* kids”), but it exists. See, e.g., Anonymous, *The 4 Words of the Pariah*, HEARTLESS BITCHES, <http://www.heartless-bitches.com/rants/identlikekids.shtml> (last visited Aug. 25, 2015) (“I don’t like children.”).

92. Bella DePaulo, *Who Are the Adults Without Children and What’s the Right Word for Them?*, PSYCHOL. TODAY (Sept. 11, 2010), <http://www.psychologytoday.com/blog/living-single/201009/who-are-the-adults-without-children-and-what-s-the-right-word-them> (quoting a comment by Lauri).

93. Some versions of this sentiment sound in legal positivism. As Leslie Green writes: “According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction.” Leslie Green, *Legal Positivism*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 3, 2003), <http://plato.stanford.edu/entries/legal-positivism/>.

legislate or adjudicate an act as opposed to an omission.<sup>94</sup>

Another reason it is useful to consider negative identity collectively is sociological. Ingroup theory posits the existence of “ingroups”—those viewed as sharing particular characteristics or values that comprise a certain identity—and “outgroups”—those viewed as outside the shared identity.<sup>95</sup> In a world of diverse preferences and finite resources, people experience a drive to band together with those like them and form groups with shared interests. In some instances, this involves organizing around shared identity characteristics. For social ingroup members—those with positive religious, sexual, partnership, and parental identities—it is natural to coalesce around shared preferences and to advocate for policies respecting these interests. Such advocacy often relegates outgroup members to the margins. This shared experience of marginalization unifies the four negative identities I have selected for discussion in this Article, making comparative discussion a worthy project.

Negative identity is also viewed—often incorrectly—as more fluid than positive identity. Atheists can convert, people say. Asexuals just need to meet someone who turns them on. Singles can marry. The childfree can have biological or adopted children. Many negative identity group members would likely dispute the claim that their identity is any more fluid than positive identity. People stop believing in religion, they would argue. People change (or discover) their sexual orientation. People divorce, and decide they like being permanently divorced. And not everyone who has children will remain a parent. Nonetheless, the prevailing social perception is that conversions from negative to positive social identity are common, while the reverse is not. Many people see negative identity as unanchored by a socially important thing—religion, sex, partner, child—and thus more likely to change.

Relatedly, negative identity raises questions. If people know that someone is Protestant, gay, married, or a parent, it allows them to place that person in a category that does not immediately lead to additional questions. Negative identity, on the other hand, always leads to more questions. If someone does not have a child, for example, questions remain unanswered against the backdrop of our current social defaults. Is the person trying to have a child? Will they be trying soon? Are they infertile? Do they want

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94. We might frame this as follows. It is easier to understand the instruction “you must do X” or “you must not do X” instead of “you must do everything *except* X” or “you must not do anything *besides* X.”

95. See, e.g., Miles Hewstone et al., *Intergroup Bias*, in Richard J. Crisp, *SOC. PSYCHOL.* 323–44 (2002); Marilyn B. Brewers, *The Psychology of Prejudice: Ingroup Love and Outgroup Hate?*, 55 *J. OF SOC. ISSUES* 429 (1999).

children? If not, why not? Are they childfree by choice? If so, why? Not all those to whom such questions might be directed fall within the category of what I call negative identity—for instance, not all people without children are childfree. The point, however, is that prevailing social scripts reflexively subject everyone who *is* categorized within a negative identity group to such questions.

Considering negative identity in the aggregate is also valuable because negative identity spans a continuum of relationships to the positive identity category. Acknowledging this spectrum highlights the similarities among a diverse group of people.

TABLE. The Negative Identity Spectrum

<i>View toward positive identity:</i>	<i>Limited personal appreciation</i>	<i>Neutral</i>	<i>Individual revulsion</i>	<i>Generalized revulsion</i>
Atheist	I appreciate some aspects of religion (music, community)	I have no need or desire for religion in my life.	I am repelled by religion on a personal level.	I am repelled by the fact that anyone has religious beliefs.
Asexual	I appreciate some aspects of sex (cuddling, pleasing my partner)	I have no need or desire for sex in my life.	I am repelled by the idea of participating in sex.	I am repelled by the idea of anyone having sex.
Single	I appreciate some partner activities (sex, dating)	I have no need or desire for a partner in my life.	I am repelled by the idea of having a partner.	I am repelled by the idea of anyone having a partner.
Childfree	I appreciate interacting with children sometimes (babysitting, meeting friends' children).	I have no need or desire for children in my life.	I am repelled by the idea of having my own children.	I am repelled by the idea of anyone having children.

In addition to these conceptual reasons that negative identity provides a useful overarching framework, several pragmatic considerations also warrant discussion and set up the next Parts. First, individuals who pass to conceal various forms of negative identity suffer harms that, while not identical, take a similar toll on the self.<sup>96</sup> Passing might involve a single person alluding to an online dating profile that does not exist, or a childfree person feigning an interest in having children “someday.” Likewise, Kenji Yoshino’s famous work on covering, or “ton[ing] down a disfavored identity to fit into the mainstream,” also applies to people who do not conceal their atheism, asexuality, singleness, or childfree identification, but who avoid drawing attention to that identity.<sup>97</sup> For example, a person’s coworkers may know she is an atheist, but she may still avoid drawing attention to that identity by reading a novel at lunch rather than the Christopher Hitchens book she would rather read. Or someone’s family may know he identifies as asexual, but he may still refrain from telling them about his participation in an AVEN conference.

Second, individuals whose identity does not include a relationship to something that a majority of society considers important automatically share certain types of experiences. They are marginalized from discourse that presumes that religion, sex, partnership, or children is of universal importance. Across negative identities, this marginalization takes a toll on the self.<sup>98</sup> Feeling as though one is an outcast from society merely for being oneself is a painful experience.<sup>99</sup> Members of negative identity groups experience this ostracism in a more regular, sustained, predictable fashion.

Third, negative identity is a target for animus. While such animus does not always take precisely the same form, individuals who are atheist, asexual, single, or childfree are treated as abnormal or suspect by members of positive identity groups.<sup>100</sup> In Part II, I will elaborate on this experience of discrimination and elaborate on the underlying motive, which has some important similarities across negative identity categories.

Finally—and most importantly for purposes of my project—individuals who fall into negative identity categories are disadvantaged in many legal contexts. I will discuss this phenomenon further in Part III. For now, suffice it to say that some of the reasons for this systematic legal disadvantage are common to all negative identity groups. The law is better

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96. As I will describe in Part II.A.1, *infra*, atheists and asexuals are frequently not “out” to their colleagues, and often not to many of their family and friends.

97. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 23(2006).

98. *Id.* at 23–35.

99. *See id.* at 35–109.

100. I will discuss these views further in Part II.

at dealing with tangible, concrete things—children, partners, gods, sex. It falters when confronted with the less tangible, particularly when those affected are members of a social minority.

## II. NEGATIVE IDENTITY AND ANIMUS

Negative identity is subject to animus and bias. Given that such animus is sometimes overlooked or minimized, this Part catalogs animus against atheist, asexual, single, and childfree people. It then offers some explanations for why negative identity provokes animus.

### A. NEGATIVITY TOWARD NEGATIVE IDENTITY

This Section documents negative attitudes and behavior toward members of negative identity groups—specifically, toward atheist, asexual, single, and childfree people. For all four groups, animus against the negative identity category has deep historical roots and continues to experience significant bias and negative treatment. One point of clarification: I am not minimizing or trivializing the negative treatment of religious people, sexual people (primarily sexual minorities), married people, and parents. The harms to these groups are real and well-documented, but they are not my focus here.

#### 1. Atheist

Atheists have long met with suspicion and mistrust in American society. In his influential work “A Letter Concerning Toleration,” John Locke argued that all religions deserved “toleration,” but that atheism did not:

[T]hose are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides also, those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration.<sup>101</sup>

For the most part, Locke’s views paralleled those of his contemporaries. Before the French Revolution, atheism was virtually nonexistent in America: “The known unbelievers of Europe and America before the French Revolution numbered fewer than a dozen.”<sup>102</sup> And while atheists increased in number after the revolution ended in 1799, it remained

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101. JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans. 1689).

102. JAMES C. TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 44 (Johns Hopkins Univ. Press 1986).

true that “an outright rejection of all conceptions of God was politically untenable.”<sup>103</sup> Joel Barlow, who some identify as America’s first atheist, found his views marginalized; at the time, the designation “atheist” was an insult and a slur.<sup>104</sup>

Nor did atheists enjoy high esteem in the courts. In 1837, for example, one judge described blasphemy as “a gross offence against society on account of its tendency to disturb the public peace.”<sup>105</sup> The same court concluded “that the religion of the people of Delaware is *Christian*.”<sup>106</sup> Indeed, as late as 1917, a Note published in the *Harvard Law Review* discussed the “legality” of atheism.<sup>107</sup> Part III will discuss legal regimes related to atheism in more detail; here, the point is simply that the legality of atheism was sufficiently debatable to warrant research and commentary less than a century ago.

In recent years, many would agree that American culture has grown more secular.<sup>108</sup> But this is not to say atheists are more popular than they used to be. Rather, atheism is “the glaring exception to the general rule of increasing social tolerance over the last thirty years of the twentieth century.”<sup>109</sup>

Research reveals consistently negative attitudes toward atheists. In the political sphere, a recent poll revealed that atheism was the characteristic most likely to make people less likely to vote for a political candidate.<sup>110</sup> Fifty-three percent of people would be less likely to vote for an atheist candidate—more than for someone who had an extramarital affair (35%), was gay or lesbian (27%), or used marijuana (22%).<sup>111</sup> While these figures represent an improvement over 2007—when a similar poll found that fully 63% would be less likely to vote for an atheist person—they also reveal

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103. RICHARD BUEL JR., JOEL BARLOW: AMERICAN CITIZEN IN A REVOLUTIONARY WORLD 35 (2011).

104. *Id.*

105. *State v. Chandler*, 2 Del. (2 Harr.) 553, 553 (1837).

106. *Id.* at 567 (emphasis in original).

107. Note, *The Legality of Atheism*, 31 HARV. L. REV. 289, 293 (1917).

108. See *Religion*, GALLUP, <http://www.gallup.com/poll/1690/religion.aspx> (last visited Aug. 25, 2015) (showing that the percentage of Americans who say religion is “not very important” in their lives has doubled to 22% since 1999 and citing polls that indicate, among other things, that a growing percentage of Americans do not attend church and religion unimportant in their life).

109. Edgell et al., *supra* note 17, at 215.

110. *For 2016 Hopefuls, Washington Experience Could Do More Harm than Good*, PEW RESEARCH CTR. (May 19, 2014), <http://www.people-press.org/2014/05/19/for-2016-hopefuls-washington-experience-could-do-more-harm-than-good/>.

111. *Id.*

that much animosity remains.<sup>112</sup>

Similarly, a much-cited study found that, “out of a long list of ethnic and cultural minorities, Americans are less willing to accept intermarriage with atheists than with any other group, and less likely to imagine that atheists share their vision of American society.”<sup>113</sup> When presented with a lengthy list of religions, races, ethnicities, and sexual orientations, survey respondents were most likely to say that atheists disagreed with their vision of society (39.6%), followed by Muslims (26.3%) and homosexuals (22.6%).<sup>114</sup> Likewise, survey respondents were most likely to say they would disapprove if their child wanted to marry an atheist (47.6%), with the next most frequent responses Muslim (33.5%) and African American (27.2%).<sup>115</sup> Another recent Pew poll found that 49% of Americans would not want an atheist as an in-law.<sup>116</sup> By way of comparison, only 14% would be upset about an in-law without a college degree and less than 10% about a person from the opposing political party.<sup>117</sup> Indeed, even believers who do not belong to a specific religious group view atheists as untrustworthy.<sup>118</sup>

Sociologists have identified a common belief in a “religious convergence” during the twentieth century, which posits America as a nation of diverse religious views that nonetheless yield consensus on basic values—what researchers have termed the “common creed.”<sup>119</sup> Under this theory, people express hostility toward atheists because they disrupt this emerging narrative. This explains why tolerance of religious difference has increased dramatically in recent years, while tolerance for atheism has increased only slightly during the same time period.<sup>120</sup> Indeed, recent increased tolerance for religious diversity “may have heightened awareness

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112. See Cathy Lynn Grossman, *More Americans Willing to Vote for an Atheist President*, WASH. POST (MAY 20, 2014), [http://www.washingtonpost.com/national/religion/more-americans-willing-to-vote-for-an-atheist-president/2014/05/20/4a73d900-e05c-11e3-9442-54189bf1a809\\_story.html](http://www.washingtonpost.com/national/religion/more-americans-willing-to-vote-for-an-atheist-president/2014/05/20/4a73d900-e05c-11e3-9442-54189bf1a809_story.html) (“Atheists are still the most mistrusted group in the U.S., and a godless politician is still the least likely candidate to win votes in a presidential election.”).

113. Edgell et al., *supra* note 17, at 216.

114. *Id.* at 218.

115. *Id.*

116. PEW RESEARCH CENTER, *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC* 48–49 (June 12, 2014).

117. *Id.*

118. See Will Gervais, *In Godlessness We Distrust: Using Social Psychology to Solve the Puzzle of Anti-Atheist Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 366, 372 (2013) (“Believers consistently distrust atheists.”).

119. Edgell et al., *supra* note 17, at 216.

120. STEVE FARKAS ET AL., *FOR GOODNESS’ SAKE: WHY SO MANY WANT RELIGION TO PLAY A GREATER ROLE IN AMERICAN LIFE* 35–36 (2001).

of religion itself as a basis for solidarity in American life and sharpened the boundary between believers and nonbelievers in our collective imagination.”<sup>121</sup>

Whatever the reason, the realities of American society bear out the attitudes expressed in research and polls. Americans remain mistrustful of atheists in public office. We have never had an atheist president.<sup>122</sup> There are currently no admitted atheists in Congress, and only one in state legislatures—Nebraska’s Ernie Chambers.<sup>123</sup> Longtime Massachusetts Representative Barney Frank came out as an atheist in 2013, after he left Congress<sup>124</sup>; it is significant that he felt comfortable coming out as gay in 1985, yet waited nearly thirty years to make his atheism public. By some accounts, former California Representative Pete Stark is the only atheist to serve openly in Congress.<sup>125</sup> But Stark identifies himself as “a Unitarian who does not believe in a Supreme Being”—hardly a ringing endorsement of atheism.<sup>126</sup> A particularly revealing example is Cecil Bothwell, an atheist city councilman from North Carolina, whose opponents attempted to prevent him from taking office on the ground that a state constitutional provision barred it,<sup>127</sup> notwithstanding that the Supreme Court has unequivocally held that such provisions violate the Establishment Clause.<sup>128</sup> Although Bothwell eventually took his oath and assumed office, it is telling that, in 2009, people thought it politically acceptable—to say nothing of legally valid—to express the view that atheists are unfit for office.

Many public organizations and events explicitly or implicitly exclude atheists. Atheists are often omitted from public ceremonies that include

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121. Edgell et al., *supra* note 17, at 212.

122. Michael Lipka, *Americans Are Somewhat More Open to the Idea of an Atheist President*, PEW RESEARCH CTR. (May 29, 2014), <http://www.pewresearch.org/fact-tank/2014/05/29/americans-are-somewhat-more-open-to-the-idea-of-an-atheist-president/> (citing research that indicates many Americans remain uncomfortable with electing a president who does not believe in God).

123. Nick Wing, *Here Are All the Atheists in Congress*, HUFFINGTON POST (Sept. 19, 2013), [http://www.huffingtonpost.com/2013/09/19/atheists-in-congress\\_n\\_3944108.html](http://www.huffingtonpost.com/2013/09/19/atheists-in-congress_n_3944108.html).

124. Mary Elizabeth Williams, *Barney Frank’s Atheist Triumph*, SALON (Aug. 5, 2013), [http://www.salon.com/2013/08/05/barney\\_franks\\_atheist\\_triumph/](http://www.salon.com/2013/08/05/barney_franks_atheist_triumph/).

125. Charles Mahtesian, *Non-believers on Rise in Congress*, POLITICO (Jan. 5, 2014), <http://www.politico.com/blogs/charlie-mahtesian/2013/01/nonbelievers-on-rise-in-congress-153418.html>.

126. Carla Marinucci, *Stark’s Atheist Views Break Political Taboo*, SFGATE. (Mar. 14, 2007, 4:00 AM), <http://www.sfgate.com/politics/article/Stark-s-atheist-views-break-political-taboo-2570270.php>.

127. See N.C. CONST., art. VI, § 8; David Zucchino, *Councilman Under Fire for Atheism*, L.A. TIMES (Dec. 20, 2009), <http://articles.latimes.com/2009/dec/20/nation/la-na-hometown-asheville20-2009dec20>.

128. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

representatives from many religions.<sup>129</sup> And even when atheists are nominally included, their inclusion does not always take place on equal footing.<sup>130</sup> Likewise, many private organizations exclude atheists, such as the Boy Scouts,<sup>131</sup> the Freemasons,<sup>132</sup> the Elks,<sup>133</sup> and many others.<sup>134</sup> The reason for exclusion is often simply that nonreligion is incompatible with the organization's goals. Moreover, even for many organizations that do not explicitly require religious belief, religion is an informal norm among members.

Perhaps most telling is the reluctance of atheists themselves to identify publicly as atheist. Despite the relatively privileged social status atheists occupy,<sup>135</sup> many report such reluctance.<sup>136</sup> The nontrivial fear of openly expressing atheist identity to family, friends, neighbors, and colleagues is often a sufficient deterrent for atheists to conceal their identity. Atheists have recently gained political and social salience.<sup>137</sup> But a great deal of discourse continues to disparage atheists, reinforcing the negative attitudes described in this section and legitimizing acts of overt discrimination.

## 2. Asexual

Historically, asexuals have not been subject to wide-ranging discrimination. Elizabeth Abbott suggests that asexual people existed but

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129. See, e.g., Program, *Healing Our City*, April 18, 2013 (“interfaith” service commemorating Boston Marathon bombing excludes atheists).

130. Consider President Obama’s Interfaith and Community Service Campus Challenge: while the President explicitly stated that the initiative should include atheists, agnostics and humanists, a faith-based program does not treat those without faith equally.

131. See *Duty to God Breakfast*, BOY SCOUTS OF AMERICA, <http://www.scouting.org/NationalAnnualMeeting/events.aspx> (last visited Aug. 25, 2015) (providing for a breakfast reinforcing a scout’s duty to God and honoring youths of various faiths).

132. Josh L. Rubin, *For No Atheist May Be Made a Freemason*, REVIEW OF FREEMASONRY, <http://www.freemasons-freemasonry.com/atheism-freemasonry.html> (“If an Atheist were to join the Craft, he would find that he would be not able to fully understand even part of the esoteric mysteries which bind Masons together.”).

133. See Billie Sieg, *Freethinker Rebuffed by Elks Club*, FREEDOM FROM RELIGION FOUND., <http://ffrf.org/about/getting-acquainted/item/12759-freethinker-rebuffed-by-elks-club> (providing that an atheist was denied membership in Elks).

134. See, e.g., Jessica Chasmar, *CPAC Reverses Decision, Bans Atheist Group*, WASH. TIMES (Feb. 25, 2014), <http://www.washingtontimes.com/news/2014/feb/25/cpac-reverses-decision-allow-atheists-report/> (CPAC banned atheist organization from attending annual conference); *Activities Manual*, SIGMA CHI 3, [http://sigmach.org/sites/default/files/Sigma%20Chi%20Activities%20Manual\\_5.21.12.pdf](http://sigmach.org/sites/default/files/Sigma%20Chi%20Activities%20Manual_5.21.12.pdf) (last visited Aug. 24, 2015) (members of Sigma Chi fraternity must believe in God); *Membership*, SHRINERS, <http://www.mohammedshriners.org/#!/units/cjs3> (Shriners must believe in God).

135. Tebbe, *supra* note 4, at 1121–22.

136. *Id.*

137. See *supra* Part I.A.1.

largely escaped attention: perhaps they never married; perhaps they entered sexless marriages; perhaps they had sex without wanting to.<sup>138</sup> Yet even historically, a failure to engage in sex met with suspicion; for example, a failure to consummate a marriage was viewed as an insult to the sacrament of marriage.<sup>139</sup>

As asexuality has gained attention, animus has increased. Recent research has found that heterosexual people view asexual people more negatively than individuals of any other category.<sup>140</sup> The study found that heterosexuals view homosexuals most positively, then bisexuals, with asexuals last.<sup>141</sup>

Asexuals report less discrimination in traditional contexts, such as the workplace, than other groups. A small study of thirty-nine asexuals found that most participants responded that a question about workplace discrimination was not applicable to them.<sup>142</sup> As Emens observes, however, the results are open to interpretation because most participants were not open about their asexuality to their colleagues—only 13.6% of the subjects' work peers actually knew they were asexual.<sup>143</sup> If most asexuals are passing as sexuals at work, it would explain participants' response that the question was not applicable as well as the fact that they did not experience discrimination on account of sexual orientation.<sup>144</sup>

While academic research about discrimination against asexuals is relatively thin, anecdotal evidence supports the existence of animus directed at asexuals. At its extreme, such animus sometimes takes the form of sexual violence designed to eradicate asexualism. Case law hints at such attempts at so-called "corrective rape": in *State v. Dutton*, for example, a rape complainant stated that she approached the pastor of her church for help with a variety of emotional and psychological issues.<sup>145</sup> Her pastor subsequently had sex with her repeatedly and told her that "sexual contact and intercourse would be consistent with her treatment because it would remove her inhibitions about sex during her menstrual period," that "sexual

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138. See generally ELIZABETH ABBOTT, *A HISTORY OF CELIBACY* (2001).

139. *Id.* at 355.

140. See Cara C. MacInnis & Gordon Hodson, *Intergroup Bias Toward "Group X": Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination Against Asexuals*, 6 *GROUP PROCESSES & INTERGROUP REL.* 725, 731 (2012).

141. *Id.*

142. Sephanie B. Gazzola & Melanie A. Morrison, *Asexuality: An Emergent Sexual Orientation*, in *SEXUAL MINORITY RESEARCH IN THE NEW MILLENNIUM* 21, 31–32 (Todd G. Morrison et al. eds. 2013).

143. Emens, *supra* note 30, at 368 & n.386.

144. *Id.*

145. *State v. Dutton*, 450 N.W.2d 189, 191–92 (Minn. Ct. App. 1990).

contact . . . could set her free,” and that “he knew she was ‘hung up’ sexually.”<sup>146</sup> Perhaps most tellingly, the pastor “assured her during months of counseling that sex was a gift from God *in response to her stated desire to be asexual*.”<sup>147</sup>

This judicial account of a possible corrective rape parallels other anecdotal accounts. In a thoughtful series of columns examining asexuals, Dominique Mosbergen recounts several such attempts.<sup>148</sup> Self-identified asexual Julie Decker, now an activist, recalls how, at age nineteen, a male friend tried to “fix” her by sexually assaulting her—as she puts it, “He was basically saying that I was somehow broken and that he could repair me with his tongue and, theoretically, with his penis.”<sup>149</sup> Others have emphasized that asexual men (and men generally) can also be victims of corrective rape.<sup>150</sup> And in a 2011 poll on the AVEN message board, 12.58% of asexual women reported being “threatened with sexual assault because of their asexuality.”<sup>151</sup>

Other animus takes the form of denial that asexuality exists. Contrary to the bulk of medical research,<sup>152</sup> one doctor claims: “Sex is a natural drive, as natural as the drive for sustenance and water to survive. It’s a little difficult to judge these folks as normal.”<sup>153</sup> Skepticism is much higher in the general population. Relatedly, even those who believe asexuality exists are openly condescending about the political importance of the identity or its status as a target of animus. Dan Savage says: “[Y]ou’ve got the gays marching for the right to be cocksucking homosexuals, and then you have the asexuals marching for the right to not—do anything. You just need to stay home, and not do anything.”<sup>154</sup>

Moreover, the stereotypes associated with asexuals are highly

146. *Id.*

147. *Id.* at 192 (emphasis added).

148. Dominique Mosbergen, *Battling Asexual Discrimination, Sexual Violence and ‘Corrective’ Rape*, HUFFINGTON POST (June 20, 2013), [http://www.huffingtonpost.com/2013/06/20/asexual-discrimination\\_n\\_3380551.html](http://www.huffingtonpost.com/2013/06/20/asexual-discrimination_n_3380551.html).

149. *Id.*

150. See Marie S. Crosswell, *Men, Masculinity, Asexuality, and Rape*, THINKING ASEXUAL (2011), <http://thethinkingasexual.wordpress.com/2012/04/02/men-masculinity-asexuality-and-rape/>.

151. *Have You Ever Been Threatened with Sexual Assault Because of Your Asexuality?*, ASEXUAL VISIBILITY & EDUC. NETWORK (June 7, 2011), <http://www.asexuality.org/en/topic/62338-have-you-ever-been-threatened-with-sexual-assault-because-of-your-asexuality/page-2>.

152. See Mary Duenwald, *For Them, Just Saying No Is Easy*, N.Y. TIMES (June 9, 2005), [http://www.nytimes.com/2005/06/09/fashion/thursdaystyles/09asexual.html?\\_r=0](http://www.nytimes.com/2005/06/09/fashion/thursdaystyles/09asexual.html?_r=0) (discussing H.S.D.D.—hypoactive sexual desire disorder).

153. *Id.* (equating lack of sexual desire to a lack of appetite for food).

154. (A)SEXUAL (Arts Engine 2011).

disparaging, erasing the legitimacy and potential desirability of asexuality. For women, asexuals are viewed as frigid or hung up, or, alternatively, treated condescendingly—a common belief is that women who identify as asexual simply have not met the right man yet. For men, as one commentator explains, the stereotype holds that

the virgin male is socially inept or awkward, physically unattractive, often stupid or oblivious, the story's comic relief, and generally unsuccessful or at least unremarkable in all areas of his life. More importantly, he is often not a virgin because he *wants* to be; he's a virgin or sexually inexperienced because he's too much of a loser for anyone to feel attracted to him.<sup>155</sup>

Much of the negativity toward asexuals is created by a culture in which men measure their worth by sexual success.<sup>156</sup> Freighted by “thousands and thousands of years [ ] of cross-cultural pressure . . . to be highly sexed beings, to demonstrate, earn, and prove their masculinity through sexual performance,” society views asexual men with suspicion and asexual men have a hard time accepting themselves.<sup>157</sup>

Collectively, these attitudes and behaviors express substantial negativity toward asexuals. This presents asexuals with a choice not unlike that of atheists: either pass as sexual—with all the problems that both passing and sexual activity entail—or confront bias and discrimination. And there are more subtle difficulties. Jay explains: “Sex is very central to life in a lot of ways, and one of the real challenges of being asexual is trying to figure out where you fit.”<sup>158</sup> Whether via targeted intentional discrimination or social structures that disadvantage those uninterested in sex, asexuals experience both overt and covert animosity.

### 3. Single

Historically, treatment of singleness is complex and contradictory. When he left the Catholic Church, Martin Luther announced that there was no biblical foundation for celibacy, married a former nun, had five children, and proclaimed that “one cannot be unmarried without sin.”<sup>159</sup> Yet around the same time, single women held positions of enormous power and social regard. In the wake of the Protestant Reformation, Elizabeth I,

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155. Crosswell, *supra* note 150.

156. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 178 (1979) (“A major substantive element in the social meaning of masculinity, what men learn makes them ‘a man,’ is sexual conquest of women.”).

157. Crosswell, *supra* note 150.

158. Duenwald, *supra* note 152.

159. 54 LUTHER'S WORKS, TABLE TALK (Theodore G. Tappert ed., 1967).

beloved by her subjects, never married.<sup>160</sup> Perhaps recalling her father King Henry VIII's execution of her mother, Ann Boleyn, she pronounced, "Better beggar woman and single than Queen and married."<sup>161</sup> A century later, Mary Astell—a respected writer known today as the world's first English-speaking feminist—worked to persuade other women that marriage need not be a default.<sup>162</sup> Even the word "spinster"—fraught with negative connotations today—arose as a simple description of a woman whose occupation was to spin yarn.<sup>163</sup> Indeed, one commentator reports that in nineteenth century New England the term was an honorable one: spinsters earned money for themselves and "were celebrated for their unwillingness to compromise their moral standards for the sake of a relationship."<sup>164</sup>

Although "America has always been a very married country,"<sup>165</sup> it was not until the twentieth century that singlehood really became viewed with near-universal negativity. In a survey taken in 1957, 80% of Americans responded that people who preferred to remain single were "sick," "neurotic," or "immoral."<sup>166</sup> More recently, scholars have argued that even those who might be viewed as natural supporters of marital choice for women—for instance, second-wave feminists—have neglected single women in their goals.<sup>167</sup> Rachel Moran explains:

By drawing on a rhetoric of equality and entitlement, liberal feminists have lobbied successfully for changes in education, employment, and reproductive rights. At the same time, liberal feminists often have presumed that women will marry and have children, so that the central dilemma to be addressed is how to reconcile work and family responsibilities.<sup>168</sup>

With its focus on the family—meaning spouse and children—second-wave feminism neglected the concerns of single women. Indeed, perhaps

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160. MIKE ASHLEY, *A BRIEF HISTORY OF BRITISH KINGS AND QUEENS: BRITISH ROYAL HISTORY FROM ALFRED THE GREAT TO THE PRESENT* (2003).

161. *Id.*

162. See MARY ASTELL, *A SERIOUS PROPOSAL TO THE LADIES FOR THE ADVANCEMENT OF THEIR TRUE AND GREATEST INTEREST, AND SOME REFLECTIONS ON MARRIAGE* (1694).

163. Wendy Braitman, *Goodbye to the Spinster*, in *SINGLISM*, *supra* note 6, at 26.

164. *Id.*

165. Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 *HOFSTRA L. REV.* 223, 224 (2004).

166. Janelle Nanos, *Single by Choice*, *BOSTON MAG.* (2012) <http://www.bostonmagazine.com/2012/01/single-by-choice-why-more-of-us-than-ever-before-are-happy-to-never-get-married/2/>.

167. Moran, *supra* note 165, at 224–25 ("[T]he women's liberation movement, which enabled females to opt out of marriage, has failed to give full recognition to single women as a distinct constituency with unique needs.").

168. *Id.* at 226.

the consequence was more than neglect: by positing spouse and children as central to its goals, second-wave feminism normalized a particular lifestyle and marginalized those who neither achieved nor sought that lifestyle.<sup>169</sup>

Today, singlehood arguably enjoys more visibility and positive attention than in the recent past.<sup>170</sup> Cultural icons—paradigmatically Samantha of “Sex and the City”—have portrayed singleness as acceptable, even glamorous and desirable. Discourse in mainstream media suggests that singleness is a worthy life choice.<sup>171</sup> A burgeoning scholarly literature legitimizes singleness.<sup>172</sup> And cultural and scholarly discourse inform one another; for instance, of the media fixation on Justice Elena Kagan’s singleness, Deborah Rhode said: “I resist the notion that the only way to be happy in the world is . . . to be married.”<sup>173</sup>

Yet recent research also documents the substantial biases against single people. One study revealed that single people were viewed more negatively across a wide spectrum of personality traits.<sup>174</sup> For example, married people were more likely than singles to be described as mature, stable, honest, happy, kind, and loving; singles were more likely to be called immature, insecure, self-centered, unhappy, lonely, and ugly.<sup>175</sup> In a different study, married people were described as caring, kind, and giving by almost 50% of respondents, compared to just 2% of single people.<sup>176</sup> These stereotypes extended even to single twenty-five year olds, who are younger than the average age of marriage.<sup>177</sup>

Research also suggests that bias against single people affects actions, not only beliefs. For example, a series of studies of housing rentals found that when presented with a choice between married and unmarried renters

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169. *Id.* at 270.

170. Bolick, *supra* note 60.

171. See, e.g., Thomas Rogers, *In Defense of Single People*, SALON (July 8, 2012), [http://www.salon.com/2012/07/09/in\\_defense\\_of\\_single\\_people/](http://www.salon.com/2012/07/09/in_defense_of_single_people/) (discussing Michael Cobb’s argument that negative attitudes toward single people are not just hurting singles—they are hurting relationships and culture); Tara Parker-Pope, *The Plight of American Singles*, N.Y. TIMES (Sept. 19, 2011), <http://well.blogs.nytimes.com/2011/09/19/the-plight-of-american-singles/> (arguing that single people often contribute more to the community because married people tend to put their energy and focus into their partners and families at the expense of friendships, communities and extended families).

172. See, e.g., MICHAEL COBB, *SINGLE: ARGUMENTS FOR THE UNCOUPLED* (2012); STACEY, *supra* note 68; DEPAULO, *supra* note 6.

173. Laura M. Holson, *Then Comes the Marriage Question*, N.Y. TIMES (May 14, 2010), <http://www.nytimes.com/2010/05/16/fashion/16noticed.html>.

174. Bella M. DePaulo & Wendy L. Morris, *The Unrecognized Stereotyping and Discrimination Against Singles*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 251, 251 (2006).

175. *Id.*

176. Wendy L. Morris et al., *Perception of People Who Are Single* (unpublished manuscript).

177. *Id.*

who had the same occupation, hobbies, and other characteristics, 80% of people chose to rent to a married couple, 12% to a cohabiting couple, and 8% to a pair of friends.<sup>178</sup> Likewise, a study found that participants rated a male job applicant as more “suitable” if he was married and rated a male employee as more dedicated if he was married.<sup>179</sup>

And finally, people are remarkably willing to admit their bias against single people. When asked why they preferred to rent to married people, for example, between 42% and 84% of the participants<sup>180</sup> simply said, “because they’re married.”<sup>181</sup> It is difficult to imagine a study in which people admitted that they preferred to rent to white people because they are white, or to Christians because they are Christian. On the flip side, people were generally oblivious to the idea that bias existed: according to one measure, they viewed discrimination against single people as nearly twice as “legitimate” as discrimination against black people.<sup>182</sup>

Beyond academia, the view of singles is polarized. On the one hand, more people believe remaining single is acceptable.<sup>183</sup> On the other, singleness is still viewed by many as less desirable than marriage. Indeed, in the historic decision declaring same-sex marriage bans unconstitutional, Justice Kennedy quite clearly—and unnecessarily—communicated a view of singleness as tragic or pitiable. He wrote:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions.<sup>184</sup>

This passage was received with sentimental applause from many people, with some even stating that they would include it in their wedding vows,

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178. Wendy L. Morris et al., *No Shelter for Singles: The Perceived Legitimacy of Marital Status Discrimination*, 10 GROUP PROCESSES & INTERGROUP REL. 457, 460 (2007).

179. Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCHOL. 474, 476-480 (2012).

180. The study involved four iterations with varying results. Morris et al., *supra* note 178, at 460-67.

181. *Id.*

182. *Id.*

183. Bolick, *supra* note 60.

184. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

but with distaste from many others. As Michael Cobb wrote, “[w]hat Justice Kennedy, and everyone else too, needs to remember is that simply being yourself—your single self—is already the fundamental form of dignity.”<sup>185</sup>

Books and articles urge people (especially women) to get married, even if they feel like they are settling, or they will regret it later.<sup>186</sup> In many forums, single women are called “old maids” or “spinsters,” and the image of a lonely old woman with dozens of cats is part of our cultural iconography. One might say that the more things have changed, the more they have stayed the same: “Ancient marriages might be arranged and modern ones chosen, but in both periods, betrothal was/is seen as the single, overwhelming event of a woman’s life.”<sup>187</sup>

Single men are too often neglected in the discussion of singleness.<sup>188</sup> Although the stereotypes are different, single men are likewise often subject to negative bias. Moran explains that in the early days of America, “the stigma of singlehood was not limited to women.”<sup>189</sup> During that time “males achieved full manhood only when they could earn a living, marry, and support a family,” and “[c]oncerns about the interrupted masculinity of single men led the founders of the United States to wonder whether unmarried males had the maturity and temperament to handle the responsibilities of freedom.”<sup>190</sup>

Modernly, some of the specifics have changed, but the bias remains. Many negative stereotypes stem from the social equation of manliness with sexual activity, which leads to an association between singleness and supposedly undesirable attributes such as virginity or lack of sexual success with women.<sup>191</sup> Indeed, an entire online and offline subculture has emerged

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185. Michael Cobb, *The Supreme Court’s Lonely Hearts Club*, N.Y. TIMES (June 30, 2015), [http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html?\\_r=0](http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html?_r=0).

186. Consider Lori Gottlieb’s opus, *MARRY HIM: THE CASE FOR SETTLING FOR MR. GOOD ENOUGH* (2013), which argues in favor of the “good enough” marriage. *Id.* at 273. Similarly, Princeton graduate Susan Patton urges women to find a man in college because they will never have such an accessible and desirable pool again. *SUSAN PATTON, MARRY SMART: ADVICE FOR FINDING THE ONE* (2014).

187. Jaclyn Geller, *Why the History of Marriage Matters*, in *SINGLISM*, *supra* note 6, at 34–35.

188. See Bella DePaulo, *But What About Single Men?*, PSYCHOL. TODAY (June 25, 2008), <http://www.psychologytoday.com/blog/living-single/200806/what-about-single-men>.

189. Moran, *supra* note 165, at 228–30.

190. Mark E. Kann, *The Bachelor and Other Disorderly Men During the American Founding*, 6 J. MEN’S STUD. 1, 1–2, 7–8 (1997).

191. Such attitudes are most prevalent in the so-called “manosphere,” which includes sites devoted to both men’s rights activists and pick-up artists. See Caitlin Dewey, *Inside the Manosphere that Inspired Santa Barbara Shooter Elliot Rodger*, WASH. POST (May 27, 2014), <http://www.washingtonpost.com/news/the-intersect/wp/2014/05/27/inside-the-manosphere-that->

to help men escape the awful fate of having less sex than they want.<sup>192</sup> Relatedly, men who remain single “too late” in life are automatically suspected of being gay: Bob Chang recounts how his teaching evaluations improved when he started wearing a wedding ring, perhaps because in previous classes students suspected him of same-sex attraction.<sup>193</sup>

Despite the pervasive bias against single people, research has found no support for the negative stereotypes.<sup>194</sup> Moreover, research has also concluded that many positive stereotypes about marriage are false. An eighteen-year longitudinal study of thousands of adults suggest that, on average, people who married experienced a small increase in happiness around the time of the wedding, but this was outweighed by a significant decrease in happiness among those who divorced.<sup>195</sup> That is, marriage was no panacea.<sup>196</sup>

Ultimately, single people are often subject to bias and hostility by society. Troublingly, some turn this negativity inward. Bolick says: “the single woman is very rarely seen for who she is—whatever that might be—by others, or even by the single woman herself, so thoroughly do most of us internalize the stigmas that surround our status.”<sup>197</sup>

#### 4. Childfree

Bearing and raising children has long been a social default. Martin Luther posited it as more important than life, at least for women: “If a woman grows weary and, at last, dies from childbearing, it matters not. Let her die from bearing; she is there to do it.”<sup>198</sup> For much of history, choosing

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inspired-santa-barbara-shooter-elliott-rodger/.

192. *Id.*

193. Robert S. Chang & Adrienne D. Davis, *Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Classroom*, 33 HARV. J. L. & GENDER 1, 15–18 (2010).

194. See Tobias Greitmeyer, *Stereotypes of Singles: Are Singles What We Think?* 39 EUR. J. SOC. PSYCHOL. 368 (2009). Greitmeyer found that single and married people did not differ significantly in self-esteem, life satisfaction, agreeableness, conscientiousness, physical attractiveness, neuroticism, and social skills. Singles were less satisfied with their relationship status and more lonely, but a logical explanation is that these differences are a response to social pressure rather than inherent traits.

195. Richard E. Lucas et al., *Time Does Not Heal All Wounds: A Longitudinal Study of Reaction and Adaptation to Divorce*, 16 PSYCHOL. SCI. 945 (2005); Richard E. Lucas et al., *Reexamining Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status*, J. PERSONALITY & SOC. PSYCHOL. 527, 527 (2003) (finding that on average individuals reacted to events and then adapted back towards baseline; marital transitions can be associated with long-lasting changes in satisfaction, but these changes can be overlooked when only average trends are examined).

196. Bella DePaulo & Wendy L. Morris, *The Unrecognized Stereotyping and Discrimination Against Singles*, in SINGLISM *supra* note 6, at 19, 22 (“Claims about the transformative power of marriage . . . seem to be grossly exaggerated or just plain wrong.”)

197. Bolick, *supra* note 60.

198. LUTHER’S WORKS, *supra* note 159.

otherwise was not an option. Among many other consequences, the invention of the birth control pill made possible childfree identity without celibacy. Yet childfree status remains suspect.

Childfree identity is a hotly contentious issue. A recent poll found that 46% of Americans believed that the rising number of women without children “doesn’t make much difference” to society, while 38% thought it was a bad thing and 9% thought it is a good thing.<sup>199</sup> Fifty-nine percent—a majority, but a small one—disagreed with the statement that people without children lead empty lives.<sup>200</sup>

This disagreement manifests itself in the workplace, with one news outlet describing the conflict between childfree people and people with children as an “office smackdown.”<sup>201</sup> Field research suggests that at least some employers prefer people with children to childfree people, and that childfree women are treated worse than both men and women with children.<sup>202</sup>

A number of workplace harassment cases reveal bias and discrimination against childless people. One hostile work environment case brought under Title VII explains that the plaintiff’s supervisor “called her a slut and a stupid, air head, miserable childless person.”<sup>203</sup> In another such case, a police officer brought suit due to allegations such as those of officers who said they “were going to start calling [plaintiff] and her husband (whose nickname was ‘Spud’) ‘Spud and Spudless’ because they had no children” and that the defendants laughingly said that “[plaintiff] and her husband had no children because they weren’t ‘right with God.’”<sup>204</sup> In another case, a plaintiff who was a nurse alleged that a doctor she worked with repeatedly made unpleasant comments to her and others, such as a comment that the nurse was “going to be an old, wrinkled-up, childless woman one day, like the patient he was discussing.”<sup>205</sup> The fact that such facts surface in Title VII claims is particularly significant given that the

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199. Paul Taylor et al., *The New Demography of American Motherhood*, PEW RESEARCH CTR. 26 (Aug. 19, 2010), <http://www.pewsocialtrends.org/files/2010/10/754-new-demography-of-motherhood.pdf>.

200. NATIONAL DATA PROGRAM FOR THE SOCIAL SCIENCES, GENERAL SOCIAL SURVEY (2002).

201. Allison Linn, *Office Smackdown: Parents vs. Childless Workers*, CNBC (Nov. 6, 2013), <http://www.cnbc.com/id/101172788#>.

202. See Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 358 (2013) (“Our results showed that women who violated traditional gender roles by not having children, or by not actively caring for them outside of work, experience more mistreatment than more caregiving mothers.”).

203. *Ponticelli v. Zurich Am. Ins. Grp.*, 16 F. Supp. 2d 414, 422 (S.D.N.Y. 1998).

204. *Redpath v. City of Overland Park*, 857 F. Supp. 1448, 1453 (D. Kan. 1994).

205. *Still v. Roberts*, No. 00-0150-CB-C, 2001 U.S. Dist. LEXIS 8751, at \*9 (S.D. Ala. 2001).

statute does not explicitly protect people who do not have children—such comments tend to arise in claims of sex discrimination or sexual harassment. A logical inference is that harassment of the childfree occurs elsewhere but does not arise in court because it is less explicitly linked to gender.

Workplace discrimination against childfree people occurs more subtly as well. Some supervisors assume that a childfree person can devote all her time to her job.<sup>206</sup> Sometimes work is redistributed to childfree people.<sup>207</sup> Sometimes their schedules are changed on short notice or they are presumed to be able to travel.<sup>208</sup> Sometimes their vacations are given lower priority.<sup>209</sup> Sometimes they are assumed to have no family responsibilities because they have no children, even when they are heavily committed to caring for elderly parents, partners, or other people.<sup>210</sup> Sometimes parents receive particular benefits, such as permission to work from home on snow days or to call in to conference calls, while similar benefits are denied to childfree coworkers.<sup>211</sup> The disparity in treatment often takes a significant toll on childfree people. For example, a telephone operator recounts repeatedly arriving late to the community college classes she was attempting to take at night because the pregnant woman who was supposed to take over her shift at a designated time “was sick for months so she never made it in”; supervisors told her, “Well, you have to understand, she’s not feeling well.”<sup>212</sup> And resistance to these forms of disparate treatment is treated as failure to act as a team player.<sup>213</sup>

In the sphere of public discourse, many commentators denounce the

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206. While empirical research on this issue is scarce, anecdotal evidence abounds. See, e.g., Sarah Wheaton, *Blogtalk: Rendell on Napolitano’s ‘No Life’*, N.Y. TIMES (Dec. 4, 2008), [http://thecaucus.blogs.nytimes.com/2008/12/04/blogtalk-rendell-on-napolitanos-no-life/?\\_php=true&\\_type=blogs&\\_r=0](http://thecaucus.blogs.nytimes.com/2008/12/04/blogtalk-rendell-on-napolitanos-no-life/?_php=true&_type=blogs&_r=0) (recounting Governor Edward Rendell’s comment that Janet Napolitano is perfect for homeland security secretary because “for that job, you have to have no life. Janet has no family. Perfect. She can devote, literally, 19, 20 hours a day to it”).

207. Ayana Byrd, *The Single Girl’s Second Shift*, MARIE CLAIRE, June 18, 2013 (quoting one worker: “No one has ever directly said this to me, but when late nights or extra projects come up, it’s clear the thinking is, She’s single, she has time to do this.”).

208. Sarah Eckel, *Singles Have “No Life” and Other Work Stereotypes*, FORBES (Apr. 23, 2010), <http://www.forbes.com/2010/04/23/single-worker-stereotypes-forbes-woman-leadership-career.html> (quoting one professional: “I was always the one who had to travel more and stay late. I became the default go-to person because I wasn’t married and had no children”).

209. Belkin, *supra* note 7.

210. Case, *supra* note 84, at 1766-67.

211. Belkin, *supra* note 7.

212. *Id.*

213. See Anonymous, “*Pulling Together as a Team*” *When a Coworker Goes on Extended Maternity or Sick Leave*, DATA LOUNGE (Apr. 2, 2011), <http://www.dataounge.com/cgi-bin/iowa/ajax.html?t=10310372#page:showThread,10310372>.

childfree life. A *Deseret News* editorial calls it a “banal fantasy,” arguing that “it would be disastrous for our collective prosperity and character were this conceit of childless fulfillment to become a commonplace lifestyle.”<sup>214</sup> Some frame the issue as one of social good: “As Americans individually eschew families of their own, they are contributing to the ever-growing imbalance between older retirees . . . and working-age Americans, potentially propelling both into a spiral of soaring entitlement costs and diminished economic vigor.”<sup>215</sup> Others judge the childfree more directly: they argue that the childfree life is one of pure selfishness,<sup>216</sup> or insist that “the reasons couples give for avoiding parenthood are deeply, deeply lame”<sup>217</sup> as well as “painfully obvious and . . . tiresome”<sup>218</sup>; or describe them as “lazy yuppies.”<sup>219</sup> And some commentators bemoan “a culture marked by hyperindividualism and dependence on the state as the family unit erodes.”<sup>220</sup>

Hostility toward the childfree is sometimes framed as advocacy on behalf of children, such as outrage when children are not allowed in certain public places.<sup>221</sup> Consider the following example, which is illuminating not because it is particularly eloquent or persuasive, but rather because it is typical. Responding to some airlines’ decision to create childfree sections, one parent argues: “I believe our child has a right to fly and we shouldn’t have to sit in a certain section of the airplane. I believe children should be allowed at restaurants and not just at fast food chains. . . . I don’t think kids should be discriminated against even if they sometimes cry and make noise.”<sup>222</sup> The commenter goes on to argue that restaurants should not “plaster signs outside that say No Kids Allowed” and that “this bias against

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214. *In Our Opinion: Time Magazine’s Deceptive Fantasy of the Childfree Life*, DESERET NEWS (Aug. 11, 2013), <http://www.deseretnews.com/article/765635631/Time-Magazines-deceptive-fantasy-of-the-child-free-life.html?pg=all>.

215. Harry Siegel, *Why the Choice to Be Childless Is Bad for America*, NEWSWEEK (Feb. 19, 2013), <http://www.newsweek.com/why-choice-be-childless-bad-america-63335>.

216. See Tom Trinko, *The Selfishness of the Intentionally Childless*, AMERICAN THINKER (Sept. 19, 2010), [http://www.americanthinker.com/2010/09/the\\_selfishness\\_of\\_the\\_intenti.html](http://www.americanthinker.com/2010/09/the_selfishness_of_the_intenti.html).

217. Kristen Hatten, *TIME Magazine Asks: Who Needs Kids, Anyway?* LIFESITE (Aug. 7, 2013), <http://www.lifesitenews.com/opinion/time-magazine-asks-who-needs-kids-anyway?>.

218. *Id.*

219. Beth Greenfield, *Is Being Child Free Selfish?*, TIME (Aug. 13, 2013), <https://in.lifestyle.yahoo.com/blogs/itsaparentthing/is-being-childfree-selfish--debating-time-magazine-s-touchy-new-issue-204219641.html>.

220. Siegal, *supra* note 215.

221. The appropriate role of children in public spaces is a topic of considerable discussion. See, e.g., Room for Debate, *Are Modern Parents Self-Absorbed?*, N.Y. TIMES (Aug. 27, 2012), <http://www.nytimes.com/roomfordebate/2012/08/27/are-modern-parents-self-absorbed>.

222. KyAnn Lewis, *Stop Discriminating Against Kids and Parents*, YAHOO! (July 14, 2011), <https://shine.yahoo.com/parenting/stop-discriminating-against-kids-and-parents-2511571.html>.

kids—and *their parents*—has gone too far.”<sup>223</sup>

These comments—and thousands of others like them—are instructive for three reasons. First, they reveal that bias against parents is the commenter’s true concern: I am highly skeptical that children themselves are offended at a sign that many of those in the relevant age group are too young to read, or that children mind being seated in a particular part of an airplane where there are other children they can meet, or that they prefer a sedate meal at a five-star restaurant to an evening at Chuck-E-Cheese.<sup>224</sup> Second, the comment’s sensitivity to perceived discrimination against parents contrasts sharply with its indifference to preferences of the childfree and those who wish to have the childfree as their clientele.<sup>225</sup> And finally, deploying “rights” discourse reveals the importance of both parental and childfree identity: elevating treatment of a group to a “right” rather than a matter of etiquette or considerate behavior correspondingly elevates the importance of that group’s identity.

As I have already described in some detail in Part I, childless couples have a range of responses to these criticisms.<sup>226</sup> Rewriting anti-childfree discourse from the perspective of childfree people is instructive. Consider one illustration. During her Supreme Court nomination proceedings, then-Judge Sonia Sotomayor “had to deflect suggestions that she treated colleagues and close friends like an extended family because she had no children of her own.”<sup>227</sup> Many childfree people would argue that this narrative is exactly backwards. How wonderful—childfree people might say instead—that Sonia Sotomayor enriched the lives of so many colleagues and close friends. It would be a shame if she had sacrificed the opportunity to influence so many people to the burdens of diapers, bottles, tedious play dates, talent-free little league games, and interminable school plays.<sup>228</sup>

But the notion that different people have different identities vis-à-vis children—and that neither identity is inherently better—unfortunately does

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223. *Id.* (emphasis added).

224. Anecdotally, I can say that this is true of the children in my life.

225. I am not saying that one set of concerns should always trump the other. The answer to that question is context-specific, a subject I will explore in more detail in Parts III and IV. The point is that there are two sets of competing concerns and that the failure to legitimize the concerns of the childfree is a position that requires a normative defense.

226. *See supra* Part I.A.1.

227. *See* Laura M. Holson, *Here Comes the Marriage Question*, N.Y. TIMES, (May 16, 2010), [http://www.nytimes.com/2010/05/16/fashion/16noticed.html?\\_r=0](http://www.nytimes.com/2010/05/16/fashion/16noticed.html?_r=0).

228. To be clear, I consider this an unfairly negative caricature of parenting. My point is that many people present an analogously negative portrayal of childfree life when they allude condescendingly to bitter spinsters with cats, or speak pityingly of those who grow old alone.

not always carry the day. Not everyone agrees that difference need not mean judgment, despite arguments that it should.<sup>229</sup>

#### B. EXPLANATIONS FOR NEGATIVITY

Why is negative identity subject to so much negativity? The goal of many atheist, asexual, single, and childfree people is simply *not* to do something and to have everyone else accept their way of being. Although the “something” is something that a majority of society finds important, others’ lives are at most minimally affected when members of negative identity groups decide that the positive identity is not for them.

Perhaps more so than with other identity categories, the aversion directed at negative identity results from two diametrically opposed emotions. One is that a particular negative identity is so far outside a person’s understanding that they fear, distrust, and dislike those with that identity. The other is that a particular negative identity hits uncomfortably close to home—and that the particularly vicious animus directed at negative identity is a way of people persuading themselves that their own lifestyle really is the right one.

The former explanation is the more obvious. In some instances, these sentiments are clear, uncomplicated explanations for bias. Positive identity group members simply cannot conceive of a world without god, sex, a partner, or children, and this creates an unbridgeable gulf between positive and negative identities. Examples of such alienation are numerous.<sup>230</sup> Some religious people mistrust atheists in part because they reject the so-called “common creed”—a vision of American religious life that emphasizes shared elements from different faiths.<sup>231</sup> Some sexual people dislike asexuals because sex is so much a part of their own lives, and society is so thoroughly sexualized, that they view those who reject sex as somehow not human.<sup>232</sup> The sheer popularity of happily ever after movies, books about how to find “the one,” and online dating websites reveal how fundamental coupledness is to a large segment of the population.<sup>233</sup> And childfree people are viewed as suspect because for many people, a life without children is

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229. See generally Filipovic, *supra* note 83.

230. See *supra* Part II.A.

231. THEODORE CAPLOW ET AL., ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDLETOWN’S RELIGION 35 (1983) (discussing the common creed).

232. JULIE SONDRÁ DECKER, THE INVISIBLE ORIENTATION 35 (2014) (“Asexuals are seen as not fully human.”).

233. For example, the dating services industry generated \$2.1 billion in 2012, of which about 53% will come from dating websites. MARKETDATA ENTERPRISES, THE U.S. DATING SERVICES MARKET (2012).

unthinkable.<sup>234</sup>

The latter explanation is perhaps less evident. Perhaps one reason that members of negative identity groups suffer animus and discrimination is that they threaten nonmembers.<sup>235</sup> Encountering someone who is content with her negative identity forces positive group members to contemplate what life might be like without religion, without sex, without a partner, without children. Perhaps it forces positive identity group members to admit they are a little bit curious, or a little bit jealous. Or it might force them to convince themselves that they are not curious, or not jealous. The intensity of attraction manifests itself in overt revulsion. Indeed, in other areas of identity, this dynamic is well-known. It is a truism—supported by research—that some of the most ardent opponents to same-sex relationships are closeted individuals who experience same-sex attraction.<sup>236</sup> Recall the words of Ted Haggard, an evangelical pastor who preached that homosexuality was a sin and who subsequently resigned his position after allegations that he engaged in sexual activity with male escort and masseuse: “I think I was partially so vehement because of my own war.”<sup>237</sup>

A similar dynamic emerges in response to negative identity. Some religious people dislike atheists not because the atheist does not believe in god, but because atheists cause them to question their own faith. Research suggests that those who believe in a god or gods tend to be intuitive thinkers.<sup>238</sup> Because atheists, by their existence, force people to confront

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234. JENNIFER SENIOR, ALL JOY AND NO FUN: THE PARADOX OF MODERN PARENTHOOD 35–47 (2014).

235. Of course, this possibility runs in two directions. I suspect that negative identity group members also sometimes strive to reassure themselves that their choice is the correct one. Consider, for example, the many childfree forums that delight in collecting and sharing parenting horror stories. For some, this focus on the worst parts of parenting may mask a desire to ignore the best. For purposes of explaining animus against negative identity group members, I will focus on the doubts of positive identity groups. But I am not implying that negative identity groups are universally untroubled and confident in their choices, while positive identity groups are wracked with doubt and jealousy.

236. See, e.g., Netta Weinstein et al., *Parental Autonomy Support and Discrepancies Between Implicit and Explicit Sexual Identities: Dynamics of Self-Acceptance and Defense*, 102 J. PERSONALITY & SOC. PSYCHOL. 825 (2012) (discussing men who identified themselves as highly straight yet whose experimental results suggests some level of same-sex attraction tended to favor anti-gay policies and expressed more hostility toward gay people); Henry Adams et al., *Is Homophobia Associated with Homosexual Arousal*, 105 J. ABNORMAL PSYCHOL. 440, 443 (1996) (discussing a study of supposedly heterosexual men in which 54% of homophobic men but only 24% of nonhomophobic men became aroused while viewing gay pornography).

237. Richard M. Ryan & William S. Ryan, *Homophobic? Maybe You're Gay* (Apr. 27, 2012), [http://www.nytimes.com/2012/04/29/opinion/sunday/homophobic-maybe-youre-gay.html?\\_r=0](http://www.nytimes.com/2012/04/29/opinion/sunday/homophobic-maybe-youre-gay.html?_r=0).

238. See, e.g., Amatai Shenhav et al., *Divine Intuition: Cognitive Style Influences Belief in God*, 141 J. EXPERIMENTAL PSYCHOL. 1, 5 (2012) (“Three studies—two correlative, one experimental—showed

their own beliefs in a less intuitive fashion, they may inspire the hostility that comes with self-doubt from their religious interlocutors.

Some sexual people direct hostility toward asexuals not because they do not understand the lack of desire, but because they relate to it all too well. Elizabeth Emens suggests, “Perhaps some of the laughter . . . that arises in response to the topic of asexuality is partly, or at least sometimes, motivated by people’s anxieties about their own moments of past, present, or future lack of attraction, or a partner’s, or both.”<sup>239</sup> As one asexual explains, men are freighted by thousands of years of cultural pressure “to be highly sexed beings, to demonstrate, earn, and prove their masculinity through sexual performance.”<sup>240</sup> As a result, society views asexual men with suspicion, and asexual men have a hard time accepting themselves. Likewise, female sexuality is positively rewarded in a patriarchal society that conditions some forms of approval on sexual availability.<sup>241</sup> But sexual availability, or the performance of sexuality, is different from actual sexual desire.<sup>242</sup> Ours is a world where there is a market for drugs to increase both male and female libido<sup>243</sup>; where countless articles have been written for both men and women to rekindle the sexual spark in their marriages; where a google search for “spice up your relationship” yields over seventeen million hits.<sup>244</sup> Certainly some of this preoccupation with sexuality is the product of sexual desire, but much of it is intense anxiety about its lack. Perhaps, then, asexuals trigger hostility in some self-identified sexual people because asexuals have declined to traverse the labyrinth of sexual desire and are perfectly happy with their decision. Perhaps some sexual people question what their life might have involved if they had not spent so much time thinking about sex, preparing to have sex, having sex, and dealing with the consequences of sex.

Single people, too, trigger anxiety predicated on envy. In one study, participants expressed the greatest hostility toward single people who had

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that intuitive thinking predicts belief in God.”); Will M. Gervais & Ara Norenzayan, *Analytic Thinking Promotes Religious Disbelief*, 336 SCI. 493, 493 (2012).

239. See, e.g., Emens, *supra* note 30, at 340.

240. Crosswell, *supra* note 150.

241. See, e.g., ARIEL LEVY, *FEMALE CHAUVINIST PIGS: WOMEN AND THE RISE OF RAUNCH CULTURE* (2005).

242. E.g. Vanessa Grigoriadis, *Princess Paris*, ROLLING STONE (Nov. 19, 2003) (quoting Paris Hilton: “My boyfriends always tell me I’m not sexual. Sexy, but not sexual”).

243. See Daniel Bergner, *Unexcited? There May Be a Pill for That*, N.Y. TIMES (May 22, 2013), <http://www.nytimes.com/2013/05/26/magazine/unexcited-there-may-be-a-pill-for-that.html?pagewanted=all>; Lesley Alderman, *For Common Male Problem, Hope Beyond a Pill*, N.Y. TIMES (Aug. 28, 2009), <http://www.nytimes.com/2009/08/29/health/29patient.html?ref=health>.

244. GOOGLE, <https://www.google.com/#q=spice+up+your+relationship> (A screenshot is on file with the author).

chosen their singleness, as opposed to those who hoped to become partnered.<sup>245</sup> While this hostility is consistent with straightforward antipathy, it might be equally consistent with participants' insecurity about their own choices. As DePaulo writes: "Not everyone reacts to single people—even the happy ones—with hostility. . . . I wonder, as readers have suggested, whether those who are quick to put down single people are not so happy with their own lives."<sup>246</sup> Others have suggested similar explanations.<sup>247</sup>

And examples of the anxiety borne of jealousy that childfree people trigger in those with children. Despite the cultural elevation of parenthood, some parents have doubts and regrets. I have turned to anonymous forums to find opinions expressing regret about having children because the cultural stigma is so great that people rarely express these sentiments in their own names. A few of these selections include:

I absolutely regret [becoming a parent]. . . . I miss my old life and while I don't miss everything about it I absolutely hate how everyone feels that I should have had some magical change of outlook on life. I would turn back the clock in a heartbeat. . . . I find parenthood or specifically motherhood unfulfilling and intellectually demeaning.<sup>248</sup>

It's great, and I do love my kids to death, but it's really not as great as I thought it would be. . . . I love both my kids and I enjoy teaching them to someday become productive members of society but I long for the days when it will be just my husband and [me].<sup>249</sup>

And those who do not regret their decision to have children sometimes say that they regret some of its costs. One parent writes: "[F]ar and away my biggest regret about my years at home was that I lowered my sights for myself as I dimmed in my own mind what I thought I was capable of."<sup>250</sup> This is not to say that parents with children all regret their decisions. But perhaps even some devoted parents sometimes long for life without children (and, because of their devotion, feel more guilty about it), and some parents would indeed undo their decision, even if they do not admit

245. Bella De Paulo, *Dealing with the Put-Downs*, in *SINGLISM*, *supra* note 6, at 217–18.

246. *Id.*

247. See Eleanor Wells, *The "Why Aren't You Married" Question in Context*, in *SINGLISM*, *supra* note 6, at 74–75.

248. Yesireallyfeelthis, Comment to *Do You Regret Having Children?*, REDDIT (Feb. 3, 2014), [http://www.reddit.com/r/Parenting/comments/1wvx04/serious\\_do\\_you\\_regret\\_having\\_children/](http://www.reddit.com/r/Parenting/comments/1wvx04/serious_do_you_regret_having_children/).

249. psychictrouble, Comment to *Do You Regret Having Children?*, REDDIT, (Feb. 3, 2014), [http://www.reddit.com/r/Parenting/comments/1wvx04/serious\\_do\\_you\\_regret\\_having\\_children/](http://www.reddit.com/r/Parenting/comments/1wvx04/serious_do_you_regret_having_children/).

250. Lisa Endlich Heffernan, *Why I Regret Being a Stay-at-Home Mom*, HUFFINGTON POST (June 17, 2013), [http://www.huffingtonpost.com/grown-and-flown/why-i-regret-being-a-stay-at-home-mom\\_b\\_3402691.html](http://www.huffingtonpost.com/grown-and-flown/why-i-regret-being-a-stay-at-home-mom_b_3402691.html).

this to themselves.

In short, aversion to negative identity may, perversely, be the product of self-recognition, even attraction. Certainly the distinction between hostility predicated on insurmountable difference and uncomfortable similarity is sometimes ambiguous in interpretation, and perhaps it is also ambiguous in experience. People who are happy with their decisions do not feel the need to question the decisions of others.<sup>251</sup> But this is the nature of negative identity and the reactions it prompts. Whether negative identity is viewed as uncomfortably foreign or uncomfortably familiar, hostility, animus, bias, and discrimination sometimes result.

### III. NEGATIVE IDENTITY AND LAW

This Part considers the treatment of the negative identity groups I discuss under existing law. It begins by establishing that they deserve protection against discrimination, then demonstrates that in many areas, negative identity groups are underprotected or disadvantaged under existing laws.

#### A. WHY NEGATIVE IDENTITY DESERVES PROTECTION

At an intuitive level, negative identity is a plausible candidate for legal protection against discrimination. The fact that the legal system already accords protection to religion beliefs, sexual orientation, marital status, and parental status indicates that we believe those identities are important and their protection serves principles basic to our legal system, such as equality, dignity, and liberty. Those values extend naturally to the negative identities I discuss here—atheist, asexual, single, and childfree—and suggest these identities also deserve protection.

In the context of one negative identity—asexuality—Elizabeth Emens has drawn on antidiscrimination cases, statutes, and scholarly analysis to identify eight criteria that help to determine whether a particular identity deserves protection from discrimination.<sup>252</sup> These criteria provide a useful and comprehensive framework for analysis of why negative identity deserves antidiscrimination protection, and I adopt them here.<sup>253</sup> The

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251. See, e.g., Sonja Lyubomirsky & Lee Ross, *Hedonic Consequences of Social Comparison: A Contrast of Happy and Unhappy People*, 73 J. PERSONALITY & SOC. PSYCHOL. 1141 (1997) (discussing how unhappy people are heavily affected by people they perceive as better off than they are, while happy people are not).

252. Emens, *supra* note 30, at 377.

253. Emens's framework is recent, comprehensive, and shares characteristics with many others, and the negative identity categories I discuss in this Article do not present a close case. Therefore, I think it unnecessary to justify her framework as unequivocally the best.

criteria are:

*Individual*

(1) Identity beyond the individual's control or thought too deeply rooted to ask people to alter

(2) Identity characterized by a visible trait or distinct behavior

*Political*

(3) Identity associated with a salient social group

(4) Identity associated with a widely known social movement

*Relational*

(5) Negative public attitudes toward the group

(6) Limiting or demeaning stereotypes attached to the group

*Legal*

(7) History of explicit or direct legal burdens

(8) History of implicit or indirect legal burdens

All or nearly all of these criteria apply to negative identity in part by virtue of its negative status, as well as to the specific negative identity categories I have discussed.

In prior sections, have already discussed some of the criteria thoroughly. In Part I, I established that the four negative identity categories are associated with "salient social groups" (criterion (3)).<sup>254</sup> In Part II, I established the "negative public attitudes" and "limiting or demeaning stereotypes" associated with the group (criteria (5) and (6)).<sup>255</sup> And in Part III.B, I will detail the explicit and implicit legal burdens placed on all four groups (criteria (7) and (8)).<sup>256</sup>

The other criteria require more detailed discussion. All four negative identities I have discussed meet category (1) as "beyond the individual's control or too deeply rooted to ask people to alter." It is a philosophical question beyond the scope of this Article to ask whether one's religious beliefs are within one's control,<sup>257</sup> but in any event, most people believe it unreasonable to ask people to change religions to reap some social or legal benefit beyond the value of the religion itself.<sup>258</sup> Similarly, people debate

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254. *See supra* Part I.A.

255. *See supra* Part II.A.

256. *See infra* Part III.B.

257. Many atheists say they cannot force themselves to believe in god.

258. Exceptions occur at an individual level, such as a person asks her partner to convert prior to

whether sexual orientation can theoretically be changed, but “a growing consensus reflects the view that no one *should be asked* to change” sexual orientation.<sup>259</sup> And both single and childfree identities are something that we do not think we can “ask people to alter”—virtually no one believes that someone should be asked to change her marital status against her will, and polls show that a majority of society does not feel that anyone should have to have a child.<sup>260</sup>

The four identities also meet criteria (2)—identity characterized by a visible trait or distinct behavior. Although negative identity is not immediately visible as are characteristics such as race, all four identities involve distinct behavior, albeit that involves not doing something: believing in a higher power; experiencing sexual desire; marrying or partnering; raising children. True, those with negative identity may be passing or covering, in which case their identities may not be particularly visible or distinct. But this is also true of various other identities that we consider uncontroversially worthy of antidiscrimination protection: people pass as other races or cover racial identity, for example.

Criteria (4)—association with a widely known social movement—is the most debatable. While atheist groups are well-established, the movements associated with the other three identities are younger, smaller, and less well-known. Each identity has multiple affiliated organizations, which are improving public knowledge about the identity, and in the past several years, media attention on each identity has also increased. Although it is debatable whether all the negative identities I have discussed currently meet criteria (4), it seems a reasonable guess that they will not too long in the future. Thus, the negative identity groups I discuss meet at least seven of the categories and perhaps eight of the criteria I discuss, and are a proper subject for antidiscrimination law.

## B. EXISTING LEGAL REGIMES

The following section describes legal regimes pertaining to atheists, asexuals, singles, and the childfree. It shows how these negative identity groups are often disadvantaged by current laws.

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marriage.

259. Emens, *supra* note 30, at 318–19; 381.

260. See, e.g., NBC NEWS/WALL STREET JOURNAL SURVEY (January 2013) (finding only 9% of people think abortion should always be illegal). Whether single and childfree identity are “beyond the individual’s control” is more debatable, although some commentators view them as immutable: that is, if a strongly-identified single were forced to marry, she would always long to be single.

## 1. Atheist

Legal doctrine systematically disadvantages atheists relative to both religious majorities and religious minorities in a host of areas. This section will catalog these instances of disadvantage. I note that in no instance am I asserting that religious majorities and religious minorities are always equally advantaged by the law; in some instances, they are on equal footing, while in other instances, they are not. The point is simply that people of all religions—both majority and minority—are better-situated under the legal doctrines I describe than are atheists.

The Establishment Clause of the U.S. Constitution provides that the government “shall make no law respecting an establishment of religion.”<sup>261</sup> One interpretation—though not the prevailing one among either courts or scholars—is that the government must treat atheism neither better nor worse than other belief systems.<sup>262</sup> Instead, courts’ interpretation of the Establishment Clause often provides atheists with less protection than other groups.

Consider the following examples.<sup>263</sup> The Court has upheld a holiday display on public property that included a crèche, and public displays incorporating religious elements are more generally upheld.<sup>264</sup> The Court has upheld school voucher programs providing taxpayer-funded financial assistance for families to send their children to religious schools.<sup>265</sup> A student organization can use public-university funds to publish a newspaper with a religious viewpoint.<sup>266</sup> Places of religious worship receive special property tax exemptions.<sup>267</sup> The parents of children who attended private

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261. U.S. CONST. amend. I. Although the Establishment Clause specifies “Congress,” the Supreme Court has extended its reach to state governments through the Fourteenth Amendment. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 205 (1963).

262. Establishment Clause scholars fall into three categories. The first includes scholars who believe that the Constitution permits the government to engage in religious activity as long as it does not “establish” an official religion. *See, e.g.,* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 148 (1986). The second includes scholars who believe that the government may not distinguish among religions, but can prefer religion to nonreligion. Micah Schwartzman, *What if Religion Is Not Special?*, 44 ARIZ. L. REV. 293, 311 (2002). And the third—a distinct minority—believe that the government should not prefer religion to nonreligion. *See About American Atheists*, AM. ATHEISTS, <http://www.atheists.org/about-us> (last visited Aug. 27, 2015).

263. Some might debate whether all the examples I have listed actually describe disadvantage to atheists. A full defense of each item would require a separate article, but the important point is that in many circumstances religion receives government funding and support when, either literally or practically speaking, there is no analogous function for atheists.

264. *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005).

265. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653–55 (2002).

266. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 840–843 (1995).

267. *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 672–73, 676 (1970). It is unclear whether an

religious schools were eligible for reimbursement by the government for their children's bus fare.<sup>268</sup> The Supreme Court has upheld a criminal law that bars businesses from operating on Sundays.<sup>269</sup> Courts have held that the motto "In God We Trust" may be inscribed on money and in public buildings.<sup>270</sup> Most recently, the Court has upheld against Establishment Clause scrutiny a town's practice of opening board meetings with prayer.<sup>271</sup>

Beyond constitutional law, atheists fare somewhat better. Some statutory law that protects religion has been interpreted to protect atheists to the same extent as religious people. In the workplace, Title VII has been held to protect atheists,<sup>272</sup> and the Fair Housing Act protects atheists from housing discrimination.<sup>273</sup> But in other areas, atheists are disadvantaged. For example, judges sometimes take religion into account in custody decisions.<sup>274</sup> And, law aside, discrimination against atheists still happens

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atheist meeting house would qualify for such an exemption as a "house of religious worship."

268. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 17–18 (1947).

269. *McGowan v. Maryland*, 366 U.S. 420, 449–522 (1961).

270. *See Newdow v. Lefevre*, 598 F.3d 638, 643–44 (9th Cir. 2010) (stating that the national motto has patriotic and ceremonial character, and "bears no true resemblance to a governmental sponsorship of a religious exercise.").

271. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824 (2014).

272. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (holding that an atheist could not be required to attend employer's devotional services); *Young v. South Western Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975) (employee with sincere atheist beliefs protected under Title VII). *See also Tillery v. ATSI, Inc.*, 242 F. Supp. 2d 1051 (N.D. Ala. 2003) (reconsidered on other grounds) ("Title VII protects persons who are not members of organized religious groups, as well as atheists.").

273. For example, the U.S. Department of Justice prosecuted a case in which a home insurance company offered discounts to "churchgoers" and "persons of faith" when the policies were initially challenged by an atheist and an agnostic. Department of Justice, News Release, *Justice Department Settles Allegations of Religion Discrimination Against Guideone Mutual Insurance Co.* (Sept. 18, 2009), 2009 WL 2994825.

274. As of the time of this Article's publication, this is a list of all the cases I could find in which such determinations occurred. Of course, not all such cases are published, so in all likelihood there are in fact many other examples. *See, e.g.* *Blevins v. Bardwell*, 784 So. 2d 166, 175 (Miss. 2001); *Staggs v. Staggs*, 919 So. 2d 112 (Miss. Ct. App.); *Brekeen v. Brekeen*, 880 So. 2d 280, 282 (Miss. 2004); *Turner v. Turner*, 824 So. 2d 652, 655–56 (Miss. Ct. App. 2002); *Pacheco v. Pacheco*, 770 So. 2d 1007, 1011 (Miss. Ct. App. 2000); *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999); *Johnson v. Gray*, 859 So. 2d 1006, 1014–15 (Miss. 2003); *McLemore v. McLemore*, 762 So. 2d 316 (Miss. 2000); *Hodge v. Hodge*, 188 So. 2d 240 (Miss. 1966); *Johns v. Johns*, 918 S.W.2d 728 (Ark. Ct. App. 1996); *Ark. Sup. Ct. Admin. Order No. 15* (1999); *Peacock v. Peacock*, 903 So. 2d 506, 513–14 (La. Ct. App. 2005); *Pahal v. Pahal*, 606 So. 2d 1359, 1362 (La. Ct. App. 1992); *Ulvund v. Ulvund*, No. 224566, 2000 WL 33407372 (Mich. Ct. App. 2000); *Mackenzie v. Cram*, No. 206807, 1998 WL 1991050 (Mich. Ct. App. 1998); *Jimenez v. Jimenez*, No. 190805, 1996 WL 33347958 (Mich. Ct. App. 1996); *Jonhston v. Plessel*, No. A03-581, 2004 WL 384143 (Minn. Ct. App. 2004); *In re Storlein*, 386 N.W.2d 812 (Minn. Ct. App. 1986); *McAlister v. McAlister*, 747 A.2d 390, 393 (Pa. Super. Ct. 2000); *Thomas v. Thomas*, 739 A.2d 206, 213 (Pa. Super. Ct. 1999); *Gancas v. Schultz*, 683 A.2d 1207 (Pa. Super. Ct. 1996); *Scheeler v. Rudy*, 2 Pa. D. & C. 3d 772, 780 (C.P. Franklin Cty. 1977); *Shainwald v. Shainwald*, 395 S.E.2d 441, 446 (S.C. Ct. App. 1990); *Hulm v. Hulm*, 484 N.W.2d 303, 305 & n.\* (S.D. 1992); *In re*

regularly when laws are under enforced. It seems reasonable that this under-enforcement results in part because social attitudes toward atheists remain so negative.<sup>275</sup>

One might argue that in some instances there are sound reasons for distinguishing between religious people and atheists. I will address these reasons in Part IV. But as a descriptive matter, the examples above show that the First Amendment does not offer equivalent protection for the beliefs of religious people and those of atheists.

## 2. Asexual

Elizabeth Emens has considered how the legal system intersects with asexuality. This Section is greatly indebted to her work. While Emens notes a number of interesting ways in which asexuals might be either advantaged or less disadvantaged relative to other groups,<sup>276</sup> I focus here on disadvantage.

At the broadest level, the legal system often treats sex as special. We have laws governing everything from sex work<sup>277</sup> to sexual expression in the workplace<sup>278</sup> to sexual obligations within marriage<sup>279</sup> to sexual speech<sup>280</sup> to sex-oriented businesses.<sup>281</sup> Various structures, ranging from bathrooms<sup>282</sup> to jails,<sup>283</sup> are regulated out of concern for sexuality. Collectively, this legal preoccupation with sex is marginalizing to asexuals, many of who are indifferent to, or at least not particularly concerned with,

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Davis, 30 S.W.3d 609 (Tex. App. 2000); Snider v. Grey, 688 S.W.2d 602, 611 (Tex. App. 1985); In re F.J.K., 608 S.W.2d 301 (Tex. App. 1980); In re Marriage of Moorhead, 224 N.W.2d 242, 244 (Iowa 1974); Ahlman v. Ahlman, 267 N.W.2d 521, 523 (Neb. 1978); Dean v. Dean, 232 S.E.2d 470, 471–72 (N.C. Ct. App. 1977); Robert O. v. Judy E., 90 Misc. 2d 439, 442 (N.Y. Fam. Ct. 1977).

275. See *supra* Part II.A.1.

276. Emens, *supra* note 30, at 345–61.

277. Elizabeth M. Johnson, Note, *Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 723–25 (2014) (summarizing laws criminalizing prostitution).

278. See generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (discussing sex-based harassment in the workplace).

279. See *infra* Part II.A.2.

280. FCC v. Pacifica Found., 438 U.S. 726 (1978); Miller v. California, 413 U.S. 15 (1973). See also David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

281. See, e.g., Los Angeles v. Alameda Books, 535 U.S. 425 (2002); Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991); Renton v. Playtime Theatres, Inc. 475 U.S. 41 (1986).

282. Mary Anne Case, *Why Not Abolish the Laws of Urinary Segregation?*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 218–219 (Harvey Molotch & Lara Norén eds., 2010); Mary Anne Case, *All the World's the Men's Room*, 74 U. CHI. L. REV. 1655 (2007).

283. Russell K. Robinson, *Masculinity as Prison, Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011).

most iterations of sexual behavior.<sup>284</sup> That is, energy devoted to regulating sex with the legal system is energy not spent on concerns of greater importance to asexuals and may lead to self-reinforcing results. As Emens explains: “treating sex as special under law may do more than *reflect* the assumptions of a sexual society; rather, special legal treatment for sex may *reinforce* the specialness of sex as a cultural matter.”<sup>285</sup>

Explicit statutory or judicial discussion of asexuals is far more rare. One state—New York—has a statute explicitly protecting asexuals.<sup>286</sup> That statute, known as the Sexual Orientation Non-Discrimination Act, protects against discrimination on the basis of sexual orientation and defines “sexual orientation” as “heterosexuality, homosexuality, bisexuality *or asexuality*.”<sup>287</sup> A number of municipalities have also included asexuals in their antidiscrimination protections.<sup>288</sup> And the United Kingdom’s hate crime law has been interpreted to cover asexuality.<sup>289</sup> Yet research by myself and others has uncovered no cases in which any of these laws were deployed.<sup>290</sup>

Thus, most of the disparate legal treatment of asexuals takes the form of omission. By failing to recognize asexuals, while recognizing other sexual orientations, laws implicitly signal that asexuals are unworthy of the same antidiscrimination protection as those of other sexual orientations, which in turn leads to more separation between asexuals and everyone else. Legal scholars have noted the power of the law to express or suppress disapproval of particular identities; this is another example.<sup>291</sup>

One might ask whether antidiscrimination protection is necessary: perhaps asexuals do not suffer discrimination. A response is that perhaps they do not because many of them are in the closet about their sexuality.

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284. An exception, of course, would be sexual violence such as corrective rape, which I discussed in Part II.B.

285. Emens, *supra* note 30, at 356.

286. For helpful background regarding the genesis of the law, see Emens, *supra* note 30, at 362–66.

287. Sexual Orientation Non-Discrimination Act, ch. 2, § 3, 2002 N.Y. LAWS 46 (codified at N.Y. Exec. Law § 292(27) (McKinney 2013)). Vermont’s Human Rights Commission has issued a pamphlet defining “sexual orientation” to include asexuality, but has not codified that definition; and Australia has drafted, but never passed, legislation that includes asexuality. See Emens, *supra* note 30, at 362 & n.349.

288. Emens, *supra* note 30, at 362 n.351 (collecting statutes).

289. U.K. HOME OFFICE, CHALLENGE IT, REPORT IT, STOP IT: THE GOVERNMENT’S PLAN FOR DEALING WITH HATE CRIME 4 (2012) (including asexual groups protected by hate crime law).

290. See Emens, *supra* note 30, at n. 373.

291. Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 533–59 (2007).

But these passing or covering harms are consequential, as Kenji Yoshino has compellingly demonstrated.<sup>292</sup> Simply not being able to be out is a burden, and, with increased acceptance of gays, lesbians and other queer people, it is a burden that asexuals disproportionately suffer. Moreover, the research I catalogued earlier suggests that, if asexuals were to be open about their sexuality, they would likely be targeted for negative treatment.<sup>293</sup>

Without the legal protection of antidiscrimination laws, asexuals are largely unprotected from discrimination on the basis of their status in employment, housing, education, and public benefits. Moreover, asexuals also suffer other legal harms of omission. While I will not attempt an exhaustive catalogue, two in particular stand out. First, given the documented incidents of attempted or completed corrective rape against asexuals, the fact that asexuals are not included in any hate crime enhancement statutes is notable. If other sexual orientations are worthy of enhancement when a crime against a group member is motivated by animus toward the group, then failure to afford asexuals the same status amounts to unequal and worse treatment.

Second, asexuals face discrimination in family law. In particular, impotency is a statutory ground for terminating a marriage in at least thirty-six jurisdictions,<sup>294</sup> and in many, it is grounds for a fault-based divorce.<sup>295</sup> Courts define impotency as more than the inability to bear children.<sup>296</sup> Rather, it means an inability to engage in, or a lack of capacity for, normal sexual intercourse, and is grounds for both divorce and annulment.<sup>297</sup> The law often requires the complaining party to not be aware of the issue before marriage<sup>298</sup>: as a result, asexuals who plan to marry bear the responsibility to engage in a discussion concerning the couple's sexual relationship; a corollary to this is that—if such litigation arises—aseexuals bear the burden to prove that such a discussion occurred.

Although not many cases explicitly describe marital termination on those grounds—unsurprisingly, given the embarrassment associated with

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292. See generally YOSHINO, *supra* note 97 (2005).

293. See *supra* Part II.A.2.

294. Reed v. Reed, 177 S.W.2d 26, 27 (Tenn. Ct. App 1943).

295. See Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 44 (2012) (explaining that impotency is typically ground for finding “fault” in divorce).

296. *Id.* at 35.

297. Courts have determined that impotency due to “mental defect” is sufficient. Rickards v. Rickards, 166 A.2d 425, 427–27 (Del. 1960).

298. See *Lovelace v. Lovelace*, 177 S.E. 685, 689–90 (Ga. 1934); *Jorden v. Jorden*, 93 Ill. App 633, 636 (1901); *Peipho v. Peipho*, 88 Ill. 438, 440 (1878).

such grounds for divorce—some cases do cite impotency, and others gesture at the possibility.<sup>299</sup> I do not claim to know whether all these cases involved an asexual party, but I think it likely that some do. And in any event, they instantiate sex as the centerpiece of marital relationships.<sup>300</sup> And all of this, of course, is without taking into account the couples for whom one member's asexuality is the unstated cause of infidelity, emotional and physical abuse, and, perhaps, a financially disadvantageous divorce. Some recent scholarship has questioned the centrality of sex to the marital relationship,<sup>301</sup> but this more inclusive approach to what constitutes marriage is not the prevailing one.

### 3. Single

Social disfavor of singleness finds expression in law.<sup>302</sup> At the federal level, antidiscrimination law offers little protection. Title VII does not prohibit workplace discrimination against single people.<sup>303</sup> Likewise, the Fair Housing Act does not include marital status as a protected class.<sup>304</sup> Moreover, in more than half of states, marital status is entirely unprotected in employment and housing—that is, one can be fired or denied housing simply for being single.

Some state codes do protect against some forms of marital status discrimination. With respect to employment, twenty-two states and the District of Columbia prohibit marital status discrimination in employment;

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299. See, e.g., Reed, 177 S.W.2d at 27 (recognizing “natural impotency” as a situation “that admits neither copulation nor procreation”); Smith v. Smith, 229 S.W. 398 (Kan. Ct. App. 1921) (“The one essential element to constitute impotency is the absence of complete power of copulation.”); Barnett v. Barnett, 167 S.W.2d 845, 847 (Ky. Ct. App. 1943) (“[T]he wife was so malformed as to prevent the husband from enjoying marital privileges, which is a ground of divorce . . . .”); Janda v. Janda, 984 So. 2d 434, 437–39 (Ala. Civ. App. 2007) (providing an example of an annulment based on evidence that the husband refused to engage in a sexual relationship with his wife); In re Marriage of Liu, 197 Cal. App. 3d 143, 148 (1987) (explaining that a wife failed to perform her “marital duties” when she refused to engage in a sexual relationship with her husband).

300. Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1135–37 (2002).

301. See, e.g., Stephanie B. Hoffman, *Behind Closed Doors: Impotence Trials and the Trans-Historical Right to Marital Privacy*, 89 B.U. L. REV. 1725 (2009); Borten, *supra* note 300, at 1135.

302. See Laura Rosenbury, *Marital Status and Privilege*, 16 J. GENDER RACE & JUST. 769, 785 (2013) (discussing “knapsack of unearned marital privilege”); Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 207 (1988) (“Unmarried people are treated with disfavor by society, and this disfavor is reflected in the law.”).

303. See 42 U.S.C. § 2000e-2(a) (2012). See also Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1 (2000) (arguing Title VII should protect against marital status discrimination).

304. See 42 U.S.C. §§ 3601–3619 (2012).

one (Indiana) only with respect to teachers.<sup>305</sup> But most of these protections arose out of cases in which people who were unmarried and cohabiting were judged unfit by their employers; this was particularly common in jobs involving children.<sup>306</sup>

Likewise, twenty-four states have statutes that protect against marital status discrimination in housing. As the research I catalogued demonstrates, these concerns are more than hypothetical—those asked to play the role of landlord preferred both married and unmarried couples to single people and cohabiting friends.<sup>307</sup> As with employment, these statutes often arose in response to cases or events in which unmarried cohabiting couples were denied housing.<sup>308</sup>

States are fairly consistent in the statutory language they use to protect marital status.<sup>309</sup> Counting the number of states that protect marital status in their enumerations of protected classes may overstate the number of people who are actually protected. In other words, even states that list marital

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305. I provide here a complete list of statutes because such a list has heretofore been absent from the literature. *See, e.g.*, ALASKA STAT. § 18.80.210 (2014); CAL. GOV'T CODE § 12940 (Deering Supp. 2015); CONN. GEN. STAT. ANN. § 46a-60 (West Supp. 2014); DEL. CODE ANN. tit. 19, § 711 (Supp. 2014); D.C. CODE § 2-1401.01 (2012); FLA. STAT. § 760.10 (2014); HAW. REV. STAT. § 368-1 (Supp. 2014); 775 ILL. COMP. STAT. ANN. 5/1-102 (2012 & Supp. 2014); IND. CODE § 20-28-10-12 (2014); MD. CODE ANN., STATE GOV'T § 20-606 (LexisNexis 2014); MICH. COMP. LAWS ANN. § 37.2202 (West 2009); MINN. STAT. § 363A.08 (2014); MONT. CODE ANN. § 49-2-303 (2014); NEB. REV. STAT. § 48-1104 (2010 & Supp. 2014); N.H. REV. STAT. ANN. § 354-A:7 (2009 & Supp. 2014); N.J. STAT. ANN. § 10:5-4 (West 2013 & Supp. 2014); N.M. STAT. ANN. § 28-1-7 (2012 & Supp. 2014); N.Y. EXEC. § 296 (McKinney 2014); N.D. CENT. CODE § 14-02.4-01 (2009 & Supp. 2013); OR. REV. STAT. § 659A.030 (2013); VA. CODE ANN. § 2.2-3900 (2014); WASH. REV. CODE § 49.60.180 (2014); WIS. STAT. § 111.31 (2014).

306. *See, e.g.*, *Cooper v. Mower Cty. Soc. Servs.*, 434 N.W.2d 494 (Minn. Ct. App. 1989); *Johnson v. Porter Farms, Inc.*, 382 N.W.2d 543 (Minn. Ct. App. 1986).

307. *See supra* notes 178–80 and accompanying text.

308. I provide here a complete list of statutes because such a list has heretofore been absent from the literature. ALASKA STAT. ANN. § 18.80.210; CAL. GOV'T CODE § 12955 (Deering Supp. 2015); COLO. REV. STAT. § 24-34-502 (2014); CONN. GEN. STAT. ANN. § 46a-64c (West 2009 & Supp. 2014); DEL. CODE ANN. tit. 6, § 4603 (2013 & Supp. 2014); D.C. CODE § 2-1401.01 (2012); FLA. STAT. § 760.10 (2014); HAW. REV. STAT. § 368-1 (1993 & Supp. 2014); 775 ILL. COMP. STAT. ANN. 5/1-102; IND. CODE ANN. § 20-28-10-12; MD. CODE ANN., STATE GOV'T § 20-707 (LexisNexis 2014); MASS. GEN. LAWS ch. 151B, § 4 (2013 & Supp. 2014); MICH. COMP. LAWS ANN. § 37.2502 (West 2009); MINN. STAT. ANN. § 363A.09 (2014); MONT. CODE ANN. § 49-2-305 (2014); NEB. REV. STAT. § 48-1104 (West, Westlaw through 2013 Reg. Sess.); N.H. REV. STAT. ANN. § 354-A:10 (2014); N.J. STAT. § 10:5-4 (2010 & Supp. 2014); N.M. STAT. ANN. § 28-1-7; N.Y. EXEC. § 296 (McKinney 2014); N.D. CENT. CODE § 14-02.4-01; OR. REV. STAT. § 659A.421 (2013); 34 R.I. GEN. LAWS § 34-37-2 (2011 & Supp. 2014); UTAH CODE ANN. § 34A-5-106 (2011 & Supp. 2014); VT. STAT. ANN. tit. 9, § 4503 (2014); WASH. REV. CODE § 49.60.222 (2014); WIS. STAT. § 106.50 (2014).

309. Of the states that have such statutes, twenty-six states use the phrase “marital status,” one defines “familial status” as including marriage status, one uses the phrase “spousal affiliation,” and one simply uses the term “marriage.”

status may codify relevant caveats and limitations elsewhere. For example, in Florida, New Hampshire, and Virginia, a person's marital status is only protected if his employer hires a certain number of people.<sup>310</sup> In Indiana, only teachers enjoy protection against discrimination based on marital status.<sup>311</sup> It does not appear the states that fail to protect a person's marital status from discrimination do so as a result of mere oversight. For example, in Kentucky and South Carolina, marital status is unprotected across the board, yet smokers are listed as a protected class in both states.<sup>312</sup> Instead of using boilerplate language that does not include "marital status," states that do not protect marital status appear to be intentional about what classes they do protect and how they protect those classes.

A few points about the marital status discrimination statutes are noteworthy. First, even where a statute nominally protects both partnered and single people, unmarried people with partners have often instigated the law.<sup>313</sup> That is, even efforts to prevent discrimination against unmarried people have focused on equalizing married and unmarried *couples*, not on equalizing partnered and single people.<sup>314</sup> In the 1970s, when many states enacted or amended civil rights laws to prohibit marital status distinctions, most of the impetus for the change was to prevent worse treatment of married people in the form of challenges to no spouse rules,<sup>315</sup> although commentators have noted that most state legislative history is surprisingly silent on the precise motivation for inclusion of marital status.<sup>316</sup> The resultant protection for single people is something of a byproduct. Secondly—and unsurprisingly—single people are not the primary beneficiaries of these laws, although cases certainly exist in which the law has afforded some protection.<sup>317</sup> And finally, the laws are far from the

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310. FLA. STAT. § 760.10; N.H. REV. STAT. ANN. § 354-A:7; VA. CODE ANN. § 2.2-3900.

311. IND. CODE ANN. § 20-28-10-12.

312. KY. REV. STAT. ANN. § 344.040 (LexisNexis 2014); S.C. CODE ANN. § 41-1-95 (1986 & Supp. 2014).

313. See generally Moran, *supra* note 165, at 235–47.

314. The most salient current example is the effort to achieve marriage equality for same-sex couples. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating federal prohibition on same-sex marriage). See also John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991) (arguing that state prohibitions against marital status discrimination should protect unmarried couples).

315. Scholarly commentary has also focused on this permutation of marital status discrimination. See, e.g., Porter, *supra* note 303, at 23–33.

316. John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991) (commenting that not one case cited the legislative history surrounding the addition of marital status as a protected category).

317. Porter, *supra* note 303, at 9 (most cases of marital status discrimination are brought to challenge an employer's no spouse rule or anti-nepotism policy).

default: a majority of states lack any such laws.

Single people also experience discrimination in other legal areas. In the context of adoption, adoption officials' inherent discretion allows them to prefer a couple over a single parent.<sup>318</sup> Other avenues to parenthood are similarly constrained. Richard Storrow explains that the effect of the focus on marriage "has been to restrict the use of assisted reproduction to those in socially sanctioned intimate relationships and to erect barriers to its use against those who are not in such relationships."<sup>319</sup> While one of Storrow's primary concerns is discrimination against same-sex couples, his reasoning extends to single people too.

Discrimination also extends to the tax code. The United States is one of only a few developed countries to retain the joint return,<sup>320</sup> which was adopted in 1948—roughly the time that the priority on partnering gained the monolithic social force it has had for the past several decades.<sup>321</sup> Lily Kahng has shown that single people who are not part of a couple always pay more taxes on the same income than either a married or unmarried couple.<sup>322</sup> It is true that unmarried *couples* sometimes pay less than married couples—what people call the "marriage penalty"<sup>323</sup>—but single people always pay more as individuals. Kahng concludes that the joint return unduly penalizes single people and should be abolished.<sup>324</sup>

And single people experience a great deal of what we might call discrimination by private parties. For example, admission to a club or charity dinner, or a membership to a gym, is often less than double for a couple what it is for a single person.<sup>325</sup> An employer might offer insurance that is cheaper on a per-person basis for couples than for singles. These

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318. See, e.g., Jessica Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799 (2009).

319. Richard F. Storrow, *Rescuing Children From the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 310 (2006).

320. Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint-Return World*, 61 HASTINGS L.J. 651, 652 (2010).

321. For scholarly accounts of the adoption of the joint return, see, for example, Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1399–1414 (1975); Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988).

322. Kahng, *supra* note 320.

323. *Id.* at 655.

324. *Id.* at 653. See also James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CINN. L. REV. 1409, 1434 (2010) ("The joint return (and special rates for married taxpayers) should be abolished as an incoherent penalty and subsidy of marriage.").

325. DEPAULO, *supra* note 57, at 219–20 (2011). The same is true—perhaps even to a greater extent—when one compares single people to entire families.

examples are not instances of harmless differentiation: the result is that single people end up indirectly subsidizing those who are not single, and the subsidy affects rates in a forward-looking sense whenever the gym recalculates its rates or the employer renews its health insurance plan. Such private discrimination against singles is—for the most part—not regulated by law, but the decision to place a particular activity beyond the reach of the law is still a legal decision.

While this is not an exhaustive catalogue of the ways that single people are disadvantaged by the legal system, it reveals a wide range of way in which single people are treated worse than both those who are married and those who are partnered.

#### 4. Childfree

Much of the legal disadvantage that childfree people experience is the result of inattention and omission rather than of conscious legislative and judicial attempts to impose disadvantage. Childfree people, in many instances, are worse off relative to people with children via omission or thoughtlessness, rather than as a conscious, targeted, legal expression of animus.<sup>326</sup> Similar to the under-protection of single people,<sup>327</sup> some omissions can be traced to advocacy by some feminist organizations that “routinely used the words ‘women’ and ‘mothers’ interchangeably.”<sup>328</sup>

Despite the cases and research I documented in that demonstrate hostility to the childfree,<sup>329</sup> the law leaves them relatively unprotected. Only a few statutes prohibit discrimination on the basis of familial or parental status.<sup>330</sup> Michigan prohibits housing discrimination on the basis of familial status, which logically includes discrimination against the childfree given that marital status is listed separately in the statute.<sup>331</sup> Alaska prohibits employment discrimination on the basis of a number of characteristics, including “pregnancy or parenthood.”<sup>332</sup> And Wisconsin law prohibits discrimination against students on the basis of “parental

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326. As I noted earlier, my point is not that childfree people are more disadvantaged in the aggregate than people with children. The point is the childfree people experience certain unique forms of disadvantage that are under-acknowledged and problematic.

327. See *supra* notes 167-68 and accompanying text.

328. ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* 147–50 (2000).

329. See *supra* Part II.B.4.

330. This is in contrast to statutes that allocate certain benefits on the basis of parental status, which I will examine separately.

331. MICH. COMP. LAWS § 37.2502 (West 2009).

332. ALASKA STAT § 18.80.220 (2014).

status.”<sup>333</sup> These statutes, however, have been deployed only by individuals *with* children, not individuals without.

Many legal regimes less explicitly disadvantage childfree people relative to those with children. Such disadvantage occurs in the workplace. Most obviously, people are entitled to parental leave, but under federal law and most state laws, childfree people are not entitled to leave to engage in human caregiving that is potentially equally time-consuming and socially worthy, such as caring for a sibling, niece, nephew, friend, or neighbor.<sup>334</sup> A few states have enacted expanded versions of the FMLA that protect a broader range of human relationships: for example, Hawaii includes a “parent-in-law, a stepparent, a legal guardian, a grandparent, or a grandparent-in-law”<sup>335</sup>; Maine includes siblings<sup>336</sup>; and Oregon includes grandparents and grandchildren.<sup>337</sup> These laws reflect a prioritization of some kinds of human relationships over others.

Beyond the realm of caregiving, it is worth discussing why neither federal nor state law provides equivalent leave to childfree people who would use that time to volunteer hours and expertise to those in need, engage in political activism, travel, or write a novel.<sup>338</sup> The claim that having a child or engaging in other caregiving warrants a leave, yet these other pursuits do not, is certainly defensible, but we should recognize it openly as a normative judgment that requires justification. Thus far, such policies are, as Case and others describe them, “undertheorized.”<sup>339</sup> The argument that child-rearing is a social good in excess of all other human activities is not entirely satisfying.<sup>340</sup> Carol Sanger acknowledges a range of reasons that people have children aside from social good: “because they love them or the idea of them, to keep a marriage together, to meet social, spousal or parental expectations, to experience pregnancy, or to pass on the family name, genes, or silver,” or “to keep someone from being an only child.”<sup>341</sup>

Beyond parental leave, employers’ benefits to families are often

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333. WIS. STAT. § 38.23 (2014).

334. Unlike caregiving for parents, spouses, and children, these activities are not covered under the Family and Medical Leave Act (FMLA), 5 U.S.C. § 6381 (2012), nor under most state versions of the FMLA.

335. HAW. REV. STAT. § 398-1 (Supp. 2014).

336. ME. STAT. tit. 26 § 843(4)(D)-(F) (Supp. 2014).

337. OR. REV. STAT. § 659A.150(4) (Supp. 2014).

338. Case, *supra* note 84, at 1735.

339. *Id.* at 1756; Franke, *supra* note 84, at 185–198.

340. See, e.g., Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 19 (2000).

341. Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN’S STUD. 15, 48 (1992).

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limited to spouses and children, leaving aside a host of other important familial and other human relationships. Again, this decision requires a normative justification that current discourse does not always provide. Likewise, an institution that provides health benefits to employees' children but not other relatives, or an institution of higher education that provides free tuition to employees' children but not other relatives, is making a normative judgment. In each instance, one might characterize the judgment as a subsidy from childfree people to people without children. As I will explain in the next section, I support many of these measures, but we should acknowledge them as subsidies that require normative justification.

And discrimination against the childfree in private contracting also occurs with regularity. A gym membership might cost \$100 per month for a single person, \$175 for a couple, and \$250 for a family of four. The same price structure characterizes admissions to sporting events, musical performances, and other gatherings. Many, although not all, health insurance policies provide a better deal on a per person basis to people with children than to people without. Many automobile insurance policies likewise provide a better deal per person to people with children than to people without. Restaurants provide various incentives to attract families with children, ranging from "kids eat free" deals to percentage discounts for families. Each of these situations can be characterized as a subsidy of people with children by the childfree.

Moreover, the very structures underlying efforts to accommodate parents nonetheless result in a degree of disadvantage to people without children and thus require normative justification. Case suggests that this is particularly true for women. She explains: "I fear the practical effect of localizing benefits for children and their parents at the level of the employer may be to effect something like a taking . . . from one group of female employees (childless women who will remain childless), for the benefit predominantly of another group of male employees (those with wives and children)."<sup>342</sup> She describes the situation for childless women a lose-lose: "[S]o long as we are potentially mothers, we are at risk for discrimination; so long as we are not actually mothers, we get no offsetting compensation from the increased childcare benefits."<sup>343</sup> In some instances, disparate accommodation of people with children extends to realms at best tenuously related to actual childrearing—for instance, to excuse inferior workplace performance. It is unclear why people should receive workplace credit for the childrearing tasks they have voluntarily undertaken when

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342. Case, *supra* note 84, at 1758.

343. *Id.* at 1759.

such tasks bear no relevance to their job. No one would suggest that someone who volunteers many hours a month in a non-job-related forum should receive analogous credit in the workplace, even when both childrearing and volunteerism were undertaken by choice. Indeed, depending on the child and the volunteer work, the latter may create more positive externalities than the former.<sup>344</sup>

Scholars have worked to develop a model for representing the interests of both parents and childfree people in the workplace.<sup>345</sup> This worthy goal should be undertaken with a full understanding of both identities. In the next Part, I will offer some preliminary thoughts about what such a model might look like, as well as how to balance the interest of other positive and negative identity groups.

#### IV. LEGAL AND POLICY REFORMS

In this Part, I propose concrete interventions to address the disadvantage that negative identity group members face in many circumstances. I discuss statutory, judicial, and policy possibilities, with the recognition that the categories of reform will overlap. For example, the contours of a particular legislative enactment against negative identity discrimination may affect how robust a remedy a court ultimately awards for discrimination under that statute. Likewise, the increase in public awareness prompted by either a legislative effort or a prominent judicial decision may mobilize efforts to reform social policy, even where reform is not required by law.

My argument is not that members of negative identity categories should be on precisely equal footing with other identities in all situations. Rather, I draw distinctions among three types of differentiation among groups: direct discrimination, subsidy, and accommodation.<sup>346</sup>

Direct discrimination refers to worse treatment targeted at members of negative identity groups because of animus or hostility to negative identity. I argue that direct discrimination against negative identity should be prohibited to the same degree that discrimination against positive identity is prohibited. Moreover, in some instances both negative and positive

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344. Again, this is not an argument against parental leave, which I support. As I will argue in more detail in Part IV, my view is that a set amount of personal leave should be available to everyone.

345. See, e.g., Debbie N. Kaminer, *The Work-Family Conflict: Developing A Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 327 (2004).

346. The distinction is one advanced by a number of legal scholars and frequently associated with Mark Kelman. See, e.g., MARK KELMAN, STRATEGY OR PRINCIPLE? THE CHOICE BETWEEN REGULATION AND TAXATION 8–9 (1999); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 830, 880–81 (2001).

dimensions of identity should be protected against direct discrimination to a greater degree than they are under current law. Both legislatures and the judiciary should act to ensure that direct discrimination is statutorily prohibited and that this prohibition is fully enforced.

Subsidy and accommodation are more complex. I distinguish the two on the grounds that subsidy is a transfer from one individual or group to another of something that both would find equally valuable, while accommodation is also a transfer, but one that provides a benefit to a particular group that would be of substantially less value to non-group-members. In other words, accommodation is a subset of subsidy. With respect to both subsidies and accommodations, the inquiry as to whether the measure is legally permissible or required is a holistic one that takes into account all of the relevant factors.<sup>347</sup> If a particular subsidy is best classified as an accommodation that may be a factor that weighs in favor of allowing or requiring it. I sketch the inquiry here in a preliminary fashion, with the understanding that resolving each specific issue will require more extensive analysis in future work, and provide a few examples of how the inquiry should apply. The approach does not always offer easy answers, but is preferable to any other because it allows for a more nuanced and flexible resolution of difficult questions about the distribution of resources.

The distinction between direct discrimination on the one hand, and subsidy and accommodation on the other, is not always clear-cut. Consider, for example, the per-child tax credit. One might argue that this is direct discrimination against the childfree: it singles out those who do not have children as ineligible for a break on their taxes. Others would argue that the tax credit is better characterized as a subsidy: it does not target the childfree; rather, it redistributes resources from childfree people to parents. If the per-child tax credit is direct discrimination, then, under my framework, the credit is impermissible. If, on the other hand, it is a subsidy, the inquiry continues: the question is whether the subsidy is justified under the circumstances.<sup>348</sup>

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347. This approach is similar to the one Nelson Tebbe proposes with respect to nonbelievers: the correct answer depends on context. Tebbe, *supra* note 4, at 1116–17.

348. My own answer to this question is more complex than I can explore in this Article. But it would depend on whether the question is a narrow one—should we continue the per-child tax credit, assuming that all else would remain constant?—or a broader one—should we engage in a massive overhaul of the tax code that would allow everyone to take good care of their families but that would not include a specific allocation for children? I would answer both questions in the affirmative.

## A. DIRECT DISCRIMINATION

As I discussed in Part III.B, some protections against direct discrimination already exist. Atheists are protected against discrimination in employment actions by Title VII, against housing discrimination by the Fair Housing Act, and against some instances of governmental discrimination by the Establishment Clause of the First Amendment (although not, as I have discussed, to the same degree as religious people). Asexuals are protected explicitly by one measure, the prohibition on discrimination against asexuals in New York. Singles are protected by the prohibition on discrimination on the basis of marital status in many (though not all) states within the realm of employment and housing.

Ideally, legislators would implement measures to cover discrimination against negative identity, in any context, by both public and private parties. While sweeping legislation could eliminate discrimination across legal domains at once, legislatures should prioritize eliminating discrimination in the realms of workplace, housing, and public accommodations. Such legislative measures would remedy the existing unequal status, in many circumstances, of atheists, asexual, singles, and the childfree.<sup>349</sup>

Ideally such measures would take place at both the federal and state level. While some might argue that this would create redundancy, there is both practical<sup>350</sup> and symbolic value to plaintiffs in the existence of parallel regimes. Moreover, parallel state and federal statutes serve the discursive function of federalism.<sup>351</sup> Advocating parity for negative identity would not require starting from scratch. In addition to the statutes that already exist, in many instances, there is also a sound platform for advocacy—for example, the scholarly work that has advocated for making marital status as a protected category under Title VII.<sup>352</sup>

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349. Of course, the Supreme Court has not interpreted the Establishment Clause to mean that religion and nonreligion should be treated equally. But legislatures could still place atheism on equal footing consistent with both the Establishment and Free Exercise Clauses. For example, legislatures (whether federal, state, or local) could require that atheist invocations must be read in any public venue where religious invocations are read. Or they could require that a governmental display including religious material requires an invitation to atheists (and other religious groups) to contribute material they find meaningful.

350. For instance, parallel statutes would provide more different forums for litigation, different remedies, and different procedural mechanisms.

351. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285–99 (2005) (advocating a “polyphonic” version of federalism allowing for interaction between federal and state law); James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1259–72 (1994) (“[T]here is an essential complementarity between the principles of federalism and traditional principles of civil rights.”).

352. Porter, *supra* note 303.

And finally, legislatures should penalize those who perpetrate crimes against members of negative identity groups through hate crime enhancements. Hate crime enhancements are part of many criminal sentencing regimes, and a crime motivated by animus toward negative identity warrants a sentencing enhancement to the same degree as a crime motivated by animus toward the positive identity category. That is, a crime motivated by someone's atheism should be treated the same as one motivated by their religious faith. Such enhancements punish hate crimes evenly and perform a valuable signaling function that such animus is particularly worthy of social disapprobation.<sup>353</sup>

While thus far I have suggested primarily legislative solutions, courts also have an important role to play. In particular, they should interpret existing laws that speak to positive identity to include negative identity as well. For example, Title VII should be interpreted not only to prohibit adverse employment action on the basis of religion, but also on the basis of atheism.<sup>354</sup> Likewise, existing statutes prohibiting discrimination on the basis of marital status should be interpreted to protect coupled and single people equally.<sup>355</sup>

#### B. SUBSIDY AND ACCOMMODATION

I distinguish subsidy and accommodation as follows. A subsidy is a transfer from one individual or group to another of a benefit that both would find equally valuable. An accommodation is a benefit to a particular group that would be of substantially less value to non-group-members.<sup>356</sup> Accommodations are a subset of subsidies.<sup>357</sup>

The boundary between the two categories is fuzzy, and it is often possible to recast a subsidy as an accommodation, or the reverse. Consider, for example, the move to create designated lactation rooms in workplaces.<sup>358</sup> Some would argue that this is an accommodation: a designated lactation room is extremely valuable to parents, and of minimal

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353. See generally Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law*, 34 LAW & SOC'Y REV. 567 (2000). In some instances, this would require enacting a hate crime enhancement for both the positive and the negative identity category: for example, neither parental nor childfree identity currently warrants such an enhancement.

354. As I have noted, Title VII has been treated this way by a few courts, but not by the Supreme Court or by the relevant appellate court in most jurisdictions.

355. Marital status discrimination statutes generally have been interpreted this way, but have not been considered by the Supreme Court or by the relevant appellate court in most jurisdictions.

356. See *supra* notes 344–346.

357. *Id.*

358. See, e.g., Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471 (2001).

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value to everyone else.<sup>359</sup> Others would characterize it as a subsidy: all workers would value a private area to use as they prefer (to pray, to make personal calls, to treat private medical issues, to recover from migraines, to deal privately with mental health issues such as panic attacks, and so on). Under this characterization, a lactation space looks more like a subsidy: that is, the employer is selectively devoting money and space to creating an area that benefits people with children, while not providing other employees with an analogous benefit. In such situations (the argument would go), childfree people are subsidizing those with children because the employer is devoting resources to children that might otherwise be used to benefit everyone equally via other workplace benefits.

Whether a measure constitutes a subsidy or an accommodation is often not susceptible to a simple analysis. In either instance, however, the courts should then determine whether the measure is permissible by examining the totality of the circumstances surrounding the proposed measure, considering factors including the importance of the measure to the benefitted group; the degree of burden to nonmembers of the group; the cost to the employer, landlord, or other decisionmaking entity; possible second-best alternatives to the measure; the use to which the resources would be put if not directed to the proposed measure; and the extent to which the measure reinforces or undermines other social values such as equality, dignity, and liberty. If a particular subsidy is best classified as an accommodation, that weighs—in some instances heavily—in favor of permitting or requiring that measure. In my view, this is appropriate because accommodations do not favor one group over another; they simply acknowledge relevant differences among groups by providing items tailored to the needs of particular groups. The factors I have enumerated do not exhaust those that might be relevant. Rather, they provide a nonexhaustive list of considerations to help determine whether a particular measure is a subsidy or an accommodation.

Such analysis leads to the conclusion that lactation rooms are accommodations, and moreover should be required. Lactation rooms are vitally important to many women in the workplace. In most workplaces, they are a relatively minimal burden—that is, all that is needed is a relatively small space with a door that locks, an electrical outlet for plugging in a breast pump, a comfortable chair, a table or counter, and arrangements for routine cleaning. Such a space creates virtually no burden

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359. While I understand (and agree with) the argument that a lactation room is of value to everyone who values breastfeeding mothers' participation in the workplace, at the point of determining whether a particular benefit is an accommodation or a subsidy, I limit the inquiry to whether the benefit is personally useful to everyone, or only to a particular group.

to other employees and most employers can create them with minimal cost. Perhaps most importantly, lactation rooms promote equality by removing a historical obstacle to women's participation in the workplace. Under my analysis, then, lactation rooms are an accommodation warranted in light of the factors I have described.

Consider another example. Should employers pay for drug treatments for erectile dysfunction, such as Viagra and Cialis? Such treatments can be characterized as subsidies because they transfer wealth from asexual people to sexual people. It is more debatable whether they can be classified as accommodations. Specifically, are drugs such as Viagra and Cialis beneficial only to those with erectile dysfunction, or to all males who want to have sex? Some evidence supports the latter proposition. For example, research has found certain sexual benefits when males without erectile dysfunction take the relevant drugs,<sup>360</sup> and, tellingly, the drugs have become standard within the adult film industry.<sup>361</sup> On the other hand, one could argue that the benefit for males with erectile dysfunction is the difference between engaging in sex and not, while for other males the benefit is at best recreational. But even if we consider drug treatment as at least arguably an accommodation, it is unclear whether the wealth transfer from asexual to sexual people is warranted under a holistic appraisal. The cost to the employer is relatively minimal, compared to many treatments, but the benefit is open to dispute. Even if the individual male views the treatment as a net gain, the calculus should also include the effect on the people he has sex with: some people might view a partner's drug treatment for erectile dysfunction as a benefit; others might be considerably happier if their partners never received such treatment. And treatment for erectile dysfunction has none of the equality-enhancing benefits associated with lactation rooms in the workplace. Ultimately, I consider this a more difficult case.

Setting the difficulties with categorization, my prescriptions for subsidy and accommodation may be summarized as follows. Subsidies

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360. See, e.g., N. Mondaini et al., *Sildenafil Does Not Improve Sexual Function in Men Without Erectile Dysfunction But Does Reduce the Postorgasmic Refractory Time*, 15 INT'L J. IMPOTENCE RES. 225, 227 (2003) (explaining that Viagra reduces post-orgasmic refractory period for men without erectile dysfunction).

361. See, e.g., Tracy Clark-Flory, *A Male Porn Star Speaks*, SALON (July 27, 2011), [http://www.salon.com/2011/07/28/porn\\_13/](http://www.salon.com/2011/07/28/porn_13/) (quoting James Deen: "Nowadays it's completely standard for guys to show up with their pills and say 'gimme a 30 minute warning for the scene.'"); *Interview: Ron Jeremy*, ASKMEN, [http://www.askmen.com/celebs/interview/34\\_ron\\_jeremy\\_interview.html](http://www.askmen.com/celebs/interview/34_ron_jeremy_interview.html) (quoting Ron Jeremy: "With Viagra everybody can be a porn star. I mean, only a handful of us guys could last a long time, but today, with Viagra and all these different pills . . . anybody can be a porn star—really.").

from negative to positive identity groups should be granted in some instances, and we should employ a holistic review to determine when those instances are. If a particular subsidy can be further classified as an accommodation, that will generally cut in favor of permitting or requiring the subsidy. While this inquiry inherently involves a case-by-case assessment, the approach is both necessary in order to take account of the many relevant factors and desirable because it promotes serious engagement with the many competing issues that should dictate our assessment of a subsidy of one identity group by another.

### C. POLICY

Some hostility against negative identity the law will never touch. Speaking broadly, this is no different than any other identity category. We cannot ban Internet forums that propagate hate speech, or prevent people from shunning neighbors and colleagues whose identity they mistrust, or force members of the media to stop asserting that asexuality does not exist or that all single people are destined to grow old alone with twenty cats.

Given that so much in our culture and society runs counter to negative identity—that is, we constantly hear messages about the importance of religion, sex, partnership, and children—those who have negative attitudes toward negative identity will find plenty of reinforcement of those attitudes in the world around them. Many have argued that the signaling of legal protection has the power to change attitudes, and I tend to agree. But we should also remember that policy reform need not originate with legal actors. Teachers, business-owners, clergy, members of the media, and many other figures have the power to catalyze change in others' attitudes through thoughtful conversation and interaction. While much of this Article has dealt with the legal mechanisms that should offer recourse to negative identity groups, perhaps one lesson is that the law is not always the only or even the best way of ending discrimination.

### CONCLUSION

Negative identity is not, in fact, negative in either sense of the word: it is a rich, complex, positive phenomenon worthy of protection within our antidiscrimination regime. Thinking of negative identity as a collective phenomenon helps to demonstrate that the protection of a class should include protection for its opposite.

