Status-Conduct, Old and New

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

The slippery relationship between status and conduct has preoccupied scholars, activists, and courts for many years.[1] At various points, state and private actors have avoided claims of unlawful discrimination by disaggregating status from conduct—claiming that they have singled out individuals for unfavorable treatment based not on protected identity but rather on objectionable and unprotected acts. In *Intimate Liberties and Antidiscrimination Law*, Deborah Widiss uncovers the extensive reach of this status-conduct argument, persuasively urges actors in the legal system to abandon it, and elaborates the implications of that abandonment for current conflicts over the scope of antidiscrimination law.

Perhaps nowhere has the status-conduct distinction been more prominent than in the realm of sexual orientation. In *Bowers v. Hardwick*, the 1986 decision upholding anti-sodomy laws against constitutional challenge, the U.S. Supreme Court refused to identify "homosexual conduct" as a protected liberty. After *Bowers*, LGBT rights advocates attempted to disaggregate conduct from status, even though they understood same-sex sex as inextricably linked to lesbian and gay identity. Advocates would contend that even though the government could criminalize the underlying conduct, it should not be permitted to discriminate against people based on their status as lesbian or gay. This strategy yielded mixed results. As the D.C. Circuit reasoned in 1987, "If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious."[2]

In 2003, in *Lawrence v. Texas*, the Court repudiated *Bowers* and its status-conduct distinction, as it ruled that same-sex sex is a liberty protected by the Fourteenth Amendment's Due Process Clause. Writing for the Court, Justice Kennedy explained how the prohibition on conduct produced substantial status-based harms: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." In a concurring opinion rooted in equal protection principles, Justice O'Connor rejected the status-conduct distinction that had hampered LGBT rights claims for many years: Because "the conduct targeted by this law is conduct that is closely correlated with being homosexual . . . , Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class." In its 2010 decision in *Christian Legal Society v. Martinez*, the Court summed up how far it had traveled, explaining that its recent decisions "have declined to distinguish between status and conduct in this context."

While this record suggests that the status-conduct distinction that blocked LGBT progress has been relegated to the dustbin of history, Widiss's article reveals that the status-conduct argument—with its power to disarm claims to equality—persists. Consider claims to religious exemption arising in the context of same-sex marriage. The religious claimant, Widiss shows, articulates an objection to conduct—same-sex marriage—and not status. Indeed, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, currently pending before the Supreme Court, Jack Phillips argues that he does not discriminate based on sexual orientation; indeed, he would happily serve lesbian and gay individuals. It is same-sex marriage to which he objects.

This distinction between lesbian and gay identity, on one hand, and same-sex marriage, on the other hand, is in important ways an updated version of the status-conduct distinction that pervaded the era of anti-sodomy laws. As I have documented, many of the objections that have been characterized as objections to same-sex marriage have in fact included general objections to same-sex relationships, whether marital or not.[3] From this perspective, we can

understand same-sex *marriages* as merely a subset of same-sex *relationships*. And same-sex relationships represent the very enactment of lesbian or gay identity. Through this lens, the same-sex marriage objection is properly understood as an objection to status, not simply to conduct.

Widiss shows us that the status-conduct distinction that has emerged in the same-sex marriage context pervades antidiscrimination law. Indeed, she notes how the arguments in *Masterpiece Cakeshop* are underwritten by earlier decisions on marital status discrimination. In the closing decades of the twentieth century, some state courts "held that landlords could refuse to rent to cohabiting couples because that decision simply reflected disapproval of 'conduct' (i.e., non-marital intimacy), rather than impermissible marital status discrimination." (P. 2087.) More recently, "courts have similarly reasoned that discrimination on the basis of pregnancy is illegal sex discrimination, but discrimination against a pregnant woman premised on her having engaged in non-marital sex is permissible." (P. 2087.)

Widiss persuasively attacks the status-conduct distinction on both conceptual and doctrinal grounds. Just as "[s]exual orientation is defined by actual or desired partners for sexual intimacy," "[m]arital status is defined by choices regarding whether and when to marry. And pregnancy, including non-marital pregnancy, is the physical manifestation of sexual intimacy and choices regarding procreation and contraception." (P. 2088.) Not only does the status-conduct distinction miss the deep connection between identity and acts in these settings, it reads into the relevant nondiscrimination statutes an unnecessary and harmful limit. Here, Widiss argues that modern constitutional law is relevant to the interpretation and application of private antidiscrimination law. Decisions on abortion, contraception, and same-sex sex demonstrate how conduct protected as fundamental for due process purposes is deeply connected to identity. And, whereas *Lawrence* demonstrates that criminalization of intimate conduct can fuel private discrimination, Widiss asserts that "permitting private discrimination can undermine individuals' freedom to exercise fundamental liberties." (P. 2089.)

The connection between protected conduct in constitutional law and protected status in antidiscrimination law is relevant not only to interpretive considerations but also to the weight of the interest the government seeks to vindicate through the nondiscrimination mandate's enforcement. On Widiss's account, given that fundamental rights are at stake, shielding from discrimination those who exercise such rights should be deemed a compelling governmental interest.

These insights, in Widiss's framework, guide resolution of contemporary claims to religious exemption from antidiscrimination law. First, courts should understand the religious objection against same-sex marriage, unmarried cohabitation, and non-marital pregnancy as a status-based objection covered by antidiscrimination mandates that include sexual orientation, marital status, and pregnancy. Second, courts should understand unencumbered enforcement of the law as necessary to further the compelling governmental interest in preventing discrimination.

In all, *Intimate Liberties and Antidiscrimination Law* presents both an insightful conceptual argument and a convincing doctrinal intervention. Widiss disarms the status-conduct arguments that for too long have obscured discrimination based on sexual orientation, marital status, and pregnancy. And she tightly connects the constitutional principles that animate the Court's protection of intimate conduct to questions of interpretation and enforcement in antidiscrimination law.

1. *See* Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 **Va. L. Rev.** 1721 (1993). [?]
2. *See* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987). [?]
3. Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 **Calif. L. Rev.** 1169 (2012). [?]

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