I. INTRODUCTION

Defining the typical American family is becoming a greater challenge as the traditional family structure moves steadily towards alternative forms. Alternative families such as unmarried cohabitating couples, same-sex couples, single-parent households and extended-family households now make up the majority of U.S. families. For instance, in Cynthia Lane’s monologue, she identifies her nuclear family as follows: her mother, brother, son, and daughter (seemingly “normal”); her ex-husband and his wife; and, the same sex “love of her life” (her former partner). Cynthia’s alternative family regularly participates in typical family activities such as birthday dinners and school activities. A close relationship is maintained between each member; Cynthia’s children and mother remain particularly close with her former partner.

The law has struggled to accommodate alternative families in certain areas because the traditional family form remains the primary influence in the creation of family law and policy. This Note first provides an overview of how family dynamics have evolved over recent decades and how laws have sought to define family through ordinances and statutes. The focus then shifts to inconsistencies in child visitation rights based on family type. Next, the lingering challenges faced by unmarried cohabitating couples are addressed. Finally, the effect of traditional, gender-based caretaking roles on the implementation of non-discriminatory employment policies such as the Federal Medical Leave Act is considered.
II. THE EVOLUTION OF FAMILY DYNAMICS AND THE LAW

A. Familial Changes Over Recent Decades

The dynamics of the American family have significantly changed in recent decades. In 1970, more than forty percent of families fit the traditional family definition of married parents and their biological children; currently less than a quarter of families fit this definition. The shift towards alternative family forms is due in large part to higher divorce rates, more single-parent households, and larger numbers of same-sex couples.

Unmarried cohabitating couples—both same-sex and heterosexual—have also increased significantly resulting in higher numbers of alternative households. Heterosexual cohabitating couples have grown in number over the past thirty years from 450,000 to over 4.6 million, forty-five percent of which include children. This increase has been attributed to greater societal acceptance, advances in contraception, and changed views regarding the morality of cohabiting women.

The number of cohabitating same-sex couples has also risen. According to the 2000 census, 594,000 households are comprised of same-sex couples. In addition, the number of single-parent households has tripled over the past twenty-five years and it is estimated that sixty percent of children will live in a single-parent household during their lives. The above statistics indicate a significant trend in family dynamics away from traditional forms and towards alternative forms such as single-parent households, unmarried cohabitating couples, and extended family households.

B. Government Response to Changing Families

Despite the clear changes in family dynamics, the law remains conflicted in the implementation of family law and policy. The characteristics and roles of traditional family households remain heavily promoted by legislation that

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7 Weisberg & Appleton, supra note 1, at 361.
8 Ayelet Blecher-Prigat, Rethinking Visitation: From a Parental to a Relational Right, 16 Duke J. Gender L. & Pol’y 1, 5 (2009).
10 Id. at 177.
encourages or only recognizes traditional marriage. For example, the majority of states, including Utah, still only recognize marriage as the legal union of a man and a woman. One the other hand, however, Massachusetts has expanded the scope of marriage to include same-sex couples and a growing number of states now afford same-sex couples marital benefits by recognizing civil unions or domestic partnerships.

In addition to regulating who can marry, attempts to promote traditional families are also found in the single-family home ordinance laws of local governments. Such regulations often define family narrowly, resulting in the exclusion of families outside of the traditional family form. For instance, a zoning regulation that excluded non-traditional families from a neighborhood was upheld by the U.S. Supreme Court in Belle Terre v. Boraas. Households that consisted of unmarried adults were limited to two in number, meaning that if one or both adults had children, then they were in violation of the ordinance. However, the Supreme Court subsequently rejected an ordinance which disallowed certain extended family members from living together in Moore v. City of East Cleveland, Ohio. In Moore, an elderly woman was sentenced to five days in jail for housing her son and her two grandsons who were cousins. The ordinance only allowed the husband or wife of the head of a household and their unmarried children. In contrast to Belle Terre, the Court held that zoning is not intended to control the “genetic or intimate family relations of human beings.”

Following Belle Terre and Moore the constitutionality of family-defining ordinances has been largely left to the details of state constitutions. Some state courts have held these ordinances unconstitutional for treating unrelated persons who live together differently from traditional families, while others have upheld

13 Hamilton, supra note 6, at 311 (stating that traditional roles include father providing, mother caretaking, etc.).
15 See generally Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003); see also WEISBERG & APPLETON, supra note 1, at 181 (stating that California, Connecticut, the District of Columbia, Hawaii, Maine, New Jersey, and Vermont have enacted domestic partnership legislation to provide marital like benefits to same sex couples).
17 Id.
18 416 U.S. 1, 7–8 (1974).
19 Id. at 9.
21 Id. at 497.
22 Id. at 496.
23 Id. at 517 (citing White Plains v. Ferraioli, 313 N.E2d 756, 758 (N.Y. 1974)).
24 Brener, supra note 16, at 449.
such ordinances citing legitimate state interests in the promotion of traditional family values.\textsuperscript{25}

Perhaps the law will eventually view family relations as being as important as family form. In order to more uniformly accommodate alternative families, the law could adopt a more functional approach in which the functions and characteristics of a nuclear family are identified, and a similarly-functioning alternative family would be entitled to the same benefits.\textsuperscript{26}

III. INCONSISTENCIES IN CHILD VISITATION RIGHTS AND OTHER LEGAL CHALLENGES FACED BY UNMARRIED COHABITATING COUPLES

\textit{A. Child Visitation}

One of the striking features of Cynthia Lane’s monologue is that despite divorcing her husband and separating from her same-sex partner, they all continue to have a close relationship with Cynthia’s mother and children.\textsuperscript{27} In many instances, however, when a family divides, child visitation becomes a major issue. Courts often approach the visitation rights of alternative family members differently than those of traditional family members.\textsuperscript{28} As discussed below, the right to child visitation is often influenced by family type as much as by a child’s best interests.

The Utah case of \textit{Jones v. Barlow} addressed the issue of child visitation in an alternative family.\textsuperscript{29} The case involved two women—Jones and Barlow—who entered into a civil union in November of 2000 and subsequently had a baby girl through Barlow’s artificial insemination.\textsuperscript{30} The child’s surname was “Jones-Barlow,” and both women were designated as co-guardians.\textsuperscript{31} The couple separated shortly after the child’s second birthday whereupon Barlow ended all contact between the child and Jones.\textsuperscript{32} In granting Jones’s petition for visitation, the District Court held that contact with Jones would be in the child’s best interest.\textsuperscript{33} The Utah Supreme Court reversed, however, holding that Barlow, the child’s biological parent, could terminate the temporary parental status of Jones.

\textsuperscript{25} \textit{Id.} at 457.
\textsuperscript{27} Lane, \textit{supra} note 3.
\textsuperscript{28} Blecher-Prigat, \textit{supra} note 8, at 1.
\textsuperscript{29} Jones v. Barlow, 2007 UT 20, 154 P.3d 808.
\textsuperscript{30} \textit{Id.} at ¶ 4.
\textsuperscript{31} \textit{Id.} at ¶ 5.
\textsuperscript{32} \textit{Id.} at ¶ 6.
\textsuperscript{33} \textit{Id.} at ¶ 8.
based on her status as co-legal guardian rather than biological or adoptive parent. Despite the lower court’s finding that continued visitation was in the child’s best interest, Jones was denied visitation solely because she did not fit a traditional family role.

Unlike Jones v. Barlow, the Utah court was willing to look “beyond the effect of the parent-child relationship . . . [in] determining what constitutes a reasonable award of visitation in the best interest of the children” in a child visitation case involving a more traditional family. In Campbell v. Campbell, after a married father of four passed away, a dispute regarding grandparental visitation arose between the mother and paternal grandparents. The grandparent’s petition for visitation was granted under the court’s reasoning that such an order was in the best interests of children.

Jones and Campbell illustrate the law’s apparent preference for nuclear, traditional families. One major distinction in these two cases is the traditional versus alternative familial status when the children were born. Despite a child’s best interests, courts often presume that time spent in a traditional nuclear family setting trumps visitation and contact with the “non-traditional” family members regardless of an established relationship. In visitation cases in which a caring guardian has raised a child and a court finds continued contact to be in the child’s best interest, the focus should be more on the child’s well-being than the family type.

B. Non-marital Cohabitation

Unmarried cohabitating couples still face discrimination in many areas. Due to the increased numbers of unmarried cohabitating couples, the law’s continued reliance on marriage as a centerpiece for social policy has created a widening gap between legal policies and modern family realities. Nonetheless, marriage remains a “tool relied on by federal and state family policies to ensure the well-being . . . of families and children.”

Unmarried cohabitating couples often face discrimination in landlord-tenant scenarios. For example in a recent North Dakota case a landlord refused to rent to an unmarried couple, claiming they were unlawfully cohabitating. In North

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34 Id. at ¶ 22 (stating that a “legal parent may freely terminate the in loco parentis status by removing her child from the relationship . . . .”).
36 Id. at 636.
37 Id. at 640.
39 Hamilton, supra note 6, at 307.
40 Id.
Dakota non-marital cohabitation is a class B misdemeanor. The couple argued that the landlord’s refusal was in violation of the North Dakota Human Rights Act. The Supreme Court of North Dakota held that it was not discriminatory to refuse to rent to unmarried persons seeking to cohabit. Many courts, however, have held that a landlord’s refusal to rent to unmarried couples violates state and municipal prohibitions against discrimination based on marital status. Thus, while the laws of some states have progressed to protect the rights of cohabitating couples, others have failed to do so.

Another case involving alleged discrimination based on non-marital cohabitation is Veenstra v. Washtenaw Country Club, wherein a country club golf professional alleged that his employment was terminated because of his separation from his wife and cohabitation with another woman. While the plaintiff asserted that his firing violated the civil rights laws of Michigan, the Court distinguished discrimination based on marital status from discrimination based on conduct—adultery in this case. The dissent, however, stated that “conduct and status are often inextricably linked . . . [and] marital status and conduct are concepts that cannot always be easily distinguished.”

Discrimination against unmarried cohabitating couples still exists despite the tremendous increase in unmarried couples living together. The law should better recognize the rights of unmarried cohabitating couples and seek to prevent inequality because of the outdated view that cohabitation is less favorable than marriage.

IV. THE EFFECT OF TRADITIONAL CARETAKING ROLES ON NON-DISCRIMINATORY EMPLOYMENT POLICIES

Gender roles within families are increasingly overlapping in the modern American family. The number of households in which both parents work has greatly increased; both men and women must balance workplace and family responsibilities. Congress, in passing the Family and Medical Leave Act (“FMLA”), has attempted to eliminate employment discrimination against caretakers. The FMLA and its state equivalents prohibit employers from
discriminating against employees who take their protected family and medical leave.\textsuperscript{51} Furthermore, courts have prohibited gender-based application of the FMLA, wherein men were discouraged from taking family leave when compared to woman.\textsuperscript{52}

Despite the progressive efforts of lawmakers, litigation involving family care discrimination has increased.\textsuperscript{53} “Family care commitment discrimination occurs when an employee who has family responsibilities is discriminated against in the workplace because of those responsibilities.”\textsuperscript{54} Workplace practices often fail to follow the policies set forth in the FMLA.\textsuperscript{55} For example, in McCormick v. Hi-Tech Planning, a Massachusetts man who recently obtained child custody was fired after being late due to caretaking of his kids. He was told “children should be with their mother . . . [and that] he would still have his job had he not obtained custody of his children.”\textsuperscript{56} Unfortunately the Court sided with the employer, finding that employment discrimination because of parenthood was not protected by Massachusetts law.\textsuperscript{57}

In adopting the FMLA, Congress has recognized the caretaking responsibilities faced by many employees. However, the gender roles associated with the traditional family model have slowed the implementation of anti-discrimination policy. Courts should better recognize the evolution of caretaking and seek to prevent employers from discriminating from employees based on traditional views of gender roles.

V. CONCLUSION

While the dynamics of the U.S. family have shifted from traditional to alternative, many laws remain centered around traditional family policy. In areas of the law involving child visitation rights, non-marital cohabitation, and caretaking policies, the focus on traditional family form rather than modern family function has resulted in a failure to fully accommodate the needs of alternative families.

\textsuperscript{53} Lindsay Taylor, Family Care Commitment Discrimination: Bridging the Gap Between Work and Family, 46 FAM. CT. REV. 558, 559 (2008).
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{57} Id.