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No Sinners Under My Roof: Can California Landlords Refuse to Rent to Unmarried Couples by Claiming a Religious Freedom of Exercise Exemption from a Statute Which Prohibits Marital Status Discrimination?

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"NO SINNERS UNDER MY ROOF": CAN CALIFORNIA LANDLORDS REFUSE TO RENT TO UNMARRIED COUPLES BY CLAIMING A RELIGIOUS FREEDOM OF EXERCISE EXEMPTION FROM A STATUTE WHICH PROHIBITS MARITAL STATUS DISCRIMINATION?

I. INTRODUCTION

In *Smith v. Fair Employment & Housing Commission*, a landlady, based on her religious convictions, refused to rent an apartment to an unmarried couple.[1] She sincerely believed that sex outside of marriage was sinful and that renting to a couple who engaged in such conduct would be a sin as well.[2] For that reason, the landlady claimed that she should be exempt from a California statute that prohibits discrimination on the basis of marital status.[3]

In 1993, the Supreme Court of California accepted for review a case with similar facts, *Donahue v. Fair Employment & Housing Commission*.[4] However, the court eventually dismissed the review as "improvidently granted."[5] Then, in September 1994, the court agreed to consider *Smith v. Fair Employment & Housing Commission*.[6] Thus, the issue stands before the California Supreme Court once more: whether a private landlady is entitled to a constitutional religious freedom exemption from a statute which prohibits marital status discrimination.[7]

In an attempt to resolve the issue, this comment will summarize *Smith*,[8] and then outline the court's reasoning in

1. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994).

2. *Id.* at 397.

3. *Id.* at 398.

4. 2 Cal. Rptr. 2d 32 (1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993).

5. *Id.*

6. 30 Cal. Rptr. 2d 395 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994).

7. *Id.* at 398.

8. *See infra* part II.A.

Donahue.[9] Next, it examines cases of marital status discrimination in California, first, by a public landlord,[10] then by a private landlord who did not claim a freedom of religion exemption from the statute.[11] Further, this comment will analyze how the highest courts of other states have solved the problem of religious freedom exemptions.[12] So far, only three state supreme courts — Minnesota,[13] Massachusetts,[14] and Alaska[15] — have attempted to tackle this sensitive and controversial issue.

Finally, it suggests that the California Supreme Court should refuse to grant the landlady in *Smith* a religious freedom exemption.[16] This comment, however, will not address the issue of whether the California Supreme Court should use the compelling interest test or the incidental effect test in deciding the issue.[17] It is assumed, for the sake of argument, that the State must pass the higher threshold of the compelling interest test in order to prevail in this case.[18]

II. BACKGROUND

A. *California:* Smith v. Fair Employment & Housing Commission

Smith v. Fair Employment & Housing Commission involved Evelyn Smith, a member of the Bidwell Presbyterian Church in Chico and owner of two duplexes, and Gail Randall and Kenneth Phillips, an unmarried couple.[19] Smith regularly refused to rent to unmarried couples.[20] She did so based on her religious belief that nonmarital sex was sinful, and that she would be guilty of a sin herself if she rented to people

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9. *See infra* part II.B.
10. *See infra* part II.C.1.
11. See *infra* part II.C.2.
12. *See infra* part II.D.
13. *See* State *ex rel.* Cooper v. French, 460 N.W.2d 2 (Minn. 1990).
14. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994).
15. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).
16. *See* discussion *infra* parts IV, V.
17. *See infra* note 31 and text accompanying note 180 for explanation of the constitutional tests.
18. *See infra* text accompanying notes 205, 236-37.
19. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 397 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994).
20. *Id.*

who were committing the sin.[21] She usually informed couples who were interested in her units that she preferred renting to married people.[22] At first, the couple told Smith that they were married, but before moving in they admitted that they were not.[23] The landlady canceled their agreement, returned their deposit, and refused to rent to them.[24]

The court of appeal established that Smith violated Government Code section 12955, subsections (a) and (d),[25] which provide that it shall be unlawful:

> (a) For the owner of any housing accommodation to discriminate against any person because of the . . . *marital status* . . . of that person.
>
> . . . .
>
> (d) For any person subject to the provisions of Section 51 of the Civil Code, to discriminate against any person because of . . . *marital status* . . . or on any other basis prohibited by that section.[26]

However, the court of appeal also decided that the statute conflicted with Smith's religious belief.[27]

The issue before the court of appeal was, therefore, "whether plaintiff [was] constitutionally entitled to exemption from the operation of a statute designed to eliminate housing discrimination against unmarried couples where the enforcement of the statute [would] interfere with plaintiff's free exercise of religion."[28]

1. *Federal Constitutional Law*

In deciding this issue, the court of appeal considered both federal[29] and California law.[30] As far as federal law was concerned, the court followed *Department of Human Resources of*

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21. *Id.*

22. *Id.* Smith in fact rented to single, divorced and widowed people. *Id.*

23. *Id.*

24. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 397 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994).

25. *Id.*

26. *Id.* at 398 n.1 (emphasis added).

27. *Id.* at 412. The Commission had no doubt as to the sincerity of Smith's religious convictions. *Id.* at 398.

28. *Id.* at 398.

29. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 399-408 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994). The concurring opinion stated that the federal constitutional analysis applied by the majority was unnecessary because the state law protected freedom of religion as well. *Id.* at 412-13 (Raye, A.J., concurring).

Oregon, Employment Division v. Smith.[31] Relying on that case, the court stated that if a law was neutral and generally applicable, no religious exercise exemption should be granted.[32] However, the United States Supreme Court also suggested in the *Peyote Case* that such free exercise of religion exemptions had been granted in "hybrid" situations.[33] "Hybrid" cases occur when religious exercise is implicated together with another First Amendment freedom, such as freedom of speech or freedom of the press.[34]

The court of appeal recognized the case to be the type of hybrid situation discussed in the *Peyote Case*.[35] According to the *Smith* court, not only was the landlady's freedom of religion implicated, but her freedom of speech was implicated as well.[36] Her freedom of speech was violated by the Commission's order that the landlady "post notices on her property proclaiming concepts and rules which [were] antithetical to her religious beliefs and sign them as if to make them her own."[37]

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30. *Id.* at 408-13. The First Amendment to the United States Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The California Constitution guarantees the "free exercise and enjoyment of religion." CAL. CONST. art. I, § 4.

31. 494 U.S. 872 (1990) [hereinafter *Peyote Case*]. The issue in the *Peyote Case* was whether the criminal prohibition of religious use of peyote was constitutional under the Free Exercise Clause of the First Amendment to the United States Constitution. *Id.* The Court held that the prohibition was constitutional. *Id.* at 890. The Court reasoned that the Free Exercise Clause prohibited governmental regulation of religious beliefs but not practices. *Id.* at 878-82. According to the Court, individuals must comply with the law regardless of their religious beliefs. *Id.* The Court rejected the test used in Sherbert v. Verner, 374 U.S. 398 (1963), which balanced government interest in enforcing a statute against the burden such a statute imposed on religious practice. *Id.* at 885. The *Smith* Court explained that the *Sherbert* test should not be used with a generally applicable criminal law. *Id.* at 885. Otherwise, citizens would be free to not obey a law when it conflicted with their religious beliefs and the government interest was not compelling.

32. *Smith*, 30 Cal. Rptr. 2d at 400.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* The First Amendment to the United States Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

37. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 401 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994). The *Smith* court stated:

Since a hybrid situation required a compelling interest test, the court decided on the basis of the *Peyote Case* that the state, in order to prevail, had to show that it had a compelling interest in protecting unmarried couples from discrimination in housing.[38] That interest should be significant enough "to outweigh plaintiff's right . . . to free exercise and free speech."[39]

Having established the standard, the court then analyzed the state's interest.[40] According to the court of appeal, the interest was significant but not compelling.[41] The court perceived the interest as significant because the legislature decided to add provisions prohibiting marital status and sex discrimination to the statute which previously forbade discrimination only on the basis of race, creed, and color.[42]

The interest in protecting unmarried couples from marital status discrimination was also seen by the court as significant because other California appellate court opinions interpreted the term "marital status" to include unmarried couples.[43] Nevertheless, the *Smith* court did not view the state interest as compelling or overriding.[44] Despite the fact that California statutes prohibited discrimination based on marital status, and the statutes were interpreted to protect unmarried couples, the court stated that the legislature did

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Plaintiff was ordered to post in her rental units for a period of 90 days notice announcing she had been adjudicated in violation of FEHA for refusing to rent to prospective tenants because they were an unmarried couple. She was ordered to post permanently in her rental units a notice to rental applicants of their rights and remedies under FEHA generally and specifically with regard to discrimination against unmarried couples. Plaintiff was ordered to sign both notices and to provide copies to each person thereafter who expressed interest in renting from plaintiff.

Id. at 397-98.

38. *Id.* at 401.

39. *Id.* at 403.

40. *Id.* at 404-05.

41. *Id.* at 404.

42. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 404 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994).

43. *Id.* (citing Hess v. Fair Employment and Hous. Comm'n, 187 Cal. Rptr. 712, 714 (Ct. App. 1982) and Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375, 381 (Ct. App. 1976)).

44. *Id.*

not intend prohibitions against discrimination on the various other grounds to be of equal importance.[45]

2. *State Constitutional Law*

After the *Smith* court decided that, according to the United States Constitution, the State did not have a compelling interest in protecting unmarried couples from housing discrimination, it proceeded to discuss the California Constitution.[46] The court determined that the California Constitution had a broader scope than the Federal Constitution.[47] Therefore, under the California Constitution, the State carried a heavier burden of proof in order to justify infringement on religious freedom.[48] According to the *Smith* court, the California Constitution required the State to pass a compelling interest test.[49]

Ultimately, the *Smith* court reached the same result under the California law as under the federal law.[50] The court decided that the State failed to prove a compelling interest in preventing discrimination against unmarried couples in housing.[51] The landlady was, therefore, entitled to a religious freedom exemption from the state statute.[52]

B. Donahue v. Fair Employment & Housing Commission

Donahue v. Fair Employment & Housing Commission[53] was the only California appellate court case decided before

45. *Id.* at 404. The court explained that, "it cannot be said that the goal of eliminating discrimination on the basis of unmarried status enjoys equal priority with the state public policy of eliminating racial discrimination." *Id.*

46. *Id.* at 408.

47. Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 408 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994). The court quoted Gabrielli v. Knickerbocker, 82 P.2d 391, 395 (Cal. 1938): "[O]ur state Constitution contains an express guaranty of freedom of religion . . . [while t]he federal Constitution does not contain a similar express provision . . . ." *Id.* at 409; *see also supra* note 30.

48. *Id.*

49. *Id.*; *see supra* note 31.

50. *Smith*, 30 Cal. Rptr. 2d at 409.

51. *Id.* at 412.

52. *Id.* at 410.

53. 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993). *Donahue* cannot be cited by courts as authority because the court depublished the decision.

Smith[54] which concerned the same issues.[55] In *Donahue*, the landlords, Agnes and John Donahue, refused to rent to Verna Terry and Robert Wilder because they were unmarried.[56] The Donahues did not rent to unmarried couples as a rule, prompted by their religious belief that sex outside of marriage was a mortal sin, and that aiding someone in committing a sin was sinful as well.[57]

1. *Marital Status*

When the *Donahue* case reached the appellate court, one of the court's tasks was to determine whether Government Code section 12955 protected unmarried couples from housing discrimination.[58] Therefore, the court examined the legislative intent behind the statute.[59] In inferring the legislative intent, the court found helpful "the chronology of relevant case law."[60] It is generally assumed that the legislature is aware of court decisions.[61] The legislature is supposed to amend statutes "in light of such decisions which have a direct bearing on the statute."[62]

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54. 30 Cal. Rptr. 2d 395 (Ct App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994).

55. *See supra* part II.A. The first issue in *Donahue* was whether the statute prohibiting discrimination on the basis of marital status protected unmarried couples, and the second, whether the landlords were entitled to a constitutionally based religious exemption from laws which protect unmarried couples from discrimination in housing. *Donahue*, 2 Cal. Rptr. 2d at 35, 38.

56. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993).

57. *Id.* at 33 n.1.

58. *Id.* at 36. Government Code § 12955 provides that it shall be unlawful:

> (b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the . . . marital status . . . of any person seeking to . . . rent or lease any housing accommodation.
>
> (c) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on . . . marital status . . . or an intention to make any such preference, limitation, or discrimination.

CAL. GOV'T CODE § 12955 (Deering Supp. 1995).

59. *Donahue*, 2 Cal. Rptr. at 36-39.

60. *Id.* at 37.

61. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 37 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993).

62. *Id.*

The *Donahue* court explained the rule regarding legislative intent as follows: when a particular subject of law stands before the legislature, and the legislature changes the law in some respects but not in others, then legislative intent can be inferred from such action.[63] Lack of change in the law in such circumstances means, according to the court, that the legislature intended to leave the unamended portion as it stood.[64] The *Donahue* court used this reasoning to conclude that the California Legislature intended to include married as well as unmarried couples in the term "marital status."[65]

Moreover, the *Donahue* court stated that if a statute contained an exception to a general rule, no other exception should be implied.[66] In Government Code section 12955(b), the legislature created an exception from the prohibition of marital status discrimination in housing only for college and university housing.[67] From the presence of such a narrow ex-

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63. *Id.*

64. *Id.*

65. *See id.* The *Donahue* court noted that after the prohibition of marital status discrimination had been enacted, the California appellate court in Atkisson v. Kern County Housing Authority, 130 Cal. Rptr. 375 (Ct. App. 1976), applied the prohibition to unmarried couples. *Donahue*, 2 Cal. Rptr. at 37. Citing *Atkisson*, the court stated that the statute was an expression of the state's policy. *Id.* Four years after *Atkisson*, the legislature repealed and reenacted, with changes, the statutes interpreted by *Atkisson*: the legislature repealed the Fair Employment Practices Act and reenacted it as Government Code §§ 12900-12996, as a part of the California Fair Employment and Housing Act. *Id.*

Thus, the legislature failed to object to the *Atkisson* interpretation of the term "marital status" because it did not amend the pertinent part of the statute when it had an opportunity to do so. *Id.* Therefore, the *Donahue* court reasoned, the California Legislature acquiesced to the *Atkisson* reading of the term. *Id.*

To further support its conclusion, the *Donahue* court pointed out that Government Code § 12955 prohibited marital status discrimination against any "person" and noted that section 12925(d) of the Government Code defined the term to include "one or more individuals." *Id.* Consequently, according to the court, marital status includes two individuals living together, i.e. a cohabiting couple. *Id.*

The court also argued that the legislative intent for Government Code § 12955 to protect unmarried couples was consistent with the absence of any criminal sanctions for their cohabitation. *Id.* at 38. The court noted that California used to have a statute prohibiting cohabitation of persons who were both married to others. *Id.* The statute was repealed when the legislature added a statutory prohibition against marital status discrimination. *Id.*

66. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 38 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993).

67. *Id.*

ception, the court deduced that the legislature intended that no other exceptions to the statute could be implied.[68] Consequently, according to the *Donahue* court, the legislature intended the term "marital status" to include not only single people but also couples, married and unmarried.[69]

2. *State Constitutional Law*

After the *Donahue* court discussed the scope of the term "marital status" as used in Government Code section 12955, it turned to the question of whether the landlords were entitled to an exemption from the statute based on their religious belief.[70]

The *Donahue* court observed a difference between the California and the federal constitutional analyses.[71] The United States Supreme Court abandoned the *Sherbert* compelling state interest test in its *Peyote Case* decision.[72] Nevertheless, according to *Donahue*, the compelling interest test still applied in California state courts.[73] The *Donahue* court indicated that the state courts in California must follow the pre-*Peyote Case* compelling interest test because the California Supreme Court had not yet addressed the United States Supreme Court's *Peyote Case* decision.[74]

The compelling interest test, as propounded by the United States Supreme Court in *Sherbert v. Verner*,[75] requires the court to balance the landlord's interest in the free exercise of religion against the interest of the state.[76] In order to be exempt from the statute, the landlord must show a sincere religious belief and a burden on that belief.[77] The

68. *Id.*
69. *Id.*
70. *Id.*
71. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 39 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993).
72. *See id.*
73. *Id.*
74. *Id.* at 40.
75. 374 U.S. 398 (1963).
76. *See id.* at 403; *see also supra* note 31.
77. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 42 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993). The *Donahue* court stated:

> An analysis of the burden focuses on "the degree that the government's requirement will, directly or indirectly, make the believer's religious duties more difficult or more costly" (citation omitted). A conflict which

court concluded that the government statute burdened the landlord's sincere belief with personal, spiritual, and monetary encumbrances.[78]

The *Donahue* court had to determine whether the government's interest outweighed the landlord's interest in the free exercise of religion.[79] The court stated that the government must show more than the mere existence of the state law and more than just a general interest in eradicating invidious discrimination in order for the interest to be compelling.[80] The State should focus on the "particular nature of the discrimination at issue" and on the rank of the state interest among other state policies.[81] The *Donahue* court quoted several pre-*Peyote Case* United States Supreme Court cases to illustrate its point that the state interest in prohibiting discrimination against unmarried couples ranks relatively low in the discrimination hierarchy.[82]

The court stated that, in contexts other than housing, California discriminated against unmarried couples by denying them rights enjoyed by married couples.[83] The court, however, admitted that "the law has acknowledged a societal trend toward cohabitation without marriage."[84] Nevertheless, due to the existence of "a strong policy favoring mar-

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threatens "the core values of a faith poses more serious free exercise problems than does a conflict that merely inconveniences the faithful." *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12 at 1246 (2d ed. 1988).

78. *Id.* at 42-43.

79. *Id.* at 44.

80. *Id.*

81. *Id.*

82. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 42 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993). The *Donahue* court stated:

> On one end of the hierarchy, for example, "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . ." (citation omitted). Going down the hierarchy of the state's interests . . . the state's interest in compulsory education is not compelling enough to restrict the Amish from their free exercise of religion (citation omitted). Going further down the hierarchy of the state's interest, its interest in discouraging false unemployment compensation claims by requiring citizens to work on Saturdays is not sufficiently compelling to allow abridgment of the Sabbatarians' religious prohibition against working on Saturdays.

Id. (alterations in original).

83. *Id.*

84. *Id.* (Grignon, J., dissenting) (citing Elden v. Sheldon, 250 Cal. Rptr. 254 (1988) and Marvin v. Marvin, 134 Cal. Rptr. 815 (1976)).

riage," the court decided that the government lacked a compelling interest in protecting unmarried couples.[85]

C. *Marital Status in California under California Case Law*

1. Atkisson v. Kern County Housing Authority

The term "marital status" lay at the core of the issue presented in *Smith*.[86] Although *Atkisson v. Kern County Housing Authority* did not pertain to private landlords, it illustrates the state's policy regarding marital status.[87]

In *Atkisson*, the plaintiff cohabited[88] with a man while living with her children in low income housing operated by the Kern County Housing Authority [hereinafter KCHA].[89] The KCHA's statement of policies forbade "any and all low income public housing tenants from living with anyone of the opposite sex to whom the tenant [was] not related by blood, marriage, or adoption."[90] When the KCHA found that Atkis-

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85. *Id.* The court stated that discrimination by landlords due to religious belief does not deny all housing to the cohabiting couples. *Id.* at 45. The court explained that the state has no interest in providing a particular unit to the prospective tenants as opposed to another, if both are "decent and not unsanitary, unsafe, overcrowded or congested." *Id.* (citing CAL. HEALTH & SAFETY CODE § 50001(a) & (b)).

86. *See supra* text accompanying note 28.

87. 130 Cal. Rptr. 375 (Ct. App. 1976).

88. Cohabitation is defined: "To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations." BLACK'S LAW DICTIONARY 178 (6th ed. 1991).

89. *Atkisson*, 130 Cal. Rptr. at 377-78. Atkisson's lease stated that it was "subject to the . . . eligibility requirements . . . and the regulations of the Authority . . . of its lawfully constituted powers and duties." *Id.* at 377. The lease also stated that only those listed on the lease application may live in the unit. *Id.*

90. *Id.* at 377. The Kern County Housing Authority based the policy on the view that:

> (a) such cohabitation is immoral;
>
> (b) that such cohabitation results in a continuous turnover of cohabitants which results in management problems such as computation of rents;
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> (c) . . . that (1) a cohabitant tenant is or becomes less responsible to [the Housing Authority], and (2) is a poor influence on the cohabitant tenants as families; and
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> (d) . . . that unless cohabitation is prohibited, there will be (1) a demoralizing effect on tenancy relations, and (2) the number of cohabitants could not be controlled.

Id.

son was living with a man not related to her, it attempted to evict her.[91]

The California court of appeal ruled that the KCHA's policy was unlawful because it violated the regulations of the Department of Housing and Urban Development [hereinafter HUD].[92] The HUD regulations prohibited an automatic exclusion of a particular class of people, defined by marital status.[93] The court stated: "In contravention of such authority . . . policy [of the KCHA] automatically excludes all unmarried cohabiting adults; a class of persons defined by their marital status."[94] Thus, the court applied the term "marital status" to unmarried couples.[95]

In addition, the court stated that California Health and Safety Code section 35720 expressed the State's policy relating to public housing.[96] The statute provided that it shall be unlawful:

> 1. For the owner of any publicly assisted housing accommodation which is in, or to be used for a multiple dwelling, with knowledge of such assistance, to refuse to . . . rent or lease or otherwise to deny to or withhold from any

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91. *Id.* at 378. At a grievance hearing it was found that Atkisson violated her lease agreement. *Id.* When plaintiff filed a complaint with the Superior Court for a declaratory and injunctive relief, the court denied it. *Id.*

92. *Id.* at 379. On December 17, 1968, HUD issued a circular entitled "Standards for Establishment and Administration of Admission and Occupancy Regulations." *Id.* The circular provided the following in the pertinent parts:

> b. A Local Authority shall not establish policies which *automatically* deny admission or continued occupancy to a *particular* class, such as unmarried mothers, families having one or more children out of wedlock, families having police records or poor rent-paying habits, etc.
>
> c. To determine whether applicants or occupants should be admitted to or remain in its project, a Local Authority may establish criteria and standards bearing on whether the conduct of such tenants . . . does or would be likely to interfere with other tenants in such a manner as to materially diminish their enjoyment of the premises. Such interference must relate to the actual or threatened conduct of the tenant and not be based *solely* on such matters as the *marital status* of the family, the legitimacy of the children in the family, police records, etc.

Id. at 379. The court stated that the circular issued by HUD was binding on local housing authorities because it was written in mandatory language. *Id.*

93. *Id.*

94. Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375, 379 (Ct. App. 1976).

95. *Id.*

96. *Id.* at 381. The statute was amended to include the term "marital status" after the case had reached the court. Therefore, since it could not have been directly applied to *Atkisson*, it was used only as a statement of state policy. *Id.*

> person or group of persons such housing accommodation because of the . . . *marital status* . . . of such person or persons.
>
> . . . .
>
> 8. For *any* owner of housing accommodations to harass, *evict*, or otherwise discriminate against any person in the . . . rental of housing accommodations when his dominant purpose is retaliation against a person who has opposed practices unlawful under this section . . . .[97]

According to the *Atkisson* court, the statute applied to unmarried couples as well as to married ones.[98]

2. Hess v. Fair Employment & Housing Commission

In *Hess v. Fair Employment & Housing Commission*, the California appellate court interpreted the term "marital status" once more.[99] *Hess* concerned private rather than public landlords and, unlike *Smith*, the landlords in *Hess* did not claim freedom of religion as a defense.[100]

The petitioners, Victor and Helen Hess, owned a duplex which they initially agreed to rent to John Pryor and Debbie Rogers.[101] However, when the landlords learned that Pryor and Rogers were not married, they refused to rent to the couple.[102] The refusal resulted from the Hess' practice of applying different financial criteria to rental applications submitted by married and unmarried couples.[103] The landlords required only one spouse of a married couple to qualify, whereas unmarried people had to qualify individually.[104]

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97. *Id.* (quoting CAL. HEALTH & SAFETY CODE § 35720). Section 35720, together with §§ 35700-35745, was repealed in 1980. Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712, 713-14 (Ct. App. 1982). The same year, the legislature repealed the Fair Employment Practices Act, Labor Code §§ 1410-1433, and reenacted it as Government Code §§ 12900-12996, as part of the California Fair Employment and Housing Act [hereinafter FEHA]. *Id.* Therefore, the subject of housing discrimination, whether in public or private housing, is now covered by the FEHA. *Id.* at 714 n.2.

98. *Id.*

99. Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375, 379 (Ct. App. 1976).

100. *Id.* at 714.

101. *Id.*

102. *Id.*

103. *Id.*

104. Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712, 714-15 (Ct. App. 1982).

Rogers' pregnancy and the fact that she would not work after the birth made her unqualified to become the Hess' tenant.[105]

The appellate court examined the Fair Employment and Housing Act [hereinafter FEHA], including Government Code section 12955(a).[106] Relying on *Atkisson*, the appellate court stated that the FEHA "prohibits discrimination based on marital status, including that against unmarried couples."[107] As a result, the court of appeal ruled for the prospective tenants, holding that the landlords unlawfully discriminated against the couple based on their marital status.[108]

D. *Other Jurisdictions*

As indicated above,[109] the review of *Smith* by the California Supreme Court presents a case of first impression.[110] Since no California precedent exists, when a landlord claims a religious exercise exception from a state statute prohibiting marital status discrimination, decisions from other jurisdictions should be consulted for guidance.[111] Three state supreme courts have recently dealt with similar issues: Minnesota,[112] Massachusetts,[113] and Alaska.[114] Each jurisdiction reached a different result.

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105. *Id.* Consequently, Pryor and Rogers filed a complaint with the FEHC, alleging marital status discrimination. *Id.* The landlords petitioned the San Mateo Superior Court for a writ of administrative mandamus to compel the commission to set aside its decision. *Id.* When the petition was denied, the landlords appealed. *Id.*

106. The FEHA was codified in Government Code §§ 12900-12996. *Id.* at 714 n.4.

107. *Id.* at 714. As no California law specifically addressed the issue raised by the landlords, the court also looked to the federal Equal Credit Opportunity Act, which contained a provision "substantively equivalent" to Government Code section 12955. *Id.*

The court also decided that the landlords did not have any legitimate business interest to justify their practice because "a landlord can require each tenant to be personally liable for the amount of the rent. Such a practice gives a landlord a contractual cause of action against each tenant, whether married or not." *Id.* at 715.

108. *Id.* at 715.

109. *See supra* part I.

110. *See supra* text accompanying notes 4-5.

111. *See supra* text accompanying notes 13-15.

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

113. Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994).

114. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).

1. *Minnesota*

The Minnesota Supreme Court ruled for the landlord in *State ex rel. Cooper v. French*.[115] Landlord Layle French refused to rent a two-bedroom house to Susan Parsons.[116] The landlord "decided that Parsons had a romantic relationship with her fiancé, Wesley Jenson, and that the two would likely engage in sexual relations outside of marriage on the subject property."[117] According to the landlord's religious beliefs, such conduct was sinful.[118]

The Minnesota Supreme Court held that the landlord did not violate the Minnesota Human Rights Act's [hereinafter MHRA] prohibition of marital status discrimination.[119] It also held that the landlord's right to the free exercise of his religion outweighed the prospective tenant's interest in cohabiting.[120]

a. *Marital Status*

Even though the MHRA used the term "marital status," it had not defined it at the time Parson's action was initiated.[121] Therefore, the Minnesota Supreme Court first had to interpret the meaning of the phrase.[122] The past decisions of the court indicated that "[t]his court, in construing the term 'marital status' has consistently looked to the legislature's

115. 460 N.W.2d 2, 11 (Minn. 1990).

116. The house was previously occupied by the landlord, and he was renting it out while attempting to sell it. *Id.* at 3. French agreed to rent the place to Parsons at first, but after two days changed his mind. *Id.*

117. *Id.*

118. *Id.* at 3-4. As a result of the landlord's refusal to rent, Parsons brought a charge against French with the Minnesota Department of Human Rights, alleging marital status discrimination in violation of the Minnesota Human Rights Act, MINN. STAT. § 363.03 (1986) [hereinafter MHRA]. *Id.* at 4. The MHRA provided: "It is an unfair discriminatory practice: (1) For an owner, lessee . . . (a) to refuse to . . . rent or lease . . . any real property because of . . . marital status . . . ." MINN. STAT. § 363.03(2) (1986).

The administrative law judge ruled that the landlord violated the statute. *Cooper*, 460 N.W.2d at 4. The court of appeal confirmed the lower court's decision. *Id.* It also ruled that free exercise of religion did not constitute a defense against the charge of marital status discrimination. *Id.* The landlord appealed to the Minnesota Supreme Court. *Id.*

119. *Cooper*, 460 N.W.2d at 11.

120. State *ex rel.* Cooper v. French, 460 N.W.2d 2, 8 (Minn. 1990).

121. *Id.* at 4.

122. *Id.* at 4-5. The court stated: "The term 'marital status' is ambiguous because it is susceptible to more than one meaning, namely, a meaning which includes cohabiting couples and one which does not." *Id.* at 5.

policy of discouraging the practice of fornication[123] and protecting the institution of marriage."[124] According to the court, the state's pro-marriage policy was expressed by a statute that made it criminal to fornicate.[125]

The court not only looked to cases interpreting the MHRA, but also pointed out that even after the MHRA was amended in 1988, it was not intended to protect "an individual's relationship with a spouse, fiancé, fiancée, or other domestic partner."[126] Rather, the statute protected "only the status of an individual."[127] Therefore, according to the Minnesota Supreme Court, the MHRA did not protect cohabiting couples from marital discrimination either before or after the amendment.[128]

The court stressed the importance of the anti-fornication statute in interpreting the term "marital status" in the MHRA.[129] The court indicated that courts in other jurisdictions also looked to similar statutes for guidance.[130] For example, the court stated that "the Alaska Supreme Court, in ascertaining its legislature's intent as to the meaning of 'marital status,' relied entirely on the fact that Alaska's fornication statute had been repealed eleven years earlier in concluding that protection for unmarried cohabiting couples was included."[131] Thus, as interpreted by the Minnesota Supreme

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123. Fornication is defined as follows:

> Sexual intercourse other than between married persons. Further, if one of the persons be married and the other not, it is fornication on the part of the latter, though adultery for the former. In some jurisdiction, however, by statute, it is adultery on the part of both persons if the woman is married, whether the man is married or not. The offense, which is variously defined by state statutes, is very seldom enforced.

BLACK'S LAW DICTIONARY 451 (6th ed. 1991).

124. *Cooper*, 460 N.W.2d at 5.

125. *Id.*

126. *Id.* at 6.

127. *Id.* The court stated: "the legislature did not intend to expand the definition of 'marital status' in order to penalize landlords for refusing to rent to unmarried, cohabiting couples." *Id.* The court, citing amended Minnesota Statute § 363.01, subd. 40, defined marital status in the following way: " 'Marital status' means whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse." *Id.* (emphasis omitted).

128. *Id.* at 5.

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

130. Id.

131. *Id.* (citing Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1985)). In addition to the above, the court responded to the argument

Court, the term "marital status" did not include unmarried couples.[132]

b. *State Constitutional Law*

After having established the scope of the phrase "marital status" in the light of state public policy, legislative intent, and its own prior decisions, the Minnesota Supreme Court proceeded to the constitutional issue of protection of religious liberty.[133] The court decided that the case should be analyzed under the Minnesota Constitution due to then recent "unforeseeable changes" in the United States Constitution's First Amendment law.[134] The Minnesota Constitution provided more protection of religious freedom than the Federal Constitution.[135] The Minnesota Constitution demanded that the court "weigh the competing interests at stake whenever rights of conscience are burdened."[136] Thus, the court reasoned, "French must be granted an exemption from MHRA unless the state can demonstrate a compelling and overriding state interest, not only in the state's general statutory purpose, but in refusing to grant an exemption to French."[137]

The court concluded that the state did not meet its burden.[138] In support of its holding, the court showed, first, that there were many other contexts where cohabiting couples

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that French, having entered the public marketplace, gave up his constitutional rights. *Id.* at 7-8. The court distinguished "doing business for profit in the corporate form from denying Minnesota residents the basic right to earn a living." *Id.* at 8. The court stated that the landlord did not forfeit his constitutional rights by engaging in renting "his former residence while it was for sale in a depressed real estate market" since he did that due to "economic necessity." *Id.*

132. *Id.* at 5.

133. *Id.* at 8.

134. State *ex rel.* Cooper v. French, 460 N.W.2d 2, 8 (Minn. 1990). The Supreme Court of the United States had just decided the *Peyote Case*. *See supra* note 31.

135. *Cooper*, 460 N.W.2d at 9. The Minnesota Constitution provides:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . nor shall any control of or interference with the rights of conscience be permitted, or any preference be give by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state . . . .

MINN. CONST., art. I, § 16.

136. *Cooper*, 460 N.W.2d at 9.

137. *Id.*

138. *Id.* at 10.

were not legally entitled to the same treatment as married couples.[139] Second, the state could not have a compelling interest in fornication because a state statute already prohibited it.[140] Finally, the state should not be able to force a person to break one statute in order to obey another.[141] Since the state failed to show an interest overriding the landlord's interest in the free exercise of religion, and since the state also had a "paramount need under [the state] constitution to protect religious freedom," the court ruled that the landlord was entitled to a religious freedom exemption from the anti-discrimination statute.[142]

2. *Massachusetts*

Massachusetts, in *Attorney General v. Desilets,* considered the case of a landlord who refused to rent to an unmarried couple because of the landlord's religious beliefs.[143] In *Desilets*, the landlords were two brothers who owned a four-unit apartment house in Montague, Massachusetts.[144] They refused to lease an apartment to Mark Lattanzi and Cynthia Tarail, who were unmarried.[145] The landlords' action was motivated by their religious belief that "they should not facilitate sinful conduct, including fornication."[146]

a. *Marital Status*

At that time, Massachusetts General Laws provided that "it shall be an unlawful practice for the owner of a multiple dwelling 'to refuse to rent or lease . . . or otherwise to deny to or withhold from any person or group of persons such accommodations because of the . . . marital status of such person or

139. *Id.* Such contexts include: employee life and health benefits, intestate succession, and the rules of evidence regarding the privilege for marital communication. *Id.*

140. *Id.* at 10.

141. State *ex rel.* Cooper v. French, 460 N.W.2d 2, 11 (Minn. 1990). The court stated that the statutes can be easily reconciled: "[I]f the state has a duty to enforce a statute in the least restrictive way to accommodate religious beliefs, surely it is less restrictive to require Parsons to abide by the law prohibiting fornication than to compel French to cooperate in breaking it." *Id.* at 10.

142. *Id.* at 11.

143. 636 N.E.2d 233 (Mass. 1994).

144. *Id.* at 234.

145. *Id.*

146. *Id.* at 235.

persons.' "[147] The Massachusetts Supreme Judicial Court concluded that the landlords violated the statute.[148] According to the court, the landlords discriminated on the basis of marital status.[149] The court held that the statute protected married as well as unmarried cohabiting couples.[150]

b. *State Constitutional Law*

Since the statute protected unmarried couples, the main issue before the court was whether "enforcement of the statute against [the landlords] violate[d] their rights [to the free exercise of religious belief] under the State and Federal Constitutions."[151] The court decided that even though the state and federal constitutional amendments were similar,[152] the court should apply only the State Constitution.[153] Under the pre-*Peyote Case* compelling interest test of the Massachusetts Constitution, in order to be exempt from the statute, the landlords had to show a sincerely held religious belief, a conflict of that belief with the state statute, and a burden which the statute imposed on the belief.[154] The State, on the other hand, would prevail if it showed that it had an unusually important goal and that an exemption would substantially hinder the fulfillment of that goal.[155]

The Massachusetts Supreme Judicial Court noted that the landlords' religious belief was sincere and that the land-

147. *Id.* (quoting MASS. GEN. L. ch. 151B, § 4(6) (1988)) (emphasis omitted).
148. Attorney Gen. v. Desilets, 636 N.E.2d 233, 234 (Mass. 1994).
149. *Id.* at 235.
150. *Id.*
151. *Id.*
152. *Id.* Article 46, § 1 of the Amendments to the Massachusetts Constitution provides: "No law shall be passed prohibiting the free exercise of religion." MASS. CONST. art. 46, § 1.
153. Attorney Gen. v. Desilets, 636 N.E.2d 233, 234 (Mass. 1994). The court stated:

> In interpreting art. 46, § 1, we prefer to adhere to the standards of earlier First Amendment jurisprudence, such as we applied [in numerous previous cases]. In each opinion, we used the balancing test that the Supreme Court had established under the free exercise of religion clause in *Wisconsin v. Yoder*, *Sherbert v. Verner*, and subsequent opinions. By applying the balancing test as we do, we extend protections to the defendants that are at least as great as those of the First Amendment. No further discussion of the First Amendment is, therefore, necessary.

Id. (citations omitted).
154. *Id.* at 236-37.
155. *Id.* at 237.

lords' constitutional right to free exercise of religion was substantially burdened by the statute.[156] The court reasoned that the statute made the exercise of religion more difficult and more costly.[157] The court acknowledged that the landlords' participation in a commercial enterprise may be relevant, but it refused to consider the issue at such an early stage.[158] The court stated that the commercial context would be relevant at the final stage of the analysis, when the interests of both sides were being balanced.[159]

The court indicated that the government interest, in order to be compelling, must not be just a general interest in eliminating discrimination of all kinds.[160] Rather, the government should show a compelling interest specifically directed at eliminating discrimination against unmarried couples in housing.[161]

The court pointed out that the Massachusetts Constitution banned discrimination based on sex, race, color, creed or national origin, but not marital status.[162] Therefore, the court reasoned, the State's concern regarding discrimination based on marital status was not as substantial as its concern regarding discrimination based on the other enumerated factors.[163]

In addition, the court indicated that there were numerous state statutes and cases which gave married couples rights not given to unmarried couples.[164] The presence of a Massachusetts anti-fornication statute was relevant to the issue of state's interest, as well.[165] Even though the statute

156. *Id.*

157. *Id.* The court stated: "The statute affirmatively obliges the defendants to enter into a contract contrary to their religious beliefs and provides significant sanctions for its violation." *Id.*

158. Attorney Gen. v. Desilets, 636 N.E.2d 233, 234 (Mass. 1994).

159. *Id.* at 238.

160. *Id.*

161. *Id.*

162. *Id.* at 239. The court stated: "Article 1 of the Massachusetts Declaration of Rights, as amended by art[icle] 106, of the Amendments to the Massachusetts Constitution, states that '[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.'" *Id.*

163. Attorney Gen. v. Desilets, 636 N.E.2d 233, 239 (Mass. 1994).

164. *Id.* at 240 (Mass. 1994). Such statutes could be found in the following areas of the law: workers' compensation, health insurance, life insurance, disposition of property by will, right to bring a wrongful death action, and marital communication privilege. *Id.* at 239-40 nn.10-11.

165. *Id.* at 240.

was of "doubtful constitutionality," the fact that it still remained on the books suggested, according to the court, "some diminution in the strength of the Commonwealth's interest in the elimination of housing discrimination based on marital status."[166]

In the end, the *Desilets* court was not able to decide whether the state had a sufficiently compelling interest in eliminating discrimination based on marital status.[167] The court stated that it needed more facts regarding the issue and remanded the case.[168]

3. *Alaska*

In *Swanner v. Anchorage Equal Rights Commission*, the Alaska Supreme Court tackled the problem of a religious exercise exemption for a landlord who refused to rent to an unmarried couple.[169] The landlord, on three different occasions, refused to rent or even allow inspection to potential tenants because they intended to live with a member of the opposite sex to whom they were not married.[170] The court held that Swanner discriminated against the potential tenants based on their marital status.[171] It further held that the fair housing laws did not deprive the landlord of his right to the free exercise of religion.[172]

a. *Marital Status*

Two Alaska statutes were relevant to the landlord's conduct: Alaska Statute 18.80.240 and Anchorage Municipal Code 5.20.020. Alaska Statute 18.80.240 provides in pertinent part that it is unlawful:

> (1) to refuse to . . . lease, or rent the real property to a person because of . . . marital status, [or] changes in marital status . . .
>
> . . . .

166. *Id.*
167. *Id.*
168. Attorney Gen. v. Desilets, 636 N.E.2d 233, 241 (Mass. 1994). The court needed more facts regarding legislative findings as to the state's interest, numbers of rental units withheld because of religious beliefs, and availability of rental housing to unmarried couples in that particular area, among others. *Id.* at 240-41.
169. 874 P.2d 274 (Alaska 1994).
170. *Id.* at 276-77.
171. *Id.*
172. *Id.*

> (3) to make a written or oral inquiry or record of the . . . marital status, [or] changes in marital status . . . of a person seeking to . . . lease or rent real property . . .
>
> . . . .
>
> (5) to represent to a person that real property is not available for inspection . . . rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the . . . marital status, [or] change in marital status . . . of that person . . . .[173]

Anchorage Municipal Code 5.20.020 provides in pertinent part:

> Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person, it is unlawful . . .
>
> A. To refuse to . . . rent property to a person because of . . . marital status . . .
>
> . . . .
>
> C. To make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;
>
> . . . .
>
> E. To represent to a person that real property is not available for inspection . . . [or] rental . . . when in fact it is available, or to refuse a person the right to inspect real property, because of the . . . marital status . . . of that person . . . .[174]

The Alaska Supreme Court decided that the case involved marital status discrimination because the landlord would have rented to the tenants had they been married.[175] The landlord thus violated both statutes.[176]

b. *Federal Constitutional Law*

The court also held that the landlord was not entitled to a constitutional exemption from the statutes because of his religious belief.[177] The court decided that enforcement of the anti-discrimination statutes did not violate the landlord's constitutional right to the free exercise of his religion under

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173. *Id.* at 278 n.2.

174. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 n.3 (Alaska 1994).

175. *Id.* at 278.

176. *Id.*

177. *Id.* at 279.

the United States Constitution.[178] The court based its reasoning on the test applied in the *Peyote Case*.[179]

The *Peyote* Court stated that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[180] The laws in *Swanner* were neutral on their face because "[n]either the ordinance nor the statute contain[ed] any language singling out any religious group or practice."[181] The laws were generally applicable because they applied to all people renting or selling property.[182] As a result, the court concluded that "at least under the general rule, no compelling state interest is necessary."[183]

c. *State Constitutional Law*

In addition, according to the Alaska Supreme Court, the enforcement of the statutes did not violate the landlord's constitutional right to the free exercise of religion under the Alaska Constitution.[184] The court decided that the government interest in abolishing improper discrimination in housing outweighed the landlord's interest in acting based on his religious beliefs.[185] The court considered the following three factors which invoke a religious exemption: (1) whether religion was involved at all; (2) whether the conduct at issue was religiously based; and (3) whether the religious belief was sincere.[186] The court concluded that all three requirements were satisfied.[187]

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178. *Id.* at 280.

179. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Alaska 1994).

180. *Id.* at 279 (alteration in original).

181. *Id.* at 280.

182. *Id.*

183. *Id.* The court mentioned that the *Peyote Case* allows an exemption when a hybrid situation occurs. *Id.* However, such was not the case in *Swanner*, so the exemption did not apply. *Id.*

184. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 n.3 (Alaska 1994).

185. *Id.* at 284.

186. The court used the test it applied in Frank v. State, 604 P.2d 1068 (Alaska 1979), adopted from Sherbert v. Verner, 374 U.S. 398 (1963). *Swanner*, 874 P.2d at 281.

187. *Swanner*, 874 P.2d at 282.

The court then discussed the conditions which might forbid granting a religious exemption.[188] The conditions were first, either the religiously impelled action constituted a substantial threat to public safety, peace, or order, or second, there existed a compelling government interest of the highest order.[189] Since the first condition did not apply to the situation before the Alaska Supreme Court, the second was scrutinized.[190]

The majority stated that the government may have two interests: "a 'derivative' interest in ensuring access to housing for everyone, and a 'transactional' interest in preventing individual acts of discrimination based on irrelevant characteristics."[191] The majority stressed the government's strong transactional interest.[192] It stated: "The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination."[193]

The court rejected the dissent's argument that prevention of marital status discrimination was not of the highest order because the State itself treated unmarried and married couples differently on many occasions.[194] The court pointed out that those other state policies were irrelevant to the case before it because "[t]he government's interest here [was] in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general."[195]

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188. *Id.*

189. *Id.* at 282.

190. *Id.*

191. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282 (Alaska 1994). The court explained that a derivative interest means objection to the effect of an action, whereas a transactional interest means objection to the activity itself. *Id.*

192. *Id.* at 282-83.

193. *Id.* at 283.

194. *Id.*

195. *Id.* The court stated:

> [T]reating married couples differently from unmarried couples is arguable necessary to avoid fraudulent availment of benefits available only to spouses. The difficulty of discerning whose bonds are genuine and whose are not may justify requiring official certification of the bonds

As to the burden that the statutes imposed on the landlord's exercise of religion, the court noted that if there indeed existed a burden, it fell on the landlord's conduct and not on his beliefs.[196] The court underscored the importance of distinguishing between religious observance and commercial activity.[197] The court quoted the United States Supreme Court, explaining that when religious people start engaging in business, they may not impose on the laws and regulations the same limits which they impose on their consciences.[198] The court concluded that the landlord may not be granted an exemption from the statutes because his "religiously impelled actions trespass on the private right not be unfairly discriminated against in housing."[199]

III. IDENTIFICATION OF THE PROBLEM

The California Supreme Court must decide whether landlords who, on the basis of their religious beliefs, refuse to rent to unmarried couples should be exempt from a state statute that prohibits marital status discrimination. Several problems arise in connection with this issue: first, whether the term "marital status" indeed applies to unmarried couples;[200] and second, what test under the California Constitution should be applied to determine whether the court should grant the landlords an exemption from a state statute.[201] Additionally, the constitutional problem gives rise to yet another point of concern: how to correctly balance interests of the landlord and of the state.[202] The respective interests of the parties must be accurately balanced regardless of

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> via a marriage document. That problem is not present in housing cases . . . .

Id.

196. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994).

197. *Id.*

198. *Id.* (quoting United States v. Lee, 455 U.S. 252, 261 (1982)). In addition, the *Swanner* court argued: "Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden . . . is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws." *Id.* at 283.

199. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 284 (Alaska 1994).

200. *See infra* part IV.A.

201. *See supra* text accompanying notes 17-18; *see also infra* part IV.B.1.

202. *Compare infra* part II.D.1.b *and* part II.D.2.b *with* part II.D.3.c; *see also infra* part IV.B.2.

whether the compelling state interest test or the incidental effect test is used.

If Government Code section 12955 does not protect unmarried couples from marital status discrimination, then landlords will be free to refuse to rent to couples if, for any reason, the landlords disapprove of their not being married.[203] Landlords would not need to claim the right to religious freedom of exercise or any other constitutional protection to be exempt from the statute. Therefore, it is necessary to examine how the court ought to interpret the term "marital status."

The constitutional test referred to in the second sub-issue determines the level of interests that the state and the landlord must prove.[204] If the court chooses to utilize the pre-*Peyote Case* compelling interest standard, then the State will face a more challenging task than if the incidental effect test is used: to outweigh the landlord's interest, the State will have to carry a much higher evidentiary burden.[205]

Finally, determining how to correctly balance the interests of the landlord and the state is significant, since the level of state interest may vary depending on the court's focus. The state interest may reach a different level depending on whether it is an interest in eradicating discrimination in general, discrimination against unmarried couples in all areas of the law, or discrimination against unmarried couples specifically in housing.

IV. ANALYSIS

As demonstrated in the background section of this comment, the facts in all five cases[206] were alike: the landlords refused to rent to unmarried couples because they believed that non-marital sex was sinful.[207] The landlords were con-

203. *See supra* part II.C.2.

204. *See infra* part IV.B.1.

205. *See infra* part IV.B.1.

206. *Compare* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994); State *ex rel.* Cooper v. French, 460 N.W. 2d 2 (Minn. 1990). *See supra* part II.

207. *See supra* part II.

vinced that they would be sinning themselves if they rented to people who lived in sin.[208] None of the cases questioned the sincerity of the owners' religious belief.[209] Also, in all four jurisdictions, state statutes prohibited marital status discrimination.[210] The issues were also phrased similarly.[211]

The cases, however, differed in their outcomes. *French* decided that the Minnesota statute prohibiting marital status discrimination did not apply to unmarried couples.[212] Even though further analysis was redundant after such a conclusion, the court granted the landlord an exemption from the statute.[213]

The Massachusetts court, in *Desilets*, on the other hand, did apply the state statute to unmarried couples.[214] However, the court did not resolve the constitutional issue because it was unable to determine just how compelling the state's interest was.[215]

Finally, Alaska, too, decided that the statute prohibiting marital discrimination applied to unmarried couples.[216] The court held that the statute did not violate the landlord's right to the free exercise of religion under either the Federal or Alaska Constitution.[217]

A. *Marital Status*

In order to determine whether a landlord in California should be allowed to discriminate against unmarried couples based on the landlord's religious convictions, it is essential to establish first whether the term "marital status" applies to

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208. *See supra* text accompanying notes 19-24, 53-57, 99-105.

209. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 237 (Mass. 1994); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281-82 (Alaska 1994). The *Cooper* court implicitly assumed the landlord's sincerity of belief. *See also* State *ex rel.* Cooper v. French, 460 N.W.2d 2, 10 (Minn. 1990).

210. *See supra* text accompanying notes 26, 147, 173-74; *see also supra* note 118.

211. *See supra* text accompanying notes 28, 112-14.

212. *See supra* text accompanying note 119.

213. *See supra* text accompanying note 120; *see also supra* part II.D.1.a. The court weighed the landlord's interest in the freedom of religion against the state's "interest in promoting fornication" and ruled that the state interest was not overriding. State *ex rel.* Cooper v. French, 460 N.W.2d 2, 10-11 (Minn. 1990).

214. *See supra* text accompanying note 150.

215. *See supra* text accompanying notes 167-68.

216. *See supra* text accompanying notes 175-76.

217. *See supra* text accompanying notes 177-78, 184.

unmarried couples. It was the absence of marriage that prompted the landlords to refuse housing to the couples.[218] The landlords clearly stated that they would have rented to the couples had they been married.[219]

California courts have found marital status to encompass unwed mothers, single, divorced, and widowed persons.[220] They have also construed the term, in conjunction with other statutory provisions, to include couples as well.[221] Since the presence or absence of marriage in the context of individuals constitutes marital status, it should follow that the presence or absence of marriage in the context of couples likewise constitutes marital status. Therefore, if a couple is refused housing solely because they are unmarried, then such refusal equals discrimination on the basis of marital status.

The California cases *Atkisson* and *Hess*, the rules of statutory interpretation, and decisions from other jurisdictions provide the foundation for including unmarried couples in the category of marital status. Both *Atkisson* and *Hess* applied the term "marital status" to unmarried couples, the former in the public housing sector, the latter in private housing.[222] Both also agreed that treating tenants differently because of their marital status constituted prohibited discrimination.[223]

After the *Atkisson* court had interpreted the term "marital status," the California Legislature made some changes in the laws pertaining to housing.[224] However, it left intact the statutes pertaining to discrimination in housing, which were addressed in *Atkisson*.[225] Even though the meaning of the

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218. *See supra* text accompanying notes 20, 56, 117, 145, 170.

219. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276-77 (Alaska 1994); Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 396 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 33 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993); Attorney Gen. v. Desilets, 636 N.E.2d 233, 234 (Mass. 1994); State *ex rel.* Cooper v. French, 460 N.W.2d 2, 3 (Minn. 1990).

220. *See* Smith v. Fair Employment & Hous. Comm'n, 30 Cal. Rptr. 2d 395, 405 (Ct. App.), *rev. granted and opinion superseded*, 880 P.2d 111 (Cal. 1994); *see also supra* note 59.

221. Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712, 715 (Ct. App. 1982); *see also supra* note 65.

222. *See supra* text accompanying notes 94-95, 107-08.

223. *See supra* part II.C.

224. *See supra* note 65.

225. *See supra* note 65.

term "marital status" was not the main subject of the courts' rulings, it was indispensable to deciding the main issues in *Atkisson* and *Hess*.[226] Therefore, the courts' interpretation of the term carries sufficient weight for other courts to follow.

Generally, the legislature is aware of court decisions which affect statutory law.[227] The legislature could have responded to the *Atkisson* ruling with an amendment to the statute when it discussed the general topic of housing. If protection of unmarried couples against marital status discrimination in housing was inconsistent with state policy, the legislature could have taken the opportunity to react. On the contrary, the California legislative body decided not to address the meaning of the term "marital status discrimination."[228] Therefore, it is safe to assume that such failure to act was equivalent to acquiescence, and that the legislature agreed with *Atkisson*'s application of the term "marital status" to unmarried couples.

Court decisions from other jurisdictions confirm the above interpretation of marital status.[229] Both the Massachusetts Supreme Judicial Court in *Desilets*, and the Alaska Supreme Court in *Swanner*, support the position that prohibition against marital status discrimination applies to unmarried as well as married couples.[230] They both contended that a refusal to rent was the equivalent of marital status discrimination, when that refusal was based on the lack of marriage between a cohabiting couple.[231]

The courts from the other jurisdictions, in deciding the issue of marital status, paid close attention to the presence or absence of a state anti-fornication statute.[232] Such statutes, even if abandoned for many years, constitute at least a token disapproval of non-marital cohabitation by the state.[233] On the other hand, the absence of criminal penalties for cohabitation clears the way for finding that the state does not have an interest in preventing the cohabitation of unmarried

226. *See supra* part II.C.
227. *See supra* text accompanying notes 61-64.
228. *See supra* note 65.
229. *See supra* part II.D.
230. *See supra* parts II.D.2.a., II.D.3.a.
231. *See supra* parts II.D.2.a., II.D.3.a.
232. *See supra* text accompanying notes 129-31, 165-66.
233. *See supra* text accompanying note 166.

couples.[234] Therefore, the fact that California does not punish non-marital sexual relationships is strong support for applying the term "marital status" to unmarried couples.

B. *Constitutional Law*

All three jurisdictions — Minnesota, Massachusetts, and Alaska — agree that states do not need to follow the analysis the United States Supreme Court applied in cases interpreting the Federal Constitution.[235] These jurisdictions also agreed that under their respective state constitutions, the State must prove the existence of a compelling interest in order to override the landlord's interest in the freedom of the exercise of religion.[236]

1. *Compelling State Interest*

In order to decide whether California has a compelling interest in protecting unmarried couples from marital status discrimination, several questions must be answered.[237] First, how is it significant that unmarried couples are not protected by the legislature to the same extent as married couples?[238] The California appellate courts and the Supreme Courts of Minnesota and Massachusetts focused on the policy of the state towards unmarried couples, in general, and on the privileged position of married couples which pervades state law, in particular.[239] Alaska, however, was the only jurisdiction that asked the crucial question: what is the purpose of a state's differentiating between married and unmarried couples? The *Swanner* court found that the requirement of marriage is the most convenient way of ascertaining that the bonds between a couple are genuine.[240]

The existence of genuine bonds helps to distinguish between benefits like the right to spousal support, and the right

234. *See supra* note 65; *see also* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281 n.10 (Alaska 1994).

235. *See supra* text accompanying notes 134, 152, 184.

236. *See supra* parts II.D.1.b., II.D.2.b., II.D.3.c.

237. *See supra* text accompanying notes 17-18. *But see also* text accompanying notes 89-96.

238. *See supra* note 45.

239. *See supra* parts II.A., II.B., II.D.1., II.D.2.

240. *See supra* note 195. The proof of marriage is not a perfect test to evaluate the quality of the bonds. However, it appears to be simpler, less costly, more efficient and reliable, and less susceptible to fraud than having the couple prove their bonds otherwise.

to bring a wrongful death action or a negligent infliction of emotional distress action on the one hand, and the right to live together in a rented apartment on the other.[241] Access to housing does not constitute a privilege available only to those whose bonds are genuine, whereas the benefits enumerated above do. For example, if an unmarried man and woman, not romantically involved, wished to rent an apartment together, they would not encounter the same problems as a cohabiting couple would. In contrast, the benefits enumerated above are not available at all to those who are not married.[242] The need to distinguish between married and unmarried couples which exists in other contexts does not exist in the context of housing.[243]

It is also critical to correctly identify the government's interest. The issue is not whether the state should eliminate marital status discrimination in *all* areas of the law, but rather only in the area of housing. The prospective tenants did not demand from the court, in any of the cases mentioned above, that all distinctions made by the laws between married and unmarried couples be eliminated.[244] The issue before the court in each instance was limited solely to the housing arena.[245] Therefore, instead of assessing the state interest in eradicating discrimination in general, it is advisable to focus on the particular type of discrimination, i.e. discrimination in housing. If access to housing is a basic human need, as it has been described, then providing discrimination-free access to housing should be characterized as a compelling state interest.

It has been argued that not every form of discrimination is equally invidious,[246] and that, in fact, there is a spectrum of intensity of state interest with respect to the various categories.[247] However, *Pines v. Tomson*, a California appellate court case, poses a more persuasive argument: "as a general proposition 'government has a compelling interest in eradi-

241. *See supra* note 195.
242. *See supra* note 45.
243. *See supra* note 195.
244. *See supra* part II.
245. *See supra* part II.
246. *See supra* note 45.
247. *See supra* note 82.

cating discrimination in all forms.'"[248] The minutiae of weighing and relating the various categories to each other, such as race, religion, color, sex, marital and family status, are better left to the legislature. The same applies to assessing the weight of the categories allegedly existing within the marital status category, such as single parents, the divorced, the widowed, and others.[249]

2. *Landlords' Interest*

Do landlords have a compelling interest in being exempt from the statute which prohibits discrimination on the basis of marital status? It is assumed that even though the type of discrimination discussed here occurs in a commercial context, the level of interest the state must prove is not thereby lowered.[250] However, once the landlords enter the public marketplace, their right to freedom of religious expression is no longer protected absolutely. Therefore, the fact that the landlords engaged in a commercial activity while attempting to obtain a religious freedom exemption may weigh against the landlords in the final balancing of interests.[251]

It is important that landlords understand the implications of entering a heavily regulated business. Landlords are free to profess and adhere to their religious beliefs; however, their conduct prompted by religion may be, and has been, subject to limitations.[252] When landlords offer for rent units in which they do not intend to live, they engage in a commercial activity. As a result, they subject themselves to stringent

248. Pines v. Tomson, 206 Cal. Rptr. 866, 879 (Ct. App. 1984) (quoting EEOC v. Mississippi College, 626 F.2d 477, 488 (5th Cir. 1980)).

249. *See supra* note 45.

250. *See* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 43 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993).

251. *See supra* text accompanying note 159.

252. *See* Sherbert v. Verner, 374 U.S. 398, 402-03 (1963). The *Sherbert* Court stated:

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such . . . . On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'

Id. (alteration in original); *see also* Molko v. Holy Spirit Ass'n, 762 P.2d 46, 56 (Cal. 1988) for similar language.

anti-discrimination regulations.[253] It is not the promptings of their religious conscience that made the landlords enter the rental market. Therefore, they should refrain from limiting the regulations which govern the housing arena in an attempt to conform the law to their own religious beliefs.[254]

Section 12955 of the California Government Code, which prohibits discrimination in housing, does not itself prohibit the practice of religion. The landlords themselves, by injecting their religious mores into the housing arena, become subject to the statute and its "unwelcome" consequences. Similarly, the anti-discrimination statute does not require landlords to aid and abet sinners.[255] As a consequence, the burden on the landlords if an exemption is not granted is not heavy.

On the other hand, the burden on the state would be substantial if exemptions from anti-discrimination laws were allowed. As the United States Supreme Court pointed out in the *Peyote Case*, disorder and confusion would be imminent if exemptions from civil obligations were available to anyone who professed a genuine religious belief on any matter regulated by the law.[256] For example, the state would be unable to uniformly enforce anti-discrimination statutes. Due to the lack of uniform application, such statutes would become ineffective. If exemptions from anti-discrimination statutes were freely available, the reasons for their existence would become moot.[257] As a result, the state goal of eliminating discrimination would be hindered by such exemptions.[258]

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253. Even those landlords who intend to live in the same single family dwelling with one tenant are obligated to comply with California Government Code § 12955(c), which prohibits discriminatory notices, statements, and advertisements. *See* CAL. GOV'T CODE § 12927(c) (Deering Supp. 1995); *see also supra* note 55.

254. *See supra* text accompanying note 198.

255. *See* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 49 (Ct. App. 1991), *rev. granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *rev. dismissed*, 859 P.2d 671 (Cal. 1993) (Grignon, J., dissenting). "A legal compulsion . . . to refrain from discriminating against [prospective tenants] on the basis of [marital status] can hardly be characterized as an endorsement" or the aiding or abetting of sin. *Id.* (Grignon, J., dissenting) (quoting Pines v. Tomson, 206 Cal. Rptr. 866, 878 (1984) (citation omitted).

256. *See supra* note 31.

257. *See supra* note 31.

258. *See supra* note 31.

V. PROPOSAL

The California Supreme Court should avoid deliberations on the issue of whether it is viable to eliminate all distinctions in the laws between married and unmarried couples. In the case of the landlady, Smith, and her prospective tenants, Randall and Phillips, the court should focus specifically on eliminating marital status discrimination in the context of housing.

First, the court should state that there is no practical need to ascertain the genuine nature of bonds between a couple in the context of access to housing, unlike other areas of the law.[259] Any reason for preferring married couples over unmarried couples, which may occur in other situations, does not exist in the housing arena. The court should hold that married and unmarried couples enjoy the same measure of protection in housing.

Recognizing that testing the genuineness of a relationship is irrelevant in the context of housing laws will highlight the need to eliminate marital status discrimination in that area. In addition, it will underscore the necessity to maintain the distinctions between married and unmarried couples in other contexts.[260] Testing the genuine nature of the bonds between couples will be done only where it is necessary and feasible.[261] Distinguishing between housing situations and other legal situations in which such a test is practicable[262] will help to properly characterize the state interests involved in each. Thus, by more accurately assessing the state interest in eradicating housing discrimination, courts will be able to balance the interests of the prospective tenants and the landlord more precisely.

The California Supreme Court should explicitly recognize that the term "marital status" in housing applies to both

259. *See supra* notes 45, 195. In Elden v. Sheldon, 758 P.2d 582 (Cal. 1988), the California Supreme Court stated: "The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.'" *Elden*, 758 P.2d at 587. Thus, similar to the language of the Alaska Supreme Court in *Swanner*, the language points to marriage as a useful tool in determining the rights and responsibilities that a couple have towards each other. *See also supra* part IV.B.1.

260. *See supra* notes 45, 195.

261. *See supra* note 262.

262. *See supra* note 45.

married and unmarried couples.[263] Explicit inclusion of unmarried couples within the meaning of the term "marital status" will dispel any doubts and uncertainties regarding its use. Recognition of prohibition against marital status discrimination as protecting unmarried couples will constitute a logical interpretation of the term and will produce consistency in its application.[264]

Second, the court should refuse the landlady a religious exercise exemption from section 12955 of the California Government Code. Since section 12955 is an anti-discrimination statute, and since the government has a compelling interest in eliminating invidious discrimination, the burden on the state would be too great if such an exemption was granted. The court should note that if the State allowed exemptions from anti-discrimination laws, citizens would practically be denied the protection of those laws.[265] Such laws would become ineffective.[266] In addition, the court should point out that the State would experience increased difficulty in efficiently administering laws, because anti-discrimination laws would be subject to approval by the religious conscience of each and every citizen. As a result, the State would not be able to enforce the laws in which it has a compelling interest in enforcing.[267]

The proposed approach will help maintain the integrity of the legal system because it will produce consistency and predictability in the area of housing and other areas of commercial enterprise. It will also prevent the danger of disorder and confusion which could occur upon granting religious exercise exemptions from anti-discrimination laws.[268]

The court should adopt the proposals without waiting for the California Legislature to amend the Government Code.[269]

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263. *See supra* notes 45, 195.

264. *See supra* part IV.A.

265. *See supra* note 31.

266. *See supra* note 31.

267. *See supra* note 31.

268. *See supra* note 31 and text accompanying note 186.

269. In his dissent in Elden v. Sheldon, 758 P.2d 582 (Cal. 1988), Justice Broussard stated that the court has a "responsibility for the upkeep of the common law." *Id.* at 594 (Broussard, J., dissenting). Justice Broussard stated further:

> The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly ex-

Despite the above proposals directed at the California Supreme Court, however, the legislature should also act. The California Legislature ought to include a definition of marital status in the FEHA which will make the scope of the term clear. Inclusion of the language depicted below, in section 12926(h) of the FEHA, will eliminate any doubts as to the legislative intent regarding the meaning of the term "marital status."[270] It will also ensure that the term is construed in conformity with other parts of the statute.[271]

In addition, the legislature should make it explicit that denying access to housing due to race, sex, religion, color, or marital or family status is equally invidious and, therefore, equally condemned. The inclusion of such language in the FEHA will relieve the courts from having to speculate about the relative importance of the enumerated categories in the area of housing discrimination. All the categories should be accorded the same level of privilege in the area of housing, since the statute does not distinguish among them.[272] All the categories are irrelevant as to a person's ability to pay for housing, which ultimately is the main concern of a landlord. Consequently, all of them should be equally protected.

Section 12926 of the FEHA should, therefore, be amended by including the following italicized language in the definitions pertaining to housing discrimination:

> § 12926. Definitions regarding unlawful practices As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:
>
> . . . .
>
> (h) *"Marital status" includes the presence or absence of marriage with regard to individuals or couples.*

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panding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, invention, and the needs of the country. [Citations] . . . *But that vitality can flourish only so long as the courts remain alert to their obligation and opportunity to change the common law when reason and equity demand it.*

Id. at 594-95 (Broussard, J., dissenting) (citing Rodriguez v. Bethlehem Steel, 12 Cal. 3d 382, 394 (1974)) (modification in original) (emphasis added).

270. *See infra* text accompanying note 277; *see also supra* part II.B.1. and text accompanying notes 58-65.

271. It will be construed in conformity with California Government Code § 12925(d), which defines the term "person." *See supra* note 65.

272. *See* CAL. GOV'T CODE § 12955 (Deering Supp. 1995).

. . . .

(k) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age. *All these bases are to be afforded the same quality of protection from discrimination.*

VI. CONCLUSION

This comment has explored the issue of religious exercise exemptions from a California anti-discrimination statute. California case law, the rules of statutory interpretation, and court decisions from other jurisdictions support the argument that the term "marital status" applies to unmarried couples.[273] The State of California has a compelling interest in preventing marital status discrimination in housing. Therefore, the courts in California should not grant a religious exercise exemption from an anti-discrimination statute.

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273. *See* discussion *supra* part II.