The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples

INTRODUCTION

Mr. French agrees to rent a house that he owns to a young woman named Susan. Susan pays a security deposit and notifies her current landlord that she will be moving out. Two days later, Mr. French changes his mind. He tells Susan that he will not rent the house to her because she intends to live there with her fiancé, Wesley. Mr. French admits that he would have rented to Susan if she and Wesley were married.[1]

By refusing to rent his house to Susan, Mr. French has discriminated against her and Wesley because they are not married. Despite the growing number of couples like Susan and Wesley who choose to live together without marriage,[2] discrimination against these couples in the sale and rental of housing continues.[3] Moreover, despite changes in other areas of the law related to nonmarital cohabitation,[4] the law continues to provide unmarried couples little protection from housing discrimination.[5]

Federal law protects unmarried couples from housing discrimi-

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[1] These facts derive from State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990). *See also Landlord Fined $1000 For Not Renting to Unmarried Couple*, L.A. TIMES, June 17, 1989, § 2 (Metro), at 15 (Orange Co. ed.) (newspaper account of *French* facts).

[2] The number of unmarried couples cohabiting increased from 573,000 in 1970 to 2,764,000 in 1989. *See infra* notes 22-25 and accompanying text.

[3] Housing discrimination takes many forms, including refusals to rent or sell, attempted evictions, and denials of public housing benefits. *See infra* notes 47-49 and accompanying text; *see also infra* note 78 (discussing types of discriminatory acts prohibited by California fair housing law).

The extent of housing discrimination in general is difficult to determine because landlords "may simply claim that they have better offers or that the dwelling already has been sold or rented to another person." *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1612-13 n.56 (1989) [hereafter *Sexual Orientation*]. Nevertheless, the cases this Comment examines demonstrate that housing discrimination against unmarried couples does occur. *See infra* part II.

[4] *See infra* notes 27-43 and accompanying text.

[5] *See infra* part II.

nation in only two narrow areas. First, the Equal Credit Opportunity Act[6] prohibits discrimination against unmarried couples in credit transactions in housing.[7] Second, the United States Housing Act of 1937[8] and the Constitution prohibit discrimination against unmarried couples in public housing.[9] Beyond these two narrow areas, however, federal law does not protect unmarried couples. The Fair Housing Act, Title VIII of the Civil Rights Act of 1968,[10] which expressly prohibits discrimination in the sale and rental of housing, does not prohibit discrimination against unmarried couples.[11]

State law also provides limited protection to unmarried couples. Forty-seven states and the District of Columbia have enacted statutes that prohibit discrimination in housing,[12] but none of these statutes explicitly prohibit discrimination against unmarried couples.[13] Twenty-one states and the District of Columbia do include "marital status" as a prohibited basis for discrimination.[14] The courts in these jurisdictions disagree, however, about whether the term "marital status" encompasses unmarried couples.[15] At present, courts in three states and an administrative agency in a fourth state have interpreted these statutes to protect unmarried couples from housing discrimination.[16]

This Comment argues that Congress should expressly prohibit discrimination in housing against unmarried couples.[17] Part I

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6 15 U.S.C. §§ 1691-1691f (1988 & Supp. I 1989).

7 *See infra* notes 58-64 and accompanying text.

8 42 U.S.C.A. §§ 1437-1437u (West 1978 & Supp. 1991).

9 *See infra* notes 65-71 and accompanying text.

10 42 U.S.C. §§ 3601-3619, 3631 (1988).

11 *See infra* notes 72-76 and accompanying text.

12 *See infra* note 78.

13 *See infra* note 79.

14 *See infra* note 80.

15 *See infra* notes 86-87 and accompanying text.

16 The states are Alaska, California, Massachusetts, and New Jersey. *See infra* note 86.

17 This Comment focuses on housing discrimination against unmarried heterosexual couples. Nevertheless, fair housing laws with "marital status" provisions that protect heterosexual couples may protect homosexual couples also. Some courts have held that the refusal to rent to unmarried same-sex roommates constitutes unlawful discrimination on the basis of marital status. *See, e.g.*, Zahorian v. Russell Fitt Real Estate Agency, 301 A.2d 754 (N.J. 1973); Loveland v. Leslie, 583 P.2d 664 (Wash. Ct. App. 1978). As of 1989, however, there was no reported case of a homosexual couple seeking protection as same-sex roommates under the marital status

briefly surveys the continuing increase in nonmarital cohabitation, recent changes in the legal consequences of such cohabitation, and the problem of housing discrimination.[18] Part II examines federal and state law related to housing discrimination and the limited protection this law provides unmarried couples.[19] Finally, Part III proposes that Congress protect unmarried couples from housing discrimination by amending the Fair Housing Act.[20] This proposed amendment should encourage the states to grant equivalent protection under state law,[21] thus providing unmarried couples with the best protection possible from housing discrimination.

I. NONMARITAL COHABITATION AND THE LAW

A. Modern Trends

From 1960 to 1970, the number of persons cohabiting without marriage increased eightfold.[22] Since 1970, the number of

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provision of a fair housing statute. *See Sexual Orientation*, *supra* note 3, at 1617 ("Although there are no reported cases in which same-sex couples have used the marital status provision to argue that as same-sex roommates they deserved protection, such an argument might prove effective in the future.").

Some fair housing laws protect homosexual couples directly by prohibiting discrimination based on sexual orientation. *See, e.g.*, D.C. CODE ANN. § 1-2515 (1987); WIS. STAT. ANN. § 101.22 (West 1988 & Supp. 1991). On September 29, 1991, California Governor Pete Wilson vetoed a bill that would have amended the California Fair Employment and Housing Act to include "sexual orientation" as a prohibited basis for discrimination in employment. *See* George Skelton & Jerry Gillam, *Governor Vetoes Gay Job Bias Bill*, L.A. TIMES, Sept. 30, 1991, at A1. The portion of the bill that would have prohibited sexual orientation discrimination in housing was deleted before the bill went to the Governor in an attempt to garner Republican support and to encourage the Governor to sign the bill. *See* Tim Rutten, *Dread and the AB 101 Decision*, L.A. TIMES, Sept. 27, 1991, at E1. Nevertheless, a California court has held that the Unruh Civil Rights Act, which prohibits arbitrary discrimination by "business establishments," prohibits discrimination in rental housing against homosexuals. *See* Hubert v. Williams, 184 Cal. Rptr. 161 (App. Dep't Super. Ct. 1982) (construing Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West Supp. 1991)).

18 *See infra* notes 22-57 and accompanying text.

19 *See infra* notes 58-139 and accompanying text.

20 *See infra* notes 140-60 and accompanying text.

21 *See infra* notes 151-57 and accompanying text.

22 Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 275 n.1.

unmarried cohabitants has continued to increase.[23] The Bureau of the Census has estimated that in 1984, 1,980,000 couples were living in nonmarital cohabitation.[24] By 1989, that figure had grown to 2,764,000.[25] This continuing increase in the number of unmarried cohabitants indicates a growing public acceptance of cohabitation without marriage.[26]

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[23] Census figures indicate that in 1970, 523,000 couples were living in nonmarital cohabitation. Mary L. Knoblauch, Comment, *Minnesota's Cohabitation Statute*, 2 LAW & INEQ. J. 335, 335 n.1 (1984). By 1980, the number of unmarried couples cohabiting had increased to 1,560,000. *Id.*

[24] Janet Lewis, *Property Law I: Housing Discrimination and Real Property Finance*, 1985 ANN. SURV. AM. L. 947, 947 n.1 ("According to the U.S. Bureau of the Census, 1,980,000 such households existed in March 1984.").

[25] U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, NO. 445, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1989, at 6 (1990). The growth in the number of unmarried couples cohabiting may be even more dramatic than these census figures indicate. Census estimates of the number of unmarried cohabitants may have been high in 1960 and 1970 because the pertinent figures were not directly accessible, while the estimates for 1980 and later may be low because some couples report themselves as married. *See* Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1831 n.12 (1987); *see also* J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 109 (1984) (stating that census figures may be low due to concealment by cohabitants and lack of precision of census data). *See generally* D. Judith Keith & Ronald L. Nelson, Note, *Cohabitation: New Views on a New Lifestyle*, 6 FLA. ST. U. L. REV. 1393, 1393 n.3 (1978) (noting that figures regarding number of cohabitants can be misleading). In an effort to more accurately determine the number of unmarried cohabitants, the Bureau of the Census included in the 1990 Census form a category for "unmarried partners," defined as two unrelated adults in a "close, personal relationship." Beverly Beyette, *Tallying New Family Ties*, L.A. TIMES, Mar. 23, 1990, at E1 (stating that Bureau "hopes to pinpoint more accurately" incidence of non-traditional families, including unmarried couples).

[26] *See* IRVING J. SLOAN, LIVING TOGETHER: UNMARRIEDS AND THE LAW at v-vi (1980) (stating that increasing cohabitation without marriage "is largely the result of increased social acceptance"); *see also* Oldham & Caudill, *supra* note 25, at 110 (stating that despite lack of precise data, census figures indicate cohabitation is becoming socially acceptable).

A general change in societal attitudes towards marriage is also indicated by the decrease in the percentage of the population that is married. From 1965 to 1979, the percentage of married persons in the population decreased from 73.2% to 66.2%. David Meade, Comment, *Consortium Rights of the Unmarried: Time for a Reappraisal*, 15 FAM. L.Q. 223, 224 n.6 (1981). In 1988 in California, only 55% of the persons of marrying age were married. *See* David Tuller, *Standing Up for 'Singles' Rights'*, S.F. CHRON., Oct. 15, 1990, at A1 ("According to U.S. Census figures from 1988, 45 percent of

In recognition of this growing acceptance, courts and legislatures have begun to alter some of the legal consequences of nonmarital cohabitation.[27] One of the most significant changes has occurred in the criminal law. Historically, most states criminalized cohabitation.[28] Today, most states have repealed these criminal statutes.[29] In addition, many states have decriminalized fornication.[30]

Californians of marrying age are divorced or have never been married."). The Bureau of the Census defines "marrying age" as 15 years or older. Victor F. Zonana, *Report Finds Widespread Bias Against Unmarrieds*, L.A. TIMES, Mar. 29, 1990, at A1.

Despite this growth in the public acceptance of nonmarital cohabitation, many people—including judges hearing housing discrimination cases—remain vehemently opposed to unmarried partners living together. *See, e.g.*, State by Cooper v. French, 460 N.W.2d 2, 8 (Minn. 1990) (referring to nonmarital cohabitation as "a lifestyle which corrodes the institutions which have sustained our civilization, namely, marriage and family life").

[27] *See* Joseph W. deFuria, Jr., *Testamentary Gifts Resulting From Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 208-12 (1989) (discussing changes in law that reflect changing attitudes toward cohabitation and other meretricious relationships).

[28] Fineman, *supra* note 22, at 276 ("Historically, cohabitation was considered 'deviant' behavior and was criminally sanctioned in most states.").

[29] *See, e.g.*, Act of June 19, 1989, Pub. Act 86-490, § 1, 1989 Ill. Laws 2890, 2890 (codified at ILL. ANN. STAT. ch. 38, ¶ 11-8(a) (Smith-Hurd Supp. 1991)) (deleting reference to cohabitation in Illinois statute criminalizing fornication); Act of May 2, 1979, ch. 90, § 10, 1979 Kan. Sess. Laws 521, 527 (repealing KAN. STAT. ANN. § 23-118, which criminalized cohabitation); Act of May 5, 1987, ch. 43, 1987 Mass. Acts 46, 46 (codified at MASS. GEN. LAWS ANN. ch. 272, § 16 (West 1990)) (deleting reference to cohabitation in Massachusetts statute criminalizing open and gross lewdness and lascivious behavior).

Cohabitation remains a crime in 11 states: Arizona, Florida, Idaho, Michigan, Mississippi, New Mexico, North Carolina, North Dakota, South Carolina, Virginia, and West Virginia. *See* ARIZ. REV. STAT. ANN. § 13-1409 (1989); FLA. STAT. ANN. § 798.02 (West 1976); IDAHO CODE § 18-6604 (1987); MICH. COMP. LAWS § 750.335 (1979) (MICH. STAT. ANN. § 28.567 (Callaghan 1990)); MISS. CODE ANN. § 97-29-1 (1972); N.M. STAT. ANN. § 30-10-2 (Michie 1984); N.C. GEN. STAT. § 14-184 (1986); N.D. CENT. CODE § 12.1-20-10 (1985); S.C. CODE ANN. §§ 16-15-60, 16-15-80 (Law. Co-op. 1985) (requires "living together and carnal intercourse"); VA. CODE ANN. § 18.2-345 (Michie 1988); W. VA. CODE § 61-8-4 (Michie 1989).

[30] *See, e.g.*, FLA. STAT. ANN. § 798.03 (West 1976) (repealed 1983) (held unconstitutional in Purvis v. State, 377 So. 2d 674, 676 (Fla. 1979)); KY. REV. STAT. ANN. § 436.070 (Michie/Bobbs-Merrill 1985) (repealed 1975); N.J. STAT. ANN. § 2A:110-1 (West 1985) (repealed 1979). The

Another significant change in the legal consequences of nonmarital cohabitation is that courts have begun to enforce property agreements between unmarried cohabitants.[31] Tradi-

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decriminalization of fornication, as well as other sex crimes, may result more from enforcement problems than from any social acceptance of such acts. *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 566-67 (1983) ("In general, much of the support for decriminalization of sex crimes 'has been based on practical concerns' relating to enforcement difficulties, 'not on any notion that sexual freedom is a human right.' " (quoting Thomas C. Grey, *Eros, Civilization, and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83, 95)).

Fornication remains a crime in the District of Columbia and thirteen states: Georgia, Idaho, Illinois, Massachusetts, Minnesota, Mississippi, North Carolina, North Dakota, South Carolina, Utah, Virginia, West Virginia, and Wisconsin. *See* D.C. CODE ANN. § 22-1002 (1989); GA. CODE ANN. § 26-2010 (Harrison 1988); IDAHO CODE § 18-6603 (1987); ILL. ANN. STAT. ch. 38, ¶ 11-8 (Smith-Hurd Supp. 1991); MASS. GEN. LAWS ANN. ch. 272, § 18 (West 1990); MINN. STAT. ANN. § 609.34 (West 1987); MISS. CODE ANN. §§ 97-29-1 to -9 (1972 & Supp. 1991) (applies to cohabitation, teacher and pupil, incestuous relationships, guardian and ward, and incestuous marriages out of state); N.C. GEN. STAT. § 14-184 (1986) (applies to unmarried man and woman who "lewdly and lasciviously associate, bed and cohabit together"); N.D. CENT. CODE § 12.1-20-08 (1985) (limited to sexual act in a public place or by a minor); S.C. CODE ANN. §§ 16-15-60, -80 (Law. Co-op. 1985) (defined as "living together and carnal intercourse . . . or habitual carnal intercourse . . . without living together"); UTAH CODE ANN. § 76-7-104 (1990); VA. CODE ANN. § 18.2-344 (Michie 1988); W. VA. CODE § 61-8-3 (1989); WIS. STAT. ANN. § 944.15 (West Supp. 1991) (limited to sexual intercourse in public).

In a few instances, courts have found criminal statutes prohibiting cohabitation and fornication unconstitutional. *See, e.g.*, Doe v. Duling, 603 F. Supp. 960, 967-69 (E.D. Va. 1985) (holding that Virginia statutes prohibiting cohabitation and fornication violated right of privacy), *vacated on other grounds*, 782 F.2d 1202 (4th Cir. 1986); Purvis v. State, 377 So. 2d 674, 679 (Fla. 1979) (holding that Florida statute prohibiting fornication violated equal protection guarantee). The validity of these decisions may be questionable, however, in light of Bowers v. Hardwick, 478 U.S. 186 (1986), in which the Supreme Court upheld a Georgia statute prohibiting consensual sodomy. deFuria, *supra* note 27, at 209-10 n.57; *see also* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1107 (1989) (stating that Supreme Court "endorsed moral-based discrimination" in *Bowers*). *But see* Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1665-67 (1991) (arguing that despite *Bowers*, criminal statutes prohibiting consensual premarital sexual intercourse are unconstitutional).

31 *See* deFuria, *supra* note 27, at 210-12 ("Nowhere is the trend in favor of

tionally, most courts refused to enforce such agreements.[32] These courts adhered to the rule that any contract involving illicit sexual intercourse as part of the consideration is unenforceable in its entirety.[33]

In 1976, the California Supreme Court rejected this rule in *Marvin v. Marvin*.[34] In this renowned case, Michelle Marvin attempted to enforce an oral agreement with actor Lee Marvin to equally divide all property accumulated during their seven-year nonmarital relationship.[35] The California Supreme Court held that courts may enforce such express property agreements between cohabitants to the extent that those agreements do not rest on the performance of sexual services as consideration.[36] The court also indicated that implied contract, *quantum meruit*, and other equitable remedies could apply to unmarried cohabitants who lack express agreements.[37] In justifying its decision, the

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a more expansive outlook on meretricious living arrangements more pronounced than in the law's relatively recent recognition of property rights of unmarried cohabitants."). *See generally* SAMUEL GREEN & JOHN V. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS §§ 3.13 to .25 (1984 & Supp. 1991) (discussing property division and support rights of unmarried cohabitants).

32 deFuria, *supra* note 27, at 210; *see, e.g.*, Stevens v. Anderson, 256 P.2d 712 (Ariz. 1953) (finding surviving cohabitant not entitled to property acquired in deceased cohabitant's name where no agreement independent of agreement to cohabit existed); Baxter v. Wilburn, 190 A. 773 (Md. 1937) (holding cohabitant not entitled to equitable relief where conveyance of property connected to illicit cohabitation); deFuria, *supra* note 27, at 210 n.59 (citing additional cases).

33 *See* Cynthia M. Hinman, Note, *The Old Morality Lives on in Illinois:* Hewitt v. Hewitt, 56 CHI.-KENT L. REV. 1197, 1198 (1980) ("The traditional view of contracts involving cohabitation as part of the consideration is that such contracts are unenforceable."). This rule has been called "the meretricious spouse rule." deFuria, *supra* note 27, at 210 n.59. It has also been called, more generally, "the doctrine of immorality or the illegal consideration doctrine." GREEN & LONG, *supra* note 31, § 3.14, at 186.

34 557 P.2d 106 (Cal. 1976).

35 *Id.* at 110-11.

36 *Id.* at 116 ("So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.").

37 The court stated:

> The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may, when appropriate, employ principles of constructive trust

court relied in part on the social acceptance of nonmarital cohabitation.[38] Since *Marvin*, most courts have recognized that property agreements between unmarried cohabitants are enforceable.[39]

Courts have altered other legal consequences of nonmarital cohabitation as well. For example, in the past many courts reduced or terminated alimony on moral grounds if the wife cohabited after divorce.[40] Today, most courts will not alter a

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> or resulting trust. Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.

Id. at 122-23 (citations omitted).

[38] The court stated: "In summary, we believe that *the prevalence of nonmarital relationships in modern society and the social acceptance of them*, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case." *Id.* at 122 (emphasis added).

[39] Carol S. Bruch, *Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial-Legislative Interaction*, 29 AM. J. COMP. L. 217, 223 & n.24 (1981) (stating that "most of the recent cases have limited or dispensed with public policy defenses such as that of illegal contract to property claims between cohabitants"); *see, e.g.*, Hay v. Hay, 678 P.2d 672, 674 (Nev. 1984) (holding that "remedies set forth in *Marvin* are available to unmarried cohabitants" in Nevada); Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990) (holding that court may order division of property between unmarried cohabitants based on express or implied contract or constructive trust). *But see, e.g.*, Liles v. Still, 335 S.E.2d 168, 169 (Ga. Ct. App. 1985) (stating that unmarried cohabitation constitutes immoral consideration, rendering contract unenforceable); Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979) (holding that property claims arising out of cohabitational relationship are unenforceable on public policy grounds).

At least one state, Minnesota, has addressed property agreements between unmarried cohabitants through legislation. *See* MINN. STAT. ANN. §§ 513.075 to .076 (West 1990); Knoblauch, *supra* note 23, at 335 (discussing and criticizing Minnesota statute); *cf.* Kristin Bullock, Comment, *Applying* Marvin v. Marvin *to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029 (1992) (urging California Legislature to codify *Marvin*). The Minnesota statute "bars unmarried cohabitants' claims for property upon separation unless a written contract exists between the two parties." Knoblauch, *supra* note 23, at 335.

[40] *See, e.g.*, Rubisoff v. Rubisoff, 133 So. 2d 534, 538 (Miss. 1961) (noting that under "majority" rule, court may modify or revoke divorce order based on wife's "misconduct," including illicit cohabitation, following divorce). The courts based the reduction or termination of alimony on moral rather than financial considerations. *See* Fineman, *supra* note 22, at 328.

divorce decree solely because a former spouse is cohabiting.[41] Furthermore, many courts award child custody rights to single parents living in nonmarital cohabitation.[42]

Despite these and other changes in the legal treatment of unmarried cohabitants,[43] nonmarital cohabitation still results in many unfavorable legal consequences. For instance, courts in most jurisdictions will not allow an unmarried cohabitant to state a cause of action for loss of consortium.[44] The law also denies unmarried couples many other benefits available to married

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41 *See* Fineman, *supra* note 22, at 328-29 (stating that the "more modern view . . . is that post-divorce immoral conduct does not, by itself, justify modification of an alimony award"); *see also* Diane M. Allen, Annotation, *Divorced or Separated Spouse's Living with Member of Opposite Sex as Affecting Other Spouse's Obligation of Alimony or Support Under Separation Agreement*, 47 A.L.R.4th 38 (1986 & Supp. 1991) (citing relevant cases); Annotation, *Divorced Woman's Subsequent Sexual Relations or Misconduct as Warranting, Alone or With Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3d 453 (1980 & Supp. 1991) (citing relevant cases).

42 deFuria, *supra* note 27, at 209; *see also* Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 688-90 (1976) (describing cases in which this type of custody award occurs and stating that these cases "provide evidence of increasingly tolerant judicial attitudes toward alternatives to formal legal marriage"). *But see, e.g.*, Dixon v. Dixon, 360 S.E.2d 8 (Ga. Ct. App. 1987) (holding that trial court did not abuse its discretion by changing award of custody from mother to father because mother was living in nonmarital cohabitation); Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1979) (upholding change of custody predicated on mother's open and continuing cohabitation with her boyfriend), *cert. denied*, 449 U.S. 927 (1980).

43 More liberal judicial attitudes toward nonmarital cohabitation are also reflected in areas of the law other than family law. For instance, at least one court has held that a woman cannot be denied admission to the bar on moral grounds solely because she is cohabiting without marriage. *See* Cord v. Gibb, 254 S.E.2d 71 (Va. 1979). For a general discussion of the continuing changes in the legal treatment of unmarried cohabitants, see GREEN & LONG, *supra* note 31, §§ 3.01 to .25.

44 *See* Sonja A. Soehnel, Annotation, *Action for Loss of Consortium Based on Nonmarital Cohabitation*, 40 A.L.R.4th 553 (1985 & Supp. 1991) (listing only three cases allowing unmarried cohabitant to state cause of action for loss of consortium, two of which have since been overruled).

In California, the Fourth District Court of Appeal held in 1983 that an unmarried cohabitant may state a cause of action for loss of consortium by showing a stable and significant relationship. *See* Butcher v. Superior Court, 188 Cal. Rptr. 503 (Ct. App. 1983). The California Supreme Court disapproved *Butcher* in 1988. *See* Elden v. Sheldon, 758 P.2d 582, 590 (Cal. 1988) (in bank) (holding that unmarried cohabitant cannot state cause of action for loss of consortium).

couples.[45] Finally, the law provides unmarried couples little protection from discrimination in housing.[46]

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[45] Stacey L. Boyle, Note, *Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitors*, 14 HASTINGS CONST. L.Q. 111, 115-16 (1986). These benefits include "tax benefits, social security benefits, group insurance availability, and lower automobile insurance premiums." *Id.* at 115. *See generally* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32, 44-45 (Ct. App. 1991) (listing "many examples of the disfavored legal status of cohabitation without marriage" in California), *rev. granted*, 825 P.2d 766 (Cal. 1992); Grace G. Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981) (discussing claims of unmarried cohabitants to benefits and rights normally incidental to marriage); Zonana, *supra* note 26, at A1 (discussing report documenting widespread discrimination against unmarried people in Los Angeles).

[46] *See infra* part II.

An issue related to the legality of housing discrimination against unmarried couples is the legality of zoning ordinances that limit occupancy of "single-family" residences to persons related by blood, marriage, or adoption. Such ordinances have withstood the scrutiny of many courts, including the United States Supreme Court. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Rademan v. City & County of Denver, 526 P.2d 1325 (Colo. 1974) (en banc); Dinan v. Board of Zoning Appeals, 595 A.2d 864 (Conn. 1991); City of Ladue v. Horn, 720 S.W.2d 745 (Mo. Ct. App. 1986). *But see, e.g.*, City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980) (in bank) (holding that ordinance defining "family" as persons related by blood, marriage, or legal adoption or a group of five persons or less living together as a single housekeeping unit violated California Constitution); Charter Township of Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984) (holding that ordinance defining "family" as persons related by blood, marriage, or adoption and not more than one other unrelated person violated due process clause of Michigan Constitution); McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985) (holding that ordinance defining "family" as persons related by blood, marriage, or adoption or two persons not so related but both of whom are 62 years old or older violated due process clause of New York Constitution).

In most cases, these ordinances contain exceptions that allow for occupancy by a limited number of unrelated persons. *See, e.g., Village of Belle Terre*, 416 U.S. at 2 (ordinance allowed occupancy by two unrelated persons); Baer v. Town of Brookhaven, 537 N.E.2d 619, 619 (N.Y. 1989) (ordinance allowed occupancy by no more than four unrelated persons); *City of Santa Barbara*, 610 P.2d at 437-38 (ordinance allowed occupancy by no more than five unrelated persons). Thus, usually such an ordinance would not apply to an unmarried couple, unless the couple had enough children living with them to violate the limit in the ordinance. Moreover, courts have usually enforced these ordinances only against groups other than unmarried couples. *See, e.g., Rademan*, 526 P.2d at 1326 (ordinance applied to two married couples and two individuals living together); Town of Durham v.

B. The Problem of Housing Discrimination

Housing discrimination against unmarried couples takes many forms. Most commonly, a landlord refuses to rent a house or apartment to an unmarried couple.[47] Alternatively, a landlord may attempt to evict an existing tenant who allows a member of the opposite sex to move in.[48] Also, a public housing authority may deny public housing benefits to an unmarried couple.[49]

Usually, people discriminate against unmarried couples

White Enters., Inc., 348 A.2d 706, 707 (N.H. 1975) (ordinance applied to 7 to 10 students living together).

However, these ordinances have operated against unmarried couples in some instances. For example, in Missouri in 1986, the Eastern District Court of Appeals upheld such an ordinance when enforced against an unmarried couple with three children. *City of Ladue*, 720 S.W.2d at 747. In Colorado in 1984, the Denver Department of Zoning Administration attempted to enforce such an ordinance—labeled by many Denver residents the "living in sin" code—against an unmarried couple with no children. *See* Zavala v. City & County of Denver, 759 P.2d 664, 666-67 (Colo. 1988) (en banc); *Denver Zoning Fight Turns on Defining a Family*, N.Y. TIMES, Mar. 26, 1989, § 1, at 21. However, while the case was awaiting retrial on remand from the Colorado Supreme Court, the Denver City Council repealed the ordinance. *See id.*; *Denver Kills Law That Barred Homes With Unwed Couples*, N.Y. TIMES, May 3, 1989, at A24.

For other cases related to this issue, see Vitauts M. Gulbis, Annotation, *Validity of Ordinance Restricting Number of Unrelated Persons Who Can Live Together in Residential Zone*, 12 A.L.R.4th 238 (1982 & Supp. 1991); James L. Rigelhaupt, Jr., Annotation, *What Constitutes a "Family" Within Meaning of Zoning Regulation or Restrictive Covenant*, 71 A.L.R.3d 693 (1976 & Supp. 1991).

[47] *See, e.g.*, Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989) (policy against renting to unmarried couples); Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712 (Ct. App. 1982) (refusal to rent duplex to unmarried couple); State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (refusal to rent house to unmarried couple).

[48] *See, e.g.*, Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192 (Md. 1984) (threat to terminate housing co-op contract because of violation of contract term limiting occupancy to immediate family); Hudson View Properties v. Weiss, 450 N.E.2d 234 (N.Y. 1983) (attempt to evict tenant from apartment because of violation of lease term limiting occupancy to immediate family).

[49] *See, e.g.*, Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375 (Ct. App. 1976) (attempt to evict tenant from public housing unit because of violation of policy limiting occupancy to immediate family); Worcester Hous. Auth. v. Massachusetts Comm'n Against Discrimination, 547 N.E.2d 43 (Mass. 1989) (denial of applications for public housing and rental assistance payments to unmarried couples).

because they morally object to nonmarital cohabitation.[50] In some instances, the people who discriminate may claim a financial justification for their actions.[51] Courts, however, have consistently rejected the argument that legitimate business interests justify discrimination against unmarried couples.[52] Consequently, housing discrimination against unmarried couples almost always occurs because of a clash of personal values.[53]

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50 *See, e.g.*, Mister v. A.R.K. Partnership, 553 N.E.2d 1152 (Ill. App. Ct.) (policy against renting to unmarried couples based on religious belief that unmarried cohabitation is immoral), *appeal denied*, 561 N.E.2d 694 (Ill. 1990); State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (refusal to rent house to unmarried couple based on religious belief that living together outside of marriage is "sinful"); McFadden v. Elma Country Club, 613 P.2d 146 (Wash. Ct. App. 1980) (denial of country club lot to single woman planning to cohabit with man based on belief that nonmarital cohabitation is immoral).

51 *See, e.g.*, Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712 (Ct. App. 1982). In determining a couple's ability to pay rent, the landlords in *Hess* would aggregate a married couple's incomes but would not aggregate an unmarried couple's incomes. *Id.* at 714. The landlords claimed that legitimate business interests justified their practice because unmarried couples are not legally responsible for each other's debts. *Id.* at 715; *see also* Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566 (D.C. Cir. 1979) (refusal to aggregate incomes of unmarried couple for mortgage loan application).

52 The court in *Hess* held that no legitimate business interest justifies refusing to aggregate an unmarried couple's incomes if the landlord can require each party to assume personal liability for the full amount of the rent. 187 Cal. Rptr. at 715. The court in *Markham* held similarly where the lender of a mortgage loan could hold both members of the couple jointly and severally liable for the debt. 605 F.2d at 568-69. In neither case did the couple's unmarried status give the landlord or lender fewer rights in the event of nonpayment. *See id.* at 569; 187 Cal. Rptr. at 715.

53 This clash of personal values may raise First Amendment issues. Recently, landlords in several states have claimed that the First Amendment right to free exercise of religion allows them to refuse housing to unmarried couples. *See* Jerry DeMuth, *Landlords Reject Unmarried Couples on Religious Grounds*, WASH. POST, Oct. 21, 1989, at F14.

In State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990), the Minnesota Supreme Court split over whether a landlord with a sincere religious belief in the immorality of nonmarital cohabitation may discriminate against unmarried couples. A majority of the court found that the Minnesota Human Rights Act did *not* prohibit discrimination against unmarried couples. *Id.* at 3-8, 11; *see infra* notes 118-23 and accompanying text (discussing this aspect of *French*). Nevertheless, three justices went on to hold that the Minnesota constitutional guarantee of free exercise of religion protected the landlord anyway. 460 N.W.2d at 8-11. Three dissenting

In most of these clashes, the law offers no help to the unmar-

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justices concluded that the state constitution did not protect the landlord, *id.* at 11-21, while one concurring justice did not reach the constitutional issue, *id.* at 11 (Simonett, J., concurring in part).

More recently, the California Court of Appeal, Second District, held that the California Constitution allows a landlord to refuse to rent to an unmarried couple for religious reasons. Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *rev. granted*, 825 P.2d 766 (Cal. 1992); *see also* Henry Weinstein, *Rental Denial is Upheld on Religious Basis*, L.A. TIMES, Nov. 28, 1991, at A1 (newspaper account of *Donahue*). In *Donahue*, the landlords refused to rent to an unmarried couple because to do so "would compromise [the landlords'] sincerely held religious belief that fornication and its facilitation are sins." 2 Cal. Rptr. 2d at 33. The majority held that while the landlords violated the California fair housing law by refusing to rent, they were entitled to an exemption because "the state's statutory interest in protecting unmarried cohabiting couples from discrimination is not such a paramount and compelling state interest as to outweigh the [landlords'] legitimate assertion of their right to the free exercise of religion under the California state constitution." *Id.* A dissenting justice agreed that the landlords violated the state fair housing law, but disagreed on the constitutional exemption: "At the very least, I am compelled to conclude that whatever slight burden is placed on the [landlords'] free exercise of their religion is amply outweighed by our state's interest in providing nondiscriminatory access to housing and employment." *Id.* at 50 (Grignon, J., dissenting). The California Supreme Court granted review of *Donahue* on February 27, 1992, thus setting aside the appellate court's ruling. *See* Philip Hager, *Court to Rule on Refusal to Rent to Unwed Couple*, L.A. TIMES, Feb. 28, 1992, at B1.

Another case involving this same issue—Smith v. Fair Employment & Housing Commission, No. C007654—is currently pending before the California Court of Appeal, Third District. Telephone Interview with Court Clerk, California Court of Appeal, Third District (April 2, 1992); *see also* Richard Ek, *For Married Couples Only*, S.F. CHRON., May 20, 1990, This World, at 16 (newspaper account of *Smith*); Jim Haynes, *A Renter's Right to Fornicate*, CAL. LAW., Nov. 1989, at 34 (magazine article on *Smith*).

At least one critic has noted a "major flaw" in the *Donahue* decision: the court's presumption that an unmarried cohabiting couple will engage in sexual relations. *See* Weinstein, *supra*, at A1. As the dissent in *French* noted, the majority of the Minnesota Supreme Court made the same unwarranted presumption. *See French*, 460 N.W.2d at 12-13, 18-19 (Popovich, C.J., dissenting). In neither case did the facts known to the landlord indicate that sexual relations outside of marriage would occur on the rental property. Nor is it likely, at least in the California case, that the landlord could have inquired about intended sexual relations without violating the tenant's constitutional right to privacy. *See* Weinstein, *supra*, at A1. The *French* court's presumption of sexual activity is particularly troubling, because the court based its decision to deny protection to the unmarried couple on a public policy against fornication (i.e., sexual activity between unmarried persons). *See French*, 460 N.W.2d at 18-19 (Popovich, C.J., dissenting).

ried couple.[54] Despite the growing number of unmarried cohabitants,[55] neither Congress nor any state legislature has expressly prohibited housing discrimination against unmarried couples.[56] In a few instances, courts have extended the protection of existing statutes to unmarried couples, but these cases are rare.[57] Without significant changes in the law, most unmarried couples will continue to have no recourse when faced with housing discrimination.

II. Unmarried Couples and Fair Housing Law

A. Federal Law

Congress has never expressly prohibited housing discrimination against unmarried couples. A few courts, however, have interpreted federal law to protect unmarried couples from two specific types of housing discrimination: discrimination in credit transactions and discrimination in public housing. Beyond these two narrow areas, federal law offers unmarried couples no protection.

The Equal Credit Opportunity Act[58] prohibits discrimination in credit transactions on the basis of marital status.[59] In *Markham v.*

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54 *See infra* part II.

55 *See supra* notes 22-25 and accompanying text.

56 *See infra* notes 74-79 and accompanying text.

57 Only two federal courts, three state courts, and one state administrative agency have interpreted existing statutory or constitutional provisions to protect unmarried couples from housing discrimination. *See infra* notes 60-71, 86, 88-106 and accompanying text.

58 15 U.S.C. §§ 1691-1691f.

59 The pertinent part of the Act reads:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
>
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
>
> (2) because all or part of the applicant's income derives from any public assistance program; or
>
> (3) because the applicant has in good faith exercised any right under this chapter.

Id. § 1691(a).

As originally enacted, the Equal Credit Opportunity Act prohibited discrimination only on the basis of sex or marital status. *See* Equal Credit Opportunity Act, Pub. L. No. 90-321, § 701, *as added by* Pub. L. No. 93-495, § 503, 88 Stat. 1500, 1521 (1974). Congress added the bases of race, color, religion, national origin, and age by amendment in 1976. *See* Equal Credit

Colonial Mortgage Service Co.,[60] the District of Columbia Circuit Court of Appeals held that this marital status provision prohibited a lender from discriminating against an unmarried couple who had applied jointly for a mortgage.[61] The lender argued that Congress intended the "sex or marital status" provision to protect single and married women, not unmarried couples.[62] Nevertheless, the court held that the "plain meaning" of the Act encompassed unmarried couples as well.[63] Consequently, the Equal Credit Opportunity Act protects unmarried couples from discrimination in mortgage applications and other credit transactions in housing.[64]

Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251, 251 (1976).

60 605 F.2d 566 (D.C. Cir. 1979).

61 *Id.* at 569-70. In determining the couple's creditworthiness, the lender had refused to aggregate the couple's incomes. *Id.* at 568. Another federal statute, the Housing and Community Development Act of 1974, 12 U.S.C. § 1735f-5 (1989), required the lender to aggregate married couples' incomes. 605 F.2d at 569 & n.4. Thus, the lender had treated the unmarried couple differently than it would have treated a married couple. *Id.* at 569. The court held that this differential treatment constituted unlawful marital status discrimination: "We hold . . . that, under the Act Illinois Federal should have treated plaintiffs—an unmarried couple applying for credit jointly—the same as it would have treated them had they been married at the time." *Id.* at 570.

62 605 F.2d at 569. The lender argued that "it was not the Congressional purpose to require such an aggregation of the incomes of non-married applicants." *Id.* The lender contended that instead the main purpose of the Act "was to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit." *Id.*; *see also* Case Comment, *Protection of Unmarried Couples Against Discrimination in Lending Under the Equal Credit Opportunity Act:* Markham v. Colonial Mortgage Service Co., 93 HARV. L. REV. 430, 434 (1979) (citing Senate report indicating that Congress meant the Act to remedy problem of widespread discrimination against women in credit transactions).

63 605 F.2d at 569. According to the court, even if the main purpose of Congress was to protect single and married women, "granting such an assumption does not negate the clear language of the Act itself that discrimination against *any* applicant, with respect to *any* aspect of a credit transaction, which is based on marital status is outlawed." *Id.*

64 ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 29.4 (1991) (noting that Equal Credit Opportunity Act "covers applications for mortgages and other forms of credit in the housing field"). *Markham* is apparently the only federal case to discuss the application of the Equal Credit Opportunity Act to unmarried couples. *See generally* Joan Kirshberg, Annotation, *Discrimination Against Credit Applicant on Basis of*

Courts have also held that federal law protects unmarried couples from discrimination in public housing. In *Hann v. Housing Authority*,[65] a United States District Court held that the United States Housing Act of 1937[66] prohibited a public housing agency from categorically denying housing benefits to an unmarried couple.[67] Further, in *Atkisson v. Kern County Housing Authority*,[68] the

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Marital Status Under Equal Credit Opportunity Act (15 USCS §§ 1691 et seq.), 55 A.L.R. FED. 458 (1981 & Supp. 1991). Several state courts, however, have cited *Markham* for the proposition, in general, that anti-discrimination statutes with marital status provisions protect unmarried couples. *See* Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1202 n.7 (Alaska 1989); Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712, 714-15 (Ct. App. 1982); State by Cooper v. French, 460 N.W.2d 2, 13 (Minn. 1990) (Popovich, C.J., dissenting).

65 709 F. Supp. 605 (E.D. Pa. 1989).

66 42 U.S.C.A. §§ 1437-1437u.

67 709 F. Supp. at 610. The purpose of the United States Housing Act is to provide housing to "families of low income." 42 U.S.C.A. § 1437. In *Hann*, the Housing Authority for the City of Easton interpreted the term "family" to mean "two or more persons who will live together in the dwelling and are related by blood, marriage or adoption." 709 F. Supp. at 606. Consequently, when Cindy Hann and James Webster, an unmarried couple with two children, applied for housing assistance, the Authority denied their application. *Id.*

The United States District Court for the Eastern District of Pennsylvania held that the Authority's definition of "family" was impermissibly narrow. *Id.* at 610. The court noted that in 1977, the Department of Housing and Urban Development (HUD) had published a regulation defining "family" as "two or more persons sharing residency whose income and resources are available to meet the family's needs and who are either related by blood, marriage or operation of law, or have evidenced a stable family relationship." *Id.* at 607 (citing 24 C.F.R. § 812.2(d)(1) (1977) (amended repeatedly through 1989)). Though Congress had later disapproved this definition, the court found that the disapproval related only to providing public housing to homosexual couples. *Id.* Consequently, the court held that HUD regulations interpreting the United States Housing Act (USHA) prohibited the Authority from categorically denying benefits to unmarried couples:

> I hold today that the practice of categorically excluding unmarried couples from eligibility for low-income housing programs violates USHA. The defendants cannot arbitrarily exclude all applicants who are not related by blood, marriage or adoption from low-income housing. They are required to make individual determinations concerning whether applicants constitute a family unit.

Id. at 610.

68 130 Cal. Rptr. 375 (Ct. App. 1976).

California Court of Appeal, Fifth District, held that federal constitutional provisions prohibited a public housing authority from evicting a tenant for living in nonmarital cohabitation.[69] In each case, the housing authority had denied unmarried couples benefits by narrowly defining the word "family."[70] By invalidating these narrow definitions, the courts effectively prohibited discrimination against unmarried couples in public housing.[71]

Beyond the areas of credit and public housing, federal law does not protect unmarried couples from housing discrimination. The Fair Housing Act of 1968[72] prohibits discrimination in housing on the basis of race, color, religion, sex, familial status, national

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[69] *Id.* at 380-81. In *Atkisson*, the Kern County Housing Authority maintained a policy that prohibited "any and all low income public housing tenants from living with anyone of the opposite sex to whom the tenant is not related by blood, marriage, or adoption." *Id.* at 377. On the basis of this policy, the Authority attempted to evict a tenant and her six children because she was cohabiting with an unrelated adult male. *Id.*

The court of appeal invalidated the policy on several federal constitutional grounds. First, the court found that the policy "presume[d] immorality, irresponsibility and the demoralization of tenant relations from the fact of unmarried cohabitation." *Id.* at 380. The court held that such an irrebuttable presumption denied due process. *Id.* Second, the court found that the policy created a classification of cohabiting unrelated adults and that the classification "improperly assume[d] a connection with undesirable conduct associated with the class (e.g., demoralizing tenancy relations) and the conduct of the individual." *Id.* Consequently, the court found a violation of equal protection. *Id.* Third, the court found that because the policy could apply to "an unmarried couple with children of their own" and thus "effectively prevent one of the parents from living with and raising in a close and intimate relationship his or her own children," the policy invalidly infringed on the right to privacy. *Id.* at 381.

Although *Atkisson* predated the regulation at issue in *Hann*, the court also found that the policy violated a HUD circular dated December 17, 1968, which prohibited local housing authorities from automatically excluding any persons from tenancy solely because of their marital status. *Id.* at 379.

[70] In each case, the housing authority excluded unmarried couples from the definition of the term "family" because of the belief that nonmarital cohabitation is "immoral." *See Hann*, 709 F. Supp. at 606; *Atkisson*, 130 Cal. Rptr. at 377.

[71] Although neither court framed its holding in terms of prohibiting discrimination, in each case the court invalidated a rule presumptively denying public housing benefits to unmarried couples. *See Hann*, 709 F. Supp. at 610; *Atkisson*, 130 Cal. Rptr. at 379-82. Thus, under these cases, public housing authorities cannot deny benefits to couples solely because they are not married.

[72] 42 U.S.C. §§ 3601-3619, 3631.

origin, and, in some circumstances, handicap.[73] The Fair Housing Act does not, however, prohibit discrimination on the basis of marital status.[74] Consequently, the Fair Housing Act does not protect unmarried couples from housing discrimination.[75] Moreover, Congress has not attempted to extend the protection of the Fair Housing Act to unmarried couples.[76]

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[73] *Id.* The Fair Housing Act prohibits various acts of discrimination in the sale and rental of housing, including refusals to sell or rent, provision of inferior terms of rental or sale, and misrepresentations about the availability of a dwelling. *Id.* § 3604. The Act also prohibits discrimination in residential real estate transactions, which include loans and appraisals. *Id.* § 3605. Furthermore, the Act prohibits discrimination in the provision of brokerage services. *Id.* § 3606. Finally, the Act imposes criminal penalties for intimidation of and interference with persons complying with other provisions of the Act. *Id.* § 3631. For a comprehensive discussion of the coverage and operation of the Fair Housing Act, see generally SCHWEMM, *supra* note 64.

[74] SCHWEMM, *supra* note 64, § 11.1. The Fair Housing Act does prohibit discrimination on the basis of "familial status." 42 U.S.C. §§ 3604-3606 (as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620-22). The Act defines "familial status" as "one or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody of such individual or individuals." 42 U.S.C. § 3602(k). A report by the House Committee on the Judiciary concerning the Fair Housing Amendments Act of 1988 states that the committee did not intend the term "familial status" to include "marital status." H.R. REP. No. 711, 100th Cong., 2d Sess. 23, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184.

[75] Unmarried cohabitants *can* invoke the protection of the Fair Housing Act if they can prove that an act of discrimination based on their marital status disproportionately impacts one of the protected classifications. *See* Kushner, *supra* note 30, at 1106 (noting that refusal to rent to unmarried couples is "clearly not covered by [the Fair Housing Act] unless a statistical case can be mounted to demonstrate that such marital status rules carry a disproportionate racial, ethnic, religious, or gender-based impact").

[76] *See id.* at 1107 ("While numerous state and local laws prohibit marital status bias, no serious effort has been mounted to expand Title VIII coverage." (footnote omitted)).

Attempts have been made to extend the Fair Housing Act to protect homosexuals. *See, e.g.*, H.R. 1430, 102d Cong., 1st Sess. § 3 (1991) (bill prohibiting discrimination in housing, employment, and public accommodations on the basis of "affectional or sexual orientation"), *reprinted in* 137 CONG. REC. H1728-29 (daily ed. Mar. 13, 1991); S. 47, 101st Cong., 1st Sess. §§ 7-8 (1989) (same), *reprinted in* 135 CONG. REC. S340-41 (daily ed. Jan. 25, 1989); S. 464, 100th Cong., 1st Sess. §§ 7-8 (1987) (same), *reprinted in* 133 CONG. REC. S1791 (daily ed. Feb. 4, 1987). No equivalent attempts have been made to protect unmarried heterosexual couples, however.

B. State Law

Like Congress, the state legislatures have never expressly offered unmarried couples any protection from housing discrimination.[77] Forty-seven states and the District of Columbia have enacted fair housing laws.[78] None of these laws, however,

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[77] *See infra* note 79 and accompanying text. Presently, only four states offer protection to unmarried couples from housing discrimination. *See infra* note 86 (citing cases from Alaska, California, Massachusetts, and New Jersey).

[78] *See* ALA. CODE §§ 24-8-1 to -15 (Supp. 1991); ALASKA STAT. §§ 18.80.010 to .300 (1991); ARIZ. REV. STAT. ANN. §§ 41-1491 to -1491.36 (1992); CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1992); COLO. REV. STAT. ANN. §§ 24-34-501 to -510 (West 1990 & Supp. 1991); CONN. GEN. STAT. ANN. §§ 46a-51 to -99 (West 1986 & Supp. 1991); DEL. CODE ANN. tit. 6, §§ 4601-4613 (1975 & Supp. 1990); D.C. CODE ANN. §§ 1-2501 to -2557 (1987 & Supp. 1991); FLA. STAT. ANN. §§ 760.20 to .37 (West 1986 & Supp. 1992); GA. CODE ANN. §§ 99-4901 to -4924 (Harrison 1990); HAW. REV. STAT. §§ 515-1 to -20 (1985 & Supp. 1990); IDAHO CODE §§ 67-5901 to -5912 (1989 & Supp. 1991); ILL. ANN. STAT. ch. 68, ¶¶ 1-101 to -103, 3-101 to -106 (Smith-Hurd 1989 & Supp. 1991); IND. CODE ANN. §§ 22-9.5-1-1 to -10-1 (West 1991 & Supp. 1991); IOWA CODE ANN. §§ 601A.1 to .19 (West 1988 & Supp. 1991); KAN. STAT. ANN. §§ 44-1001 to -1044 (1986 & Supp. 1990); KY. REV. STAT. ANN. §§ 344.010 to .990 (Michie/Bobbs-Merrill 1983 & Supp. 1990); LA. REV. STAT. ANN. §§ 51:2231 to :2265 (West Supp. 1991); ME. REV. STAT. ANN. tit. 5, §§ 4581-4583 (West Supp. 1991); MD. ANN. CODE art. 49B, §§ 19-39 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 151B, §§ 1-10 (West 1982 & Supp. 1991); MICH. COMP. LAWS §§ 37.2501 to .2507 (1981) (MICH. STAT. ANN. §§ 3.548(501) to (507) (Callaghan 1990)); MINN. STAT. ANN. §§ 363.01 to .15 (West 1991 & Supp. 1992); MO. ANN. STAT. §§ 213.010 to .126 (Vernon Supp. 1992); MONT. CODE ANN. §§ 49-2-101 to -602 (1991); NEB. REV. STAT. §§ 20-101 to -125 (1987 & Supp. 1990); NEV. REV. STAT. §§ 118.010 to .120 (1985); N.H. REV. STAT. ANN. §§ 354-A:1 to :14 (1984 & Supp. 1991); N.J. STAT. ANN. §§ 10:5-1 to -42 (West 1976 & Supp. 1991); N.M. STAT. ANN. §§ 28-1-1 to -19 (Michie 1991); N.Y. EXEC. LAW §§ 290-301 (McKinney 1982 & Supp. 1992); N.C. GEN. STAT. §§ 41A-1 to -10 (1990); N.D. CENT. CODE §§ 14-02.4-01 to -21 (1991); OHIO REV. CODE ANN. §§ 4112.01 to .99 (Anderson 1991); OKLA. STAT. ANN. tit. 25, §§ 1451-1453 (West 1987 & Supp. 1992); OR. REV. STAT. §§ 659.010 to .990 (1989 & Supp. 1990); PA. STAT. ANN. tit. 43, §§ 951-963 (1991); R.I. GEN. LAWS §§ 34-37-1 to -11 (1984 & Supp. 1991); S.C. CODE ANN. §§ 31-21-10 to -150 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. §§ 20-13-1 to -56 (1987 & Supp. 1991); TENN. CODE ANN. §§ 4-21-601 to -607 (1985 & Supp. 1991); TEX. REV. CIV. STAT. ANN. art. 1f (West Supp. 1992); UTAH CODE ANN. §§ 57-21-1 to -10 (1990); VT. STAT. ANN. tit. 9, §§ 4501-4507 (Supp. 1991); VA. CODE ANN. §§ 36-96.1 to .23 (Michie Supp. 1991); WASH. REV. CODE ANN. §§ 49.60.010 to .330 (West 1990); W. VA. CODE §§ 5-11-1 to -19 (1990 & Supp. 1991); WIS. STAT. ANN. § 101.22

expressly prohibits discrimination against unmarried couples.[79]

In twenty-one states and the District of Columbia, the fair housing laws do prohibit discrimination on the basis of "marital status."[80] In most of these states, however, the legislatures failed to

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(West 1988 & Supp. 1991). Only Arkansas, Mississippi, and Wyoming have not enacted state fair housing laws.

These state fair housing laws prohibit many types of discriminatory acts. For instance, the California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12996, makes it unlawful for "the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such person." CAL. GOV'T CODE § 12955(a). Under the Act, "discrimination" includes

> refusal to sell, rent, or lease housing accommodations; includes refusal to negotiate for the sale, rental, or lease of housing accommodations; includes representation that a housing accommodation is not available for inspection, sale, or rental when such housing accommodation is in fact so available; includes any other denial or withholding of housing accommodations; includes provision of inferior terms, conditions, privileges, facilities, or services in connection with such housing accommodations; includes the cancellation or termination of a sale or rental agreement; and includes the provision of segregated or separated housing accommodations.

Id. § 12927(c).

[79] State fair housing laws prohibit discrimination on various bases. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 41-1491.14 to .21 (1992) (prohibiting discrimination based on race, color, religion, sex, handicap, familial status, and national origin); CAL. GOV'T CODE § 12955 (West 1980) (prohibiting discrimination based on race, color, religion, sex, marital status, national origin, and ancestry); WIS. STAT. ANN. § 101.22 (West 1988) (prohibiting discrimination based on sex, race, color, handicap, sexual orientation, religion, national origin, sex or marital status of the person maintaining a household, lawful source of income, age, and ancestry). No state fair housing law, however, specifically includes "nonmarital cohabitation" as a prohibited basis of discrimination.

[80] *See* ALASKA STAT. § 18.80.240 (1991); CAL. GOV'T CODE § 12955 (West 1980); COLO. REV. STAT. ANN. § 24-34-502 (West 1990 & Supp. 1991); CONN. GEN. STAT. ANN. § 46a-64c (West Supp. 1991); DEL. CODE ANN. tit. 6, § 4603 (1975 & Supp. 1990); D.C. CODE ANN. § 1-2515 (1987); HAW. REV. STAT. § 515-3 (Supp. 1990); ILL. ANN. STAT. ch. 68, ¶¶ 1-103, 3-102 (Smith-Hurd Supp. 1991); MD. ANN. CODE art. 49B, § 22 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982 & Supp. 1991); MICH. COMP. LAWS § 37.2502 (1981) (MICH. STAT. ANN. § 3.548 subd. 2 (Callaghan 1990)); MINN. STAT. ANN. § 363.03(2) (West 1991); MONT. CODE ANN. § 49-2-305 (1991); N.H. REV. STAT. ANN. § 354-A:8(V) (1984 & Supp. 1991); N.J. STAT. ANN. § 10:5-12(g)-(h) (West Supp. 1991); N.Y. EXEC. LAW § 296(5) (McKinney 1982 & Supp. 1992); N.D. CENT. CODE § 14-02.4-12 (1991)

indicate whether they intended to protect unmarried couples by using the term "marital status." In Connecticut and Oregon, the legislatures specifically indicated that they did *not* intend to protect unmarried couples.[81] Elsewhere, the legislatures left application of the term "marital status" to unmarried couples uncertain. The District of Columbia, Illinois, Maryland, and Minnesota define "marital status,"[82] but the definitions do not expressly

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("status with respect to marriage"); OR. REV. STAT. § 659.033 (Supp. 1990); R.I. GEN. LAWS § 34-37-4 (Supp. 1991); VT. STAT. ANN. tit. 9, § 4503 (Supp. 1991); WASH. REV. CODE ANN. § 49.60.222 (West 1990); WIS. STAT. ANN. § 101.22 (West 1988 & Supp. 1991) ("marital status of the person maintaining a household").

In addition to state laws, many municipal ordinances prohibit housing discrimination. *See* SCHWEMM, *supra* note 64, at 30-1 (stating that "many localities have some form of fair housing law"). Some of these ordinances contain marital status provisions. *See, e.g.*, Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989) (action for violation of marital status provision of Alaska fair housing law and Anchorage fair housing ordinance); Wolinksy v. Kadison, 449 N.E.2d 151 (Ill. App. Ct. 1983) (action for violation of sex and marital status provision of Chicago fair housing ordinance); Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745 (Md. Ct. Spec. App. 1981) (action for violation of marital status provision of county fair housing ordinance).

Some states whose fair housing laws do not include marital status provisions have enacted other statutes that may prohibit certain forms of housing discrimination based on marital status. *See, e.g.*, FLA. STAT. ANN. § 420.605(5)(i)(1) (West Supp. 1992) (prohibiting marital status discrimination by recipient of loan under "Affordable Housing Loan Program"); NEB. REV. STAT. § 71-1536(b) (1990) (prohibiting marital status discrimination by housing authorities).

[81] The Connecticut statute contains the following limitation: "The provisions of this section with respect to the prohibition of discrimination on the basis of marital status shall not be construed to prohibit the denial of a dwelling to a man or a woman who are both unrelated by blood and not married to each other." CONN. GEN. STAT. ANN. § 46a-64c(b)(2) (West Supp. 1991).

The Oregon statute stipulates that the prohibition against discrimination on the basis of marital status does not apply where its application "would necessarily result in common use of bath or bedroom facilities by unrelated persons of opposite sex." OR. REV. STAT. § 659.033(5) (Supp. 1990); *see* 38 Op. Or. Att'y Gen. 181 (1976) (concluding that landlord may refuse to rent apartment to unmarried couple based on this language).

[82] In the District of Columbia, " '[m]arital status' means the state of being married, single, divorced, separated, or widowed and the usual conditions associated therewith, including pregnancy or parenthood." D.C. CODE ANN. § 1-2502(17) (1987). The Illinois Human Rights Act defines "marital status" as "the legal status of being married, single, separated,

mention unmarried couples.[83] In the remaining sixteen jurisdictions, the legislatures gave no clue at all about whether the term "marital status" applies to unmarried couples.[84]

Because most of the state legislatures have failed to specify whether the term "marital status" protects unmarried couples, the state courts have had to resolve the question.[85] Courts in

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divorced or widowed." ILL. ANN. STAT. ch. 68, ¶ 1-103(J) (Smith-Hurd Supp. 1991). In Maryland, " '[m]arital status' means the state of being single, married, separated, divorced, or widowed." MD. ANN. CODE art. 49B, § 20(n) (Supp. 1991). Finally, under the Minnesota Human Rights Act, "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." MINN. STAT. ANN. § 363.01(24) (West 1991).

A few states define "marital status" for purposes of employment discrimination, but not housing discrimination. *See, e.g.*, WIS. STAT. ANN. § 111.32(12) (West 1988) (defining "marital status" as "the status of being married, single, divorced, separated or widowed" in fair employment law); CAL. CODE REGS. tit. 2, § 7292.1 (1990) (defining "marital status" as "[a]n individual's state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state" in regulations governing employment discrimination).

[83] In Illinois, the Second District Court of Appeals found that the statutory definition of "marital status" did not "dispositively determine" whether the fair housing law prohibits a landlord from refusing to rent to unmarried couples. Mister v. A.R.K. Partnership, 553 N.E.2d 1152, 1156 (Ill. App. Ct.), *appeal denied*, 561 N.E.2d 694 (Ill. 1990).

In Minnesota, the state supreme court adjudicated a similar refusal to rent to an unmarried couple in State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990). *French* arose, however, before the legislative definition of "marital status" became effective; thus, the court held that the definition did not apply. *Id.* at 4 & n.2. Nevertheless, the court indicated that the definition excluded unmarried couples from protection: "The plain language of this new definition shows that, in non-employment cases, the legislature intended to address only the status of an *individual*, not an individual's relationship with a spouse, fiancé, fiancée, or other domestic partner." *Id.* at 6.

[84] The fair housing laws in Alaska, California, Colorado, Delaware, Hawaii, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Vermont, Washington, and Wisconsin do not define "marital status" or otherwise refer to the application of the term to unmarried couples.

[85] *See generally* Caroll J. Miller, Annotation, *What Constitutes Illegal Discrimination Under State Statutory Prohibition Against Discrimination in Housing Accommodations on Account of Marital Status*, 33 A.L.R.4th 964 (1984 & Supp. 1991) (listing relevant cases).

Alaska, California, and Massachusetts and the Division of Civil Rights in New Jersey have held that the term "marital status" *does* protect unmarried couples from discrimination.[86] In contrast, courts in Illinois, Maryland, Minnesota, New York, and Washington have held that the term "marital status" *does not* protect unmarried couples.[87] A closer examination of how these courts have approached this issue reveals the inadequacy of current "marital status" provisions and the need for new legislation to protect unmarried couples from housing discrimination.

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[86] *See* Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989) (landlord's policy against renting to unmarried couples violated state and municipal prohibitions against discrimination based on marital status); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991) (refusal to rent apartment to unmarried couple violated state prohibition on marital status discrimination in housing), *rev. granted*, 825 P.2d 766 (Cal. 1992); Hess v. Fair Employment & Hous. Comm'n, 187 Cal. Rptr. 712 (Ct. App. 1982) (refusal to rent duplex to unmarried couple violated statute prohibiting housing discrimination based on marital status); Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375 (Ct. App. 1976) (policy prohibiting occupancy of public housing by unmarried couple violated statute prohibiting housing discrimination on basis of marital status); Worcester Hous. Auth. v. Massachusetts Comm'n Against Discrimination, 547 N.E.2d 43 (Mass. 1989) (denial of public housing benefits to unmarried couples violated statute prohibiting housing discrimination based on marital status); Kurman v. Fairmount Realty Corp., 8 N.J. Admin. 110 (1985) (refusal to rent apartment to two unmarried persons of the opposite sex violated statute prohibiting housing discrimination based on marital status).

[87] *See* Mister v. A.R.K. Partnership, 553 N.E.2d 1152 (Ill. App. Ct.) (refusal to rent to unmarried persons of opposite sex not prohibited by Illinois Human Rights Act), *appeal denied*, 561 N.E.2d 694 (Ill. 1990); Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192 (Md. 1984) (prohibition against marital status discrimination did not preclude housing cooperative from restricting occupancy to persons in member's immediate family); Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745 (Md. Ct. Spec. App. 1981) (refusal of housing cooperative to accept unmarried couple's application did not violate county ordinance prohibiting housing discrimination based on marital status); State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (refusal to rent to unmarried woman because of intended nonmarital cohabitation did not violate the Minnesota Human Rights Act); Hudson View Properties v. Weiss, 450 N.E.2d 234 (N.Y. 1983) (landlord did not discriminate on basis of marital status by enforcing lease restriction limiting occupancy to tenant's immediate family); McFadden v. Elma Country Club, 613 P.2d 146 (Wash. Ct. App. 1980) (denial of woman's application for membership because of intended nonmarital cohabitation did not constitute marital status discrimination).

1. Cases Interpreting the Term "Marital Status" to Protect Unmarried Couples

The courts have interpreted "marital status" provisions to protect unmarried couples in only a few instances. In these cases, most courts have used a "plain meaning" approach.[88] By finding that the plain meaning of the term "marital status" includes unmarried couples, these courts have avoided arguments based on public policy and legislative intent.[89]

For example, in *Worcester Housing Authority v. Massachusetts Commission Against Discrimination*,[90] the Supreme Judicial Court of Massachusetts held that the state fair housing law prohibited a public housing authority from denying benefits to three unmarried couples.[91] The court reached this conclusion by relying on "the reasonably straightforward language of the statute itself."[92] Simi-

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88 *See, e.g.*, Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1201 (Alaska 1989) ("When interpreting an ordinance or a statutory provision, words are given their ordinary and common meaning."); Worcester Hous. Auth. v. Massachusetts Comm'n Against Discrimination, 547 N.E.2d 43, 45 (Mass. 1989) ("[T]he words of a statute . . . are to be given their ordinary meaning . . . .").

Under the "plain meaning rule," a court will not resort to extrinsic sources when the statutory language is unambiguous. *See Worcester*, 547 N.E.2d at 45 ("[W]hen the words of the statute taken in their ordinary sense produce a workable result, there is no need to resort to extrinsic aids to interpret the legislation."); Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975) ("The plain meaning rule has many formulations, but its essential aspect is a denial of the need to 'interpret' unambiguous language.").

The problem with this approach, as Professor Sunstein has noted, is that "the meaning of words (whether 'plain' or not) depends on both *culture* and *context*. Statutory terms are not self-defining, and words have no meaning before or without interpretation." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416 (1989).

89 *See infra* note 96.

90 547 N.E.2d 43 (Mass. 1989).

91 *Id.* at 44-45. The Worcester Housing Authority had denied each couple's application "because the man and the woman were not married to each other, and, consequently, could not meet the authority's definition of a 'family.' " *Id.* The Authority defined a family as " 'two or more persons sharing a residence whose income and resources are available to meet the family needs and who [also] are related by blood, marriage or operation of law.' " *Id.* at 45 n.2 (alteration in original).

92 *Id.* at 45. The supreme court held that the "plain words of the provisions [in the fair housing law] prohibit the authority from maintaining its policy." *Id.* at 44. The court noted that "[t]he term 'marital status' is

larly, in *Foreman v. Anchorage Equal Rights Commission*,[93] the Alaska Supreme Court held that the state fair housing law prohibited a landlord from refusing to rent an apartment to an unmarried couple.[94] The court relied almost exclusively on the language of the fair housing law to find that the term "marital status" protected the couple.[95] In both of these cases, the courts rejected arguments based on public policy and legislative intent in favor of the "plain meaning" of the statutory language.[96]

In California, two courts took a similar approach. In 1976, in

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commonly used with reference to both individuals and couples in inquiring about their situation with respect to marriage." *Id.* at 45. The court noted also that the fair housing statute expressly prohibited discrimination against " '*any person or group of persons*.' " *Id.* (quoting MASS. GEN. LAWS ANN. ch. 151B, § 4). Thus, the court concluded that the statute "reaches, and prevents, discrimination in housing against, among others, unmarried couples." *Id.*

[93] 779 P.2d 1199 (Alaska 1989).

[94] *Id.* at 1203. A couple who owned several rental properties maintained a policy limiting occupancy of a single rental unit to " 'a single legal entity' or a family unit related by blood or marriage." *Id.* at 1200. The landlords, therefore, refused to rent an apartment to an unmarried couple and their child when the landlords learned that the couple were not married. *Id.*

[95] *Id.* at 1201-02. The landlords argued that the "marital status" provisions of the state fair housing statute and a municipal fair housing ordinance did not prohibit discrimination against a couple. *Id.* at 1201. The landlords based their argument on Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745 (Md. Ct. Spec. App. 1981). *See* 779 P.2d at 1201; *infra* notes 108-12 and accompanying text (discussing *Prince George's County*).

The Alaska Supreme Court disagreed with the landlords. 779 P.2d at 1201-02. The court noted that while both the statute and the ordinance prohibited discrimination against a "person," both the statute and the ordinance defined a "person" as "one or more individuals." *Id.* at 1201. Thus, the court concluded that these marital status provisions were "intended to prevent discrimination against more than one person" and that the statute and the ordinance applied to unmarried couples. *Id.* at 1202-03.

It is interesting to note that the Alaska statute in question excepts housing for "singles" only or "married couples" only from the prohibition of discrimination based on marital status. *See* ALASKA STAT. § 18.80.240 (1991). Thus, landlords in Alaska can lawfully discriminate against unmarried couples if they do so consistently by providing housing for one of the selected classes of persons. The landlords in *Foreman* did not fall within this exception because they rented to *all* classes of persons, except unmarried couples. *See* 779 P.2d at 1203.

[96] In *Worcester*, the Supreme Judicial Court of Massachusetts rejected "numerous" arguments of the Worcester Housing Authority based on "the authority's view of how the statutory language should be interpreted,

Atkisson v. Kern County Housing Authority,[97] the Fifth District Court of Appeal held that the state fair housing law prohibited a public housing authority from maintaining a policy against nonmarital cohabitation.[98] With virtually no discussion, the court relied on the statutory language to reach this conclusion.[99] Six years later,

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reference to decisions from other jurisdictions and a discussion of what the authority perceives to be good public policy." 547 N.E.2d at 45.

In *Foreman*, the Alaska Supreme Court rejected an argument based on a repealed criminal statute prohibiting cohabitation. *See* 779 P.2d at 1202. When the Alaska legislature amended the fair housing law in 1975 to add "marital status," cohabitation was a crime, punishable " 'by a fine of not more than $500, or by imprisonment in the penitentiary for not less than one year nor more than two years, or by both.' " *Id.* at 1202 & n.6 (quoting ALASKA STAT. § 11.40.040 (repealed 1978)). On the basis of this statute, the landlords argued that the legislature could not have intended to protect unmarried couples by using the term "marital status." *Id.* at 1202. The supreme court noted, however, that before the Alaska legislature amended the fair housing law, it had declared the criminal code " 'vastly out of step with constitutional and social developments of recent decades.' " *Id.* (quoting S. Con. Res. 5, 9th Leg., 1st Sess., *reprinted in* CRIMINAL CODE REVISION, ALASKA CRIMINAL CODE REVISION PRELIMINARY REPORT 2 (1976)).

Upon comprehensive revision of the code in 1978, the legislature repealed the statute prohibiting cohabitation. *Id.* Thus, the criminal prohibition against cohabitation existed alongside the civil prohibition against marital status discrimination for three years. Nevertheless, the court concluded that the existence of this outdated criminal sanction against cohabitation did not reflect any intent of the legislature to deny protection to unmarried couples. *Id.* Specifically, the court said: "Given the intent [to protect couples] so plainly reflected in the language of [the fair housing law], we think it would be manifestly unreasonable to limit the effect of these modern, remedial provisions by reference to an outdated criminal statute which was repealed eleven years ago." *Id.*

In 1985, a New Jersey administrative law judge, using a similar rationale, rejected an argument similar to the one made in *Foreman*:

> It seems to me that the attempt to connect up the "marital status" phrase in the Law Against Discrimination to the [fornication and cohabitation] statutes is of no avail . . . . The Courts of this State have stressed . . . that the statute is remedial in nature and therefore is to be liberally construed in order to insure that its salutary public purposes are to be faithfully carried out.

Kurman v. Fairmount Realty Corp., 8 N.J. Admin. 110, 115-16 (1985).

[97] 130 Cal. Rptr. 375 (Ct. App. 1976).

[98] *Id.* at 381-82. For further discussion of *Atkisson*, see *supra* note 69.

[99] *See* 130 Cal. Rptr. at 381-82. The court acknowledged that the legislature had not amended the fair housing law to prohibit marital status discrimination until after the case went to trial. *Id.* at 381. Nevertheless, the court concluded:

in *Hess v. Fair Employment & Housing Commission*,[100] the First District Court of Appeal relied on *Atkisson* in holding that the state fair housing law prohibited a landlord from refusing to rent a duplex to an unmarried couple.[101] In neither *Atkisson* nor *Hess* did the courts even mention public policy, legislative intent, or any need to interpret the meaning of "marital status."

In 1991, however, in *Donahue v. Fair Employment & Housing Commission*,[102] the Second District Court of Appeal found it necessary to determine the legislative intent behind the term "marital status."[103] The court found that the term was ambiguous in its application to unmarried couples.[104] Consequently, the court looked to the history of the marital status provision to determine

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> [T]he legislation as it reads at this time must be given effect as a general policy statement related to public housing as expressed by the State of California and is applicable to the case under consideration. *On its face* the Act prohibits evictions from or denials of publicly assisted housing on the basis of marital status, and thus makes unlawful respondents' policy in this case.

Id. (emphasis added).

100 187 Cal. Rptr. 712 (Ct. App. 1982).

101 The court simply stated that "[t]he California Fair Employment and Housing Act prohibits discrimination based on marital status, including that against unmarried couples." *Id.* at 714 (footnote omitted) (citing *Atkisson*). The court did go on to respond to and reject the landlords' claim that they had a legitimate financial interest in refusing to rent to unmarried couples. *Id.* at 715; *see supra* notes 51-52 (discussing this aspect of *Hess*).

In 1985, a New Jersey administrative law judge also relied on *Atkisson* in determining that the New Jersey fair housing law prohibited landlords from refusing to rent to unmarried couples. *See* Kurman v. Fairmount Realty Corp., 8 N.J. Admin. 110, 115 (1985).

102 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *rev. granted*, 825 P.2d 766 (Cal. 1992).

103 *Id.* at 36. In *Donahue*, the landlords had refused to rent an apartment to an unmarried couple because they believed that to do so would aid the commission of a mortal sin. *Id.* at 33 & n.1.

104 *Id.* at 36. The court stated:

> [T]he operative phrase . . . , "marital status," is susceptible of more than one reasonable interpretation. The phrase may be narrowly interpreted . . . to denote the classification of people as either a married couple or as a single, unmarried person. The phrase may also be more broadly construed . . . to denote the classification of people as either a married couple or as unmarried, whether living alone or cohabiting with another person.

Id.

whether the legislature intended to protect unmarried couples.[105] The court concluded that the legislature did so intend and that the refusal to rent to an unmarried couple was prohibited by the fair housing law.[106]

2. Cases Interpreting the Term "Marital Status" Not to Protect Unmarried Couples

The majority of courts that have relied on more than statutory language have refused to interpret the term "marital status" to protect unmarried couples. These courts have employed a variety of extrinsic aids to interpret the term "marital status."[107] In each case, however, the court has found some reason to deny unmarried couples protection from housing discrimination.

In *Prince George's County v. Greenbelt Homes, Inc.*,[108] the Maryland Court of Special Appeals held that a municipal fair housing ordinance did not prohibit a housing cooperative from denying membership to an unmarried couple.[109] The court looked at the

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[105] *Id.* at 36-38. First, the court noted that after *Atkisson*, the legislature repealed and reenacted the state fair housing law without making any substantive change to reverse the effect of *Atkisson*'s interpretation of "marital status." *Id.* at 37. Second, the court relied on the definition of "person" in the statute as "one or more individuals," as had the courts in Massachusetts and Alaska. *Id.*; *see supra* notes 90-96 and accompanying text (discussing *Worcester* and *Foreman*). Third, the court noted that California had never criminalized unmarried cohabitation. 2 Cal. Rptr. 2d at 37-38. Finally, the court relied on the statutory exception of college and university housing for married students from the prohibition against discrimination based on marital status, noting that "when a statute contains an exception to a general rule, no other exceptions should be implied." *Id.* at 38.

[106] 2 Cal. Rptr. 2d at 33. The court went on to hold that the landlords were entitled to a constitutional exemption from the fair housing law because of their "sincerely held religious belief that fornication and its facilitation are sins." *Id.* at 33, 38-46; *see supra* note 53 (discussing this aspect of *Donahue*). The *Donahue* decision was set aside, however, when the California Supreme Court granted review on February 27, 1992. *See* Hagar, *supra* note 53, at B1.

[107] For example, some courts have looked beyond the statutory language to criminal statutes prohibiting cohabitation and fornication. *See infra* notes 116, 122, 132 and accompanying text. Also, some courts have looked at the application of the term "marital status" in employment discrimination cases. *See infra* notes 121-23, 126-28, 134-35 and accompanying text. Further, some courts have looked at the statutory renouncement of common law marriage. *See infra* notes 112, 116 and accompanying text.

[108] 431 A.2d 745 (Md. Ct. Spec. App. 1981).

[109] *Id.* at 749. In *Prince George's County*, a housing cooperative (Greenbelt)

statutory language of the ordinance to determine whether the ordinance protected the couple.[110] The court concluded that the term "marital status" protected unmarried *individuals*, but not unmarried *couples*.[111] Yet, to reach this conclusion, the court interpreted the statutory language in light of what it perceived to be a public policy against nonmarital cohabitation.[112]

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maintained a policy allowing only members and their immediate family to occupy its units. *Id.* at 746. Greenbelt's definition of "family" did not include unmarried partners. *Id.* Accordingly, Greenbelt denied joint membership to the unmarried couple. *Id.*

[110] *Id.* at 747-48. Based on its interpretation of the county fair housing ordinance, the Human Relations Commission for Prince George's County had ordered Greenbelt to revise its membership policies to eliminate the provisions that had excluded the couple. *Id.* at 747. When the Commission sought to enforce its order in circuit court, the circuit court held that " '[p]eople who are not married to one another do not have a marital status and for that reason it is clear that the legislative body [the County Council] did not intend for [the fair housing ordinance] to apply [to unmarried couples].' " *Id.* (quoting circuit court opinion). The Commission appealed this ruling to the Court of Special Appeals, which affirmed. *Id.* at 749.

[111] *Id.* at 748. The court noted that neither member of the couple involved was discriminated against "*individually* because of his or her *individual* marital status." *Id.* Moreover, the court concluded that "[w]hile each separately had a marital status, collectively they did not." *Id.*

[112] *See id.* In determining that unmarried couples do not have a marital status, the court noted:

> Only marriage as prescribed by law can change the marital status of an individual . . . . The law of Maryland does not recognize common law marriages or other unions of two or more persons . . . as legally bestowing upon two people a legally cognizable marital status. Such relationships are simple illegitimate unions unrecognized, or in some instances condemned, by the law. That public policy message rings out from the procedural prerequisites for legitimating "marriages" and the statutory condemnation of other relationships . . . .

Id. (citations omitted).

In Maryland Commission on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192 (Md. 1984), the Maryland Court of Appeals relied in part on *Prince George's County* in holding that the "marital status" provision of the state fair housing law also did not protect unmarried couples. *Id.* at 1196-97. *Maryland Commission* involved the same housing cooperative (Greenbelt) and the same policy involved in *Prince George's County*. *See supra* note 109.

In *Maryland Commission*, Greenbelt had threatened to terminate the ownership contract of a couple whose daughter (Kuhr) was living in the couple's unit with a man to whom she was not married (Searight), in violation of Greenbelt's policy. 475 A.2d at 1193. After the Maryland Commission on Human Relations (the Commission) ordered Greenbelt to stop discriminating against Kuhr, Greenbelt filed a petition for review in circuit court. *Id.* at

In *Mister v. A.R.K. Partnership*,[113] the Illinois Appellate Court, Second District, held that the state fair housing law did not prohibit a landlord from refusing to rent apartments to two unmarried couples.[114] The court found the fair housing law ambiguous in its application to unmarried couples.[115] Consequently, for aid

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1194. On appeal from a decision in favor of Greenbelt, the Maryland Court of Appeals found that the marital status provision of the fair housing law "means precisely what it says: no *person* shall be discriminated against in regard to housing because of *that person's* marital status." *Id.* at 1196 (emphasis added). The court continued: "As we see it, 'marital status' connotes whether *one* is married or not married." *Id.* (emphasis added). The court went on to conclude that Greenbelt's policy of limiting occupancy to a member and her immediate family did not discriminate on the basis of marital status. *Id.* at 1198. The court stated:

> Here, the fact that Kuhr was not married to Mr. Searight was irrelevant. It would have made no difference under the circumstances of this case if Searight had been Kuhr's best girlfriend, her favorite aunt, her destitute cousin, or her infant nephew. The point is that no one of these people, including Mr. Searight, falls within the defined class of family members in the regulation.

Id. at 1196. In response to the Commission's argument that the fair housing law prohibited differential treatment of married and unmarried couples, the court of appeals quoted from *Prince George's County*. *See id.* at 1196-97. (For the passage from *Prince George's County* quoted by the court in *Maryland Commission*, see *supra* this note.)

The dissent in *Maryland Commission* agreed with the majority's interpretation of the meaning of "marital status" in the fair housing law, but disagreed with their result. *Id.* at 1198-99 (Davidson, J., dissenting). The dissent found the discrimination unlawful because under Greenbelt's policy, Kuhr was allowed to live in the unit if she was married to Searight but not if she was not married to him. *Id.*

Neither the majority nor the dissent discussed the definition of "person" in the Maryland statute, even though the Maryland statute, like the Alaska statute, defines "person" to include "one or more individuals." *See* MD. ANN. CODE art. 49B, § 20(o) (Supp. 1991); *supra* note 95.

One critic has suggested that the rationale employed by the Maryland courts—that couples do not have a marital status—"seems to owe more to Lewis Carroll or Joseph Heller than to Holmes or Frankfurter." Peter B. Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 94 n.293 (1988).

113 553 N.E.2d 1152 (Ill. App. Ct.), *appeal denied*, 561 N.E.2d 694 (Ill. 1990).

114 *Id.* at 1159.

115 *Id.* at 1156. The couples argued that the landlord's policy of refusing to rent to unmarried couples of the opposite sex constituted unlawful discrimination against each individual on the basis of marital status and sex. *Id.* In response, the landlord argued that its policy was lawful because the refusal was based on the nature of each couple's consensual relationship,

in interpreting the statute, the appellate court resorted to public policies expressed in the criminal statute prohibiting fornication and the statutory renouncement of common-law marriages.[116] By relying on these public policies, the appellate court justified its refusal to protect unmarried couples from housing discrimination.[117]

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not each individual's sex and marital status. *Id.* The appellate court stated: "We believe that the language of the Act does not dispositively determine which of the two interpretations advanced here is correct." *Id.*

[116] *Id.* at 1157-59. At the time of the alleged discrimination in *Mister*, the Illinois fornication statute provided that "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." ILL. ANN. STAT. ch. 38, ¶ 11-8(a) (Smith-Hurd 1979) (amended 1989). The appellate court found that even though the statute had fallen into disuse (the most recent appellate record of a successful fornication prosecution was People v. Green, 114 N.E. 518 (Ill. 1916)), the criminal prohibition against fornication still expressed the public policy of Illinois against open and notorious nonmarital cohabitation. *Mister*, 553 N.E.2d at 1157. To reach this conclusion, the court relied on Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1979). In *Jarrett*, which involved a change of child custody because of the mother's nonmarital cohabitation, the Illinois Supreme Court had announced that the "fornication statute . . . evidence[s] the relevant moral standards of this State, as declared by our legislature." *Id.* at 424.

The Illinois legislature amended the fornication statute in 1989, however, deleting the words "cohabits or." *See* Act of June 19, 1989, Pub. Act 86-490, § 1, 1989 Ill. Laws 2890, 2890 (effective Jan. 1, 1990) (codified as amended at ILL. ANN. STAT. ch. 38, ¶ 11-8(a) (Smith-Hurd Supp. 1991)). The court in *Mister* implied that its decision might have been different had the alleged discrimination occurred *after* this amendment: "[O]ur holding . . . is that the [Illinois Human Rights] Act did not protect plaintiffs' status as unmarried, cohabiting couples *at the time of the alleged discrimination* . . . ." 553 N.E.2d at 1160 (emphasis added).

In addition to the fornication statute, however, the appellate court relied on a public policy "in favor of strengthening and preserving the integrity of marriage" embodied in the statutory renouncement of common-law marriages. *Id.* at 1158. The appellate court found that the Illinois Supreme Court had recognized this policy in Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979), in which the supreme court refused to recognize property claims between unmarried cohabitants. 553 N.E.2d at 1158.

[117] The appellate court concluded that in light of the public policy embodied in the fornication statute, the legislature could not have intended to protect unmarried couples from housing discrimination. 553 N.E.2d at 1158. The court stated: "It is much more likely that the legislature, cognizant of the public policy against open and notorious cohabitation, declined to extend the Act's protections to unmarried cohabitants regardless of whether the couple's conduct was open and notorious." *Id.* With regard to the public policy embodied in the statutory renouncement of

Similarly, in *State by Cooper v. French*,[118] the Minnesota Supreme Court held that the state fair housing law did not prohibit a landlord from refusing to rent a house to an unmarried couple.[119] Like the court in *Mister*, the Minnesota Supreme Court found the term "marital status" ambiguous.[120] For aid in interpreting the term, the supreme court relied on a prior employment discrimination decision.[121] In that decision, the supreme court had determined that the term "marital status" must be construed in light of a public policy against fornication and in favor of marriage.[122]

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common-law marriages, the court stated: "In light of the legislature's clear expression of a policy disfavoring private alternatives to marriage, it seems patently incongruous to suggest that the legislature would have afforded the Act's heightened protections to unmarried cohabitants." *Id.*

118 460 N.W.2d 2 (Minn. 1990).

119 *Id.* at 3-8.

120 *Id.* at 5. Citing *Mister*, the Minnesota Supreme Court stated that "[t]he 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.* The court also cited John-Edward Alley, *Marital Status Discrimination: An Amorphous Prohibition*, 54 FLA. B.J. 217 (1980) (discussing ambiguity of term "marital status" in Florida fair employment law).

121 460 N.W.2d at 5-6 (citing Kraft, Inc. v. State, 284 N.W.2d 386 (Minn. 1979)). The court also cited the legislative history of the Minnesota Human Rights Act and cases of marital status discrimination from other jurisdictions. *Id.* at 7.

122 *Id.* at 6. In *Kraft*, the supreme court had held that an anti-nepotism policy prohibiting spouses from working together constituted marital status discrimination. 284 N.W.2d at 387. The court had determined that allowing an employer to maintain such a policy might encourage couples "to forsake the marital union and live together in violation of [the fornication statute]." *Id.* at 388. Moreover, the policy would "undermine the preferred status enjoyed by the institution of marriage." *Id.*

In *French*, the court applied this same reasoning to a landlord's refusal to rent a house to an unmarried couple. 460 N.W.2d at 6. The court concluded that "*absent express legislative guidance*, the term 'marital status' will not be construed in a manner inconsistent with this state's policy against fornication and in favor of the institution of marriage." *Id.* The court rejected as "surprising" the argument that the fornication statute had fallen into disuse, citing a 1986 case in which an educator had been charged with fornication. *Id.* (citing State v. Ford, 397 N.W.2d 875 (Minn. 1986)).

The dissent, however, concluded that the fornication statute *had* fallen into disuse, because the last reported *conviction* for fornication had occurred in 1927. *Id.* at 19 (Popovich, C.J., dissenting) (citing State v. Cavett, 213 N.W. 920 (Minn. 1927)). Moreover, the dissent used employment discrimination decisions other than *Kraft* to conclude that the term "marital status" protects unmarried couples. *Id.* at 12-13 (citing State by McClure v.

Thus, the *French* court concluded that the fair housing law did not protect unmarried couples.[123]

In *Hudson View Properties v. Weiss*,[124] the New York Court of Appeals held that the state fair housing law did not prohibit a landlord from evicting a tenant who was living in nonmarital cohabitation.[125] Like the Minnesota Supreme Court, the New York Court of Appeals relied on one of its earlier employment discrimination decisions to determine whether the fair housing law protected the unmarried couple.[126] In the employment decision, the court of appeals had held that an anti-nepotism policy discriminated on the basis of a couple's relationship, not on the basis of either individual's marital status.[127] Using similar reasoning, the *Hudson View* court concluded that a lease provision

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Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985) (holding that refusal to hire job applicants living with members of opposite sex constitutes marital status discrimination), *appeal dismissed sub nom.* Sports & Health Club, Inc. v. Minnesota, 478 U.S. 1015 (1986); State by Cooper v. Mower County Social Servs., 434 N.W.2d 494 (Minn. Ct. App. 1989) (holding that refusal to hire pregnant unmarried woman because she lives with her boyfriend is marital status discrimination); State by Johnson v. Porter Farms, Inc., 382 N.W.2d 543 (Minn. Ct. App. 1986) (finding that termination of employee because he lives with person of opposite sex is marital status discrimination)).

[123] 460 N.W.2d at 7. The court concluded: "It is obvious that the legislature did not intend to extend the protection of the [Minnesota Human Rights Act] to include unmarried, cohabiting couples in housing cases." *Id.* Furthermore, Justice Yetka, author of the majority opinion, added:

> It is simply astonishing to me that the argument is made that the legislature intended to protect fornication and promote a lifestyle which corrodes the institutions which have sustained our civilization, namely, marriage and family life. If the legislature intended to protect cohabiting couples and other types of domestic partners, it would have said so.

Id. at 8.

The dissent in *French* concluded: "Our precedents are clear that discriminating against an individual because of the person that individual lives with constitutes marital status discrimination." *Id.* at 12 (Popovich, C.J., dissenting).

[124] 450 N.E.2d 234 (N.Y. 1983).

[125] *Id.* at 235.

[126] *See id.* (citing Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 415 N.E.2d 950 (N.Y. 1980)).

[127] *Manhattan Pizza Hut*, 415 N.E.2d at 954. The court in *Manhattan Pizza Hut* stated: "In sum, the disqualification of the complainant [from employment] was not for being married, but for being married to her

restricting apartment occupancy to a tenant and her "immediate family" did not discriminate on the basis of the tenant's marital status, but on the basis of the tenant's relationship to her roommate.[128] Consequently, the court held that the "marital status" provision of the New York fair housing law did not prohibit eviction of an unmarried couple who had violated such a lease provision.[129]

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supervisor. Hence, we hold that [the complainant] was not discriminated against on the basis of her marital status . . . ." *Id.*

In *Hudson View*, the court summarized its *Manhattan Pizza Hut* holding as follows:

> In that case, we held there was no statutory violation inasmuch as the disqualification of the employee under the company policy was not for being married (i.e., on the basis of her marital status), but for being married to her supervisor (i.e., on the basis of her relationship vis-à-vis a particular individual).

450 N.E.2d at 235.

[128] 450 N.E.2d at 235. In *Hudson View*, a tenant allowed a man to whom she was not married to move into her apartment. *Id.* The landlord sought to evict the tenant for breaching a lease provision limiting the occupancy of the apartment to the tenant and members of her "immediate family." *Id.*

The court of appeals concluded that eviction for breaching the lease provision did not depend on the tenant's marital status but on her lack of a familial relationship with the "additional tenant." *Id.* The court stated:

> In this case, the issue arises not because the tenant is unmarried, but because the lease restricts occupancy of her apartment, as are all apartments in the building, to the tenant and the tenant's immediate family. Tenant admits that an individual not part of her immediate family currently occupies the apartment as his primary residence. Whether or not he could by marriage or otherwise become a part of her immediate family is not an issue.

Id. The court stated further:

> Were the additional tenant a female unrelated to the tenant, the lease would be violated without reference to marriage. The fact that the additional tenant here involved is a man with whom the tenant has a loving relationship is simply irrelevant. The applicability of that restriction does not depend on her marital status.

Id.

[129] *Id.* The court stated: "Thus, we conclude that the landlord in this holdover proceeding has not discriminated against the tenant in violation of the State or city Human Rights Law." *Id.*

In response to the decision in *Hudson View*, the New York Legislature enacted the "roommate" law. Emergency Tenant Protection Act, ch. 403, 1983 N.Y. Laws 698 (codified as amended at N.Y. REAL PROP. § 235-f (McKinney 1989)). This law provides, among other things, that "[a]ny lease or rental agreement for residential premises entered into by one tenant shall

Finally, in *McFadden v. Elma Country Club*,[130] the Washington Court of Appeals held that the state fair housing law did not prohibit a country club from denying membership to a woman who intended to live in nonmarital cohabitation on club property.[131] The court employed a number of interpretive aids to determine whether the term "marital status" protected these unmarried cohabitants. First, the court relied on a statute that criminalized cohabitation to infer that the legislature did not intend to protect unmarried couples.[132] Second, the court interpreted the language of the fair housing law to mean that each member of an unmarried couple must claim discrimination *individually* to invoke the protection of the law.[133] Finally, the court distinguished an

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be construed to permit occupancy by the tenant . . . [and] one additional occupant." N.Y. REAL PROP. § 235-f(3).

130 613 P.2d 146 (Wash. Ct. App. 1980).

131 *Id.* at 148, 152. In *McFadden*, an unmarried woman had applied for membership in a country club. *Id.* at 148. Membership in the club "carrie[d] with it the right to exclusive possession, use and occupancy of a Club-owned lot." *Id.* at 150. When the club's board of directors learned that she intended to live on club property with a man to whom she was not married, the board denied her application. *Id.* at 148.

132 *Id.* at 150. The court noted that when the Washington legislature amended the fair housing law in 1973 to cover marital status discrimination, cohabitation was still a misdemeanor. *Id.* The Washington Legislature repealed the statute penalizing cohabitation in 1975, effective 1976. Act approved June 27, 1975, 1st Ex. Sess., ch. 260, § 9A.92.010, 1975 Wash. Laws 817, 866 (effective July 1, 1976). The court concluded, however, that "[t]he existence of the illegal cohabitation statute for 3 years after the amendment of [the fair housing law] would seem to vitiate any argument that the legislature intended 'marital status' discrimination to include discrimination on the basis of a couple's unwed cohabitation." 613 P.2d at 150. In a nearly identical situation, the Alaska Supreme Court reached the opposite conclusion. *See supra* note 96.

133 613 P.2d at 151. The court of appeals concluded that an earlier ruling by the Washington Human Rights Commission *protecting* unmarried couples was inconsistent with the statutory language. *Id.* at 150-51 (referring to Washington Human Rights Commission, Declaratory Ruling No. 9, Apr. 18, 1974). The court first noted that the fair housing law "repeatedly prohibits discrimination against 'a person.'" *Id.* The court then stated: "We do not dispute that discrimination against a person on the basis of . . . marital status . . . could be practiced against more than one person in violation of the statute." *Id.* Like the Alaska and Maryland statutes, the Washington statute defines a "person" as "one or more individuals." *Compare* WASH. REV. CODE ANN. § 49.60.040 (West 1990) ("'[p]erson' includes one or more individuals") *with* ALASKA STAT. § 18.80.300(11) (1991) ("'person' means one or more individuals") *and*

employment discrimination case[134] in which the Washington Supreme Court had interpreted the term "marital status" broadly.[135] The *McFadden* court concluded that the term "marital status" did not prohibit housing discrimination against unmarried

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MD. ANN. CODE art. 49B, § 20(o) (Supp. 1991) (" '[p]erson' includes one or more individuals").

Nevertheless, the court concluded that even though the statute prohibited discrimination against more than one person, "[t]his does not mean . . . that the Commission was correct when it purported to find discrimination against unmarried couples where there was no claim of discrimination against either person *individually* because of *his* or *her* marital status." 613 P.2d at 151 (emphasis added). Later in the opinion, the court reiterated this position: "We point out specifically that the discrimination complained of here was not directed against either [member of the couple] *as individuals*." *Id.* (emphasis added). This interpretation of the term "marital status" closely resembles the interpretation by the Maryland courts. *See supra* notes 109-11 and accompanying text.

[134] Washington Water Power Co. v. Washington State Human Rights Comm'n, 586 P.2d 1149 (Wash. 1978) (en banc).

[135] 613 P.2d at 151. In *Washington Water*, the Washington Supreme Court had held that the term "marital status" included not only "conditions such as being married, single or divorced" but also "the *identity* of an employee's or applicant's spouse." *Id.* (citing *Washington Water*). In *McFadden*, the court of appeals applied this expansive definition of "marital status" to a case of housing discrimination. *Id.* The court determined that in denying an unmarried woman a lot in a country club because she planned to cohabit with a man, the defendant country club had not discriminated based on the identity of the woman's partner. *Id.* Instead, the country club had discriminated based on the couple's "joint living arrangement." *Id.* The court stated: "We think the present case is distinguishable [from *Washington Water*] in that there was no discrimination against McFadden based on the identity of Sloan or on either party's individual marital status, but only on their joint living arrangement." *Id.*

The court in *McFadden* also noted that the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, prohibits discrimination in credit transactions on the basis of marital status. 613 P.2d at 151; *see also supra* notes 58-64 and accompanying text (discussing Equal Credit Opportunity Act). The court was apparently unaware, however, that the District of Columbia Circuit Court of Appeals had recently interpreted the effect of the Act's "marital status" provision on unmarried couples in Markham v. Colonial Mortgage Service Co., 605 F.2d 566 (D.C. Cir. 1979). (For a discussion of *Markham*, see *supra* notes 60-64 and accompanying text.) The *McFadden* court stated: "Although the Act has been in force since October of 1975, the only reported cases interpreting its provisions do not address the scope of the term 'marital status.' " 613 P.2d at 151-52. (*Markham* was decided on August 2, 1979. 605 F.2d at 566. *McFadden* was decided on May 23, 1980. 613 P.2d at 146.)

couples.[136]

By going beyond the statutory language to interpret the term "marital status," courts have found numerous excuses for denying protection to unmarried couples.[137] Thus, even though judicial and societal attitudes toward nonmarital cohabitation have changed significantly in recent years,[138] the courts still do not always look favorably on unmarried couples. Consequently, legislatures must act to provide unmarried couples with widespread protection from housing discrimination.[139]

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[136] 613 P.2d at 152. The court stated:

> We hold, therefore, that in the absence of any authoritative decision to the contrary, in view of the legislative history of the statute, in the absence of any strong public policy to the contrary, marital status discrimination . . . does not include discrimination against couples who choose to live together without being married.

Id.

[137] In most of these cases, the fair housing laws were virtually identical to the laws interpreted in *Worcester* and *Foreman*, defining a "person" to include "one or more persons" or "any person or group of persons." *See, e.g.*, MD. ANN. CODE art. 49B, § 20(o) (Supp. 1991); WASH. REV. CODE ANN. § 49.60.040 (West 1990). Thus, these courts could have followed an approach similar to the approach of the *Worcester* and *Foreman* courts, finding that the plain meaning of the term "marital status" protects unmarried couples. *See supra* notes 90-96 and accompanying text (discussing *Worcester* and *Foreman*). Instead, many of these courts found that "marital status" has *another* "plain" meaning—one that does *not* protect unmarried couples. *See, e.g.*, Prince George's County v. Greenbelt Homes, Inc., 431 A.2d 745, 748 (Md. Ct. Spec. App. 1981); McFadden v. Elma Country Club, 613 P.2d 146, 151 (Wash. Ct. App. 1980). Thus, it appears that the meaning of "marital status" is anything *but* plain. This problem highlights the need for legislative action defining the term with respect to unmarried couples.

[138] *See supra* notes 26-27, 31-43 and accompanying text.

[139] One student commentator has proposed a specific method of interpreting statutes with "marital status" provisions that would protect unmarried couples from discrimination in housing, as well as other areas. *See* John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991). Under this "refined inclusive rule of marital status discrimination," the courts would have to find unlawful discrimination whenever "marital status is a factor considered under the challenged policy, and the aggrieved person would not have been harmed but for her marital status." *Id.* at 1442-43. As the commentator suggests, this method of interpretation would lead to greater protection of unmarried couples in those states with marital status provisions in their fair housing laws. However, in the majority of states, where the fair housing laws do not prohibit marital status discrimination, unmarried couples would remain unprotected. Thus, to achieve widespread

III. PROPOSAL: AMENDMENT OF THE FAIR HOUSING ACT

As this Comment has shown, existing federal and state laws afford unmarried couples little protection from housing discrimination.[140] Federal law protects unmarried couples from discrimination in credit transactions and public housing only.[141] Only a handful of states grant any protection at all.[142]

Nevertheless, unmarried couples deserve protection from housing discrimination. A couple's marital status alone does not indicate whether the couple will make good tenants or neighbors.[143] Moreover, as previously discussed, discrimination against unmarried couples usually arises out of landlords' moral objections to nonmarital cohabitation rather than their legitimate business interests.[144] Such personal distaste for a couple's decision not to marry before cohabiting should not justify denying that couple access to a basic human need like housing.[145]

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protection for unmarried couples, legislative action, either by the state legislatures or by Congress, is necessary.

140 *See supra* part II.

141 *See supra* part II.A.

142 *See supra* part II.B.

143 *See* Bayer, *supra* note 112, at 93-94. Professor Bayer writes:

> [I]t is not clear why . . . those who cohabitate but are unmarried should be denied housing. Certainly, the bold presumptions that such individuals are unworthy and will be poor neighbors are as irrational as basing similar conclusions on the bases of the individuals [sic] race, religion or gender. In all such instances, the classifications fail to adequately inform interested parties whether the affected persons will be peaceful homeowners or tenants.

Id. Similarly, Chief Justice Popovich of the Minnesota Supreme Court has written: "An individual's marital or familial status, just like the other prohibited classifications, is irrelevant to holding a job or renting a house, because it 'bears no relation to the individual's ability to participate in and contribute to society.' " State by Cooper v. French, 460 N.W.2d 2, 16 (Minn. 1990) (Popovich, C.J., dissenting) (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)).

144 *See supra* notes 50-53 and accompanying text.

145 In his dissent in *French*, Minnesota Supreme Court Chief Justice Popovich wrote:

> Providing equal access to housing in Minnesota by eliminating pernicious discrimination, including marital status discrimination, is an overriding compelling state interest. . . . Housing is a basic human need regardless of a person's personal characteristics, and the legislature has properly determined that it should be available without regard to "race, color, creed,

As the case law illustrates, the courts are reluctant to interpret existing "marital status" provisions to cover discrimination against unmarried couples.[146] Even if the courts did interpret "marital status" provisions more broadly, however, existing fair housing laws would protect unmarried couples from housing discrimination in fewer than half of the states.[147] Thus, to provide widespread protection from housing discrimination to unmarried couples, Congress or the state legislatures will have to amend existing fair housing laws.

Because nearly every state has some type of fair housing law,[148] the state legislatures could provide widespread protection to unmarried couples by amending the fair housing laws in each state individually.[149] Congress can accomplish this same goal,

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> religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status."

460 N.W.2d at 16 (Popovich, C.J., dissenting) (quoting MINN. STAT. ANN. § 363.03(2)(1)(a) (West 1991)).

In a similar vein, in her dissent in Donahue v. Fair Employment & Housing Commission, 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *rev. granted*, 825 P.2d 766 (Cal. 1992), California Court of Appeal Judge Grignon wrote:

> It is undisputed that the state has a compelling state interest in providing its citizens access to housing and employment free from unwarranted discrimination. It is inappropriate for courts to determine on a case by case basis that the state has a compelling state interest to prevent certain types of employment and housing discrimination, but not others. It is inappropriate for courts to determine that the state has no compelling state interest in preventing marital status discrimination in housing. That is the wrong focus. The correct focus is the state's interest in providing discrimination-free access to housing.

Id. at 49 (Grignon, J., dissenting).

The problem is that other judges share the personal distaste for nonmarital cohabitation held by many landlords, as made apparent by the tone of the majority opinions in both *French* and *Donahue*. *See, e.g.*, *French*, 460 N.W.2d at 8 ("It is simply astonishing to me that the argument is made that the legislature intended to protect fornication and promote a lifestyle which corrodes the institutions which have sustained our civilization, namely, marriage and family life."); *Donahue*, 2 Cal. Rptr. 2d at 46 ("The FEHC has not only failed to establish a compelling state interest, but has also failed to explain what exactly is so invidious or unfairly offensive in not treating unmarried cohabiting couples as if they were married.").

146 *See supra* part II.B.2.

147 Presently only twenty-one states and the District of Columbia prohibit housing discrimination on the basis of marital status. *See supra* note 80.

148 *See supra* note 78 and accompanying text.

149 Those states that already prohibit housing discrimination based on

however, by amending the Fair Housing Act.[150] An amendment to the Fair Housing Act will have the advantage of providing unmarried couples in every state with equivalent protection. Moreover, such an amendment should encourage the states to amend their fair housing laws in a similar manner.

In the past, the Fair Housing Act has encouraged many states to enact fair housing laws.[151] Under the Fair Housing Act, the Secretary of the Department of Housing and Urban Development (HUD) can "certify" a state or local agency operating pursuant to state or local legislation that is substantially equivalent to the Fair Housing Act.[152] Certification provides two advantages to state and local agencies. First, when HUD receives a complaint alleging housing discrimination within the jurisdiction of a certified agency, HUD *must* refer the complaint to that agency.[153] This procedure allows the certified state or local agency greater control over housing discrimination problems within its jurisdiction.[154] Second, certified state and local agencies become eligible to receive federal grants to support the enforcement of fair hous-

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marital status could amend their fair housing laws to define "marital status" to include unmarried couples. For one possible definition, see *infra* note 159. Those states that have not yet prohibited marital status discrimination in housing could do so by adding "marital status," defined to include unmarried couples, to their fair housing laws.

150 42 U.S.C. §§ 3601-3619, 3631; *see supra* notes 72-76 and accompanying text (discussing Fair Housing Act).

151 James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348, 349 (1988); *see also* Kushner, *supra* note 30, at 1083 ("Perhaps the most significant impact of Title VIII has been its certification of state and local programs as substantially equivalent to Title VIII, which has encouraged state and local governments to pass such fair housing legislation." (footnote omitted)).

152 42 U.S.C. § 3610(f)(3). For certification, the local legislation must be substantially equivalent to the Fair Housing Act in the substantive rights provided, the procedures followed, the remedies available, and the availability of judicial review. *Id.* § 3610(f)(3)(A); *see also* SCHWEMM, *supra* note 64, § 24.5(2) (discussing certification of referral agencies). Prior to the passage of the Fair Housing Amendments Act in 1988, HUD had certified agencies in 36 states and 79 localities. SCHWEMM, *supra* note 64, at 30-1 & app. C.

153 42 U.S.C. § 3610(f)(1).

154 Compared to HUD, local agencies have the advantage of minimal travel and other expenses when investigating housing discrimination claims within their jurisdictions. Alex Waldrop, *Enforcement of the Fair Housing Act: What Role Should the Federal Government Play?*, 74 KY. L.J. 201, 227 (1985-1986).

ing legislation.[155] Without this federal support, many states would not continue to monitor and control housing discrimination.[156] Consequently, if Congress amends the Fair Housing Act to prohibit discrimination against unmarried couples, states wishing to retain the benefits of substantial equivalency status will have to amend their fair housing laws in a similar manner.[157]

Thus, to ensure that unmarried couples nationwide have equal access to housing, Congress should amend the Fair Housing Act to prohibit housing discrimination against these couples. First, Congress must add "marital status" to the prohibited bases of discrimination in the Act.[158] Second, Congress must define "marital status" to include unmarried couples.[159] These two

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155 Kushner, *supra* note 30, at 1083. The budget for this grant program, the Fair Housing Assistance Program, was nearly $5 billion in 1985. Waldrop, *supra* note 154, at 225 n.176.

156 Waldrop, *supra* note 154, at 228; *see, e.g.*, Act approved July 13, 1988, ch. 339, § 7, 1988 Ariz. Sess. Laws 1402, 1408-09 (Arizona fair housing act repealed after June 30, 1991, if HUD does not grant substantial equivalency status within two years of effective date of act); TEX. REV. CIV. STAT. ANN. art. 1f, § 11.01 (West Supp. 1992) (Texas Fair Housing Act not effective unless and until HUD certifies the Act as substantially similar to Title VIII).

157 *See* Robert A. Bilott, Note, *The Fair Housing Amendments Act of 1988: A Promising First Step Toward the Elimination of Familial Homelessness?*, 50 OHIO ST. L.J. 1275, 1288-89 (1989) (discussing a similar effect related to 1988 amendment of Fair Housing Act); *see also* SCHWEMM, *supra* note 64, § 11.6(1), at 11-63 n.348 (noting same effect).

In the Fair Housing Amendments Act of 1988, which added "handicap" and "familial status" as prohibited bases of discrimination, Congress provided for a "grace period" of 40 months during which HUD would continue to treat previously certified agencies as though they were still certified. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 8, 102 Stat. 1619, 1627 (codified at 42 U.S.C. § 3610(f)(4)); *see also* SCHWEMM, *supra* note 64, § 24.5(3) (discussing temporary referral procedure for previously qualified agencies). This period was provided to allow state and local agencies to update their own fair housing laws to include "handicap" and "familial status." *See* SCHWEMM, *supra* note 64, § 24.5(3). Congress could provide a similar grace period when amending the Fair Housing Act to protect unmarried couples.

158 To make this addition, Congress must amend 42 U.S.C. §§ 3604(a)-(e), 3605(a), 3605(c), 3606, 3631(a)-(c).

159 Congress should amend 42 U.S.C. § 3602 as follows (new language in italics):

§ 3602. Definitions

As used in this subchapter—

. . .

(p) "Marital status" means the state of being single, married, separated,

amendments will prohibit all forms of marital status discrimination in housing, including discrimination against unmarried couples.[160]

CONCLUSION

Despite the growing public acceptance of nonmarital cohabitation,[161] unmarried couples continue to face discrimination in housing.[162] To provide some protection to these couples, Congress should extend the coverage of the Fair Housing Act to encompass unmarried cohabitants. Amending the Fair Housing Act in this manner will not undermine the institution of marriage.[163] Such an amendment will, however, provide an impor-

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divorced, or widowed, and includes the marriage or lack of a marriage between any man and woman cohabiting or intending to cohabit.

Because this definition specifies "any man and woman," it would not apply to homosexual couples. To extend the protection of the Fair Housing Act or other fair housing laws to homosexuals, a provision prohibiting discrimination on the basis of sexual orientation would be more effective than a marital status provision. *See supra* note 17.

160 Given that the amendment to include "familial status" in the Fair Housing Act "required a major legislative struggle," SCHWEMM, *supra* note 64, § 11.6(1), at 11-65, it may be unlikely that Congress will enact the amendment suggested in this Comment at any time soon. Perhaps such an amendment will have to wait until more states act to protect unmarried couples. To this end, the judiciary of the states could hasten the amendment of the Fair Housing Act by extending the protection of current marital status provisions to unmarried couples under the interpretive rule proposed in Beattie, Note, *supra* note 139.

161 *See supra* note 26 and accompanying text.

162 *See, e.g.*, *Sexual Orientation*, *supra* note 3, at 1612 ("Unmarried homosexual and heterosexual couples are subject to substantial discrimination—both overt and covert—in their efforts to acquire housing.").

163 Courts frequently refer to the state's interest in promoting marriage. *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 586 (Cal. 1988) (in bank) (stating that "the state has a strong interest in the marriage relationship"); Stern v. Stern, 332 A.2d 78, 83 (Conn. 1973) (stating that "the state has a vital interest in all marriages and family relationships"); Miller v. Miller, 366 S.E.2d 682, 683 (Ga. 1988) (referring to "a strong state policy favoring marriage and legitimacy"); City of Ladue v. Horn, 720 S.W.2d 745, 752 (Mo. Ct. App. 1986) ("There is no doubt that there is a governmental interest in marriage and in preserving the integrity of the biological or legal family."). It is unlikely, however, that couples denied housing because they are not married will subsequently marry to obtain that housing. *See* Boyle, *supra* note 45, at 132 ("There is no evidence that the current and long-standing policy of promoting marriage by penalizing the unmarried

tant civil right to an ever-increasing number of people.[164] As a result, those couples who choose to live together but not to marry will have a legal remedy when faced with landlords who want to discriminate against them for "living in sin."

Matthew J. Smith *

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encourages a heterosexual to marry if he or she was not already so inclined . . . ."). *But see* Geneva Collins, *Zoning and Public Housing Rules Dictate Who May Live With Whom*, Mar. 19, 1989, L.A. TIMES, § 1, at 19 ("In Chicago, eight couples living in public housing got married to avoid eviction late last year."). Consequently, prohibiting discrimination against unmarried couples would not lead people already inclined to marry to forsake marriage in favor of nonmarital cohabitation.

[164] *See supra* notes 22-25 and accompanying text (discussing increase in number of unmarried couples cohabiting over past three decades).

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