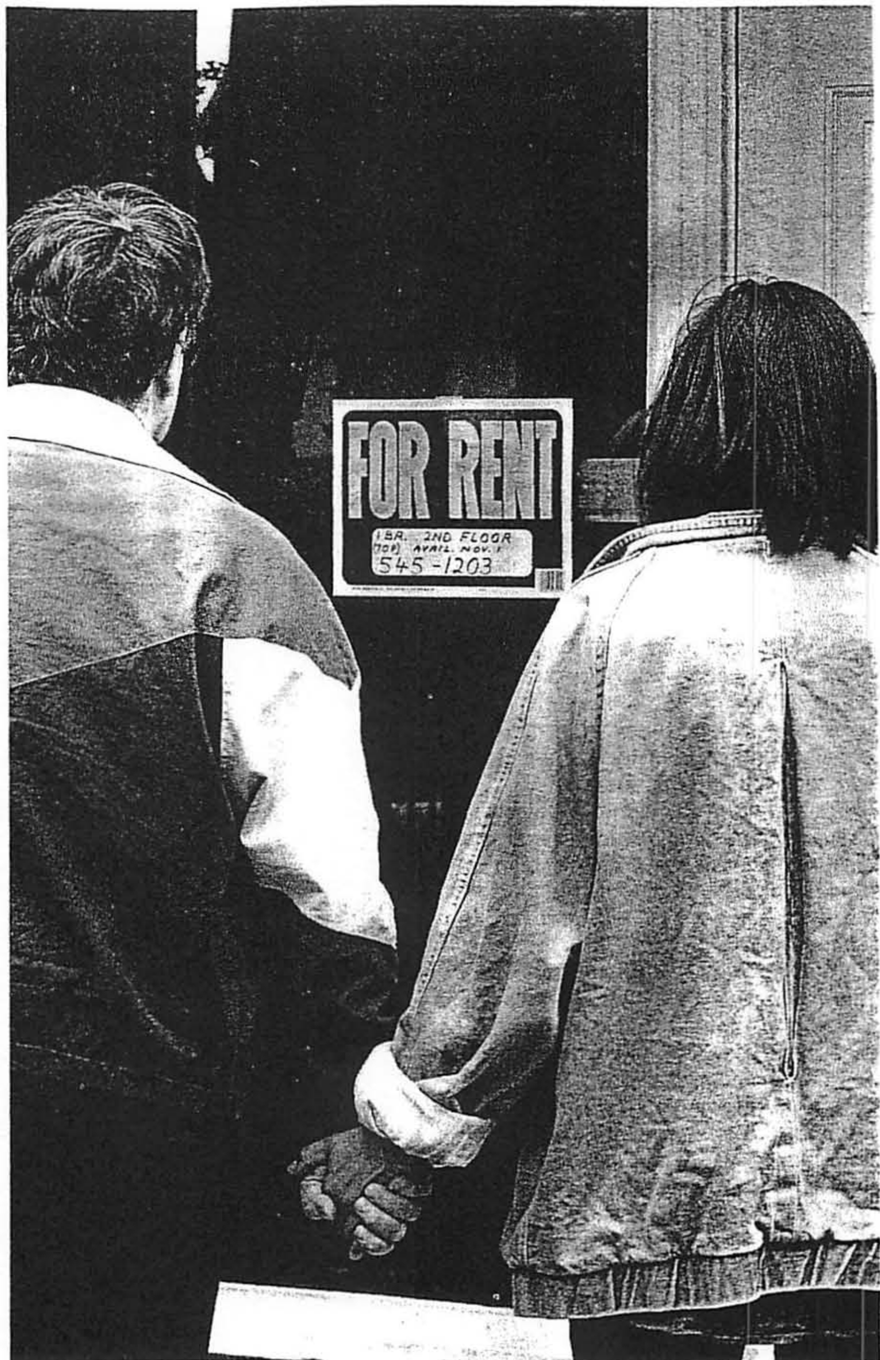
Not In My Apartment!

When Landlords Mix Business and Religion

By Jerry DeMuth



Yarka Vendrinska

The sign might say "For Rent," but, increasingly, landlords are refusing to let unmarried couples move in, citing religious beliefs as their major or sole defense.

At issue is whether business practices can be legally based on one's religious beliefs rather than on state or local law governing the business.

Tieing the exercise of religious beliefs into apartment rental practices was first employed in arguments in a 1992 California case, *Donahue v. Fair Employment and Housing Commission,* notes attorney David Link, who represents an unmarried couple in another California case.

"Agnes Donahue, a Catholic, told the court that she had two interrelated religious beliefs," he points out. "First, she believed that sexual intercourse outside of marriage is a mortal sin. Second, she said that assisting or facilitating the sinful behavior of others is also a sin."

The California Court of Appeals ruled in favor of Donahue but the California Supreme Court accepted the case for review, then dismissed the appeal.

"The issue started becoming prevalant in 1988, 1989," says Jay Sekulow, chief counsel for the American Center for Law and Justice, which is funding the defense of landlords in cases in California and Massachusetts.

The freedom of religion defense is also being used in cases in Illinois and Tennessee, he says.

Reasons for this development lie partly with the strong support given to these landlords by such fundamentalist Christian organizations as Concerned Women for America and the American Center for Law and Justice, which was founded by Christian conservative Pat Robertson. Attorneys defending these landlords have more recently been emboldened by the Religious Freedom Restoration Act of 1993.

"People are becoming more aware of what their rights are and that they don't simply surrender these rights when they engage in commercial business. So they're willing to stand up," says Sekulow. "And you've got groups like ours and others that are out there willing to defend these people at no cost to the individuals.

"We give out a tremendous amount of material and our briefs are widely circulated," he adds, referring to the cases in which it is not directly involved.

The ACLJ is defending the landlord in *Evelyn Smith v. the Fair Employment*

and Housing Commission of the State of California, and Sekulow and attorneys Thomas F. Coleman and David Link, each of whom represent one of the two couples denied apartments, say they will appeal to the U.S. Supreme Court if they lose in the California Supreme Court, which is now considering an appeal.

Sekulow says he also will appeal a Massachusetts case if he should lose that case. Whatever case the U.S. Supreme Court hears on the issue, he says, "will be involved with the issue of someone of religious faith being asked in business to do something they object to and being asked to surrender their faith at the door to their business."

The broad implications of a decision that upholds landlords, and places their religious beliefs above laws regulating the operation of a business, is reflected in the number and range of groups and agencies filing amicus curiae briefs in the *Smith* case.

They include the American Civil Liberties Union of Southern California, the Western Law Center for Disability Rights, Americans United for Separation of Church and State, the Fair Housing Congress of Southern California, the Fair Housing Congress of Northern California, Lambda Legal Defense and Education Fund, the San Francisco District attorney's office and the Santa Monica (Calif.) city attorney's office.

A decision favoring these landlords would impact the growing number of unmarried couple households—3,187,772 in 1990, more than double 1980's 1,560,000, according to the U.S. Census Bureau.

Although all of the cases now in the courts involve unmarried heterosexual couples, attorney Jordan Lorence, who represents Smith, says, "The logic would apply equally to a homosexual couple as it would to an unmarried [heterosexual] cohabiting couple."

Attorneys representing discriminated-against apartment seekers complain not just against the reduction in the rights of unmarried couples now occurring, but also about the religious protection being sought for business practices.

"Is any conduct motivated by religious belief automatically the exercise of religion?" asks Coleman. "What they are asking for is unprecedented. It's never been done—to grant an exemption to accommodate one person and in the process cause harm to the rights of another party. You can't just force someone to conform to your religious beliefs."

"The *Smith* case," says Link, "is a case where the commercial activity is claimed to be the exercise of religion and that's [a new defense].

"If renting apartments is the exercise of religion, what isn't? What conduct doesn't the First Amendment cover then?" he asks. "By renting apartments, these landlords have not been exercising their religion.

"When religiously-motivated Americans expect to make a personal profit in the commercial marketplace, they are not exercising religion, they are exercising capitalism. And like everyone else, they have to abide by the law," he says.

"The argument has been made by the other side," protests Lorence, "that once a person enters the marketplace, they lose all of their constitutional protections of religious liberties. I just think that's wrong as a matter of law and violated common sense. There are many business owners who bring their religious beliefs to the marketplace. It is common for people who have religious beliefs and are business owners to apply their beliefs to their businesses.

"I absolutely reject the argument, and so have the courts in these cases," he says, referring to four cases in which courts ruled in favor of employees who were fired because they wouldn't work on the Sabbath or, in the case of a religious pacifist, wouldn't work on tanks at a truck factory, "that just because a religious person is entering the commerce they lose all ability to exercise their constitutional rights to free exercise of religion."

Lorence says that an animal rights defender who owns commercial real estate could refuse to rent commercial space to a furrier or a butcher or a pet shop owner.

Smith, like *Donahue*, Link points out, believes that she herself would be sinning if she rented apartments to unmarried couples because she would then be facilitating the sins she believed her tenants would commit.

"By letting religious believers claim as their own sins the sins others are committing, the facilitation theory, turns the free exercise clause on its head," Link maintains. "That provision was intended to protect religious believers from governmental intrusion into private decisions about belief in God. The framers did not intend to give individuals a means of imposing their beliefs about sin on others."

Coleman points out that Smith testified that she would evict even tenants who had unmarried sex in a motel. "It doesn't even have to be on the premises," he notes.

He says there is a simple way out for Smith and other landlords—hire a property management company to screen potential applicants when vacancies occur.

Sekulow rejects that idea.

"That's just shifting the blame," he says. "And a Catholic family would still be facilitating sin. You can't negate the responsibility by making someone else do it. That's not the idea here. These people should not be forced to relegate or surrender their faith when they engage in commercial business."

In cases outside of California, landlords who refused to rent apartments to unmarried and other unrelated persons have had their actions upheld by courts in Illinois, Massachusetts, Minnesota and Wisconsin. Although in the first three states, they gave their religious beliefs as the reason for the denials, their victories were won because of the lack of protection based on marital status or the existence of anti-fornication laws.

In the Wisconsin case of *Dane County v. Dwight Norman and Patricia Norman*, which involved landlords who twice refused to rent to two women on the grounds they would rent only to families, the landlords won a 4-3 ruling in the state supreme court on April 13, 1993.

The court, citing a provision of the state's constitution that affirmed the state's intent to "promote the stability and best interests of marriage and the family," declared that the denial of apartments to the two women was "triggered by their 'conduct,' not their 'marital status,'" adding, "their living together is 'conduct,' not 'status.'"

The use of the right to the free exercise of religion as the sole or major defense further complicates a fair housing issue already complicated by lack of clarity of state fair housing laws in applying to unmarried couples.

No state laws specifically protect unmarried couples, but state fair housing laws in 21 states and the District of Columbia do bar discrimination based on marital status, according to research by Matthew J. Smith, of the *University of California Davis Law Review*. At issue is whether the term "marital status" applies to unmarried couples.

(please turn to page 52)

Apartment *(from page 45)*

Courts in only three states have said that the term "marital status" is intended to protect unmarried couples from housing discrimination.

Attorneys for the landlords are also maintaining that states have no compelling interest in protecting unmarried couples, and many other groups. The state's compelling interest, they say, is limited to protecting only those who have been discriminated against because of their race, religion or national origin.

Sekulow says that unmarried couples should not have the same rights to housing as married couples. "Benefits are given to people who are married that are not given to people living together without the benefit of marriage," he points out.

"The law," says Lorence, "is rife with disparate treatment that everyone views as a natural, normal thing, not as a sort of evil discrimination."

But Coleman says that does not mean unmarried couples can be denied housing.

Whether unmarried couples are protected or not under fair housing laws, attorneys for landlords in Alaska, California, Illinois, Massachusetts and Tennessee are arguing that landlords can still discriminate against unmarried couples when cohabitation offends their religious beliefs.

Discrimination against unmarried couples is different than discrimination because of race, they maintain. Discrimination because of race is discrimination against people for who they are, while discrimination against unmarried couples is discrimination against people because of their conduct, because they are "about to engage in an activity that is repugnant to the landlord's faith," Sekulow argues.

Sekulow and Lorence further claim that governments have no compelling interest in protecting unmarried couples as they do in protecting racial minorities. Besides, they add, unmarried couples can always find housing elsewhere since the landlords who want to be allowed to discriminate against them are a minority.

"There obviously hasn't been systematic discrimination against unmarried couples as there has been against racial minorities," says Lorence.

And if all housing in a community is not available to unmarried couples because of the religious beliefs of landlords, "That's life," he comments. "There are other factors that also can make it tough for people to find housing. I don't think that the fact of the relative abundance or lack of abundance of housing should influence whether somebody should exercise their religious liberties or not in this kind of context."

Lorence says he also objects to the other side, the prospective-tenant side of the argument, that the state has "an overall compelling interest to eradicate all forms of discrimination" when there are limits to what "people in the popular culture will see as legitimate things to prohibit under fair housing laws.

"We're not going to allow the legislatures or city councils to toss anything that they want into an anti-discrimination law and claim that any category they put in there has the high moral equivilancy to ending racial discrimination," he says.

Opposing attorney Coleman says there is a compelling state interest in protecting the rights of unmarried couples and other groups listed in protection clauses, and that interest rests in more than simply guaranteeing them the same rights as others.

"To reject you on the basis of your belonging to a particular group that is somehow disfavored, and the insult, the humiliation and the harm to your personal dignity interests is the same regardless of whether it's race or gender or color or national origin or religion or sexual orientation or whatever," he says. "That interest is still there to be treated as an individual."

The highest court victory for tenants occurred last May 14 when the Alaska supreme court, in the case of *Swanner v. Anchorage Equal Rights Commission*, ruled against a landlord, citing marital status as a protected category in the state's fair housing law. Appealed to the U.S. Supreme Court, the nation's top court denied a petition for writ of certiorari last October 31 in a 7-to-1 vote.

Justice Clarence Thomas, in a dissent welcomed by defense attorneys, cited RFRA's provision that a governmental entity "shall not substantially burden a person's exercise of religion" unless it is "in furtherance of a compelling governmental interest." He questioned whether preventing discrimination against unmarried couples is a compelling governmental interest.

"What Clarence Thomas wrote in his opinion is a precurser to what a majority of the Supreme Court is going to say in some future case," says Lorence. "I think he wrote that as a warning to state courts not to agree with what the Alaska Supreme Court did. He was saying, 'Watch it. It's not open season on landlords now.'"

The U.S. Supreme Court declined to review the Alaska case, Sekulow feels, because the RFRA issue was not litigated or framed properly.

"I think there's going to be more cases until there's a definitive court decision. And I think you're going to see a growing dimension to these cases," says Lorence. "But I don't think you're going to see a lot of landlords doing it. If there are a lot of landlords who agree with Mrs. Smith, I think you'll see state legislatures amend anti-discrimination laws to clarify that marital status does not include cohabitation. That has happened in some states already."

If exemptions from civil rights and housing laws are permitted on the basis of religious beliefs, says Colemen, agency budgets once spent on enforcing laws will be spent on side trials to determine the sincerity of claimed religious exemptions. "Resources will be diverted from enforcement and protection to these side trials," he maintains. "That will diminish civil rights enforcement."

"This is an issue that's not going to go away," says Sekulow. "There's no doubt this issue is going to be reoccuring. Eventually the Supreme Court is going to have to deal with the application of anti-discrimination laws to people of religious faith when the activity proposed violates their faith."

But Link sees even broader implications of a U.S. Supreme Court victory for these landlords, and it worries him.

"If landlords' argument that renting apartments is the exercise of their religions is accepted," he fears, "it has the potential to change constitutional law more profoundly than anything since the passage of the 14th Amendment, altering the relationship between law and religion in ways that are unprecedented in this country's history."

Jerry DeMuth is a writer in Chicago.