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Civil Rights—Marital Status Discrimination—Refusing to Rent to Unmarried Cohabitants Is Not Unlawful Marital Status Discrimination under the Minnesota Human Rights Act. State ex rel. Cooper v. French, 460 N.W.2d 2 (Minn.1990)

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NOTES

CIVIL RIGHTS—MARITAL STATUS DISCRIMINATION—REFUSING TO RENT TO UNMARRIED COHABITANTS IS NOT UNLAWFUL MARITAL STATUS DISCRIMINATION UNDER THE MINNESOTA HUMAN RIGHTS ACT. *State ex rel. Cooper v. French*, 460 N.W.2d 2 (Minn. 1990).

Layle French owned a two-bedroom house in Marshall, Minnesota, which he was attempting to sell.[1] While awaiting its sale, he rented it to married couples and single persons.[2] On February 22, 1988,[3] French agreed to rent the house to Susan Parsons.[4]

Soon after, French determined that Parsons was likely to engage in sexual relations with her fiance while living with him on the property.[5] On February 24, 1988, French told Parsons that he had reconsidered and refused to rent the house because cohabitation[6] between unmarried men and women was contrary to his religious beliefs.[7] French was a member of the Evangelical Free Church and, as such, his religious convictions included the belief that it is sinful for unmarried couples to engage in sexual relations or live together.[8]

When questioned by French, Parsons and her fiance neither indicated nor denied that they intended to have sex on the property.[9] Even

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1. State *ex rel.* Cooper v. French, 460 N.W.2d 2, 3 (Minn. 1990). French was selling the property in Marshall because he had purchased a house in the country. *Id.*

2. *Id.*

3. French advertised the property from January to March 1988 as available for rent. *Id.*

4. *Id.* French also accepted a $250 security deposit from Parsons. *Id.* At this time, French knew that Parsons intended to live with her fiance in the house. State *ex rel.* Cooper v. French, No. C2-89-1064 (Minn. App. Oct. 31, 1989) (1989 WL 127867).

5. 460 N.W.2d at 3.

6. " 'Cohabit' means to live together in a sexual relationship when not legally married." *Id.* at 4 n.1 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 259 (1980) (New College Dictionary)).

7. *Id.* at 3-4.

8. *Id.*

9. *Id.* at 4. The record is unclear as to whether French had knowledge of any intended

if French had been satisfied that the couple did not plan to engage in sex on the premises, he still would have refused to rent to them because he believed such a living arrangement constituted the "appearance of evil."[10] He admitted he would have rented the house to Parsons had she and her fiance been married.[11]

After French refused to rent the house, Parsons filed a charge of marital status discrimination against French under the Minnesota Human Rights Act (MHRA).[12] The Minnesota Department of Human Rights investigated the matter and issued a complaint against French.[13]

An administrative law judge granted partial summary judgment in favor of the department on the issue of liability.[14] The judge found that French violated the MHRA's prohibition of marital status discrimination[15] when he refused to rent the property because of Parsons' intent to live there with her fiance.[16] After a hearing on the issue of damages, the judge awarded Parsons a judgment for $368.50 in compensatory damages and $400 for mental anguish and suffering.[17] The judge also ordered French to pay a civil penalty of $300 to the state, and denied French's motion for a trial de novo before the district court.[18]

A Minnesota Court of Appeals panel affirmed that French discriminated against Parsons and held that French's argument based on the free exercise of religion provided no defense.[19] The Minnesota Supreme Court reversed the court of appeals, holding that a landlord's refusal to rent to an unmarried person because she would be living with her fiance does not violate the MHRA.[20] In addition, the court held that a landlord's right to the free exercise of religion under the Minne-

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sexual activity. *Id.*

10. *Id.*
11. *Id.*
12. *Id.* MINN. STAT. ANN. §§ 363.01 to .15 (West Supp. 1991).
13. 460 N.W.2d at 4.
14. *Id.*
15. MINN. STAT. ANN. § 363.03, subd. 2 (West Supp. 1991) provides:
    It is unfair discriminatory practice:
    1) For an owner [or] lessee . . .
        a) to refuse to sell, rent, or lease . . . any real property because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability or familial status . . . .
16. 460 N.W.2d at 4.
17. *Id.*
18. *Id.* The judge refused to award punitive damages. *Id.*
19. *Id.*
20. *Id.* at 11.

sota Constitution [21] outweighs the interest of a tenant to cohabitate with her fiance.[22] *State ex rel. Cooper v. French*, 460 N.W.2d 2 (Minn. 1990).

While most of the issues involving the legal rights of unmarried cohabitating adults have arisen fairly recently, the core obstacle to the recognition of such rights has ancient roots. Cohabitation connotes sexual relations[23] and therefore is associated with fornication.[24] Fornication is forbidden by the Bible[25] and may be one of man's oldest crimes.[26] At one time in England, fornication was punishable by death[27] and prosecutions for fornication were common in the American colonies.[28] The New England colonies imposed a number of penalties against fornicators, including fines, public whippings, injunctions to marriage, and forcing the violators to wear the letter "V" on their clothing.[29]

Fornication and cohabitation remain crimes in a number of states.[30] In response to modern commentary criticizing the use of crimi-

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21. MINN. CONST. art. I, § 16, provides: "The right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . nor shall any control of or interference with the rights of conscience be permitted . . . ."

22. 460 N.W.2d at 11.

23. *See supra* note 6.

24. Fornication is defined as "sexual intercourse between unmarried people." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 894 (3d ed. 1981).

25. *E.g.*, *Acts* 15:20 ("But that we write unto them, that they abstain from pollutions of idols, and from fornication . . . ."); 1 *Corinthians* 6:18 ("Flee fornication. Every sin that man doeth is without the body; but he that committeth fornication sinneth against his own body."); *Galatians* 5:19-21 ("Now the works of the flesh are manifest, which are these; Adultery, fornication, uncleanness, lasciviousness, idolatry . . . they which do such things shall not inherit the kingdom of God."); 1 *Thessalonians* 4:3 ("For this is the will of God, even your sanctification, that ye should abstain from fornication.")

26. Green, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 ANGLO-AM. L. REV. 226 (1988).

27. *Id.* at 226.

28. Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 253 (1978). From 1760 to 1774, 210 of the 370 criminal prosecutions in one Massachusetts county involved charges of fornication. *Id.* at 253-54.

29. Green, *supra* note 26, at 227 (in Old English type-face, the letter "V" was to signify "Vncleanness").

30. Note, *supra* note 28, at 254 n.4. (cites 15 states (Alabama, Florida, Georgia, Idaho, Illinois, Massachusetts, Mississippi, North Carolina, North Dakota, Rhode Island, South Carolina, Utah, Virginia, West Virginia, and Wisconsin) and the District of Columbia as having criminal fornication statutes as of 1978); *see also id.* at n.5 (16 states (Alabama, Alaska, Arizona, Florida, Idaho, Illinois, Kansas, Massachusetts, Michigan, Mississippi, New Mexico, North Dakota, South Carolina, Virginia, West Virginia, and Wisconsin) had criminalized nonmarital cohabitation as of 1978.).

nal sanctions to punish victimless crimes, many states repealed these statutes.[31] In states that still have fornication and cohabitation statues, the delicate political problems they pose to legislators, because of conflicting social values, make predictions regarding repeal of the statutes difficult.[32] The statutes, however, are seldom enforced by prosecutors.[33]

Criminal sanctions against unmarried sexual relations are perhaps the most glaring example of how unmarried couples have historically been denied the same legal treatment as married couples. They reflect the state's perceived compelling interest in promoting the traditional family.[34] The law has traditionally preferred marriage because it is viewed as promoting permanence and stability in the lives of individuals[35] and society.[36] Because "[c]ohabitation is an alternative to marriage which displaces the traditional nuclear family," it is at odds with fundamental policy designed to protect and preserve the family.[37]

Cohabitation is also at odds with traditional views of morality, the regulation of which has long been within the state's police powers.[38] Courts have been unsympathetic to unmarried cohabitants, viewing their relationships as immoral conduct.[39] Similarly, the protection of public health, as a legitimate state interest, serves as a basis for discouraging extra-marital sexual relationships.[40] The enforcement of laws discouraging extra-marital sexual contact is presumed to decrease the public health risk by reducing the spread of sexually transmitted

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31. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 277 (1981).

32. *Id.*

33. "District attorneys either refuse to prosecute cohabitors, or prosecute only those who are suspected of other illegal conduct." *Id.* at 277-78.

34. *Id.* at 314.

35. Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 217 (1988).

36. Maynard v. Hill, 125 U.S. 190, 211 (1888). The Court characterized marriage as "the foundation of the family and of society, without which there would be neither civilization, nor progress." *Id.*

37. Fineman, *supra* note 31, at 314. Laws prohibiting bigamy, polygamy, and homosexual mariage have survived constitutional challenges in light of the state's interest in protecting the family. Fineman, *supra* note 31, at 314.

38. Poe v. Ullman, 367 U.S. 497, 545-46 (1961). "[T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well." *Id.* (Harlan, J., dissenting). *See also* Note, *supra* note 28, at 299-300.

39. Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (W.D. Pa. 1977) (upheld the firing of two cohabitating heterosexual library employees suggesting that proper moral conduct is a bona fide occupational qualification), *cert. denied*, 439 U.S. 1052 (1978).

40. Note, *supra* note 28, at 299.

diseases.[41]

Recognition of these governmental interests in regulating the relationships of unmarried persons is expressed in a number of contexts in which the law treats unmarried couples differently from married couples.[42] For example, some employee life and health insurance benefits are payable only to formally married spouses,[43] as are benefits for survivors under Social Security.[44] Other employment benefit programs often require legal marriage in order for a spouse to participate.[45] Under tort law, marriage is generally a prerequisite to bringing wrongful death or loss of consortium claims for the tortiously caused death or injury of a domestic partner.[46]

Similarly, unmarried couples are not entitled to the same recognition as married couples under property law. This is evidenced by laws providing for the distribution of property by intestate succession, which generally direct decedents' estates to pass to a formal spouse but not to an unmarried partner.[47] Nor, in the absence of a contract, do unmarried partners generally have a right to property accumulated during the meretricious relationship upon termination of that relationship.[48]

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41. Note, *supra* note 28, at 299. The argument is also made that the state has an interest in preventing the birth of illegitimate children as they would be burdened by social stigma, lack of financial support, and would be more likely to become a burden on the state than children born to married couples. Note, *supra* note 28, at 299.

42. "American law treats cohabitants in a lopsided fashion. In dispensing economic benefits and rights based on marital status, it ignores unmarried cohabitation. In imposing economic disability, it more often than not equates unmarried cohabitation with marriage." Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1137-38 (1981). *See also infra* notes 43-77 and accompanying text.

43. *See, e.g.*, 10 U.S.C. § 1076a (1988) (dependents of military personnel entitled to medical and dental benefits); 10 U.S.C. § 1072(2) (1988) (dependent defined as spouse, some former spouses, children, and parents); *see also* Recent Developments, *Protecting the Nontraditional Couple in Times of Medical Crisis*, 12 HARV. WOMEN'S L.J. 220, 224 (1989).

44. *See, e.g.*, 42 U.S.C. § 416(c) (1988) (widow defined as the surviving wife of contributor, married to him for a period of not less than nine months prior to his death). *But see* G. DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 51-53 (1979) (if the contributor dies in a jurisdiction that recognizes common-law marriage, the surviving partner may qualify for benefits).

45. These include bereavement leave for death of a spouse or spouse's family member. *See* Recent Developments, *supra* note 43.

46. Blumberg, *supra* note 42, at 1138. *But see* Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980) (unmarried woman was allowed to bring loss of consortium claim for injuries to her partner of 30 years).

47. See Jaff, *supra* note 35, at 215. Also, "certain kinds of property—co-op apartments in New York, for example—cannot be transferred by will to a 'friend' without the approval of the Board of Directors, though the same property can be bequeathed to a lawful spouse or child without such permission." Jaff, *supra* note 35, at 215.

48. G. DOUTHWAITE, *supra* note 44, at 2 & 153-54. However, courts have recently been

With state human rights legislation of the type at issue in *French* being of relatively recent origin, early cases involving housing discrimination against unmarried persons centered around restrictive zoning ordinances.[49] In *Village of Belle Terre v. Boraas*[50] the United States Supreme Court upheld an ordinance which limited land use to single-family dwellings, defining family as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit."[51] The Court, applying minimum constitutional scrutiny,[52] found that the ordinance was reasonably related to the permissible governmental purpose of protecting "family values, youth values, and the blessings of quiet seclusion."[53] Because the *Belle Terre* ordinance made an exception for unmarried couples,[54] the constitutionality of zoning out cohabitating couples was left unanswered.

In *City of Ladue v. Horn*,[55] however, the Missouri Court of Appeals upheld a decision enjoining an unmarried couple from occupying their home in violation of an ordinance designating the neighborhood as single family residential and limiting the definition of family to those related by blood, marriage, or adoption.[56] The court rejected the argu-

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willing to enforce contract claims between cohabitants which deal with division of property should the relationship end. *See, e.g.*, Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976) (landmark decision holding community property laws do not apply to unmarried couples, but the parties may still be entitled to assets gained during their relationship based on the theory of express or implied contract). It should be noted, however, that states considering whether to recognize the property rights of unmarried cohabitants have addressed the issue in two ways. "First, there are those states which refuse to deal with the area, declaring that public policy prohibits legal protection of cohabitants' property rights. The second group of cases include those that do not recognize cohabitants' rights per se but will enforce an express or implied contractual relationship." Jennings, *Unmarried Cohabitants: New Issues . . . New Answers . . . New Problems*, 8 COMMUNITY PROP. J. 47, 51 (1981).

49. Jaff, *supra* note 35, at 218.

50. 416 U.S. 1 (1974).

51. *Id.* at 2.

52. *Id.* at 7-10. The ordinance was challenged on several grounds, including that it impermissibly interfered with the right to travel and the right to privacy and that it impermissibly expressed social preferences. The Court rejected all of these arguments. *Id.* at 7.

53. *Id.* at 9. For a critique of the rational basis scrutiny as applied in *Village of Belle Terre*, see Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 585-87 (1977).

54. 416 U.S. at 2. "A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family." *Id.*

55. 720 S.W.2d 745 (Mo. App. 1986).

56. *Id.* at 752. The ordinance defined family as "[o]ne or more persons related by blood, marriage or adoption, occupying a dwelling unit as an individaul housekeeping organization." *Id* at 747.

ment that the household was the "functional and factual equivalent of a natural family,"[57] stating "A man and woman living together, sharing pleasures and certain responsibilities, does not *per se* constitute a family in even the conceptual sense. To approximate a family relationship, there must exist a commitment to a permanent relationship and a perceived reciprocal obligation to support and care for each other."[58] The court upheld the ordinance because it met its stated purpose of promoting the health, safety, morals, and general welfare of the city.[59]

Within the last several years, states have passed human rights legislation of the type at issue in *French,* prohibiting discrimination based upon marital status.[60] The definition of marital status, however, is not settled and in some jurisdictions is not sufficiently broad to protect unmarried couples.[61] The general issue involved in interpreting these statutes is whether marital status refers solely to the state of being married or whether it also requires reference to the personal circumstances and identity of the parties involved. Courts have reached conflicting results.[62]

Some courts define marital status narrowly, holding that the denial of housing to unmarried couples living together is not illegal under

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57. *Id.* at 748. The couple had three children. Her children were 16 and 19, and his child was 18. The two older children were university students who only lived in the house on a part-time basis. Among other things, the couple shared a bedroom, paid household expenses from a joint checking account, and ate together. *Id.* at 747.

58. *Id.* at 748.

59. *Id.* at 752.

60. *See, e.g.*, ALASKA STAT. § 18.80.240 (1986); CAL. GOV'T CODE § 12955 (West 1981); ILL. REV. STAT. ch. 68, para. 1-102(A) (1987); MINN. STAT. ANN. § 363.03, subd. 2 (West Supp. 1991); WASH. REV. CODE ANN. § 49.60.222 (1990).

61. *See* Alley, *Marital Status Discrimination: An Amorphous Prohibition,* 54 FLA. B.J. 217 (1980).

62. *Id.* Courts have disagreed when interpreting statutory proscriptions of employment discrimination based on marital status. *See, e.g.*, Klanseck v. Prudential Ins. Co. of Am., 509 F. Supp. 13 (E.D. Mich. 1980) ("marital status" construed as referring only to employee's status of being single or married); Thompson v. Board of Trustees, School Dist. No. 12, 627 P.2d 1229 (Mont. 1981) ("marital status" includes the identity and occupation of a person's spouse as well as whether or not the individual has a spouse); Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 51 N.Y.2d 506, 434 N.Y.S.2d 961, 415 N.E.2d 950 (1980) (definition of "marital status" limited to single, married, divorced, or widowed status); Thomson v. Sanborn's Motor Express, Inc., 154 N.J. Super. 555, 382 A.2d 53 (1977) (fact that employer was enforcing a "no relatives" policy did not constitute unlawful marital status discrimination on the grounds that "marital status" was only the state of being married or single). *Compare* Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 586 P.2d 1149 (1978) (interpreted "marital status" broadly to permit a finding that an employer's antinepotism policy was discriminatory). *See also infra* note 99.

housing statutes prohibiting marital status discrimination.[63] In *McFadden v. Elma Country Club*[64] an unmarried woman applied for membership in a country club that included the right to own and occupy a lot within the club.[65] When the club discovered that she intended to live with her lover, its board of directors rejected her application on the ground that a club by-law provided that "no immoral practices shall be permitted on Club property."[66] The court decided that the state's statutory prohibition[67] against marital status discrimination "does not include discrimination against couples who choose to live together without being married."[68] A Maryland court held in *Prince George's County v. Greenbelt Homes, Inc.*[69] that only legal marriage can bestow a legally recognizable marital status.[70] Therefore, rejection of an unmarried couple's application for membership in a cooperative housing development did not constitute discrimination based on marital status.[71] The court acknowledged the legislature's intent to send a public policy message, through "procedural prerequisites for legitimating 'marriages,' . . . and the statutory condemnation of other relationships," to encourage "the proverbial concept that more belongs to a marriage than four bare legs in a bed."[72]

Using similar reasoning, the Illinois Appellate Court in *Mister v. A.R.K. Partnership*[73] narrowly construed the Illinois Human Rights Act's prohibition against discrimination on the basis of marital status,[74] holding that the prohibition does not include the refusal to rent to un-

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63. *See infra* notes 64-77 and accompanying text.

64. 26 Wash. App. 195, 613 P.2d 146 (1980).

65. *Id.* at 197, 613 P.2d at 148.

66. *Id.* at 198, 613 P.2d at 148.

67. WASH. REV. CODE ANN. § 49.60.222 (1990) provides:

> It is unfair practice for any person . . . because of sex, marital status, race, creed, color, national origin . . . 2) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith. . . .

Id.

68. 26 Wash. App. 195, 205, 613 P.2d 146, 152 (1980). The court stated that the existence of a statute criminalizing cohabitation at the time the marital status discrimination prohibition was enacted indicated the legislature's intent that the prohibition was not to protect unmarried cohabitants. *Id.* at 202, 613 P.2d at 150.

69. 49 Md. App. 314, 431 A.2d 745 (Md. Ct. Spec. App. 1981).

70. *Id.* at 319, 431 A.2d at 748.

71. *Id.*

72. *Id.*

73. 197 Ill. App. 3d 105, 553 N.E.2d 1152 (1990).

74. ILL. REV. STAT. ch. 68, paras. 1-102(A), 3-102(A) (1990).

married cohabitants.[75] The court focused on the state's criminalization of fornication[76] and nonrecognition of common-law marriage to reach its decision that protecting unmarried couples through a prohibition of marital status discrimination "would contravene Illinois' strong public policy in favor of strengthening and preserving the integrity of marriage."[77]

In contrast, some jurisdictions define marital status broadly enough to protect unmarried cohabitants. This was the position of the Alaska Supreme Court in *Foreman v. Anchorage Equal Rights Commission*[78] in which the court concluded that the state's prohibition against marital status discrimination[79] includes the protection of the rights of unmarried couuples.[80] The *Foreman* court was not faced with the task of harmonizing the definition of marital status discrimination with the prohibition of fornication because the Alaska Legislature had recently repealed the fornication statute.[81]

In *Markham v. Colonial Mortgage Service Co.*[82] the United States Court of Appeals for the District of Columbia Circuit construed marital status discrimination in the Equal Credit Opportunity Act[83] as protecting an unmarried couple in a residential real estate transaction.[84] The court held that the refusal to aggregate an unmarried couple's income, when a married couple's income would be aggregated, for the purpose of a mortgage credit check was "precisely the sort of discrimination prohibited by [the Act] on its face."[85] *Hess v. Fair Em-*

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75. 197 Ill. App. 3d at 116, 553 N.E.2d at 1159.

76. *Id.* at 113-14, 553 N.E.2d at 1158. ILL. REV. STAT. ch. 38, para. 11-8 (1987), as amended by Pub. Act 86-490, § 1, eff. Jan. 1, 1990, provides: "Any person who has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." The court in *Mister* explained "the mere fact that unmarried couples . . . attempted to rent apartments is sufficient to satisfy the open and notorious requirement." 197 Ill. App. 3d at 115, 553 N.E.2d at 1158.

77. 197 Ill. App. 3d at 115, 553 N.E.2d at 1158.

78. 779 P.2d 1199 (Alaska 1989).

79. ALASKA STAT. § 18.80.240 (1986) provides: "It is unlawful . . .(1) to refuse to sell, lease or rent the real property to a person because of sex, [or] marital status. . . ."

80. 779 P.2d at 1203.

81. *Id.* at 1202. The court cited a legislative resolution that characterized the portion of the code governing "crimes against morality and decency" as "vastly out of step with constitutional and social development in recent decades." *Id.* (quoting S. Con. Res. 5, 1975 Alaska).

82. 605 F.2d 566 (D.C. Cir. 1979).

83. 15 U.S.C. § 1691 (a) (1988) provides: "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 . . . or marital status . . . ."

84. 605 F.2d at 569.

85. *Id.*

ployment & Housing Commission[86] followed *Markham* in interpreting the California Fair Employment and Housing Act.[87] An owner's refusal to rent a duplex to an unmarried couple violated the Act despite the owner's business practice "to require that each person of an unrelated couple separately qualify financially to rent the duplex, while requiring that only one spouse of a married couple so qualify."[88] The court reasoned that the owner's financial interests would not be jeopardized by requiring that the same standards be applied to both married and unmarried couples, especially in light of the fact that the landlord could require each tenant to be personally liable for payment of the rent whether they were married or not.[89]

Finally, in *Munroe v. 344 E. 76th Realty Corp.*[90] a New York court enjoined a landlord from evicting an unmarried couple despite a provision in the lease requiring that only the party to the lease and his spouse and children could use the apartment.[91] The court explained that the state's human rights legislation would be meaningless if a landlord, who was prohibited from discriminating on the basis of marital status in selling or renting,[92] could serve an eviction notice or fail to renew the lease on the same discriminatory basis.[93]

A statute's failure to define marital status in only one obstacle preventing equal access to housing for unmarried cohabitants.[94] The legislation itself may be limited by its terms so that unmarried cohabitants receive little or no protection.[95]

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86. 138 Cal. App. 3d 232, 187 Cal. Rptr. 712 (1982).

87. CAL. GOV'T CODE § 12955 (West 1980) provides: "It shall be unlawful: (a) For the owner of any housing accommodation to discriminate against any person because of the race, color, . . . [or] marital status . . . of such person."

88. 138 Cal. App. 3d 232, 235, 187 Cal. Rptr. 712, 714.

89. *Id.* at 236, 187 Cal. Rptr. at 715.

90. 113 Misc. 2d 155, 448 N.Y.S.2d 388 (N.Y. Sup. Ct. 1982).

91. 113 Misc. 2d at 158, 448 N.Y.S.2d at 389.

92. *N.Y. Exec. Law* § 296, subd. 5 (a) (McKinney 1982).

93. 113 Misc. 2d at 157, 448 N.Y.S.2d at 390. *But cf.* Hudson View Properties v. Weiss, 59 N.Y.2d 733, 450 N.E.2d 234 (N.Y. 1983), 463 N.Y.S.2d 428 (The court held that a landlord did not discriminate against a tenant on the basis of marital status by attempting to evict her on the grounds that she violated the lease by living with a man on the premises. The court observed that the lease would have been violated without reference to marriage had the additional tenant been an unrelated female. Therefore, the immediate family restriction in the lease was independent of the tenant's marital status.).

94. *See supra* notes 63-77 and accompanying text.

95. For example, Colorado has a statute prohibiting discrimination on the basis of marital status in any aspect of housing. This statute, however, does not "apply to or prohibit compliance with local zoning ordinance provisions concerning residential restrictions on marital status." Oregon has a similar statute prohibiting marital status

In *State ex rel. Cooper v. French*[96] the Minnesota Supreme Court began its analysis by observing that Minnesota Human Rights Act (MHRA),[97] at the time of the alleged violation, did not contain a definition of the term marital status.[98] Therefore, the court was forced to define marital status to determine whether French's actions resulted in a prima facie violation of the Act's provision against discrimination in the housing context.[99] Considering the statute ambiguous,[100] the court looked to legislative intent and public policy to determine its meaning.[101] The court had previously construed the term marital status by looking "to the legislature's policy of discouraging fornication and protecting the institution of marriage."[102]

The majority observed that the state's fornication statute remained a valid expression of public policy in light of a recent fornication prosecution.[103] It also stated that when a couple is cohabitating, direct evi-

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discrimination in selling, renting or leasing real property. But, this section does not apply if "the application of this section would necessarily result in common use of bath or bedroom facilities by unrelated persons of the opposite sex." Thus, these statutes tend to take away with one hand much of what they have given with the other.

Jaff, *supra* note 35, at 218 (footnotes omitted) (quoting COLO. REV. STAT. § 24-34-502 (2) (1988) and OR. REV. STAT. § 659.033 (3) (1987)).

96. 460 N.W.2d 2 (Minn. 1990) (Justice Yetka wrote the opinion for the majority).

97. *See supra* notes 12 and 15.

98. MINN. STAT. ANN. § 363.01, subd. 24, (West Supp. 1991) as it currently exists provides:

> "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.

99. 460 N.W.2d at 4. The court noted that previously it had construed the term "marital status" in the context of employment discrimination. In Kraft, Inc. v. State *ex rel.* Wilson, 284 N.W.2d 386 (Minn. 1979), the court held that an employer's antinepotism policy violated the prohibition against marital status discrimination because such a policy "could discourage similarly situated employees from marrying" and lead employees to "forsake the marital union and live together" in violation of Minnesota's fornication statute. *Id.* at 388. Also, in Cybyske v. Independent School Dist. No. 196, 347 N.W.2d 256 (Minn. 1984), the court upheld a narrow definition of marital status discrimination by refusing to extend the definition to prohibit an employer from making distinctions based on the identity or conduct of an employee's spouse.

100. 460 N.W.2d at 5. "The term 'marital status' is ambiguous because it is susceptible to more than one meaning, namely, a meaning which includes cohabitating couples and one which does not." *Id.*

101. *Id.*

102. *Id.* The court cited the state's criminal fornication statute, MINN. STAT. ANN. § 609.34 (West 1987), and its treatment in Kraft, Inc. v. State *ex rel.* Wilson, 284 N.W.2d 386 (Minn. 1979), to illustrate this point.

103. 460 N.W.2d at 6. *See* State v. Ford, 397 N.W.2d 875 (Minn. 1986) (high school teacher prosecuted under the fornication statute, MINN. STAT. ANN. § 609.34 (West 1987), for

dence of fornication is not required, as sexual relations may be inferred from the nature of the relationship.[104] Therefore, "unequal treatment based on cohabitation [is] not 'marital status' discrimination."[105]

Continuing its analysis of the legislative intent, the court looked to the definition of marital status in the MHRA,[106] which was enacted after French's alleged violation.[107] The language of that definition addressed only the status of an individual and not an individual's relationship with another.[108] The court reasoned that the language of the statute specifically granting broader protection in employment cases "constitutes legislative recognition that employment cases are fundamentally different from housing cases."[109] It concluded, after an examination of the records of legislative hearings, that the MHRA was not intended to protect unmarried couples in housing cases,[110] and, absent express legislative guidance, the Act "will not be construed in a manner inconsistent with this state's policy against fornication and in favor of marriage."[111]

After resolving the issue of statutory interpretation, the court unnecessarily addressed French's claim that his religious liberty would be infringed if the MHRA were applied against him.[112] The court rejected the argument that French surrendered his right to free exercise of religion by entering into the housing market.[113] French's situation as a landlord renting his former residence was distinguished from businesses organized in the corporate form that may be more heavily regulated by the state.[114] The court reasoned that the enforcement of the MHRA against French would be tantamount to denying him the "basic right to

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granting special favors and privileges to female students in exchange for sex).

104. 460 N.W.2d at 5-6.

105. *Id.* at 6.

106. *Id. See supra* note 98. This statutory definition was enacted in response to the *Cybyske* decision. 460 N.W.2d at 6. *See supra* note 99.

107. 460 N.W.2d at 4 n.2.

108. *Id.* at 6.

109. *Id.*

110. *Id.* at 7.

111. *Id.* at 6. The court considered Mister v. A.R.K. Partnership, 197 Ill. App. 3d 105, 553 N.E.2d 1152 (1990), and Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989), as analogous cases in which other jurisdictions considered housing discrimination against unmarried couples and statutory prohibition against fornication. *See supra* notes 73-77 and accompanying text. The court in *French* reasoned that before it could extend the MHRA to protect unmarried couples, the Minnesota fornication statute must be repealed. 460 N.W.2d at 7.

112. 460 N.W.2d at 8.

113. *Id.*

114. *Id.*

earn a living."[115]

In analyzing French's religious liberty defense, the court limited its decision to an interpretation of the Minnesota Constitution.[116] The court cited the preamble's provision protecting religious liberty and freedom of conscience,[117] and explained that the state may infringe upon these rights only if they are "licentious" or "inconsistent with the peace or safety of the state."[118] The court ruled that the state failed to make such a showing and held that "French must be granted an exemption from the MHRA unless the state can demonstrate compelling and overriding state interests."[119]

Under this analysis the court considered French's sincerely held religious beliefs and the state's asserted interest in promoting public access to housing.[120] The court recognized the "preferred status" the institution of marriage is afforded by the law, as evidenced in other contexts[121] where cohabitating persons are not entitled to the same benefits as married couples.[122] Regarding Minnesota's fornication statute,[123] the court reasoned that the state's interest in eliminating "pernicious discrimination" would not be served by applying the MHRA in this situation, as there is nothing pernicious "about refusing to treat unmarried cohabiting couples as if they were legally married" in light of the state's interest opposing fornication and favoring marriage.[124] Considering its obligation to enforce a statute in the least restrictive manner to accommodate religious liberty, the court concluded that it is less restrictive to have Parsons abide by the fornication statute than to force French to cooperate in its violation.[125] As the court analyzed the

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115. *Id.* The court noted that French's need for rental income may be as basic as the need for wage income. This same concern had directed the court's previous decision preventing discrimination in the employment context. *Id.*

116. *Id.* "It is axiomatic that a state supreme court may interpret its own constitution to offer greater protection of individaul rights than does the federal constitution." *Id.* (quoting State v. Fuller, 374 N.W.2d 722 (Minn. 1985)).

117. The preamble of the Minnesota Constitution provides: "We, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution."

118. 460 N.W.2d at 9 (quoting MINN. CONST. art. I, § 16).

119. *Id.*

120. *Id.* at 10.

121. *Id.* Examples include employee health and life insurance benefits, intestate succession statutes, and the marital communication privilege in the rules of evidence. *Id.*

122. *Id.*

123. MINN. STAT. ANN. § 609.34 (West 1987).

124. 460 N.W.2d at 10.

125. *Id.*

situation, French was being punished not only for his religious beliefs, but also for refusing to disregard the fornication statute.[126] Therefore, the court rejected the state's argument that granting French an exemption would allow landlords to discriminate on religious grounds against divorced, remarried, or single persons with children.[127]

The majority concluded by explaining the importance of fundamental values and institutions that have "served western civilization well for eons."[128] The court cautioned that before casting aside these fundamental values, it "must pause and take stock of our present social order," which it characterized as plagued by drug abuse, child abuse, and children who are growing up without parental guidance.[129] It questioned how any social improvement could be expected when the state "itself contributes . . . to further erosion of fundamental institutions that have formed the foundations of our civilization for centuries."[130] Therefore, the court held on both statutory and state constitutional grounds that French did not act unlawfully in refusing to rent his house to Parsons.[131]

Writing in dissent, Chief Justice Popovich asserted that not only did French violate the MHRA, but also that the majority misconstrued precedent, legislative history, public policy, and the facts of the case.[132] He argued that the MHRA is to be " 'construed liberally for the accomplishment of [its] purposes' "[133] of preventing " 'discrimination [i]n employment [and i]n housing.' "[134] The dissent also contended that Minnesota precedent holds that discrimination against an individual on the basis of with whom that individual lives constitutes marital status discrimination.[135]

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126. *Id.*

127. *Id.* at 10-11.

128. *Id.* at 11.

129. *Id.* at n.6 (citation omitted).

130. *Id.* at n.7 (citation omitted).

131. *Id.* Justice Simmonett concurred, stating that the statutory construction was dispositive. He did not reach the constitutional issue. *Id.* (Simmonet, J., concurring).

132. *Id.* at 11-12. (Popovich, C.J., dissenting).

133. *Id.* at 12. (quoting MINN. STAT. ANN. § 363.11 (West Supp. 1990)).

134. *Id.* (quoting MINN. STAT. ANN. § 363.12 (West Supp. 1990)).

135. *Id.* (citing State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985) (unlawful to question prospective employees about marital status, and the MHRA did not violate the freedom of religion guaranteed by the Minnesota Constitution); State *ex rel.* Cooper v. Mower County Social Servs., 434 N.W.2d 494 (Minn. App. 1989) (unlawful to refuse to hire applicant because she was pregnant and unmarried); State *ex rel.* Johnson v. Porter Farms, Inc., 382 N.W.2d 543 (Minn. App. 1986) (marital status discrimination to fire employee because he was not married to his girlfriend)).

The dissent observed that the record did not indicate that Parsons was going to have an illegal sexual relationship on the property.[136] Because French admitted that he would have rented Parsons the house had she been married, the dissent characterized French's refusal to rent the house as discrimination based solely on Parsons' marital status as a *single* individual living with an individual of the opposite sex.[137]

In addition, the dissent noted that other jurisdictions disagree on the issue of whether unmarried cohabitation falls within the definition of marital status.[138] The dissent criticized the majority's selection of precedent from other jurisdictions which it felt represented a minority position.[139]

After rejecting the majority's reasoning regarding the discrimination claim, Chief Justice Popovich proceeded to analyze French's free exercise of religion defense under a four-part test established in *State ex rel. McClure v. Sports & Health Club, Inc.*[140] The *Sports & Health Club* test requires an evaluation of whether: (1) the religious beliefs are sincerely held, (2) the "state regulation burdens the exercise of religious belief," (3) the state possesses a compelling or overriding interest in the regulation, and (4) the regulation utilizes the least restrictive means to accomplish its purpose.[141] The dissent considered the first

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136. 460 N.W.2d at 13 (Popovich, C.J., disssenting). The dissent noted that the term "cohabitation" may be used interchangeably with "living together." *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 520 (2d ed. 1934) and WEBSTER'S NEW COLLEGIATE DICTIONARY 218 (1976)). Also, because there was no direct evidence of a sexual relationship, the dissent concluded that the fornication statute had no place in the resolution of the case at hand. *Id.* at 18.

137. *Id.* at 12-13.

138. *Id.* at 12.

139. *Id.* at 13. The dissent stated that the majority ignored the following precedents: Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566 (D.C. Cir. 1979) (marital status discrimination to fail to aggregate an unmarried couples's income for purpose of a mortgage credit check); Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989) (definition of marital status includes unmarried couples); Hess v. Fair Employment & Hous. Comm'n, 138 Cal. App. 3d 232, 187 Cal. Rptr. 712 (1982) (unlawful marital status discrimination to refuse to rent a duplex to an unmarried couple); Atkisson v. Kern County Hous. Auth., 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976) (unlawful for owner of publicly assisted housing to evict on sole grounds of unmarried cohabitation); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973) (marital status discrimination includes refusal to rent to two female tenants who seek to live together); Munroe v. 344 E. 76th Realty Corp., 113 Misc. 2d 155, 448 N.Y.S. 2d 388 (N.Y. Sup. Ct. 1982) (marital status discrimination to evict a tenant for allowing a man to live with her); Yorkshire House Assocs. v. Lulkin, 114 Misc. 2d 40, 450 N.Y.S.2d 962 (N.Y. Civ. Ct. 1982) (landlord may not evict tenant on grounds that it would not have rented if it had known the tenant was not married); Loveland v. Leslie, 21 Wash. App. 84, 583 P.2d 664 (1978) (marital status discrimination to refuse to rent to two male roommates).

140. 370 N.W.2d 844 (Minn. 1985).

141. 460 N.W.2d at 14 (citing 370 N.W.2d 844, 851 (Minn. 1985)).

part of the test satisfied because the sincerity of religious belief is subjective in nature and French's sincerity was undisputed.[142] The dissent asserted that French failed, however, to establish that the regulation unduly burdened his religious beliefs because he "voluntarily entered into the rental marketplace . . . subjecting himself to potentially burdensome regulations. . . ."[143] The state's "interest in eradicating invidious discrimination" and its interest in promoting equal access to housing were viewed as compelling, especially because housing is a basic human necessity.[144] This compelling interest would justify the burden on French's religious beliefs.[145] However, the burden must be "no more burdensome than necessary to promote the secular interests."[146] Since granting an exemption was the only alternative and would result in "a complete abrogation of the state's goals of preventing invidious discrimination," the dissent contended that there was no less restrictive means of achieving the state's objectives.[147] Finally, the dissent expressed its opinion that "[d]iscrimination against unmarried individuals living with members of the opposite sex is neither the cause or solution to societal woes."[148]

The decision in *French* is more significant as a reflection of social policy than as a matter of substantive law. The law favoring traditional family relationships in this country is deeply rooted in moral precepts which, in turn, are rooted in religious canons. The court devoted a major portion of its opinion to a discussion of the landlord's religious rights, even though that was unnecessary to the decision. Once the court determined that the definition of marital status in the Minnesota Human Rights Act did not protect unmarried cohabitants, there was no reason to consider the issue of religious freedom.

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142. *Id.*

143. *Id.* at 15. The dissent stated the MHRA "adopted a functional definition of public accommodations that reaches various forms of public, quasi-commercial conduct," (quoting Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984)), and, when persons of particular religious beliefs voluntarily enter into commercial conduct, they are subject to regulation binding on others in that area of activity. *Id.* at 14-15 (citing United States v. Lee, 455 U.S. 252, 261 (1982)).

144. *Id.* at 16.

145. *Id.* at 19-20.

146. *Id.* at 19.

147. *Id.*

148. *Id.* at 20. The dissent also rejected French's argument that the MHRA violated his protection under the federal equal protection and due process clauses because French failed to specifically identify which fundamental rights the enforcement of the MHRA would jeopardize and because French was afforded a full hearing before the penalty was assessed against him. *Id.*

The *French* opinion illustrates a reliance on a moral rationale[149] which was magnified when religious freedom was raised as a defense against the operation of the anti-discrimination provision of the MHRA. Thus, the court's emphasis on the landlord's religious freedom represents a balancing of interests approach that curiously gave little consideration to the tenant's claim that her civil rights had been violated.

This opinion reflects the law's enduring attachment to a venerable line of authority that favors the values associated with marriage and traditional family life. Promotion of morality and stability in society is often raised in support of the government's interest in encouraging the traditional family. But while the ideal of the traditional family occupies an important place in American culture, recent demographic trends reflect a marked increase in the number of unmarried couples living together.[150] Extra-marital sexual relationships may still be viewed as immoral, or at least improper, by the majority of Americans, but the fact that over 1.5 million unmarried couples cohabitate[151] undoubtedly reflects a change in social mores concerning such relationships. Even when employing moral reasoning, courts should not lose sight of these changing mores when considering competing values in our dynamic and pluralistic society.

As a matter of substantive law, the *French* decision is important because it adds contours to the continuing battle over the definition of marital status used in anti-discrimination statutes. Several states have enacted legislation similar to that at issue in *French,* and more are likely to follow. Though Arkansas does not have a general civil rights statute,[152] some Arkansas statutes protect against discrimination based on marital status.[153] This decision illustrates the problems that states

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149. The court's inference of fornication from Parsons' intention to reside with her fiance without direct evidence of sexual misconduct reflects this type of legal reasoning. *See* State *ex rel.* Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990).

150. Blumberg, *supra* note 42, at 1128-29. There were 1,560,000 unmarried couples cohabitating as of 1980. This number increased by 200% from 1970 to 1980, and represents more than 3% of all couples who reside together. Blumberg, *supra* note 42, at 1128-29.

151. Blumberg, *supra* note 42, at 1128.

152. The Senate passed S. 463, 78th Gen. Assembly (1991), an Arkansas civil rights bill introduced by Sen. John Pagan. While in the house Public Health Welfare & Labor Committee, Representative William Walker proposed an amended version which included protection against marital status discrimination in housing and property transactions. Because the committee took no action before the legislature adjourned, the bill died.

153. ARK. CODE ANN. § 4-87-104 (1987) provides: "It shall be unlawful for any creditor or credit card issuer to discriminate between equally qualified individuals solely on the basis of sex or

are likely to encounter when enacting and interpreting these types of statutes.

As a representative of the nebulous meaning of marital status discrimination and the social policy favoring the traditional family, the *French* decision illustrates the dilemma that exists when balancing individual rights within the housing market. While the fabric of one's religious convictions provides important refuge, necessary shelter is also given by the roof over one's head.

Steven L. McConnell

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marital status with respect to the approval or denial of terms of credit. . . ."; ARK. CODE ANN. § 23-66-206 (1987) provides: "The following are defined as unfair methods of competition and unfair . . .practices in the business of insurance: . . .(7) (E) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the marital status of the individual."