Anti-discrimination Law—Marital Status Discrimination: Public Scorn of Personal Choices—State v. French, 460 N.W.2d 2 (Minn.)

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INTRODUCTION

The elimination of invidious discrimination is a fundamental goal of the state of Minnesota. This goal is embodied within Minnesota’s


2. See Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984). The Supreme Court of the United States noted that Minnesota’s Human Rights Act reflects the “State’s strong historical commitment to eliminating discrimination” and “plainly serves compelling state interests of the highest order.” Id. See also United States Jaycees v. McClure, 305 N.W.2d 764, 766-68 (Minn. 1981).

CONCLUSION

The elimination of invidious discrimination is a fundamental goal of the state of Minnesota. This goal is embodied within Minnesota’s
Human Rights Act (Act) which is based on the public policy of securing its residents freedom from discrimination. The Act reflects Minnesota's commitment to provide its citizenry with the freedom to make choices which are crucial to the exercise of personal liberty. Yet, despite the protections afforded by the antidiscrimination legislation, the rights of residents are jeopardized when judicial intervention denies the rights which state law purports to protect.

The Minnesota Supreme Court's recent decision, State v. French, provides an example of judicial denial of the right to secure housing without regard to marital status. The court examined the language of the Minnesota Human Rights Act, which governs the criteria for tenant selection, and upheld a landlord's refusal to rent property to a prospective tenant because of the applicant's unmarried status and intent to live in the house with her fiancé. The court determined that the applicant-tenant was not a member of the class afforded protection on the basis of "marital status."

The court's decision emphasizes the importance of a precise review of the Legislature's intent to provide protected classes with equal access to housing. Because there are no affirmative guidelines which otherwise regulate tenant selection, it is critical that the court accurately identify the protected classes. This Note will examine the meaning of the term "marital status" as intended by the Legislature and as embodied within the Minnesota Human Rights Act.

I. LANDLORDS AND TENANTS

A. State v. French

On February 22, 1988, a Minnesota landlord, Lyle French, entered into an agreement to rent his house to Susan Parsons, who responded to his newspaper advertisement. Prior to the agreement, French learned of Parsons' intention to live in the house with her fiancé. Two days later, French rescinded the agreement. French refused to rent to Parsons because he believed that she would engage

3. MINN. STAT. § 363.12, subd. 1 (1990). The Act's declaration of policy states: "It is the public policy of this state to secure for persons in this state, freedom from discrimination . . . [i]n housing and real property because of . . . marital status . . . ." Id.

4. Article I is the bill of rights for citizens of the state. Section 2 of Article I pertains to citizens' rights and privileges. It states in part: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." MINN. CONST. art. I, § 2.

5. 460 N.W.2d 2 (Minn. 1990).

6. Id. at 3. French once occupied this house in Marshall, Minnesota. He eventually moved out of the house, but decided to rent the property before it was sold. Id.
in sexual relations with her fiancé in the house. In addition, French asserted that the cohabitation of two adults of the opposite sex was morally wrong and violated his religious convictions.

After French’s decision, Parsons filed a marital discrimination charge against him with the Minnesota Department of Human Rights. The Department conducted an investigation and issued a complaint against French. The administrative law judge (ALJ) ruled that French violated the law prohibiting marital status discrimination. The ALJ awarded to Parsons compensatory damages, damages for mental suffering and, in addition, assessed a civil penalty to be paid to the state of Minnesota by French. The Minnesota Court of Appeals affirmed the ALJ’s ruling. In 1990, the Minnesota Supreme Court granted French’s petition for further review and reversed the decision.

The Minnesota Supreme Court held French’s refusal to rent to Parsons on the basis of his religious beliefs was not a violation of the Act. The court’s 4-3 decision turned on an issue of statutory construction. Justice Yetka, writing for the majority, stated that the Legislature did not intend to protect unmarried couples from housing discrimination on the basis of marital status. Consequently, landlords are permitted to deny access to housing solely because the prospective tenants are members of the opposite sex and unmarried. Although three of the justices also based their decision on a state constitutional analysis, Justice Simonett concurred in the decision, basing his analysis solely on the statutory construction issue. In a strong dissent, Chief Justice Popovich stated that the majority’s deci-

7. French, 460 N.W.2d at 4. Neither Parsons nor her fiancé answered French when he questioned whether they planned to have sexual relations on the property. French apparently inferred that the couple would engage in sexual relations. Id. In his answer to the complaint, French alleges that renting his property to Parsons would force him to violate Minnesota’s fornication statute. See Brief of Respondent at app. 5, State v. French, 460 N.W.2d 2 (Minn. 1990) (DHR No. H 1812).

8. French, 460 N.W.2d at 3. French believed that two unmarried adults living together constituted the “appearance of evil” and that couples living together or having sexual relations outside of marriage are sinful. Id. at 4.

9. French, 460 N.W.2d at 4; Brief of Respondent at app. 3, French, 460 N.W.2d at 2 (DHR No. H 1812).

10. French, 460 N.W.2d at 4.


12. French, 460 N.W.2d at 3.

13. Id. at 11.

14. Id. See MINN. STAT. § 609.34 (1990). The statute prohibits fornication and states: “When any man and single woman have sexual intercourse with each other, each is guilty of fornication, which is a misdemeanor.” See also id. § 363.01, subd. 40 (defining marital status).

15. French, 460 N.W. 2d at 6.

16. Id. at 11 (Justice Simonett concurred as to the statutory construction issue but did not reach the constitutional questions.).
sion "misconstrues legislative history, public policy and the facts presented to reach a result contrary to this court’s interpretation of the [Minnesota Human Rights Act]." Chief Justice Popovich argued, in part, that religious and moral values "include not discriminating against others solely because of their color, sex, or whom they live with . . . ."18

The court’s holding is based on the Legislature’s definition of marital status discrimination.19 The analysis centers on the interpretation of legislative intent in light of two issues: (1) whether the Act’s prohibition against marital status discrimination extends protection to unmarried cohabiters in their access to housing, and (2) whether Minnesota’s fornication statute precludes any interpretation which protects unmarried cohabitation.

B. Background

1. Landlord-Tenant Law

Historically, the law permitted a landlord to refuse property rental to prospective tenants on any grounds the landlord chose.20 This common law right is illustrated in the New York case of Kramarsky v. Stahl Management Co.21 The Kramarsky court affirmed a landlord’s right to refuse rental housing to a prospective tenant because the prospective tenant was an attorney22 and might prove to be difficult.23 The court concluded that there was nothing illegal about dis-

17. Id. at 12.
18. Id. at 17.
19. Id. at 6-7. Although the court based its holding on statutory interpretation of marital status discrimination, the plurality opinion addressed the landlord’s constitutional rights of religious freedom under the Minnesota Constitution. Id. at 8-11. This note will not discuss the constitutional arguments or issues raised by this dicta.
21. 92 Misc. 2d 1030, 401 N.Y.S.2d 943 (1977) (A black, female attorney asserted she was denied housing because of her race, gender and marital status.).
22. Id. at 1031, 401 N.Y.S.2d at 944. The landlord submitted documentation that 30% of apartments had been rented to blacks and 60% of apartments had been rented to unmarried people to support his contention that complainant’s sex or race were not at issue. Id.
23. The New York court stated:

Absent a supervening statutory proscription, a landlord is free to do what he wishes with his property, and to rent or not to rent to any given person at his whim. The only restraints which the law has imposed upon free exercise of his discretion is that he may not use race, creed, color, national origin, sex or marital status as criteria. So, regrettable though it may be, a landlord can employ other criteria to determine the acceptability of his tenants—occupational, physical or otherwise. He may decide not to rent to singers because they are too noisy, or not to rent to baldheaded men because he has been told they give wild parties. He can bar his premises to the lowest strata of society, should he choose, or to the highest, if that be his personal desire.
criminating against attorneys as a class and the landlord's subjective evaluation was permitted by law.24

The civil rights movement of the 1960s prompted the United States Congress to enact the Civil Rights Act of 1968.25 In doing so, Congress protected against landlord discrimination on the basis of race, color, religion or national origin.26 The Housing and Community Development Act of 1974 further expanded the protected grounds to include discrimination on the basis of gender.27

The fair housing section of the Civil Rights Act exempts certain categories from its provisions, including the rental of single family housing when the landlord does not own more than three such units28 and residences which are operated by religious organizations or private clubs which are used on a noncommercial basis.29 It also exempts rooms or dwelling units which are intended for occupation for up to four families if the owner occupies one of the units as her residence.30 Although the Act entitles a landlord to discriminate in tenant selection, the landlord is prohibited from advertising the intent to so discriminate.31

\[\text{Id. at 1032, 401 N.Y.S.2d at 945.}\]

24. The court also briefly addressed the restrictions of the state's human rights act but upheld the prevailing position that a landlord has total discretion in tenant selection on any basis which is not prohibited. Id.


[I]t shall be unlawful:
(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

26. See id. (also providing protection to other types of real estate transactions).

27. Id. §§ 3604-3606, 3631.

28. Id. § 3603(b) (Exemption applies only where owner does not use a real estate service/agent.).

29. Id. § 3607 (Exemption applies provided that the religion itself does not restrict membership on basis of race, color, or national origin.).

30. Id. § 3603(b)(2) (Four families may live independently of one another.).

31. This section states:
It shall be unlawful ... [t]o make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

\[\text{Id. § 3604(c).}\]
State-enacted antidiscrimination statutes provide similar protection in access to fair housing. Cumulatively, these federal and state legislative decisions provided the first constraints on a landlord's criteria for tenant selection.

While most states have enacted legislation that prohibits discrimination against tenants or prospective tenants, there is considerable deviation between these statutes. For example, statutes vary in the scope, the identity of the protected classes, the grounds which constitute illegal discrimination and the remedies available. Many state statutes extend the protection offered by the federal law to include coverage on grounds such as age, marital status and families with children.

2. Tenant Selection

An underlying assumption of antidiscrimination law is that there are criteria in which a landlord has no legitimate interest and which may not be utilized in assessing a potential tenant. There are, however, legitimate considerations which a landlord may use as a basis for tenant selection. Of foremost concern is a prospective tenant's ability to pay the rent. In addition, the landlord may be concerned with preserving the value of the property and thus may choose a tenant who will not inflict damage during the tenancy. The criteria for tenant selection, therefore, would include considera-

32. See American Law, supra note 20, at § 11.1 (Civil rights movement also prompted enactment of state antidiscrimination legislation.).
33. See supra notes 25-32 and accompanying text. See also American Law, supra note 20, at § 11.1 (A few jurisdictions prohibited certain types of discrimination against tenants before the 1960s.).
34. American Law, supra note 20, at § 11.9 (Legislation prohibiting some type of discrimination has been adopted in about two-thirds of the states.).
37. See supra notes 25-27 and accompanying text (discussing federal prohibitions); see also supra notes 35-36 and accompanying text (discussing state prohibitions).
38. See Note, Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act, 54 Fordham L. Rev. 563, 583 (1986) [hereinafter Note, Business Necessity] (recognizing that "[t]he tenant's ability to pay lies at the core of the landlord's concerns").
39. Id. at 584.
tion of such factors as income, and credit and rental history.

Except for the considerations prohibited by federal and state discrimination statutes which enforce fair access to housing for the protected classes, the common law still applies. The landlord may make tenancy decisions based on personal taste. Thus, the importance of accurately identifying the classes which the Legislature intended to protect becomes critical in the enforcement of antidiscrimination law. Otherwise, a prospective tenant who should receive statutory protection may be unfairly denied choice of housing.

III. THE MINNESOTA HUMAN RIGHTS ACT

The Act provides:

It is an unfair discriminatory practice . . . to refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status . . . .

The public policy which the statute is intended to promote is freedom from discrimination in securing housing and real property. To accomplish this objective, the Act should be construed liberally. The Minnesota Supreme Court has consistently held that the "remedial nature of the Minnesota Human Rights Act requires liberal construction of its terms." The court has recognized this liberal

40. See Minn. Stat. § 363.03, subd. 2(1)(a), (b) (1990) (A landlord may not discriminate against individuals who receive public assistance, unless exempted from compliance by Minn. Stat. § 363.02, subd. 2(1)(b) (1990)).

41. See Note, Business Necessity, supra note 38, at 584 (Reversion interest of the landlord is proper consideration in the selection of a tenant).

42. See supra notes 29-36 and accompanying text (Except for statutory provisions providing protection from certain types of discrimination, a landlord may discriminate on any grounds).

43. The Act states: "It is the public policy of this state to secure for persons in this state, freedom from discrimination . . . ." Minn. Stat. § 363.12, subd. 1 (1990). "The opportunity to obtain . . . housing . . . is hereby recognized as and declared to be a civil right." Id. § 363.12, subd. 2.

44. Minn. Stat. § 363.03, subd. 2 (1)(a) (1990).

45. See City of Minneapolis v. Richardson, 307 Minn. 80, 86, 239 N.W.2d 197, 201 (1976) (Discrimination means the "distinction in treatment of individuals based upon impermissible or irrelevant factors such as race, color, sex, etc."); Minn. Stat. § 363.01, subd. 14 (1990) (The term "discriminate" means to separate or segregate).

46. Minn. Stat. § 363.12, subd. 1(2) (1990) (Employment is similarly protected but is not applicable in this situation).

47. Id. § 363.11 (1990).

48. See Cybyske v. Independent School Dist. No. 196, 347 N.W.2d 256, 264 (Minn. 1984) (upholding the broad prohibition of the Act against arbitrary classification); City of Minneapolis v. State, 310 N.W.2d 485 (Minn. 1981) (holding "race" discrimination included discrimination for association with persons of another race);
construction in its interpretation of marital status discrimination.49

The Minnesota Supreme Court first interpreted the language of the Act regarding unfair discriminatory practice in Minneapolis v. Richardson.50 In this case of first impression, the court established a standard for unfair discriminatory practice.51 A finding of discrimination in the area of public services may be made when the record establishes either the adverse treatment of one or more persons because the existence of a factor such as race, color, gender, or when the treatment accorded is so unreasonable that discrimination is the probable explanation.52

The analysis of discrimination claims under the Act requires the application of a three part analysis53 developed in the adjudication of claims arising under Title VII of the 1964 Civil Rights Act.54 The Minnesota Supreme Court adopted this analysis.55 A plaintiff presents a prima facie case of discrimination;56 the defendant answers the plaintiff’s showing;57 and the plaintiff rebuts this evidence of nondiscrimination.58 In order to establish a prima facie case of

Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980) (holding gender discrimination included employer inaction in face of sexually derogatory statements and verbal sexual advances directed at one employee by fellow employees); City of Minneapolis v. Richardson, 307 Minn. 80, 89, 239 N.W.2d 197, 203 (1976) (holding Act should be liberally construed to aid in eliminating discrimination in public services).

49. See Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979) (The court endorsed a broad construction of "marital status" to prohibit employment discrimination based on the identity or situation of one's spouse in addition to whether an individual was or was not married.).

50. 307 Minn. 80, 85, 239 N.W.2d 197, 201 (1976).

51. Id. at 89, 239 N.W.2d at 203.

52. Id. at 87, 239 N.W.2d at 202 (establishing standard to serve as a guide to the evaluation of evidence in discrimination cases).

53. See Sigurdson v. Isanti County, 386 N.W.2d 715, 719-22 (Minn. 1986) (remanding case for findings and conclusions in specific conformance with the three-part analysis previously adopted).

54. See generally 42 U.S.C. § 2000e (1988); see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing four-part analysis in Title VII cases); Hubbard v. UPI, 330 N.W.2d 428, 441 (Minn. 1983) (applying the test developed to interpret federal law to Minnesota law cases because of the similarities between the two statutes).

55. Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978) (Plaintiff alleged employment-based sex discrimination.).

56. Id. at 399 (Only the "bare essentials of unequal treatment based on gender is required for a proper prima facie case.").

57. Id. at 400 (Defendant must submit proper, admissible and relevant evidence to rebut the plaintiff's showing.).

58. Id. at 402 (Plaintiff must be given an opportunity to answer defendant's rebuttal evidence.; see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (identifying the respective burdens of persuasion and production in disparate treatment discrimination claims under Title VII); Sigurdson v. Isanti County, 386 N.W.2d 715, 722 (Minn. 1986) (discussing employment discrimination on the basis of gender); Hubbard, 330 N.W.2d at 428 (discussing employment dis-
discrimination, the plaintiff must be a member of a protected class, meet the minimum qualifications of the job, have been denied employment despite the qualifications, and the defendant must have continued to seek applicants with similar qualifications.59

In order to rebut the evidence presented, the employer must show a legitimate reason for the discriminatory conduct.60 In real property situations, the landlord/owner would need to show that the conduct fell within one of the exceptions provided by the Legislature61 or that the conduct was otherwise permissible.62

In French, the landlord refused to rent the property to Parsons because she intended to live in the house with her fiancé.63 The marital status of the prospective tenant constituted the sole basis for the landlord's refusal to rent. Two issues arise as to the landlord's rejection of this otherwise suitable tenant. The first is whether the refusal to rent to an applicant-tenant based on an intention to live with a member of the opposite sex constitutes marital status discrimination, and the second is whether a landlord is permitted to inquire into the marital status of prospective tenants and to use the information (or refusal to provide the requested information) as a basis for tenancy decisions.64

A. Marital Status Discrimination

There are no federal laws which specifically prohibit discrimination on the basis of marital status. Marital status discrimination is not covered by Title VIII65 or its amendment, the Fair Housing Act...
of 1988.66 However, Title VII of the Civil Rights Act of 196467 has been used to attack marital status discrimination as a form of gender discrimination in the employment context.68 In marital status discrimination cases, Title VII claims require that the plaintiff present a prima facie case69 showing that the employment policy resulted in either disparate treatment70 or disparate impact71 on one gender. Under Title VII, rules that have no adverse impact on one gender are generally not unlawful.72 The claim of marital status discrimination under the Civil Rights Act has not been an effective remedy.73 Thus, many states have enacted antidiscrimination statutes which prohibit discrimination based on "marital status."74

66. See id. at 1107 (The only way to extend coverage to marital status is if marital status rules carry disparate racial, ethnic, religious, or gender-based impact.).
67. 42 U.S.C. §§ 2000e to 2000e-17 (1988); Section 2000e-2a(2) provides that an employer may not "limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin." Id. § 2000e-2a(2).
69. See id. at 350-51 (discussing requirements of a prima facie case in marital status discrimination claim under Title VII).
70. See Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1197-98 (7th Cir. 1971) (Company policy prohibiting only female flight attendants from marrying was unlawful gender discrimination because the rule adversely impacted on women; the court relied in part on the EEOC Guidelines for sex discrimination.), cert. denied, 404 U.S. 991 (1971).
71. See Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (Facially neutral standard must disproportionately exclude a protected class from employment.).
72. See Gelb & Frankfurt, California's Fair Employment and Housing Act: A Viable State Remedy For Employment Discrimination, 34 HASTINGS L.J. 1055, 1085 (1983) (pointing out that marital status discrimination has been found illegal in certain situations which adversely impact women). See also Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir. 1977) (Company's policy of refusing to hire married flight attendants does not violate Title VII since there is no dissimilarity in treatment between the sexes.).
73. See Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977) (Company's no spouse rule was job-related and did not violate Title VII.), cert. denied, 435 U.S. 934 (1978); Harper v. Trans World Airlines, Inc., 525 F.2d 409, 414 (8th Cir. 1975) (Policy which prohibited employment of spouses within the same department had no disparate impact on women and thus did not constitute gender discrimination.); Tuck v. McGraw-Hill, Inc., 421 F. Supp. 39, 45 (S.D.N.Y. 1976) (Employer's no-close relative rule which prohibited female employee from transferring into husband's employment area did not constitute gender discrimination.); see generally Note, Marital Status, supra note 68 (discussing the difficulties involved in maintaining a Title VII claim); see infra notes 81-84 and accompanying text (discussing no-spouse rule).
74. See Note, Marital Status, supra note 68, at 360; see also ALASKA STAT. § 18.80.240 (1986); CAL. GOVT. CODE § 12955 (West 1980); COLO. REV. STAT. § 24-34-502 (1988); CONN. GEN. STAT. § 46a-64 (1986); D.C. CODE §§ 1-2512, 1-2515
While federal law does not protect against marital status discrimination, Minnesota prohibits real property and employment discrimination on this basis.\textsuperscript{75} In 1988, the Legislature added the definition of marital status discrimination to the Act.\textsuperscript{76} Marital status is defined to mean "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."\textsuperscript{77}

The definition itself potentially encompasses three different types of claims: (1) those based on the person’s marital relation with another individual (e.g., whether a person is married to another employee of a company); (2) those based on a person’s individual relation to the marital status; and (3) those based on living arrangements, including cohabitation with another adult who is not a spouse.\textsuperscript{78}

Prior to French, Minnesota case law did not address the issue of marital status discrimination in the context of access to housing. Therefore, it is necessary to examine the case law which exists in the context of employment. The Minnesota Legislature’s intent in the area of housing will then be compared with the Legislature’s intent in the employment setting.

\textbf{1. Marital Status Discrimination in Employment}

The first type of marital status discrimination is one in which an employer refuses to employ an individual because the spouse is al-

\begin{itemize}
  \item \textsuperscript{75} Act of May 24, 1973, ch. 729, § 3, 1973 Minn. Laws 2161-64.
  \item \textsuperscript{76} Act of Apr. 26, 1988, ch. 660, § 1, 1988 Minn. Laws 918 (Prior to 1988, the courts interpreted the meaning of the term “marital status.”).
  \item \textsuperscript{77} Minn. Stat. § 363.01, subd. 24 (1990) (Prior to the 1988 definition, the court refused to interpret marital status in the employment context to include the identity or situation of spouse.).
  \item \textsuperscript{78} Unmarried heterosexual and homosexual couples are similarly affected by discrimination on the basis of marital status. Besides discrimination in housing and employment, both may face denial of social security, tax and insurance benefits because of their marital status. However, homosexual couples are not allowed the opportunity to gain the legal rights of marriage, whereas unmarried heterosexual couples may obtain those rights at any time by marrying. The denial of a legal right to marriage and the resulting benefits which are denied to homosexual couples is beyond the scope of this article and better addressed by a discussion of discrimination on the basis of sexual orientation.
\end{itemize}
ready employed by the company. In *Kraft, Inc. v. State,*79 several part-time employees were denied full-time positions with the company because each was married to a full-time employee of the company.80 The Minnesota Supreme Court held that this practice constitutes marital status discrimination.81 The court endorsed the broad definition of marital status to include not only whether an individual was married, but also the identity or situation of one’s spouse.82 The court further stated that the Legislature’s intent was to prohibit this type of marital status discrimination by an employer, unless a business necessity existed which entitled the company to an exemption.83 The business necessity had to meet the criteria of a bona fide occupational qualification.84

The second type of claim involves the mere status of being married or unmarried. Recently, the Minnesota Court of Appeals held that the refusal to hire an applicant because of marital status or pregnancy constituted an unfair employment practice under the Act.85 In *State v. Mower County Social Services,* an employer refused to hire a qualified applicant after the employer discovered the applicant’s unmarried, pregnant state. The ALJ found sufficient evidence to support the finding that the woman was not hired because of her marital status and pregnancy.86 The court of appeals affirmed the judgment which included an award for mental anguish.87

Two Minnesota cases involve the third type of marital status dis-

79. 284 N.W.2d 386 (Minn. 1979).
80. Id. at 387. This policy is often known as the “no-spouse rule.”
81. Id. Absent a bona fide occupational qualification for the antinepotism rule, the no-spouse practice constitutes marital status discrimination.
82. Id. at 388; contra Cybyske v. Independent School Dist. No. 196, 347 N.W.2d 256, 259 (Minn. 1984) (refusing to extend interpretation of marital status discrimination to include the identity or situation of the spouse).
83. See *Kraft,* 284 N.W.2d at 388. “To justify such an employment policy, an employer must advance a bona fide occupational qualification which will withstand the strict scrutiny of a reviewing court. Mere business convenience is insufficient.” Id.
84. See MINN. STAT. § 363.08, subd. 1 (1990) (Statute does not specifically define a bona fide occupational qualification.); 42 U.S.C. § 2000e-2(e)(1) (1988) (Bona fide occupational qualification is not specifically defined.); see also Note, *Marital Status,* supra note 68, at 351 (discussing bona fide occupational qualifications; an employer’s defense is usually that discriminatory policy is necessary to operation of the employer’s business, thus entitling employer to discriminate).
85. See *State v. Mower County Social Servs.*, 434 N.W.2d 494, 495 (Minn. Ct. App. 1989) (County agency refused to hire qualified applicant despite her merit system ranking of number one out of seven applicants.).
86. Id. at 497 (Defendant’s nondiscriminatory reasons for not hiring applicant were a pretext for discrimination.).
87. Id. at 500 (Act authorizes damages for mental anguish.).
crimination claim. In State v. Sports and Health Club, Inc., the Minnesota Supreme Court affirmed an ALJ’s findings that an employer’s refusal to hire persons believed to be engaging in fornication constituted discrimination based on marital status. In this case, the owners of a health club questioned prospective employees about their marital status and whether they engaged in premarital or extramarital sexual relations. The court stated that the employer’s questioning went beyond the bounds permitted by the Act and affirmed the ALJ’s finding that at least two applicants were not hired on the basis of marital status discrimination.

In State v. Porter Farms, Inc., an employer issued an ultimatum to a male employee that he would have to marry the woman with whom he lived or have her move out of his home. Otherwise, the employee would be terminated. The Minnesota Court of Appeals affirmed the ALJ’s finding that the employer’s termination constituted marital status discrimination. The court stated that the supreme court’s holding in State v. Sports and Health Club, Inc. extended the protection of the Act to unmarried couples.

In each of these cases, an employer sought to evaluate factors other than the job skills of the individual. The employer ceased

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88. 370 N.W.2d 844 (Minn. 1985) (Action was brought against a for-profit, closely-held Minnesota corporation.).

89. Id. at 854. See also State v. Sports & Health Club, Inc. HR-82-005-RL, slip op. at 29 (OAH Apr. 26, 1984) (The ALJ’s finding of “marital status” discrimination included refusal to hire because individuals lived with adults of the opposite sex.).

90. See Sports & Health Club, 370 N.W.2d at 850 (Employer’s questioning regarding religion and marital status pervaded the interview process.).

91. See Sports & Health Club, HR-82-005-RL, slip op. at 50 (OAH Apr. 26, 1984) (ALJ found that the marital status and sex based questions went beyond permissible grounds: “[T]hey ask single persons who live away from home whom they live with and, if they live with an unrelated member of the opposite sex to whom they are romantically attached, they presume he/she is a fornicator and will not hire them.”).

92. Id.

93. 382 N.W.2d 543 (Minn. Ct. App. 1986) (Defendant is a family-owned subchapter S corporation which consists of dairy and crop farming.).

94. Id. at 546 (Complainant was hired to work in the dairy operation and lived in a trailer house on defendant’s farm.).

95. Id. at 547 (Court rejected complainant’s contention that marital status discrimination did not include protection from discharge because of a sexual relationship with a member of the opposite sex.).

96. See State v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985) (Unmarried applicants were denied employment because they lived with adults of opposite sex.); Kraft v. State, 284 N.W.2d 386, 387 (Minn. 1979) (Complainants were refused full-time employment because they were married to full-time employees of the defendant-company.); State v. Mower County Social Servs., 434 N.W.2d 494, 495 (Minn. Ct. App. 1989) (A qualified applicant was refused employment because of unmarried, pregnant status.); State v. Porter Farms, Inc., 382 N.W.2d 543 (Minn. Ct. App. 1986) (Complainant was discharged from employment when he refused to either marry or terminate his living arrangement with an adult of the opposite sex.).
functioning as a businessperson and became a judge of the employee's personal conduct and choices. 97 In all three possible definitions of marital status, Minnesota courts have held that this practice by employers constitutes discrimination, and individuals are protected under the Act. 98

2. Is a Prospective Tenant's Access to Housing Protected?

   a. Legislative Intent

   The French court held that the definition of marital status discrimination applied in Sports and Health Club did not apply to housing cases because the Legislature intended different effects for housing and employment cases. 99 The court examined both the language and legislative intent of the statute and held that the Legislature did not intend to extend protection from housing discrimination to unmarried couples. 100

   The prohibition against marital status discrimination was included in the Act in 1973. 101 An examination of the legislative history of this amendment reveals that the Legislature specifically considered and balanced 102 the right of a single person to live with a member of

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97. See Note, Marital Status, supra note 68, at 347 (Employer evaluated matters which lie in the private domain of the individual.).
98. See supra notes 79-97 and accompanying text.
99. State v. French, 460 N.W.2d 2, 6 (Minn. 1990). The court noted that the definition of marital status should not apply in this case because it did not become effective until August 1, 1988. Id. at 5. Yet, the court used the 1988 definition to justify the court's holding in this case. See infra notes 101-06 and accompanying text for a discussion of the legislative intent for the 1973 Act amendment.
100. Id. at 6-7 (Court examined the legislative history of the subdivision to discern the Legislature's intent.).
102. See Hearing on S.F. 419 Before the Subcomm. on Jud. Admin. of the Senate Jud. Comm., 68th Minn. Leg., Apr. 20, 1973 (audio tape) (tape on file at the Legislative Reference Library). Senator Robert Tennessen, one of the bill's authors, discussed the scope of the proposed amendment with Phyllis Janey, President of the League of Minnesota Human Rights Commissioners:

   Janey: Well, in landlord-tenant relationship, I guess I think that we've come to find that there does need to be some attention paid to the rights of tenants where property owners are offering that property for income. That then there are certain kinds of restraint that can, and perhaps should, be imposed on them for the benefit of renters.

   Tennessen: Well, I am sure you understand that I agree with that in a way since I authored the bill. The question I have, put it this way, if Mrs. Murphy has a one-room she rents out and Mrs. Murphy wants it as a room for two people and she does not want to rent that to two people of the opposite sex who are not married. Do you think under the bill she can do that?

   Janey: Well, I don't believe that Mrs. Murphy, you know, ought to have some sort of right to supervise the lives of her tenants, you know, provided that they do not invade her privacy.

   Tennessen: But, Mrs. Janey suppose this is very offensive to her, totally offen-
the opposite sex and the objections which a property owner might have to the tenant's living arrangement.\textsuperscript{103} The Legislature provided that a landlord may discriminate on the basis of gender, marital status, or status with regard to public assistance or disability if the landlord lives on the premises.\textsuperscript{104} Landlords who do not live on the premises, however, are precluded from discriminating on any basis specified by the Act.\textsuperscript{105}

The partial exemption provided by the Legislature recognizes the right of a landlord, who lives in close proximity to a tenant, to discriminate.\textsuperscript{106} Once the landlord enters into the commercial marketplace, however, the right to discriminate on the basis of marital status is prohibited by the Act. Thus, it is clear that the Legislature intended to provide protection to single individuals like Parsons who live with individuals of the opposite sex.

The French court ignored the 1973 legislative intent to prohibit marital status discrimination for unmarried persons who choose to live together. Instead, the court examined the language of the marital status definition enacted by the Legislature in 1988. This definition includes broader language in the context of employment cases. As defined by the statute: "Marital status means whether a person is single, married, remarried, divorced, separated, or a surviving

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\item she is living there, you know, it just bothers her. Now is that situation any substantially different or do you think it's different from the, you know, the large apartment complex or, you know, where owners don't normally super[vise] or live in close proximity to their tenants, etc.?
\item Janey: No, I don't and I guess . . . well, for one thing Senator Tennessen, I hope you are aware that St. Paul has no such protection for the mythical Mrs. Murphy and you know I am not aware of any terrible hardship that women who rent property in their homes are suffering in the city of St. Paul. This also, this kind of permission to discriminate, was dropped in Wisconsin, Iowa, Wisconsin, I think. Yes, and the world didn't come to an end for renters of property.
\item The full Senate Judiciary Committee met on May 8, 1973. Senator Nicholas Coleman, the chief author of the bill stated: "And marital status we declared an unfair practice to discriminate in employment and in housing with an important exception, Mrs. Murphy's boarding house."
\end{itemize}

\textsuperscript{103} See Minn. Stat. § 363.02, subd. 2(1)(a), (b) (1990). This exemption provides that section 363.03, subdivision 2, shall not apply to:

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\item (a) rooms in a temporary or permanent residence home run by a nonprofit organization, if the discrimination is by sex; or
\item (b) the rental by a resident owner or occupier of a one-family accommodation of a room or rooms in the accommodation to another person or persons if the discrimination is by sex, marital status, status with regard to public assistance or disability.
\end{itemize}

\textit{Id.}

\textsuperscript{104} Id. § 363.02, subd. 2(1)(b).

\textsuperscript{105} See supra note 44 and accompanying text.

\textsuperscript{106} This exemption is more restrictive than the exemptions provided in Title VIII. See supra notes 28-31 and accompanying text.
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." Because of this language, the court stated: "[T]his 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."

The Legislature included the definition of marital status in the Act as a direct result of the Minnesota Supreme Court decision of Cybyske v. Independent School District No. 196. In that case, the court refused to extend the Act's interpretation of marital status discrimination to include the identity or situation of the plaintiff's spouse. In Cybyske, the plaintiff-teacher was not hired for a teaching position because of the allegedly political pro-teacher views of her husband. Although purporting to adhere to a broad interpretation of marital status, the court held that employment discrimination based on

107. MINN. STAT. § 363.01, subd. 24 (1990).
108. State v. French, 460 N.W.2d 2, 6 (Minn. 1990) (emphasis in original) (Court determined the broad language used to describe prohibited discrimination in employment indicates that the Legislature considered employment and housing cases differently.).
110. See Cybyske, 347 N.W.2d at 261 (Complainant asserted that she was refused employment because her husband espoused pro-teacher views and held a school board position in a neighboring school district.).
111. Id. at 259 (Plaintiff's husband was elected to the district school board on a pro-teacher platform.).
112. Id. at 260. Significantly, Justice Yetka joined in the dissent of Justice Wahl in the Cybyske decision, arguing that the majority opinion narrowed the broad construction given marital status in Kraft, Inc. v. State. Justice Wahl stated:

We recognized in Kraft that 'by including marital status within the parameters of the Human Rights Act, the legislature clearly intended to outlaw arbitrary classifications relating to marriage.' We found further that, in acknowledging the fundamental nature of the marriage relationship in the Act, the legislature intended that an employer may differentiate on the basis of marital status only where a business necessity is compelling and overriding.

Id. at 264 (citation omitted).

In Kraft, Inc. v. State, 284 N.W.2d 386 (Minn. 1979), the court stated:

We reject the view that 'marital status,' while it denotes the fact that one is or is not married, does not embrace the identity or situation of one's spouse. Since respondent does employ married, single and divorced individuals, to hold otherwise would condone discrimination against a portion of a protected class, i.e., job applicants already married to full-time Kraft employees. To do so would ignore the broad prohibition against arbitrary classifications embodied in the Human Rights Act and would elevate form over substance.

Id. at 388 (citations omitted).

The majority in Cybyske attempted to reconcile its holding with Kraft, stating that the school district's actions in Cybyske did not directly attack the institution of mar-
the political beliefs of one's spouse did not constitute marital status discrimination under the Act.\textsuperscript{113}

The decision in Cybyske sparked concerns in the Minnesota Legislature.\textsuperscript{114} During legislative hearings on the expanded definition, Minnesota's Human Rights Commissioner Stephen Cooper explained that the Cybyske ruling forced a dismissal of a number of complaints in which employees were terminated because of the actions or situation of the employees' spouses.\textsuperscript{115} Commissioner Cooper explained

riage. The court contrasted this with the employer's antinepotism rule in Kraft which constituted a "direct attack on the husband and wife as an entity and is contrary to the 'legislative judgment [that] reflects the protected status the institution of marriage enjoys in our society.' " Cybyske, 347 N.W.2d at 261 (quoting Kraft, 284 N.W.2d at 388).

113. Id. at 261 (Act does not prohibit discrimination on the basis of political beliefs but prohibits discrimination on the basis of creed or religion.).


Senator Reichgott: Number one is a very important one, it's the marital status provision and what it does is, you've heard of instances where there have been, there might be a spouse who might be out and about active in the various organizations or whatever and the spouse of that person is employed somewhere, may in fact have repercussions because they're married to this person who is out and about creating trouble.

[Laughter]

Senator Reichgott: [Responding to laughter] Well it's true. Maybe I didn't say it artfully but, in our law, of course, we have a provision which says you can't discriminate on the basis of marital status, but what does that really mean? What the courts have said is that what it means is you can't discriminate on the basis if somebody is married or single. It doesn't say anything about whether you can discriminate on the basis of what their spouse does, and there is, in fact, a case recently that made that very clear, where a woman was fired from her teaching position because her spouse was running around apparently doing activities before the school board and raising trouble. So, that decision made very clear that they [the courts] felt they didn't have jurisdiction to cover that, and we need to change and broaden the marital status definition so that it will now include protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse.

115. See id. Commissioner Cooper explained the reason for the proposed marital status definition to the subcommittee.

Commissioner Cooper: The first section as was set out before is put before you to deal with a problem we've had at the department ever since the supreme court ruled that the definition of marital status only included whether you were or were not married. We've had a significant number of cases that come to the department where somebody's clearly been terminated for the actions of their spouse. A husband may be picked up for DWI, his wife who works at a different company altogether, is fired when that gets in the newspaper for something that has absolutely nothing to do with her her [sic] abilities or lack of abilities. The complainant comes to the department and says I've been discriminated against because of marital status. We have to say, "No, you haven't as law is presently interpreted. Were you fired because you're married?" "No." "Then that's not a violation." It's our belief
that, under the *Cybyske* holding, the Act is violated only when an employee is fired because she is married or single. The Act is not violated when an employee is fired because of the actions of a spouse.\textsuperscript{116}

The Legislature limited the expanded definition of marital status discrimination to employment cases because of its concern that the expanded language would be inappropriate in a housing context. Married individuals generally rent property together.\textsuperscript{117} The expanded definition in a housing context would prohibit taking into consideration the actions of one of the tenants as a basis for possible eviction.\textsuperscript{118} In order to avoid this interpretation, the Legislature lim-

\textsuperscript{116} See id.

\textsuperscript{117} See Hearing on S.F. 1769 Before the Subcomm. on Civil Law of the Senate Jud. Comm., 75th Minn. Leg., Feb. 26, 1988 (audio tape) (tape on file at the Legislative Reference Library). This was the second meeting of the civil law subcommittee in which the expanded marital status definition was restricted to employment.

\textsuperscript{118} See Hearing on H.F. 2054 Before the Subcomm. on Civil Law of the Senate Jud. Comm., 75th Minn. Leg., Feb. 26, 1988 (audio tape) (tape on file at the Legislative Reference Library). Representative Allen Quist and Commissioner Stephen Cooper speaking:

\textit{Representative Quist:} This applies not only to employment but also to housing, does it not?

\textit{Commissioner Cooper:} It applies to employment and it applies to, I believe it does apply to housing, but let me just check . . .

\textit{Representative Quist:} Employment and housing might be different situations if you're talking about a spouse. I don't have any problem with former spouse but if you're talking about a spouse, it seems to me if we're saying that you can't discriminate with regards to housing as to the identity, situation, actions, or belief of a spouse, that, that's an extremely broad kind of concept because a person's spouse normally could have just a whole lot of impact on housing so, and I'm not sure what that would be.

I guess things that come to mind include things like out in is it Utah, where you've got these polygamists you know, where you know we've all read about these situations where people have intense religious beliefs about maintaining polygamy and I think it's bizarre, but I mean, those kinds of things happen. And what this would say if it applies to housing is that you can't consider what the beliefs, actions and so on of a person's spouse are.

And I mean, you've got cases where spouses out there are shooting at and,
At no time during the legislative hearings on the amendment did the authors of the amendment, the Commissioner of Human Rights, or other House and Senate members state an intention to preclude protection of unmarried cohabitation. Indeed, this protection was already provided both by the court’s interpretation of marital status discrimination in prior cases and by the 1973 Legislature. Rather, the focus of this amendment was to clarify that marital status discrimination includes the identity, situation, actions or beliefs of one’s spouse or former spouse. The Legislature resolved this issue by adopting this amendment.

Although the French court refused to “include what the legislature excluded” in its interpretation of marital status discrimination, it excluded what the Legislature included. The Legislature intended to differentiate between landlords who had not entered the marketplace and those who had entered the commercial arena. The distinction was made by providing a partial exemption for landlords living on the rented property. Landlords must either meet the criteria for the housing exemption or comply with the Act.

The Minnesota Supreme Court noted a similar distinction for employment cases in the *Sports and Health Club* decision. Differentiating between an employer engaged in a business for profit and a religious corporation, the court noted that the Act provided an ex-
emption for religious corporations.\textsuperscript{124} Upon entering into the business arena to participate in the secular marketplace, however, an employer is subject to the standards proscribed by the Legislature in preventing "pernicious discrimination."\textsuperscript{125}

The Minnesota Supreme Court refused to recognize this distinction in \textit{French}. Rather, the court stated, "in non-employment cases, . . . only the status of the individual, not an individual's relationship with a spouse, fiancé, fiancée, or other domestic partner," is protected from marital status discrimination.\textsuperscript{126} The majority refused to protect the unmarried, cohabiting couples the Legislature intended to protect.

\textbf{b. Minnesota's Fornication Statute}

Minnesota's fornication statute makes it a misdemeanor "when any man and single woman have sexual intercourse with each other."\textsuperscript{127} The majority in \textit{French} relied on the existence of Minnesota's fornication statute as evidence of the Minnesota public policy favoring the institution of marriage\textsuperscript{128} and thereby denied unmarried, cohabiting couples the statutory protection of freedom from discrimination in access to housing.\textsuperscript{129}

The court's reliance on Minnesota's fornication statute necessitates an examination of that statute and the validity of any inferences which may be made from its existence. In particular, three issues deserve consideration. The first is whether the existence of the fornication statute sufficiently implies the legislative intent of denying cohabiting couples protection from marital status discrimination. The second is whether the statute violates an individual's right to privacy. The third is whether the fornication statute is constitutional.

\textbf{(1) The Fornication Statute and Public Policy}

The fact that the fornication statute has not been repealed permits a state to prosecute an individual for fornication.\textsuperscript{130} The majority in

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\item \textsuperscript{124} \textit{Id.} (The Act contains exemptions for religious corporations in certain contexts; see also \textit{Minn. Stat.} § 363.02, subd. 1(2) (1990) (A religious corporation may be exempted from compliance with the Act when religion is a bona fide occupational qualification for employment.).
\item \textsuperscript{125} \textit{Sports & Health Club}, 370 N.W.2d at 853 (A state's interest in eliminating discrimination would be frustrated if nonreligious business were allowed to discriminate solely because of sincerely held religious beliefs.).
\item \textsuperscript{126} \textit{French}, 460 N.W.2d at 6 (emphasis in original).
\item \textsuperscript{127} \textit{Minn. Stat.} § 609.34 (1990).
\item \textsuperscript{128} \textit{French}, 460 N.W.2d at 6.
\item \textsuperscript{129} See supra notes 14-17 and accompanying text.
\item \textsuperscript{130} \textit{French}, 460 N.W.2d at 6. The majority opinion strongly objected to the assertion that the fornication statute had "fallen into complete disuse." \textit{Id.} However,
French, construed the existence of a fornication statute to embody a public policy against unmarried cohabitation and to reflect the Legislature's intent to deny protection to unmarried couples who attempt to rent housing. One indicator of whether the existence of the fornication statute accurately expresses current social mores is the frequency with which the statute has been used as a basis for prosecution.

The last reported conviction for fornication occurred in 1927. In the context of unmarried cohabitation, the last reported conviction occurred in 1914. Subsequent case law indicates that the state no longer attempts to regulate nonmarital, heterosexual activity between two consenting adults when such activity is conducted in the privacy of an individual's home. This lack of prosecution and enforcement of unmarried cohabitation is inconsistent with a public policy which allegedly condemns unmarried cohabitation.

(2) Right to Privacy

The United States Supreme Court first recognized the constitutional right of privacy in *Griswold v. Connecticut*. *Griswold* provided constitutional protection for the childbearing decisions of married couples. The right to contraception established in *Griswold* was extended to unmarried persons in *Eisenstadt v. Baird* on an equal protection theory. Justice Brennan's opinion, however, allowed the state legislature discretion in creating laws preventing the act of

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131. French, 460 N.W.2d at 5 (The court stated that marital status does not include unmarried cohabiting couples as this would be inconsistent with public policy and legislative intent.).

132. See *State v. Cavett*, 171 Minn. 222, 213 N.W. 920 (1927).

133. See *State v. Gieseke*, 125 Minn. 497, 147 N.W. 663 (1914). The married defendant was involved in a sexual relationship with a woman who worked and lived on his farm. *Id.* at 506, 147 N.W. at 667. The defendant's wife and five children also resided upon the farm. *Id.* at 506, 147 N.W. at 666. The Minnesota Supreme Court affirmed the conviction for fornication. *Id.* at 506, 147 N.W. at 667.

134. *But see* *State v. Ford*, 397 N.W.2d 875, 880 (Minn. 1987). The defendant-school administrator was involved in sexual activity with high school students who attended the school in which defendant was employed. The defendant was initially charged with fornication and sodomy but those charges were not prosecuted after defendant pled guilty to other charges. *Id.* at 881. *See also* *State v. Sauer*, 217 Minn. 591, 15 N.W.2d 17 (1944) (The court affirmed defendant's conviction on the charge of keeping a disorderly house for persons to engage in unlawful sexual intercourse.).

135. 381 U.S. 479 (1965).


137. *Id.*
fornication.138 The United States Supreme Court declined the opportunity in *Hollenbaugh v. Carnegie Free Library*139 to address the state's proper role in regulating sexual behavior. In *Hollenbaugh*, two library employees were fired from their positions because they were "living together in 'open adultery.'"140 Thus, although the Supreme Court has recognized a right of privacy in areas concerned with marriage,141 the family, and procreation, that right "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."142

The Minnesota Supreme Court has not addressed the right of privacy for unmarried cohabiting couples. In *In re Agerter*,143 however, the court examined a judge's right to privacy in response to allegations of sexual misconduct. In *Agerter*, an informal complaint alleged that a judge was having a sexual relationship with the complainant's ex-wife.144 The Board on Judicial Standards obtained a subpoena requiring the judge to appear before the Board for an inquiry into the allegations. Ruling on a motion to quash, the court determined that enforcement of the subpoena would violate the judge's right to privacy.145

The court's analysis in *Agerter* examines the right of the state to intrude into the intimate affairs of an individual. The court stated that the "protectable right of informational privacy depends on a balancing of the competing interests of the individual in keeping his or her intimate affairs private and the government's interest in know-

138. *Id.* at 449.
140. *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328, 1331 (W.D. Pa. 1977), *aff'd* 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978). Although the Court did not grant certiorari, Justice Marshall filed a dissenting opinion. He asserted that the personal choice of living arrangements is sufficiently close to other fundamental constitutional guarantees recognized by the Court and should receive more than the minimum rationality tier of equal protection analysis. *Hollenbaugh*, 439 U.S. at 1056. Justice Marshall expressed doubt that the employee's termination would survive even the relaxed scrutiny of the rational-basis test. *Id.* at 1056-57.
141. See *Zablocki v. Redhail*, 434 U.S. 374 (1978). The United States Supreme Court invalidated a state law which required noncustodial parents to obtain court permission for marriage when the parent was under a court order to provide child support payments. *Id.* at 386.
143. 353 N.W.2d 908 (Minn. 1984). This case involved an alleged disciplinary violation by a Minnesota judge. The investigation by the Board on Judicial Standards investigated a complaint that the judge had an alcohol problem and was involved in a sexual relationship with complainant's ex-wife. *Id.* at 910.
144. *Id.*
145. *Id.* Although the judge asserted that the subpoena would also violate his right of freedom of association, the court's holding was based on his right to privacy. *Id.*
ing what those affairs are when public concerns are involved."\textsuperscript{146} In order to intrude on the judge's right to privacy, the court stated that an important public interest must be shown.\textsuperscript{147} The public interest involved the possibility that the judge’s conduct might bring the judicial office into disrepute. The court stated that the existence of adultery or fornication statutes did not make the allegations of the complaint any less speculative. Therefore, the court refused to compel the judge to disclose this information.\textsuperscript{148}

Contrasting \textit{Agerter} with \textit{French}\textsuperscript{149} shows the inconsistency of the Minnesota Supreme Court in addressing privacy matters. The court never acknowledged the tenant’s right to privacy nor the landlord’s interest in making the inquiry.\textsuperscript{150} As in \textit{Agerter}, the existence of a fornication statute does not make the intrusion into the intimate sexual lives of prospective tenants any more justifiable. There must be an important state interest which would justify the intrusion into what the court has recognized as a privacy interest.\textsuperscript{151}

\textsuperscript{146} Id. at 913 (citation omitted) (At issue is the state’s right to compel disclosure of private information.).
\textsuperscript{147} Id. at 915. The court asserted that a judge’s right to privacy, was “admittedly less pervasive than the private citizen’s.” \textit{Id}.
\textsuperscript{148} Id. at 915. The court balanced the right of the individual to keep intimate affairs private against the government’s interest when public concerns are involved. \textit{Id} at 913.
\textsuperscript{149} See \textit{State v. French}, 460 N.W.2d 2, 18 (Minn. 1990) (The landlord admitted he did not know whether the prospective tenants would engage in sexual activity on the property.).
\textsuperscript{150} Privacy issues are also raised by the use of tenant screening services. These services are being used in some areas of the country to offer data on prospective tenants to landlords. The services use advanced computer technology to provide a wide range of data to subscribing landlords.

The tenant screening services operate in a manner similar to credit bureaus. The landlord subscribes to the service and provides the name of the applicant tenant to the service. If the information on the tenant is contained within the database of the company, the landlord may purchase the information. \textit{See} \textit{Note, Tenant Blacklisting: Tenant Screening Services and the Right to Privacy}, 24 \textit{HARv. J. ON LEGIS.} 239-40 (1987).

At present, these services are unregulated and pose concerns regarding the privacy of prospective tenants. Because computer technology dramatically expands the capacity of the services to provide information on a prospective tenant, information may be provided which the tenant would not choose to disclose. In addition, although information may be initially disclosed by the tenant in one context, once placed in a computer data base, the subsequent disclosure may be without the tenant’s consent. \textit{See} \textit{id.} at 247-50.

Generally, companies have information in at least one of three possible categories: (1) information from public records; (2) credit information; and/or (3) information on the lifestyle of the prospective tenant. Only legislative action can provide protection to the tenant’s right to privacy by limiting the type of information provided to that which is relevant in tenant selection. \textit{See} \textit{id.} at 242-44.

\textsuperscript{151} The governmental interest in the fornication statute \textit{may} include interests in preserving the family, preventing disease, deterring illegitimacy and promoting mo-
Chief Justice Popovich, dissenting in *French*, questioned the constitutionality of Minnesota’s fornication statute. He stated: “While a challenge to the fornication statute is not before us, other states have struck down their fornication statutes under equal protection.”

The equal protection clause of the fourteenth amendment to the United State Constitution provides: “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Although a state is not required to treat all individuals the same, equal protection requires that groups similarly situated be treated equally.

The application of the equal protection clause to Minnesota’s fornication statute requires an examination of whether similarly situated individuals are treated disparately. Because the fornication statute punishes only men and single women for fornication, it is necessary to also examine Minnesota’s adultery statute in order to determine whether there is, in fact, unequal treatment.

Minnesota’s adultery statute provides: “When a married woman has sexual intercourse with a man other than her husband, whether married or not, both are guilty of adultery and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3000, or both.” Contrast the punishment for adultery with the punishment for fornication, which constitutes a misdemeanor. As defined by Minnesota law, a “[m]isdemeanor means a crime for which a sentence of not more than 90 days or a fine of not more than $700, or both, may be imposed.”

An initial examination of the adultery and fornication statutes indicates a classification on the basis of marital status. Married women receive harsher penalties for sexual intercourse as compared with single women. However, marital status distinctions have not been considered either a suspect class or fundamental interest by the United States Supreme Court. Thus, any challenge to the marital status classification would be subject to the traditional standard of rationality. Whether the fornication statute is an appropriate means for accomplishing these objectives deserves both legislative and judicial consideration. See Note, *Fornication, Cohabitation, and the Constitution*, 77 Mich. L. Rev. 252, 301 (1978).

152. *French*, 460 N.W.2d at 19. The dissent stated: “Although the legislature has refused to repeal Minnesota’s fornication statute, and it may be of questionable constitutionality, it has fallen into disuse.”
156. Id. § 609.02, subd. 3.
157. See *Eisenstadt* v. *Baird*, 405 U.S. 438, 449 (1971). Justice Brennan conceded that the legislature has “a full measure of discretion in fashioning means to prevent fornication.” However, the state’s objective in prohibiting contraception was incon-
review which, assuming the existence of a constitutionally permissible goal, would survive challenge.158

A closer examination of the two statutes indicates a second level of unequal treatment. Similarly situated men and women are treated disparately on the basis of gender in two ways. First, married women are treated more harshly than married men. A married woman is always guilty of adultery, whether she engages in sexual intercourse with a married or single man. A married man, however, will be only guilty of fornication when he engages in sexual intercourse with a single woman. Second, single men will be treated more harshly than similarly situated single women. A single man will be guilty of adultery if he engages in sexual intercourse with a married woman. A single woman, however, will be guilty of fornication only if she engages in sexual intercourse with a married man.

The governmental objectives reflected in these gender classifications are subjected to an intermediate standard of review.159 This requires an important objective and the means employed must be substantially related to the government’s objective.160 The majority in French states that Minnesota’s public policy discourages fornication and protects the institution of marriage.161 Assuming that this objective is important, the issue is whether the fornication statute is substantially related to this objective. Another way of examining this issue is to ask whether there is an alternative means to accomplish this objective without raising constitutional concerns. Clearly, the consistent with the equal protection clause in its denial of distribution of contraceptives to unmarried but not married individuals. Id. at 454.

158. See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1910). The Court stated:

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id.

159. See Craig v. Boren, 429 U.S. 190 (1976). “To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” Id. at 197.

160. Id.

statutes could be made gender neutral and thus avoid the disparate treatment accorded on the basis of gender.

In *Purvis v. State*, the Supreme Court of Florida declared the state fornication law unconstitutional. The Florida statute provided: "If any man commits fornication with a woman, each of them shall be guilty of a misdemeanor of the second degree." The state common law defined fornication as "illicit sexual intercourse between either a married or an unmarried man and an unmarried woman . . . ." This definition drew a gender-based distinction between married women and married men. In comparing Florida's fornication statute and adultery statute, the result was that a married woman and her partner could not be punished for isolated instances of sexual intercourse, whereas a married man could be. The court held that the gender-based classification did not bear even a rational relationship to a permissible state objective and declared it violative of the equal protection clause of the United States Constitution.

(4) Summary

In *Sports and Health Club*, the Minnesota Supreme Court held that an employer violated the antidiscrimination statute when he refused to hire applicants who were cohabiting with members of the opposite sex. The court found a single job applicant's consensual heterosexual activity irrelevant to a decision regarding employment. Similarly, a prospective tenant's consensual sexual activity is irrelevant to the determination of whether the individual is an acceptable tenant. To allow a landlord to refuse housing on the basis of cohabitation with the opposite sex amounts to an attack on the Act's prohibition of discrimination based on marital status. Justifying an intrusion into the intimate lives of prospective tenants on the dubious rationale that such an intrusion reflects public policy against cohabitation

163. *Id.* at 676 (quoting FLA. STAT. § 798.03 (1977), repealed in 1983).
164. *Purvis*, 377 So. 2d at 676 (quoting De Laine v. State, 262 So. 2d 655, 657 (Fla. 1972)).
165. *Id.* ("[T]he distinction drawn by the fornication statute is not offset or cured by the existence of these other laws [prohibition of living in open adultery and prostitution statutes].").
166. *Id.* at 677.
168. See *State v. French*, 460 N.W.2d 2, 20 (Minn. 1990). The *French* dissent stated:

In substance, appellant argues even if it is not against your religious beliefs for persons of the opposite sex to live together, you can still discriminate against these people if you personally disagree with them living together. This basically amounts to a facial attack on the Act's prohibition of marital status discrimination.

*Id.*
violates the Legislature's clear intent to provide equal access to housing.

B. Inquiry as a Violation

The Act states that, in regards to real property:

It is an unfair discriminatory practice . . . [to] make any record or inquiry in connection with the prospective purchase, rental, or lease of real property which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, or familial status, or any intent to make any such limitation, specification, or discrimination . . . .

The language of the statute indicates that any inquiry which directly or indirectly expresses a limitation, specification, or discrimination with regard to the protected classes constitutes an unfair discriminatory practice. It is doubtful that this section of the statute would be troublesome if the area of discrimination centered on race, color, or national origin. However, the clear meaning of the statute has been clouded by dicta from the court in the area of marital status discrimination.

The dissent in French, explicitly states: "The Human Rights Act prohibited appellant from even inquiring about Parsons' marital status . . . and Parsons and [her fiancé] had absolutely no duty to protest their innocence when illegally questioned." The majority opinion addressed, only indirectly, the issue of illegal inquiry into an individual's marital status. The relevant issue is whether inquiry into an individual's marital status is a violation of the Act's prohibition against marital status discrimination.

Sports and Health Club directly raises the issue of illegal inquiry. The majority stated that an employer should be allowed leeway in the questioning of job applicants regarding their "background, upbringing and perspective." However, in this case, the employer went "far beyond legally permissible bounds in questioning applicants and employees." According to the findings of the ALJ, the

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170. See infra notes 176-96 and accompanying text.
171. French, 460 N.W.2d at 18 (Dissent stated that prospective tenants had no duty to answer when illegally questioned.).
172. See id. at 5-6. The majority opinion's reference to the inquiry issue was only used to support the assertion that direct evidence of fornication is unnecessary. Any unequal treatment because of cohabitation does not constitute marital status discrimination. Id.
173. State v. Sports & Health Club, Inc., 370 N.W.2d 844, 849-50 (Minn. 1985) (Leeway is necessary in order to allow the employer to make an informed employment decision.).
174. Id. at 850.
questioning regarding marital status consisted of asking:

[S]ingle persons who live away from home whom they live with and, if they live with an unrelated member of the opposite sex to whom they are romantically attached, they presume he/she is a fornicator and will not hire them. The basic reason for these inquiries is their belief that persons who are on the “wrong” side of the above-listed “litmus test” questions relating to marital status and/or sex are either immoral or lack the requisite “teachable spirit” and “disciplined life style” they look for in an employee.175

The specific nature of the ALJ findings, combined with the affirmance by the court that this questioning constitutes marital status discrimination,176 should support the dissent’s position in French that the landlord’s inquiry was illegal. However, a footnote to the majority opinion in Sports and Health Club injects a confusing element.177 The footnote referenced Justice Peterson’s dissent in which he states:

[I]t is only a discriminatory employment decision of the employer, not the inquiry itself, that should invoke the state’s concern. The fact of the inquiry may prove the inquirer’s knowledge of a person’s religion or marital status and tie an inference from that knowledge to an otherwise unexplained adverse decision, but the [ALJ] made no such linkage . . . .178

In the footnoted reference to this argument, the majority stated: Justice Peterson, in dissent argues that the discrimination claim predicated upon questioning of employees and applicants on cohabitation of unmarried persons is not a ground under the statute for finding discrimination. Even though we agree with his contention, yet the record appears clear to us that Sports and Health went far beyond permissible bounds in questioning employees and applicants in areas clearly prohibited by the act.179

Thus, the majority appears to be saying that evidence of inquiry into the cohabitation arrangements of unmarried persons is not, in itself, sufficient to support a finding of marital status discrimination. Yet, in Sports and Health Club, the majority affirmed the ALJ’s finding of discrimination based on inquiry alone. There are three possible

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175. State v. Sports and Health Club, Inc., HR-82-005-RL, slip op. at 50-51 (OAH Apr. 26, 1984). Furthermore, the employer believed that women are subordinate to men and should have the permission of the “responsible” men in their lives (husbands, fathers) to work and/or live away from home; . . . [and] want[ed] to know who was “at fault” and presume[d], unless shown otherwise, that the woman was in instances involving persons who are or who have been divorced . . . . Id. at 50.

176. Sports & Health Club, 370 N.W.2d at 854 (ALJ’s findings supported by substantial evidence.).

177. Id. at 850 n.10.

178. Id. at 869 (emphasis added).

179. Id. at 850 n.10.
interpretations of this inconsistency which may reconcile the majority dicta with the majority decision.

The first interpretation involves the three-part analysis required for discrimination claims under the Minnesota Human Rights Act. This analysis requires the establishment of a prima facie case by the plaintiff, a rebuttal by the defendant, and a response to the rebuttal by the plaintiff. In employment cases, the plaintiff must have been a member of a protected class; must have met the minimum qualifications of the job; must have been denied employment despite the qualifications; and the defendant must have continued to seek applicants with similar qualifications. Inquiry alone leads to an inference of discrimination. Where there is no available information regarding the applicant actually hired by the employer, then the prima facie case is incomplete.

Applying these elements to a housing context, the plaintiff must be a member of a protected class, must have met the minimum criteria for an acceptable tenant, must have been denied housing despite meeting the criteria, and the landlord-owner must have continued to seek tenants with similar qualifications. The ALJ’s findings indicate that French did not rent the subject property to any other tenants after refusing to rent to Parsons. Had the landlord in French provided no explanation for the denial of housing, then the prima facie case would be incomplete. Strict application of the required prima facie elements precludes a finding of discrimination as the landlord did not continue to seek other tenants with similar qualifications. French, however, clearly stated that his refusal to rent was based on his objections to Parsons unmarried cohabitation. Thus, no further evidence of discriminatory conduct is necessary to constitute a prima facie case for discrimination.

The second interpretation is that the inquiry must be directly linked to a discriminatory act before there can be a finding of discrimination. In employment cases, there must be evidence that the

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180. See supra notes 58-62 and accompanying text.
181. See Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978) (citations omitted) (Plaintiff needs to show only the bare essentials of unequal treatment to establish the prima facie elements.); State v. Mower County Social Servs., 434 N.W.2d 494, 498 (Minn. Ct. App. 1989) (Elements constitute prima facie case of disparate treatment.); State v. Hennepin County, 420 N.W.2d 634, 640 (Minn. Ct. App. 1988) (Only when these elements are established should the ALJ proceed to next stage of analysis.).
182. See State v. Sports & Health Club, Inc., HR-82-005-RL, slip op. at 23 (OAH Apr. 26, 1984). The ALJ stated that the prima facie case was dicta only and thus not a binding test. In Sports & Health Club, the ALJ departed from the strict application of the prima facie case in the finding of religious and marital status discrimination. Id. at 23-25.
183. See State v. French, 460 N.W.2d 2, 3 (Minn. 1990).
184. Id. at 3 (French told Parsons it was inconsistent with his religious beliefs for unmarried adults of the opposite sex to live together.).
employer refused to hire or terminated an employee on the basis of prohibited discrimination.\(^{185}\) This interpretation would support Justice Peterson's argument that the inquiry be linked to an adverse decision.\(^{186}\) Justice Peterson specifically referenced one of the complainants in \textit{Sports and Health Club} who, following the inquiry into his personal life and an explanation of the religious beliefs under which the club operated, did not fill out a job application.\(^{187}\) Yet, the ALJ found the employer's conduct discriminatory because he improperly asked for information regarding the applicant's religion.\(^{188}\) Justice Peterson's argument focused on the lack of a discriminatory act when an applicant decides not to apply for employment.

Applying this interpretation to \textit{French}, a prospective tenant must actually apply to rent and the landlord must refuse to rent the property. Only then will there be the requisite discriminatory act. Had Parsons decided not to rent the property there would be no violation of the Act based on illegal inquiry. However, the facts are clear that Parsons applied for, and entered into, an agreement to rent the property from French.\(^{189}\) Subsequent to this rental agreement, French rejected Parsons on the basis of her marital status. There is the requisite direct link between Parsons' application for rental, French's inquiry, and French's subsequent discriminatory act of rescinding the rental agreement. Therefore, the prima facie case is complete.

The facts in \textit{French} support a finding that French's inquiry violated the Act. In contrast, however, the \textit{Sports and Health Club} decision found no such discriminatory act and yet affirmed the ALJ's finding of discrimination.\(^{190}\) This inconsistency may be reconciled by reference to the ALJ's findings which indicate a departure from the rigid requirements of a prima facie case.\(^{191}\) The ALJ stated that Minnesota's test for discriminatory treatment\(^{192}\) is one method of establishing a prima facie case of discrimination. The unique facts in \textit{Sports and Health Club}, however, create inferences of religious and marital sta-

\(^{185}\) See supra text accompanying note 59.

\(^{186}\) State v. Sports & Health Club, 370 N.W.2d 844, 869 (Minn. 1985).

\(^{187}\) Justice Peterson stated, "[t]he most obvious example is that of Joseph Williams, for the complaint was limited to the inquiry only." \textit{Id.}

\(^{188}\) \textit{Id.} at 846.

\(^{189}\) See State v. French, 460 N.W.2d 2, 3 (Minn. 1990) (The landlord agreed to rent the property and accepted Parsons' security deposit of $250.00.).

\(^{190}\) \textit{See Sports & Health Club}, 370 N.W.2d at 850 n.10.

\(^{191}\) \textit{See State v. Sports & Health Club, Inc., HR-82-005-RL, slip op. at 23 (OAH Apr. 26, 1984). The ALJ stated that rigid application of the Minnesota test would leave the plaintiffs short of establishing a prima facie case of discrimination. However, the test is dicta only and therefore not the only test which can be applied. \textit{Id.}

\(^{192}\) See supra notes 60-63.
tus discrimination. These inferences may constitute a prima facie case of illegal discrimination. These unique facts permit divergence from a rigid application of the Minnesota test for discriminatory treatment.

The third interpretation is supplied by Justice Yetka’s majority opinion. He contends that Justice Peterson asserted that where there is a clear inference of sexual relations between cohabiting couples, there is a violation of the fornication statute. This interpretation is difficult to reconcile with the majority in Sports and Health Club which affirmed the ALJ’s finding and yet agreed with Justice Peterson’s assertion. If the fornication statute precludes a violation of the Act when unmarried adults of the opposite sex cohabit, the Sports and Health Club majority should not have affirmed the ALJ’s findings.

IV. CONCLUSION

The right of a landlord to choose tenants has been tempered with the rights of tenants to choose the home and the community in which they live. Both federal and state law have provided the protection and enforcement mechanisms necessary to insure that identified classes are provided with freedom in their housing choices. Although traditional landlord-tenant law has been substantially changed by judicial and legislative intervention, there remain areas in which a landlord may legally discriminate in the selection of prospective tenants.

The case of State v. French legalizes discrimination against unmarried cohabiting couples in their access to housing. It allows landlords to inquire into the lives of prospective tenants, and to base tenant selection on speculative conclusions about a prospective tenant’s personal and intimate affairs. The legitimization of personal living arrangements as a criteria for tenant selection limits an indi-

194. See id. The ALJ based this decision, in part, on the Fifth Circuit’s departure from a rigid prima facie case requirement in unique cases. The ALJ quoted federal precedent which stated: “‘[N]o single formulation of the prima facie evidence test may fairly be expected to capture the many guises in which discrimination may appear. The focus of the inquiry may not be obscured by the blind recitation of a litany.’” Id. at 24 (emphasis in ALJ’s opinion) (quoting Byrd v. Roadway Express, Inc., 687 F.2d 85, 86 (5th Cir. 1982) (citations omitted)).
196. Id. at 5-6 (Justice Yetka contends that this is the clearly established precedent which leads to the conclusion that no marital status discrimination occurred in French.).
198. See supra notes 25-36 and accompanying text.
individual's right to privacy, choice of home and community, and denies the basic freedom from discrimination which the Minnesota Human Rights Act is designed to protect.

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