North Dakota Law Review

Volume 78 | Number 3 Article 6

2002

Civil Rights - Rights Protected and Discrimination Prohibited: Living in Sin in North Dakota - Not under My Lease

Erin P. B. Zasada

CIVIL RIGHTS—RIGHTS PROTECTED AND DISCRIMINATION PROHIBITED: LIVING IN SIN IN NORTH DAKOTA? NOT UNDER MY LEASE

North Dakota Fair Housing Council, Inc. v. Peterson, 2001 ND 81, 625 N.W.2d 551 (2001)

I. FACTS

In March 1999, Robert Kippen and Patricia DePoe, an engaged but unmarried couple, unsuccessfully attempted to rent a duplex from David and Mary Peterson.[1] The couple was denied housing by the Petersons because they were unlawfully seeking to cohabit according to the North Dakota unlawful cohabitation statute.[2] The couple married a month after the Petersons refused to rent them the duplex, and at this time, the Kippens joined with the North Dakota Fair Housing Council (NDFHC).[3] The NDFHC and the Kippens filed a claim against the Petersons alleging housing discrimination in violation of the North Dakota Human Rights Act, which prohibited a landlord from discriminating against a prospective tenant on the basis of marital status.[4]

The issue addressed in *North Dakota Fair Housing Council, Inc. v. Peterson*[5] was whether it was contrary to the discriminatory housing practices provision of the North Dakota Human Rights Act to refuse to rent to an unmarried couple because they were seeking to cohabit.[6] The crucial determination was whether the term "status with respect to marriage," as it appeared in the North Dakota Human Rights Act, would be extended to

---

1. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶ 2, 625 N.W.2d 551, 553.

2. *Id.*; *see generally* N.D. CENT. CODE § 12.1-20-10 (1997) (prohibiting unmarried cohabitation).

3. *Peterson*, ¶ 1, 625 N.W.2d at 553. The North Dakota Fair Housing Council (NDFHC) is a non-profit organization that was founded in 1995. North Dakota Fair Housing Council, *About Our Organization*, *available at* http://ndfhc.fairhousing.com (last visited September 16, 2002). The NDFHC seeks to eliminate "housing discrimination through community education; encouragement of public involvement; assistance to those experiencing housing discrimination; and support of individuals and organizations seeking equal opportunity in housing." *Id.*

4. *Peterson*, ¶ 2, 625 N.W.2d at 554. The North Dakota Human Rights Act, as it appeared when the Kippens were refused housing, was codified at North Dakota Century Code chapter 14-02.4. *Id.* The pertinent part of the Act made it a discriminatory practice for a person who owned housing properties to discriminate against people based on "race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance." N.D. CENT. CODE § 14-02.4-12 (repealed 1999).

5. 2001 ND 81, 625 N.W.2d 551.

6. *Peterson*, ¶ 6, 625 N.W.2d at 554.

include unmarried cohabitation.[7] If the court considered unmarried cohabitation a form of marital status, the Petersons would have been guilty of marital status discrimination because they refused to rent to the Kippens on the basis that they were unmarried and seeking to cohabit.[8] However, if the court considered cohabitation as something other than a form of marital status, the Petersons' refusal to rent to the Kippens would have been permissible because the applicable law only punished landlords who refused to rent housing on the basis of status.[9] The apparent conflict between the unlawful cohabitation statute, prohibiting cohabitation between unmarried persons, and the North Dakota Human Rights Act, prohibiting housing discrimination on the basis of marital status, was an issue of first impression in North Dakota.[10]

The district court granted summary judgment in favor of the Petersons.[11] The court concluded that the Petersons were permitted to refuse housing accommodations to the Kippens because North Dakota public policy did not approve of unmarried cohabitation and because it did not interpret unmarried cohabitation as being marital status.[12] The Kippens appealed the district court's decision, alleging that the court misinterpreted North Dakota law.[13] The North Dakota Supreme Court affirmed the decision of the district court and *held* that refusing to rent housing to an unmarried couple seeking to cohabit did not violate the North Dakota Human Rights Act.[14]

---

7. *Id.* ¶ 27, 625 N.W.2d at 560 (stating that the term "status with respect to marriage" was not defined in the North Dakota Human Rights Act).

8. *Id.* ¶ 29. The North Dakota Human Rights Act defined a landlord's refusal to rent to a person on the basis of marital status as a discriminatory housing practice. N.D. CENT. CODE § 14-02.4-12 (repealed 1999).

9. *See* N.D. CENT. CODE § 14-02.4-12 (repealed 1999) (proscribing discrimination on the basis of marital *status*).

10. *Peterson,* ¶ 14, 625 N.W.2d at 555. In 1990, North Dakota Attorney General Nicholas J. Spaeth issued a formal report on the apparent conflict between the unlawful cohabitation statute and the North Dakota Human Rights Act provision. *See* 1990 N.D. Op. Att'y Gen. No. 12, 43. He concluded that it was not a discriminatory practice under the North Dakota Human Rights Act to discriminate against two unmarried persons seeking to cohabit. *Id.* at 45. The issue had also been raised previously to a United States district court in 1999. *See generally* Fair Hous. Council, Inc. v. Haider, No. A1-98-77, 1999 WL 33283355 (D.N.D. Mar. 9, 1999).

11. *Peterson,* ¶ 3, 625 N.W.2d at 554. The NDFHC was dismissed from the action by the District Court of Cass County because it lacked standing to sue. *Id.* The court did not consider it an "aggrieved party" under the North Dakota Human Rights Act. *Id.* The NDFHC filed an appeal, arguing that it was an aggrieved party and had standing according to the North Dakota Fair Housing Act. *Id.*

12. *Id.* ¶ 4.

13. *Id.*

14. *Id.* ¶ 49, 625 N.W.2d at 563.

II. LEGAL BACKGROUND

A. THE HISTORY OF UNLAWFUL COHABITATION LAWS IN THE UNITED STATES

Unlawful cohabitation became a crime in the United States with the enactment of the Edmunds Act in 1882.[15] The Edmunds Act was a reflection of the anti-polygamy sentiment expressed by Congress and was directed toward Utah and the Mormon Church.[16] The Edmunds Act disenfranchised Mormons, made them ineligible for public office and jury duty, and made "unlawful cohabitation" a criminal act.[17] The Act also imposed civil penalties on polygamists, which consisted of canceling their rights to vote,[18] hold public office,[19] and serve on juries.[20]

Under the Edmunds Act, prosecution of polygamists was facilitated through the creation of a new offense called unlawful cohabitation.[21] According to the Act, a male committed the crime of unlawful cohabitation when he cohabited with more than one woman.[22]

In 1885, in the District Court of the Third Judicial District in the Territory of Utah, Angus Cannon was found guilty of living with more than one woman and was charged with the crime of unlawful cohabitation.[23] The evidence presented to the district court indicated that Cannon lived in a residence with two women and their children; that each woman and her children occupied a specific portion of the house; that Cannon spent time interacting with each woman and her children; and that he was the father to

---

15. Edmunds Act, ch. 47, § 8, 22 Stat. 30, 31 (1882) (codified at 48 U.S.C. § 1461 (1978)), *repealed by* Pub. L. No. 98-213, § 16(*l*), 97 Stat. 1462, 1463 (1983).

16. Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 703-04 (2001).

17. *See* Soc'y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 926 (Utah 1993).

18. Edmunds Act, ch. 47, § 8, 22 Stat. 30, 31-32.

19. *Id.*

20. *Id.* § 5, 22 Stat. 31; *see also Whitehead*, 870 P.2d at 926 (stating "[a]s a result of the Edmunds Act, many Mormons were not permitted to vote or serve on juries, and polygamists faced criminal indictments in the federal courts").

21. *See* Edmunds Act, ch. 47, §§ 3-5, 22 Stat. 31. The cohabitation crime was created to charge polygamists because a cohabitation conviction required less evidence than what a prosecutor needed to convict a polygamist without proving an illegal marriage. *See* Utah History to Go, *The History of Polygamy*, *available at* http://www.utahhistorytogo.org/historyofpolygamy.html (last visited May 22, 2002). Cohabitation was defined broadly because it criminalized the act of "living with more than one woman." Edmunds Act, ch. 47, § 5, 22 Stat. 31. With the addition of the cohabitation offense, a prosecutor could charge a person with polygamy and cohabitation at the same time. *Id.* § 4.

22. Edmunds Act, ch. 47, § 3, 22 Stat. 31.

23. *See* Cannon v. United States, 116 U.S. 55, 59 (1885).

some of the children.[24] The jury was instructed to find Cannon guilty of cohabitation if it determined beyond a reasonable doubt that he lived in the same house with both women.[25] The court further instructed that it was not necessary for the jury to find that Cannon slept in the same bed with either of the women or that he had sexual intercourse with them.[26] The jury found Cannon guilty of unlawful cohabitation based on the sole fact that he was living in the same house with both women.[27]

Cannon appealed the decision to the United States Supreme Court, arguing that the lower court erred in its instructions to the jury regarding the term "cohabit."[28] He argued that the term "cohabit" necessarily includes the notion of having sexual intercourse.[29] The Court, however, rejected his interpretation and subsequently affirmed the jury instructions given by the lower court.[30] In affirming Cannon's conviction, the Court held that a man has committed the crime of unlawful cohabitation when he lived in a house with more than one woman and that proof of sexual intercourse or evidence of sleeping in the same bed with each woman was not necessary.[31]

B. UNLAWFUL COHABITATION IN NORTH DAKOTA

Unlawful cohabitation has been a criminal offense in North Dakota since the mid-nineteenth century.[32] Toward the end of the nineteenth century, statutory prohibition on unlawful cohabitation read as follows:

> Every person who lives openly and notoriously and cohabits as husband and wife with a person of the opposite sex without being married to such person is guilty of a misdemeanor and upon conviction thereof is punishable by imprisonment in the county jail for not less than thirty days and not exceeding one year, or by a fine of not less than one hundred and not exceeding five hundred dollars.[33]

---

24. *Id.* at 60-62.
25. *Id.* at 66.
26. *Id.*
27. *Id.* at 59-60.
28. *Id.* at 67.
29. *Id.* at 70.
30. *Id.* at 71.
31. *Id.* at 71, 79.
32. LAWS OF DAKOTA, ch. 10, § 4 (1863) (Criminal Code).
33. REVISED CODE OF NORTH DAKOTA, ch. 28, § 7171 (1895).

The terms of the unlawful cohabitation statute were not defined, however, until 1938.[34]

In 1938, the North Dakota Supreme Court decided the seminal case of *State v. Hoffman*,[35] in which the language of the unlawful cohabitation statute was interpreted and defined.[36] The term "openly" was defined as "living together the same as a husband and wife would live together . . . undisguised and unconcealed, as opposed to hidden and secret."[37] "Having occasional illicit intercourse, without publicly or notoriously living together, [was] not sufficient to constitute the offense of living in a state of open and notorious adultery" because to satisfy the open and notorious element of the offense, the parties must have exhibited to the community a relationship that suggested a conjugal relation existed between them.[38]

The *Hoffman* court then defined the term "notoriously" as "generally known or acknowledged."[39] This meant it was common knowledge in the community that the two people were cohabiting.[40] In addition, the court stated the couple must have lived and acted in such a way that people who noticed them would be justified in concluding that they were living in the same house as husband and wife.[41]

Finally, the *Hoffman* court interpreted the term "cohabits as husband and wife" as a requirement that the two people were having intercourse with each other the same way they would if they were married.[42] The court reasoned that the unmarried couple did not have to act any more "openly" or "notoriously" than any married couple would; however, the quality of living of the unmarried couple must have been comparable to that of a married couple.[43] Since the *Hoffman* court defined the terms of unlawful cohabitation in 1938, there were few modifications to the semantics of the statute or the penalties associated with the crime until an interim committee created the present unlawful cohabitation law in 1971.[44]

---

34. *See* State v. Hoffman, 282 N.W. 407, 409 (N.D. 1938) (defining the terms "openly," "notoriously," and "cohabits as husband and wife").

35. 282 N.W. 407 (N.D. 1938).

36. *Hoffman*, 282 N.W. at 409.

37. *Id.* (citing Commonwealth v. Wardell, 128 Mass. 52, 53 (Mass. 1880)).

38. Burns v. State, 182 P. 738, 738 (Okla. Crim. App. 1919).

39. *Hoffman*, 282 N.W. at 409 (citing McCorkendale v. McCorkendale, 111 Iowa 314, 316 (Iowa 1900)).

40. *Id.* (citing NORTH DAKOTA COMPILED LAWS, ch. 30, § 9581 (1913)).

41. *Id.* (citing Copeland v. State, 133 P. 258, 258 (Okla. Crim. App. 1913)).

42. *Id.*

43. *Id.* (citing Leonard v. State, 153 S.W. 590, 591 (Ark. 1913)).

44. *See* 2 NORTH DAKOTA LEGISLATIVE COUNCIL INTERIM MINUTES AND BACKGROUND MEMOS, CLASSIFICATION OF CRIMINAL OFFENSE STUDY-BACKGROUND MEMORANDUM 1 (1999-2001) (stating "[d]uring the 1971-72 interim, that the Judiciary 'B' Committee, pursuant to

An interim committee was commissioned by the legislature in 1971 to revise the substantive criminal laws in North Dakota.[45] The committee provided a draft of a new criminal code and considered recommending the repeal of the unlawful cohabitation statute to the legislature.[46] Three alternative provisions were proposed for the sexual offenses chapter of the North Dakota Criminal Code.[47] The crime of unlawful cohabitation appeared in each of the alternatives.[48] The same language on cohabitation was found in each of the alternatives, except for a proposal that the offense be classified as a class A misdemeanor as opposed to a class B misdemeanor.[49] The legislature chose the lesser penalty, and unlawful cohabitation was classified as a class B misdemeanor in the 1973 North Dakota Criminal Code.[50] The unlawful cohabitation statute in North Dakota, as found in section 12.1-20-10 of the North Dakota Century Code, currently reads as follows: "A person is guilty of a Class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person."[51]

House Concurrent Resolution No. 3050, was assigned to review and revise the substantive criminal statutes of North Dakota").

45. *Id.*

46. N.D. Fair Hous. Council v. Peterson, 2001 ND 81, ¶ 11, 625 N.W.2d 551, 555.

47. *Id.* ¶ 12, 625 N.W.2d at 556. The Forty-Third Legislative Assembly of North Dakota considered three alternative provisions for the unlawful cohabitation statute; under alternative one, a person would have been guilty of a class B misdemeanor if he or she lived openly and notoriously with a person of the opposite sex as a married couple without being married to the other person. S.B. 2047, 1973 Leg., 43d Sess. 4 (N.D. 1973). The text of the other two proposed alternatives was identical, however, proposed changes in other sections of the Criminal Code resulted in the assignment of different section numbers: under alternatives two and three, a person would have been guilty of a class B misdemeanor if he or she lived openly and notoriously with a person of the opposite sex as a married couple without being married to the other person. S.B. 2048, 1973 Leg., 43d Sess. (N.D. 1973); S.B. 2049, 1973 Leg., 43d Sess. (N.D. 1973) (codified at N.D. CENT. CODE § 12.1-20-10 (1997)).

48. *See supra* note 47 and accompanying text.

49. *See North Dakota Criminal Code Hornbook*, 50 N.D. L. REV. 639, 646 (1974). A class A misdemeanor referred to an offense with a punishment of a maximum of one year imprisonment, a one thousand dollar fine, or both. *Id.* A class B misdemeanor differed from a class A misdemeanor because it resulted in a lesser penalty of a maximum of thirty days imprisonment, a fine of five hundred dollars, or both. *Id.*

50. N.D. CENT. CODE § 12.1-20-10 (1997). This represented a relatively small change in the interpretation of the unlawful cohabitation statute because the crime was defined as a misdemeanor by section 9581 of the Compiled Laws when the North Dakota Supreme Court decided *Hoffman*. State v. Hoffman, 282 N.W. 407, 409 (N.D. 1938).

51. N.D. CENT. CODE § 12.1-20-10.

C. ANTI-DISCRIMINATION LAWS IN HOUSING

Anti-discrimination provisions in both state[52] and federal legislation[53] exist to prohibit discrimination in housing. Although the groups of people offered protection under the federal law run the gamut, no specific prohibition exists to prohibit discrimination against unmarried couples in the sale or rental of housing.[54] No express provisions have been included to prohibit discrimination against unmarried couples in fair housing provisions regulated under state law.[55]

1. Federal Statutory Protection Against Housing Discrimination

Congress enacted the Civil Rights Act of 1866 to provide all United States citizens with the same rights to inherit, purchase, lease, and convey property as the white man enjoyed.[56] On paper, this law afforded all citizens equal property rights; however, it did not address discrimination in

---

52. *E.g.*, CAL. GOV'T CODE §§ 12980-12988 (West 1992 & Supp. 2002); IOWA CODE §§ 216.8 to 216.8A (2000); MICH. COMP. LAWS §§ 37.2501-37.2507 (2001); MINN. STAT. § 363.03 (1991 & Supp. 2002); N.Y. EXEC. LAW § 296 (McKinney 2001); N.D. CENT. CODE §§ 14-02.4-01 to -46 (Supp. 2001); S.D. CODIFIED LAWS § 20-13-20 (Michie 1995); WIS. STAT. § 106.50 (Supp. 2001).

53. General Program of Assisted Housing, 42 U.S.C. §§ 1437-1437z-7 (2000).

54. *See* Maureen E. Markey, *The Price of Landlord's "Free" Exercise of Religion: Tenant's Right to Discrimination-Free Housing*, 22 FORDHAM URB. L.J. 699, 744 (1995) (stating that as of 1995, the Federal Fair Housing Act did not include marital status in its enumerated categories and did not specifically prohibit discrimination against unmarried couples in the sale or rental of housing). As of 2001, unmarried couples were still not included within the enumerated categories of people protected against discrimination in housing. *See* 42 U.S.C. § 3604 (2000) (prohibiting discrimination in housing on the basis of race, color, religion, sex, familial status, or national origin).

55. *See* Matthew J. Smith, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1056 (1992) (stating none of the state laws prohibiting discrimination in housing specify non-marital cohabitation as an impermissible basis for a landlord to discriminate).

56. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) (current version at 42 U.S.C. §§ 1981-1982 (2000)). Section 1 of the Civil Rights Act of 1866 stated:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

Id.

housing.[57] A broad-based anti-discrimination law was not available to vindicate housing rights until the enactment of the 1968 Civil Rights Act, which codified the Federal Fair Housing Act.[58] Congress enacted Title VIII of the Civil Rights Act of 1968 (the Federal Fair Housing Act) to ensure, within constitutional limitations, the availability of fair housing throughout the country.[59] Together, the Civil Rights Act of 1866 and the Federal Fair Housing Act included within the Civil Rights Act of 1968 provided for the right of all United States citizens to enjoy property and housing rights free from discrimination, a right that is backed by federal enforcement.[60]

2. *Federal Anti-Discrimination Provisions for the Protection of Unmarried Couples*

There is no specific protection against marital status discrimination anywhere in the Federal Fair Housing Act; however, a minority of courts has interpreted other federal laws as offering protection to unmarried cohabiting couples.[61] The reason the anti-discrimination provisions of the Federal Fair Housing Act have rarely been extended to unmarried couples is two-fold. First, marital status discrimination has not been interpreted to fall within the term "familial status," which is a prohibited basis for landlord

57. *See id.*

58. *See id.* The Civil Rights Act of 1866 prohibited racial discrimination in the sale or rental of property. *Id.* The Federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968) furthered the scope of earlier anti-discrimination laws by prohibiting discrimination in housing based on race, national origin, color, and religion. *See* Title VIII of Act of April 11, 1968, P.L. 90-284, 82 Stat. 81 (current version at 42 U.S.C. §§ 3601-3619 (2000)). The Fair Housing Act prohibited discrimination in housing because of race or color, national origin, religion, sex, familial status (including children under the age of eighteen living with their parents, pregnant women, and persons who have custody of children under the age of eighteen), and handicap or disability. 42 U.S.C. § 3604. Later amendments were made to the Fair Housing Act in 1974 and 1988 to prohibit discrimination in housing based on sex and on handicap or familial status respectively. *Id.*

59. *See* Fair Housing Act, 42 U.S.C. § 3601 (declaring that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"). Like the 1866 Civil Rights Act, the Federal Fair Housing Act was an exercise of congressional power under the Thirteenth Amendment. United States v. Hunter, 459 F.2d 205, 214 (4th Cir. 1972); *see also* U.S. CONST. amend. XIII, § 2 (giving Congress the power to use legislative enforcement).

60. Williams v. Matthews Co., 499 F.2d 819, 825 (8th Cir. 1974).

61. *See* Hann v. Hous. Auth. for the City of Easton, 709 F. Supp. 605, 610 (E.D. Pa. 1989) (reasoning that rejecting a couple's application for a low-income housing program because the couple was not married was a violation of the 1937 Federal Fair Housing Act); *see also* Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375, 379-82 (Cal. Ct. App. 1976) (holding that the public housing authority was not allowed to evict a tenant because she was cohabiting with an adult male because the agency's policy of evicting a tenant solely because he or she was found to be cohabiting with a person who was not related by blood or marriage was in violation of a Department of Housing and Urban Development (HUD) provision, which stated that "a local authority shall not establish policies which automatically deny admission or continued occupancy to a particular class").

discrimination.[62] Second, legislative history of the Fair Housing Amendments Act indicates that the term "familial status" as used in the Federal Fair Housing Act was never meant to include "marital status."[63]

Federal public housing has been one area where federal law has been extended to protect unmarried couples against marital status discrimination.[64] In *Hann v. Housing Authority of the City of Easton*,[65] Cindy Hann and her common-law husband, James Webster, were an unmarried couple living with their children in an apartment complex when they were given a notice of eviction.[66] The Easton Housing Authority offered vouchers for rent subsidies to eligible applicants in an effort to assist those tenants who would be affected by the eviction.[67] Hann and Webster applied for assistance, but the Housing Authority denied their request because it did not accept common-law relationships and their living arrangement did not fit within the agency's interpretation of "family."[68] Only people related by blood, marriage, or adoption fell within the definition of "family" used by the agency to determine eligibility for assistance.[69] The District Court for the Eastern District of Pennsylvania rejected the narrow use of the term "family" and instructed the Housing Authority to make individual determinations about whether applicants constituted a family unit.[70]

The Pennsylvania court held that the Easton Housing Authority could not deny an unmarried couple eligibility for federally subsidized low-income housing programs on the basis that the couple was unmarried and cohabiting.[71] The court further held that denying Hann and Webster's

---

62. *See* 42 U.S.C. § 3604 (stating the Federal Fair Housing Act prohibits discrimination on the basis of family status).

> Familial status means one or more individuals (who have not attained the age of 18 years) being domiciled with—
>
> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

42 U.S.C. § 3602(k); *see also* Markey, *supra* note 54, at 744 (stating that "the Federal Fair Housing Act has not included marital status in its enumerated categories and has not specifically prohibited discrimination against unmarried couples in the sale or rental of housing").

63. *See* H.R. Rep. No. 100-711, at 23, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184 (stating that the committee did not intend the term "familial status" to include marital status).

64. *See Hann*, 709 F. Supp. at 610 (holding that categorically denying unmarried couples eligibility for low-income housing programs violated the United States Housing Act of 1937).

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

66. *Hann*, 709 F. Supp. at 606.

67. *Id.*

68. *See id.*

69. *Id.*

70. *Id.* at 610.

71. *Id.*

application violated the United States Housing Act of 1937, which was enacted for the purpose of providing low-income families with financial aid to assist them in finding housing.[72] The court concluded that according to federal regulations codified in the United States Housing Act of 1937, unmarried cohabitants were entitled to "family status," thereby protecting them from housing discrimination.[73]

The second area where federal courts have extended protection of anti-discrimination provisions to unmarried couples has been in credit transactions involving housing accommodations.[74] For example, in *Markham v. Colonial Mortgage Service Co.*,[75] an engaged couple jointly applied for a mortgage loan, but their loan application was denied because they were not married.[76] The couple submitted the loan application again for reconsideration, but once again their application was denied because their separate incomes did not qualify for a loan.[77] The couple then sued and alleged that the denial of their mortgage application violated the Equal Credit Opportunity Act (ECOA), which specifically prohibited a creditor from discriminating against a credit applicant on the basis of marital status.[78]

The District Court for the District of Columbia held that under the ECOA, savings and loan associations must aggregate the incomes of unmarried couples applying for a mortgage, thereby treating them like a married couple instead of separate individuals.[79] The court reasoned that by refusing to aggregate the engaged couple's incomes, the savings and loan association treated their application differently than it would have if the couple had been married.[80] The court, therefore, found that the savings and loan association had committed marital status discrimination, which was prohibited by the ECOA.[81]

Unmarried couples are not protected from marital status discrimination under the Federal Fair Housing Act; therefore, an unmarried couple who has been refused housing on the basis of being unmarried must consult state

---

72. *Id.; see also* 42 U.S.C. §§ 1437-1437u (amended 1998). The 1937 Housing Act was passed by Congress to provide sanitary, decent, and safe rental housing for eligible low-income families. *Hann*, 709 F. Supp. at 608.

73. *Hann*, 709 F. Supp. at 608.

74. *See* Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691e (2000) (prohibiting discrimination against unmarried couples in credit transactions for financing of housing accommodations).

75. 605 F.2d 566 (D.C. Cir. 1979).

76. *Markham*, 605 F.2d at 568.

77. *Id.*

78. *Id.*; *see also* 15 U.S.C. § 1691 (2000).

79. *Markham*, 605 F. Supp. at 570.

80. *Id.* at 569.

81. *Id.*

laws to determine whether a remedy exists for such discrimination.[82] Although many states have enacted laws prohibiting marital status discrimination, very few state courts have interpreted the provision as extending protection to unmarried couples.[83]

3. State Statutory Protection Against Housing Discrimination

There is a split in state court jurisprudence over the issue of protecting unmarried couples against discrimination in housing.[84] Twenty-one states and the District of Columbia have state statutes specifically prohibiting marital status discrimination in housing.[85] However, states differ regarding whether unmarried cohabitants fall within the definition of marital status.[86] Currently only Alaska, California, and Massachusetts have extended the protection of marital status discrimination laws to unmarried couples seeking to cohabit.[87]

---

82. *See supra* text accompanying notes 62-63.

83. *See* Barbara Endoy, *Irreconcilable Cohabitation Statutes and Statutory Proscriptions Against Marital Status Discrimination:* McCready v. Hoffius *and the Unworkable Status-Conduct Disctinction*, 44 WAYNE L. REV. 1809, 1821 (1999). The author provides an example of only three state supreme courts that have held that marital status discrimination includes discrimination against unmarried couples. *Id.* The three courts that have extended protection against marital status discrimination to unmarried couples are the Alaska Supreme Court, the California Supreme Court, and the Massachusetts Supreme Court. *Id.*

84. *See, e.g.*, State by Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990) (holding that the landlord's refusal to rent to an unmarried couple because they were unmarried was not a violation of a state statute prohibiting marital status discrimination). *But see, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994) (holding that the landlord violated state legislation prohibiting discrimination in housing on the basis of marital status when he refused to rent to a couple only after learning that they were not married).

85. Keirsten G. Anderson, *Protecting Unmarried Cohabitants from the Religious Freedom Restoration Act*, 31 VAL. U. L. REV. 1017, 1020 (1997) (naming states that have enacted legislation prohibiting discrimination based on race, sex, national origin, or familial status in the sale or rental of housing accommodations). The following states have enacted legislation that prohibits marital status discrimination in housing: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *Id.* The District of Columbia has also enacted legislation that prohibits marital status discrimination in housing. *Id.*

86. *See supra* text accompanying note 84.

87. *See Swanner*, 874 P.2d at 278 (finding that the landlord's policy of not renting to unmarried couples because unmarried cohabitation offended his religious beliefs constituted marital status discrimination because the landlord would have rented to the unmarried couple if they had been married); Atkisson v. Kern County Hous. Auth., 130 Cal. Rptr. 375, 381 (Cal. Ct. App. 1976) (finding that the housing authority's definition of family was too narrow, and therefore, an unmarried couple who had been denied housing assistance had been discriminated against based on their unmarried status); Worcester Hous. Auth. v. Mass. Comm'n Against Discrimination, 547 N.E.2d 43, 45 (Mass. 1989) (finding the denial of public housing benefits to an unmarried couple was discrimination based on marital status).

D. SPLIT IN JURISDICTIONS OVER A LANDLORD'S REFUSAL TO RENT TO UNMARRIED COUPLES

Some jurisdictions have affirmatively answered the question of whether a landlord is allowed to refuse to rent to an unmarried couple because they intend to cohabit while others have answered it negatively.[88] The split in jurisdictions has occurred because courts have addressed the issue from many different standpoints.[89]

1. Interpretation of Fair Housing Laws Prohibiting Marital Status Discrimination and the Status/Conduct Distinction

Some state courts have made a distinction between a person's marital status and his or her unmarried conduct when determining whether unmarried couples should be protected against marital status discrimination.[90] For instance, in *County of Dane v. Norman*,[91] the Wisconsin Supreme Court made a distinction between what it considered "marital status" and what it considered "conduct."[92] The court determined marital status was "the state or condition of being married, the state or condition of being single, and the like."[93] Conduct was defined to mean "personal behavior; deportment; mode of action; [and] any positive or negative act."[94]

In *Norman*, the landlord, Norman, did not discriminate against a specific marital status as he openly rented to married people, single people, divorced people, and people who were widowed.[95] Norman did, however, have a policy of not renting to groups of people who were unrelated.[96] His

88. *See, e.g.*, CONN. GEN. STAT. ANN. § 46(a)-64(c)(b)(2) (West. Supp. 1991) (indicating that an anti-discriminatory housing provision was not to be interpreted as prohibiting a landlord from refusing to rent an accommodation to a man and woman who were not related to each other by either blood or marriage); *see also French*, 460 N.W.2d at 6 (holding that state fair housing legislation did not prohibit a landlord from refusing to rent to an unmarried couple); McFadden v. Elma Country Club, 613 P.2d 146, 148 (Wash. Ct. App. 1980) (holding that state fair housing legislation did not prohibit a private country club from refusing to transfer title to real estate to an unmarried woman who intended to cohabit on the property with her fiancé). *But see, e.g.*, Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1203 (Alaska 1989) (holding that state fair housing legislation prohibited a landlord from refusing to rent an accommodation to an unmarried couple).

89. *See supra* Part II.C.3 (demonstrating that courts differ in interpreting anti-discrimination provisions).

90. *See, e.g., French*, 460 N.W.2d at 6.

91. 497 N.W.2d 714 (Wis. 1993).

92. *Norman*, 497 N.W.2d at 717.

93. *Id.*

94. *Id.*

95. *Id*

96. *Id.* at 714.

policy was challenged on the ground that it violated Dane County Ordinance chapter 31, a fair housing provision prohibiting discrimination on the grounds of marital status.[97] The term "marital status" was defined in the ordinance as including cohabitants.[98] Because the term "cohabitant" was not defined in the ordinance, the court adopted a dictionary definition that defined cohabitant in terms of an unmarried couple living together as husband and wife.[99]

The Wisconsin Supreme Court rejected the argument that Norman's policy of not renting to groups of unrelated individuals violated the Dane County ordinance because a group of unrelated individuals did not fall within the definition of cohabitants, and therefore, the group was not afforded marital status.[100] Choosing to live together with a group of unrelated people was considered conduct.[101] The court held that Norman was justified in refusing to rent to the prospective tenants because it was their conduct of living together that he was opposed to and not their marital status.[102]

2. *The Rejection of the Status/Conduct Distinction*

Other courts have rejected the conduct as opposed to status distinction.[103] In *Swanner v. Anchorage Equal Rights Commission*,[104] the Alaska Supreme Court held that Swanner, a landlord, had discriminated against three groups of unmarried tenants when he refused to rent them housing accommodations after he learned of their intention to cohabit with people of the opposite sex.[105] Swanner's argument rested on a distinction between status and conduct.[106] Swanner proposed that it was not the status of the prospective tenants that he had been opposed to because he willingly rented apartments to people of all forms of marital status—single, married,

97. *Id.*
98. *Id.* at 715.
99. *Id.* at 716.
100. *Id.*
101. *Id.* at 717.
102. *Id.*
103. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994) (rejecting the argument that the landlord had discriminated against the unmarried couple because of their conduct instead of their marital status because it was actually the couple's unmarried status that made their cohabitation offensive to the landlord's moral values); *see also* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994) (rejecting the landlord's argument that he refused to rent to an unmarried couple because he found their conduct of living together while unmarried to be offensive to his religious beliefs because it was their unmarried status that made their conduct offensive).
104. 874 P.2d 274 (Alaska 1994).
105. *Swanner*, 874 P.2d at 278.
106. *Id.* at 277.

widowed, and divorced.[107] Instead, he argued that he had refused to rent to the prospective tenants because he was opposed to the type of conduct he expected them to engage in, namely unmarried cohabitation.[108]

The court rejected Swanner's argument.[109] It reasoned that because Swanner denied the tenants housing only after finding out they were unmarried, it was the unmarried status of the tenants that made their conduct of cohabiting immoral to Swanner.[110] Therefore, the Alaska Supreme Court did not allow the landlord to make a distinction between the unmarried couple's marital status and their conduct to justify his rejection of their prospective tenancy.[111] The court instead reasoned that the fact the couple was unmarried was at the root of the landlord's disapproval of the their conduct.[112]

3. *Interpretation of Fair Housing Laws Prohibiting Marital Status Discrimination and the Existence of Unlawful Cohabitation and Fornication Statutes*

Other courts have looked to state statutes criminalizing fornication and unmarried cohabitation when deciding whether to protect unmarried cohabitants from discrimination.[113] Courts in these jurisdictions have not extended the protection of an anti-discrimination statute to unmarried couples because unmarried cohabitation has been viewed as a form of illegal conduct.[114]

For example, in *Mister v. A.R.K. Partnership,*[115] an unmarried couple sued on the grounds that a landlord's policy of not renting to unmarried couples violated an Illinois housing discrimination provision in the Illinois

---

107. *Id.* at 278.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *See* Mister v. A.R.K. P'ship, 553 N.E.2d 1152, 1157-59 (Ill. App. Ct. 1990) *superceded by statute as recognized in* Jasniowski v. Rushing, 678 N.E.2d 743, 747 (Ill. App. 1997) (providing that the court took into consideration the existence of the Illinois statute criminalizing fornication); *see also* State by Cooper v. French, 460 N.W.2d 2, 5-6 (Minn. 1990) (refusing to interpret the term "marital status" as used in the Minnesota Human Rights Act as extending protection from marital status discrimination to unmarried couples because to do so would have been inconsistent with the Minnesota fornication statute, which provided that when a single man and woman have sexual intercourse they are guilty of fornication).

114. *Mister*, 553 N.E.2d at 1156-59; *see also French*, 460 N.W.2d at 4-6; County of Dane v. Norman, 497 N.W.2d 714, 716 (Wis. 1993).

115. 553 N.E.2d 1152 (Ill. App. Ct. 1990).

Human Rights Act.[116] The Illinois Human Rights Act protected citizens from discrimination on the basis of marital status.[117]

In deciding whether the legislature intended to protect unmarried cohabitants under the anti-discrimination provision of the Illinois Human Rights Act, the court took into consideration a state statute criminalizing fornication and a statutory renouncement of common-law marriages.[118] The court acknowledged that amendments were made to the fornication statute, whereby cohabitation was no longer a criminal offense.[119] However, because the fornication statute was in effect at the time the anti-discriminatory provision was enacted, the court reasoned that in order to give effect to both statutes, it was only logical to conclude that the legislature did not intend to extend the protections of the Illinois Human Rights Act to unmarried cohabitants.[120] The court held that the Illinois Act's prohibition on marital status discrimination did not extend to unmarried couples; therefore, it concluded that a landlord could refuse to rent to a couple because they were unmarried.[121]

4. *Interpretation of Fair Housing Laws Prohibiting Marital Status Discrimination by Application of the Plain Meaning of the Statute*

Other courts have taken their state statutes at face value when determining whether unmarried cohabitants should be protected against marital status discrimination.[122] In *Foreman v. Anchorage Human Rights Commission*,[123] the Alaska Supreme Court interpreted anti-discrimination provisions in a municipal code and in a state statute regarding unlawful

116. *Mister*, 533 N.E.2d at 1153.

117. *See* 775 ILL. COMP. STAT. § 5/1-103 (2001) (stating that the Act protects against discrimination on the basis of "race, color, religion, sex, national origin, ancestry, age, marital status, [and] physical or mental handicap").

118. *Mister*, 553 N.E.2d at 1157.

119. *Id.*

120. *Id.* at 1157-59.

121. *Id.* at 1159.

122. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994) (reasoning that the plain language of the Anchorage Municipal Code showed that marital status included cohabiting couples); *see also* Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1201-02 (Alaska 1989) (stating that the court looked at the plain language of the Alaska statute and reviewed the intent behind the anti-discrimination law); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 914-15 (Cal. 1996) (reasoning that to determine what a statute means, the first place to look is the words of the statute, and those words must be given their ordinary and plain meaning); Attorney Gen. v. Desilets, 636 N.E.2d 233, 234-35 (Mass. 1994) (holding that landlords, by refusing to rent to an unmarried couple, violated the anti-discrimination provision of Massachusetts law, which prohibited discrimination in housing on the basis of marital status).

123. 779 P.2d 1199 (Alaska 1989).

practices in the sale or rental of property to determine whether a landlord could refuse to rent to an unmarried couple.[124] In pertinent part, the Anchorage Municipal Code provided that it was unlawful for a person to refuse to rent, sell, or lease property because of marital status.[125] The statute further provided that it was unlawful for a person to discriminate based on marital status.[126] The Alaska statute made it unlawful for a person with rights to sell, lease, or rent property to discriminate against a person because of marital status.[127] The court interpreted the state statute and the municipal ordinance using the ordinary and common meaning of the words and concluded that both provisions clearly prohibited discrimination based on marital status.[128]

In analyzing the words of both pieces of legislation, the Alaska Supreme Court determined that an unmarried couple was to be afforded the benefits of the anti-discrimination provisions because the term prohibiting discrimination against a "person" was defined to include "more than one person" in both provisions.[129] Further support for the decision to protect

---

124. *Foreman*, 779 P.2d at 1201.

125. *Id.* (citing Anchorage Municipal Code, AMC 05.20.020 (1993)). The Anchorage code stated that:

> [I]t is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property:
>
> (A) To refuse to sell, lease or rent the real property to a person because of race, religion, age, sex, color, national origin, marital status or physical handicap;
>
> (B) To discriminate against a person because of race, religion, age, sex, color, national origin, marital status or physical handicap in a term, condition or privilege relating to the use, sale, lease or rental of real property.

Id. at 1201 n.2.

126. *Id.*

127. *Id.* at 1202; *see also* ALASKA STAT. § 18.80.240 (Michie 2000). The Alaska statute stated:

> It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property
>
> (1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;
>
> (2) to discriminate against a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of real property; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only.

Id.

128. *Foreman*, 779 P.2d at 1201-02.

129. *Id.*; *see also* ALASKA STAT. § 18.80.240 (stating that the term "person" as defined in Alaska statute section 18.300 includes "one or more individuals").

unmarried couples from discrimination was found in the municipal code's definition of marital status, which specifically included treating people differently because they were either married or unmarried.[130] The Alaska Supreme Court held that the protection against marital status discrimination found in the state statute and the Anchorage Municipal Code protected the rights of unmarried couples.[131]

5. *Interpretation of Fair Housing Laws Prohibiting Marital Status Discrimination and Consideration of State Public Policy Promoting the Institution of Marriage*

A final factor that some courts have taken into consideration when deciding whether to protect unmarried couples from discrimination is the public policy of the state regarding unmarried cohabitation. For instance, in *Norman,* the Wisconsin Supreme Court struck down a county ordinance that protected unmarried cohabitants from marital status discrimination because it conflicted with Wisconsin public policy, which promoted the stability of marriage and family.[132] Dane County ordinance section 31.02 prohibited unlawful discrimination in housing.[133] The ordinance specified that it was unlawful for a person to discriminate upon the basis of marital status regarding the rental of property.[134] Included within the definition of marital status were people who were cohabiting.[135]

The court determined that the county ordinance was invalid because it violated the general public policy of the state of Wisconsin.[136] Therefore, as Wisconsin public policy dictated, unmarried cohabitants were not afforded protection against a landlord who discriminated on the basis of their status as unmarried cohabitants.[137]

As the above discussion on state anti-discrimination law indicates, many states afford their citizens the right to be protected against marital status discrimination when seeking housing accommodations.[138] It is also clear that not all states have extended these protections to unmarried

130. *Foreman,* 779 P.2d at 1202 n.5.

131. *Id.* at 1203.

132. County of Dane v. Norman, 497 N.W.2d 714, 716 (Wis. 1993).

133. *See id.* at 715 (citing section 31.02 of the Dane County ordinance, which stated that the intent of the ordinance was to end discrimination in housing).

134. *Id.* (citing section 31.02 of the Dane County ordinance).

135. *Id.* (citing section 31.03(5) of the Dane County ordinance).

136. *Id.* at 716.

137. *Id.* The Supreme Court of Wisconsin rejected the ordinance because the municipality did not have the power or authority to pass legislation that was contrary to state laws or "repugnant to the general policy of the state." *Id.*

138. *See supra* text accompanying note 85.

cohabitants who have suffered discrimination at the hands of landlords who have refused to rent to couples because of their unmarried status.[139] The current protection offered against marital status discrimination for North Dakota residents is codified in the Housing Discrimination Chapter of the North Dakota Century Code.[140] Section 14-02.5-02 of the North Dakota Century Code specifies that there is no provision in the Housing Discrimination chapter that prevents a landlord from refusing to rent to a couple that is unmarried, unrelated, and of the opposite sex.[141] Therefore, it is now clear in North Dakota that anti-discriminatory provisions are not extended to unmarried couples who have been denied the ability to rent housing by a landlord because they are unmarried.[142]

---

139. *See, e.g.*, State by Cooper v. French, 460 N.W.2d 2, 7 (Minn. 1990) (holding that state fair housing legislation did not prohibit a landlord from refusing to rent to an unmarried couple); McFadden v. Elma Country Club, 613 P.2d at 146, 148 (Wash. App. Ct. 1980) (holding that state fair housing legislation did not prohibit a private country club from refusing to transfer title to real estate to an unmarried woman who intended to cohabit on the property with her fiancé).

140. N.D. CENT. CODE §§ 14-02.5-02 & 14-02.5-07 (Supp. 2001).

> 1. A person may not refuse to sell or rent, after the making of a bona fide offer, refuse to negotiate for the sale or rental of, or in any other manner make unavailable or deny a dwelling to an individual because of race, color, religion, sex, disability, age, familial status, national origin, or status with respect to marriage or public assistance.
>
> 2. A person may not discriminate against an individual in the terms, conditions, or privileges of sale or rental of a dwelling or in providing services or facilities in connection with a sale or rental of a dwelling because of race, color, religion, sex, disability, age, familial status, national origin, or status with respect to marriage or public assistance.
>
> . . . .
>
> 4. Nothing in this chapter prevents a person from refusing to rent a dwelling to two unrelated individuals of opposite gender who are not married to each other.

N.D. CENT. CODE § 14-02.5-02.

> A person whose business includes engaging in residential real estate-related transactions may not discriminate against an individual in making a real estate-related transaction available or in the terms or conditions of a real estate-related transaction because of race, color, religion, sex, disability, age, familial status, national origin, or status with respect to marriage or public assistance. A residential real estate-related transaction is the selling, brokering, or appraising of residential real property or the making or purchasing of loans or the provision of other financial assistance to purchase, construct, improve, repair, maintain a dwelling, or to secure residential real estate. Nothing in this section prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, sex, disability, age, familial status, national origin, or status with respect to marriage.

N.D. CENT. CODE § 14-02.5-07.

141. N.D. CENT. CODE § 14-02.5-02(4).

142. *See id.* (providing that a landlord's decision not to rent to an unmarried, opposite sex couple is not discrimination because nothing in the housing discrimination chapter of the North Dakota Century Code prevents a landlord from refusing to rent on that basis).

E. THE NORTH DAKOTA HUMAN RIGHTS ACT

Before the North Dakota Legislature enacted the North Dakota Human Rights Act in 1983, there was no established public policy prohibiting housing discrimination in North Dakota.[143] With the enactment of the Human Rights Act, attention was brought to the prevention of discrimination in housing, and remedies were designed to further vindicate a person's right to be free of discrimination.[144] In implementing this policy, the legislature was able to specify a vast number of grounds upon which a person engaged in the sale or rental of property could not discriminate against another person.[145] Under the North Dakota Human Rights Act, a person could not discriminate based upon race, color, religion, sex, national origin, public assistance, or *status with respect to marriage* when making a decision regarding whether to rent accommodations to a prospective tenant.[146] These protections remained part of the Human Rights Act until the North Dakota Legislature repealed the discriminatory housing provisions in 1999 and 2001 and enacted the Discriminatory Housing Practices Act.[147]

---

143. N.D. Fair Hous. Council, Inc. v. Haider, No. A1-98-077, 1999 WL 33283355, at *4 (D.N.D. Mar. 9, 1999).

144. Moses v. Burleigh County, 438 N.W.2d 186, 188-90 & n.1 (N.D. 1989).

145. *See* N.D. CENT. CODE § 14-02.5-02.

146. N.D. CENT. CODE § 14-02.4-12 (1997) (repealed 1999). The North Dakota Century Code stated that:

> It is a discriminatory practice for an owner of rights to housing or real property . . . to:
>
> (1) Refuse to transfer an interest in real property or housing accommodation to a person because of race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance;
>
> (2) Discriminate against a person in the terms, conditions, or privileges of the transfer of an interest in real property or housing accommodation because of race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance; or
>
> (3) Indicate or publicize that the transfer of an interest in real property or housing accommodation by persons is unwelcome, objectionable, not acceptable, or not solicited because of a particular race, color, religion, sex, national origin, age, physical or mental disability, or status with respect to marriage or public assistance.

Id.

147. *Id.* Discriminatory Housing Practices by Owner or Agent, section 14-02.4-12, was repealed by the North Dakota Legislature by S.L. 1999, ch. 134, § 4. Section 14-02.4-12.1, Discriminatory Housing Practices, was subsequently repealed by the North Dakota Legislature by S.L. 2001, ch. 145, § 14.

F. APPARENT CONFLICT BETWEEN NORTH DAKOTA'S UNLAWFUL COHABITATION STATUTE AND THE NORTH DAKOTA HUMAN RIGHTS ACT

The North Dakota unlawful cohabitation statute provides that "a person is guilty of a class B misdemeanor if he or she lives openly and notoriously with a person of the opposite sex as a married couple without being married to the other person."[148] The North Dakota Human Rights Act, as it appeared when the Petersons refused to rent the duplex unit to the Kippens in 1999, stated that it was a discriminatory practice for an owner of rights to housing or real property to refuse to transfer an interest in real property or housing accommodations to a person because of status with respect to marriage.[149]

A cursory reading of the two statutes could lead to the conclusion that they conflicted with each other.[150] On one hand, the unlawful cohabitation statute made it illegal for two unmarried persons to live together as a married couple would.[151] But on the other hand, the North Dakota Human Rights Act dictated that a landowner could not refuse to rent housing accommodations to people because of their marital status.[152] The apparent conflict between these two statutes had been addressed and resolved on prior occasions by both the North Dakota Attorney General[153] and the United States District Court for the District of North Dakota.[154]

1. The North Dakota Attorney General's 1990 Opinion Addressing the Conflict Between the Two Statutes

In 1990, the North Dakota Attorney General considered whether it was an unlawful discriminatory practice under the provisions of the North Dakota Human Rights Act to refuse to rent accommodations to unmarried persons of the opposite sex who intended to cohabit.[155] The attorney general stated that it was not unlawful discrimination under the North Dakota Human Rights Act for a landlord to refuse to rent to an unmarried

148. N.D. CENT. CODE § 12.1-20-10 (1997).

149. N.D. CENT. CODE § 14-02.4-12 (repealed 1999).

150. *See* N.D. CENT. CODE § 12.1-20-10 (classifying unmarried cohabitation as a criminal offense); *see also* N.D. CENT. CODE § 14-02.4-12 (repealed 1999) (prohibiting a landlord from discriminating against a person based on marital status).

151. N.D. CENT. CODE § 12.1-20-10.

152. N.D. CENT. CODE § 14-02.4-12 (repealed 1999).

153. 1990 N.D. Op. Att'y Gen. No. 12, 43.

154. N.D. Fair Hous. Council, Inc. v. Haider, No. A1-98-77, 1999 WL 33283355, at *4 (D.N.D. Mar. 9, 1999).

155. 1990 N.D. Op. Att'y Gen. No. 12, 43.

couple who intended to live together.[156] In formulating his opinion, the attorney general looked to *McFadden v. Elma Country Club*,[157] a Washington case involving a statute prohibiting cohabitation and one prohibiting discrimination based on marital status.[158]

In *McFadden*, the Washington appellate court held that the Elma Country Club could refuse to grant a membership into the Elma Country Club community because Ms. McFadden intended to cohabit, even though there was a statute that prohibited discrimination on the basis of marital status.[159] The Washington appellate court based its reasoning on the fact that the cohabitation statute had not been repealed when the anti-discrimination statute was enacted.[160] Therefore, the court concluded that unmarried cohabitants were not protected under the anti-discrimination statute.[161]

The North Dakota Attorney General found the reasoning applied by the Washington appellate court to be persuasive.[162] In resolving the conflict between the two North Dakota statutes, the attorney general similarly reasoned that the unlawful cohabitation statute had not been repealed by the legislature at the time the Human Rights Act was enacted in 1983.[163] Therefore, the attorney general concluded that the legislature did not intend "marital status discrimination to include discrimination on the basis of a couple's unwed cohabitation."[164]

Also, North Dakota statutory rules governing conflicting statutes dictate that a particular provision of a statute controls over a general provision of a statute.[165] The attorney general determined that the unlawful cohabitation statute must be held to control as it prohibited a particular activity.[166] The North Dakota Human Rights Act, as a general provision, was left in a subservient position because its prohibitions covered several different bases for discrimination.[167] By applying the terms of the unlawful cohabitation statute to the issue, the attorney general concluded that under

156. *Id.*
157. 613 P.2d 146 (Wash. Ct. App 1980).
158. 1990 N.D. Op. Att'y Gen. No. 12, 44; *McFadden*, 613 P.2d at 149 n.2.
159. *McFadden*, 613 P.2d at 152.
160. *Id.* at 150.
161. *Id.*
162. 1990 N.D. Op. Att'y Gen. No. 12, 44.
163. *Id.* (citing *McFadden*, 613 P.2d at 150).
164. *Id.* (quoting *McFadden*, 613 P.2d at 150).
165. *Id.* (citing N.D. CENT. CODE § 1-02-07 (1987)).
166. *Id.*
167. *Id.*

the Human Rights Act, it was not an unlawful discriminatory offense to refuse to rent housing to an unmarried couple intending to cohabit.[168]

2. *United States District Court Decision in North Dakota*

In *North Dakota Fair Housing Council, Inc. v. Haider*,[169] the United States District Court for the District of North Dakota considered whether unmarried cohabitants were offered protection from housing discrimination on the basis of marital status under the North Dakota Human Rights Act.[170] The landlord, Haider, argued that he did not want to rent to the unmarried plaintiffs because he did not want to assist them in violating the cohabitation statute and potentially expose himself to criminal liability for aiding in the commission of a crime.[171] The unmarried plaintiff couple argued that the unlawful cohabitation statute was never meant to punish unmarried, opposite sex couples, but that it was enacted to punish unmarried couples who hold themselves out to be married for unlawful purposes.[172]

The district court looked to the 1990 opinion of the North Dakota Attorney General[173] and regarded it as being "highly persuasive" and consistent with the court's own analysis of the issue.[174] Of particular importance to the *Haider* court was the fact that the unlawful cohabitation statute was not repealed when the Human Rights Act was enacted, nor was it repealed when the Human Rights Act was amended a few years later.[175] The court concluded that the statutes could be harmonized so that the cohabitation statute effectively removed unmarried cohabitants from being protected against housing discrimination under the North Dakota Human Rights Act.[176] The court, therefore, dismissed the plaintiffs' claim with prejudice.[177]

In 1999, the North Dakota Legislature began making changes to the housing discrimination provisions in the North Dakota Human Rights Act.[178] The legislature repealed the discriminatory housing provisions of the Human Rights Act and created a new act entitled Housing

168. *Id.* at 45.
169. No. A1-98-77, 1999 WL 33283355 (D.N.D. Mar. 9, 1999).
170. *Haider*, 1999 WL 33283355, at *1.
171. *Id.* at *3.
172. *Id.*
173. *See supra* Part II.F.1.
174. *Haider*, 1999 WL 33283355, at *4.
175. *Id.*
176. *Id.*
177. *Id.* at *5.
178. N.D. CENT. CODE § 14-02.4-12 (1997) (repealed 1999).

Discrimination.[179] A final piece of legislation enacted in 2001 resolved whether it is a discriminatory practice for a landlord to refuse to rent to an unmarried couple because they are unmarried.[180]

G. THE NORTH DAKOTA DISCRIMINATORY HOUSING PRACTICES ACT

In 1999, the North Dakota Legislature enacted the Discriminatory Housing Practice Act.[181] Two provisions were created to prohibit discrimination in residential real estate.[182] The first provision addressed discriminatory practices by a landowner in the sale or rental of property.[183] In 1999, the statute provided that

> [a] person may not refuse to sell or rent, after the making of a bona fide offer, refuse to negotiate for the sale or rental of, or in any other manner make unavailable or deny a dwelling to an individual because of race, color, religion, sex, disability, age, familial status, national origin, *or status with respect to marriage* or public assistance.[184]

---

179. N.D. CENT. CODE §§ 14-02.5-01 to -45 (Supp. 2001).

180. *See* N.D. CENT. CODE § 14-02.5-02 (providing "nothing in this chapter prevents a person from refusing to rent a dwelling to two unrelated individuals of opposite gender who are not married to each other").

181. H.R. 1043, 56th Leg. 649-62 (N.D. 1999). House Bill 1043, the Discriminatory Housing Practices Act, provided an in-state mechanism for enforcement of federal and state fair housing complaints and created a fair housing law that is substantially equivalent to the Federal Fair Housing Act. *Testimony before the House Judiciary Committee* by Amy Schauer Nelson, Executive Director of the North Dakota Fair Housing Council (Jan. 12, 1999). At the time the legislature was considering enacting House Bill 1043, the only redress a person had under the North Dakota Human Rights Act was to file a claim in state court. *Id.* The changes in housing discrimination law made North Dakota law substantially equivalent to anti-discrimination provisions in the Federal Fair Housing Act. *Id.* The North Dakota Legislature created the Discriminatory Housing Practices Act so that the state would be in substantial compliance with federal law in order to partake in federal discrimination programs and so that the state would be provided with assistance in investigating and bringing discrimination actions. *See House Standing Committee Minutes Bill/Resolution No.* 1043, 1999 Leg., 56th Sess. 1 (N.D. 1999) (explanation of Vonette Richter, Legislative Council on House Bill 1043); *see also* Testimony on HB 1043 by Mark Bachmeir, Interim Commissioner at the Department of Labor prepared for the House Judiciary Committee (explaining that House Bill 1043 attempts to establish an in-state regulatory authority and administrative process for receiving and investigating charges of housing discrimination under state law). The Bill also provided for state enforcement of federal fair housing law as long as the provisions are substantially equivalent to those in the Federal Fair Housing Act. *House Standing Committee Minutes Bill/Resolution No.* 1043, 1999 Leg., 56th Sess. 1 (N.D. 1999).

182. *See* N.D. CENT. CODE § 14-02.5-02 (relating to the sale or rental of property); *see also* N.D. CENT. CODE § 14-02.5-07 (relating to residential real estate-related transactions).

183. N.D. CENT. CODE § 14-02.4-12 (1997) (repealed 1999).

184. N.D. CENT. CODE § 14-02.5-02 (emphasis added). Under the prior housing discrimination law of the North Dakota Human Rights Act, an aggrieved party could only seek remedies through the court system. North Dakota Department of Labor-Division of Human Rights, *Understanding Housing Discrimination Laws in North Dakota, available at* http://www.state.nd.us/labor (last visited May 30, 2002). Under the Housing Discrimination Act, North Dakota citizens can

The second provision addressed discrimination in residential real estate-related transactions.[185] According to the statute, a person involved in real estate-related transactions could not discriminate against a person because of race, religion, color, sex, national origin, age, familial status, or status with respect to marriage when making the transaction available or in making the terms of the transaction.[186]

In 2001, the North Dakota Legislature created a new subsection to the sale or rental provision of the Housing Discrimination Chapter.[187] This new section was entitled Unmarried Couple Property Rental Act.[188] The Act was created to clarify the conflicting provisions in North Dakota's housing discrimination chapter and its unlawful cohabitation statute.[189] The new provision provided that "nothing in [the housing discrimination chapter] prevents a person from refusing to rent a dwelling to two unrelated individuals of opposite gender who are not married to each other."[190] Since August 1, 2001, a landlord in North Dakota can refuse to rent to an unmarried couple because they are of the opposite sex and are not married.[191]

H. CASES WHERE A LANDLORD REFUSED TO RENT TO AN UNMARRIED COHABITING COUPLE BECAUSE OF RELIGIOUS BELIEFS

When landlords refuse to rent to unmarried couples seeking to cohabit, it is often because unmarried cohabitation is against the landlords' religious beliefs.[192] The issue then raised is whether landlords' religious beliefs

---

voice their complaints of unlawful housing discrimination to the Department of Labor for investigation. *Id.* Citizens also have the option of filing claims with the Federal Department of Housing and Urban Development. *Id.*

185. N.D. CENT. CODE § 14-02.5-07 (Supp. 2001).

186. *Id.*

187. *See* H.R. 1448, 2001 Leg., 57th Sess. 114 (N.D. 2001) (providing for the creation and enactment of a new subsection to North Dakota Century Code section 14-02.5-02 relating to rental property for unmarried people).

188. N.D. CENT. CODE § 14-02.5-02; *see also Human Services Committee: Testimony on HB 1448*, 57th Sess. 213 (N.D. 2001) (prepared by Representative Jim Kasper) (stating House Bill 1448, Unmarried Couple Property Rental, was introduced at the request of a constituent who was aware of what happened to the Petersons when they refused to rent to an unmarried man (Robert Kippen) and woman (Patricia Kippen (DePoe)).

189. *See* HOUSE STANDING COMMITTEE MINUTES, H.B. 1448, 57th Sess. 213 (N.D. 2001) (providing testimony by Representative Jim Kasper).

190. N.D. CENT. CODE § 14-02.5-02.

191. *Id.*

192. *See* State by Cooper v. French, 460 N.W.2d 2, 3-4 (Minn. 1990) (involving a landlord who refused to rent an apartment to an unmarried couple because he believed that "an unmarried couple living together or having sexual relations outside of marriage [was] sinful"); *see also* Attorney Gen. v. Desilets, 636 N.E.2d 233, 234-35 (Mass. 1994) (concerning landlords who had a policy of not renting to unmarried couples because the couples' conduct would be in violation of strictly held religious beliefs).

justify denying housing to unmarried couples in spite of statutes that explicitly outlaw marital status discrimination in housing.[193] Some landlords have raised constitutional challenges to anti-discrimination laws prohibiting them from refusing to rent to unmarried couples because the landlords argue the laws infringe upon their right to free exercise of religion.[194] The court must then consider whether the fair housing law, prohibiting marital status discrimination, infringes upon fundamental religious rights protected under the Free Exercise Clause of the First Amendment.[195]

Free exercise jurisprudence has been labeled one of the most "chaotic and unpredictable [areas] of the law."[196] In North Dakota, the legislature avoided burdening the courts with chaotic and unpredictable Free Exercise Clause cases by passing an amendment to the Housing Discriminatory Practices Act in 2001 that allows a landlord to refuse to rent to unmarried couples.[197]

III. ANALYSIS

Peterson was decided by a four-justice majority, which held that refusing to rent an accommodation to unmarried people unlawfully seeking to cohabit was not unlawful discrimination under the North Dakota Human Rights Act.[198] Justice Sandstrom wrote the majority opinion; he was joined by Chief Justice VandeWalle, Justice Neumann, and Justice Maring.[199] Justice Kapsner dissented.[200] She argued that the district court erred by granting summary judgment because there was not adequate evidence that

193. *See* McCready v. Hoffius, 586 N.W.2d 723, 728 (Mich. App. 1998) (discussing the landlord's argument that the anti-discrimination law provided for in the Civil Rights Act, prohibiting discrimination on the basis of status, violated religious freedoms protected by the Michigan Constitution and the United States Constitution); *see also Desilets*, 636 N.E.2d at 235 (noting a landlord's allegation that forcing him to comply with a statutory mandate prohibiting discrimination in housing rentals, violated his right to freely exercise his religion); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 279 (Alaska 1994) (concerning the landlord's assertion that enforcement of the anti-discrimination provision of section 05.20.020 of the Anchorage Municipal Code had the effect of violating his rights to free exercise of religion because the statute forced him to conduct his business as a landlord in a way that contradicted his religious beliefs).

194. *Swanner,* 874 P.2d. at 276-77; Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996); *McCready,* 586 N.W.2d. at 725; *French*, 460 N.W.2d at 3-4.

195. U.S. CONST. amend I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

196. Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487, 553 (1998).

197. N.D. CENT. CODE § 14-02.5-02(4) (Supp. 2001).

198. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶¶ 49-52, 625 N.W.2d 551, 563-64.

199. *Id.* ¶¶ 1, 52, 625 N.W.2d at 553, 564.

200. *Id.* ¶ 53, 625 N.W.2d at 564 (Kapsner, J., dissenting).

the Kippens' conduct violated the unlawful cohabitation statute.[201] She also determined that the trial court erred by dismissing the Housing Council according to Rule 12[202] and Rule 17[203] of the North Dakota Rules of Civil Procedure.[204]

A. THE MAJORITY OPINION

The North Dakota Supreme Court determined that the unlawful cohabitation statute and the North Dakota Human Rights Act could be harmonized by recognizing that the cohabitation statute regulated conduct, not status.[205] The court held that it was not unlawful to deny housing to an unmarried couple seeking to openly and notoriously live together as husband and wife because unmarried cohabitation was a crime in North Dakota.[206]

The court began its analysis from a historical standpoint, examining the text of the unlawful cohabitation statute and the North Dakota Human Rights Act.[207] The court looked to the legislative history of the cohabitation statute and noted that cohabitation had been prohibited in North Dakota since before 1890, and that the initial codification of cohabitation as a crime remained relatively unchanged until 1973.[208] The court then acknowledged that in 1971 an interim legislative committee considered whether to include

---

201. *Id.*

202. Rule 12(c) of the North Dakota Rules of Civil Procedure provides:

> Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for summary judgment of the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.D. R. CIV. P. 12(c).

203. Rule 17(a) of the North Dakota Rules of Civil Procedure provides:

> Real party in interest. Every action must be presented in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party for whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and if a statute so provides an action for the use or benefit of another must be brought in the name of the State of North Dakota. No action may be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after the objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and the ratification, joinder, or substitution has the same effect as if the action had been commenced in the name of the real party in interest.

N.D. R. CIV. P 17(a).

204. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶ 53, 625 N.W.2d 551, 564.

205. *Id.* ¶ 38, 625 N.W.2d at 562.

206. *Id.*

207. *Id.* ¶¶ 7-8, 625 N.W.2d at 554-55.

208. *Id.* ¶ 10, 625 N.W.2d at 555.

a recommendation to repeal the cohabitation statute within the proposed changes to the sexual offense chapter of the North Dakota Criminal Code.[209] The committee did not recommend repealing the statute, but adopted a proposed bill, which classified unlawful cohabitation as a class B misdemeanor.[210] The court found it significant that the unlawful cohabitation statute had not been repealed by the legislature.[211]

The court also examined the legislative history of the North Dakota Human Rights Act, which showed that no reference had been made to the cohabitation law while passing the Act.[212] The legislature's failure to recognize the pre-existing cohabitation statute was not interpreted by the court to mean that the legislature had intended to repeal the cohabitation statute by implication because in North Dakota there is a presumption against repeal of a statute by implication.[213] Instead, the court reasoned that it would not consider the cohabitation statute as being repealed without finding that the terms of the cohabitation statute and the North Dakota Human Rights Act were completely inconsistent.[214] The court reasoned it was required to attempt to harmonize the provisions of the two statutes to determine whether they were so inconsistent that both could not co-exist.[215]

The court acknowledged that a 1991 bill introduced to the North Dakota House of Representatives recommended that the unlawful cohabitation statute be repealed.[216] An overwhelming majority of the members of the House of Representatives rejected repealing the statute, and the bill was defeated.[217] Rejection of the measure to repeal the cohabitation statute by the legislature eight years after enacting the Human Rights Act provided the court with further evidence that the legislature did not intend to repeal the

---

209. *Id.* ¶ 11.

210. *See id.* ¶ 12, 625 N.W.2d at 556 (stating that the new criminal code was approved by the legislature in 1973); *see also Hearing on S.B. 2049 Before the Senate Judiciary Comm.*, 43d Sess. 12 (N.D. 1973) (labeling the unlawful cohabitation statute as section 12.1-20-10 and proposing that the crime be classified as a class B misdemeanor); N.D. CENT. CODE §12.1-20-10 (1997) (including the exact proposal made by the 1971 interim committee in the third alternative).

211. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶ 44, 625 N.W.2d 551, 563.

212. *Id.* ¶ 13, 625 N.W.2d at 556.

213. *Id.* ¶¶ 34-36, 625 N.W.2d at 561.

214. *Id.* ¶ 34.

215. *Id.* ¶ 36; *see also* N.D. CENT. CODE § 1-02-07 (1987 & Supp. 2001) (regarding rules for statutory interpretation). The rule instructs that when there is a conflict between a specific provision in a statute and a general provision in the same or in another statute, both statutes must be interpreted in a way that gives effect to both provisions. N.D. CENT. CODE § 1-02-07. Therefore, a preliminary attempt must be made to harmonize conflicting statutes before it can be determined that the statutes are irreconcilable. *Peterson*, ¶ 36, 625 N.W.2d at 561-62.

216. *Peterson*, ¶ 15, 625 N.W.2d at 557.

217. *See id.* (noting the proposed repeal of the cohabitation statute was rejected by seventy-eight members of the House of Representatives while only twenty-eight members voted in favor of it).

cohabitation statute when it enacted the Human Rights Act in 1983.[218] The continuing existence of the unlawful cohabitation statute after the enactment of the North Dakota Human Rights Act "[vitiated] any argument that the legislature intended 'marital status' discrimination to include discrimination on the basis of a couple's unwed cohabitation."[219]

The court concluded its historical overview by examining the decision in *Haider*.[220] Specifically, the court noted that the district court found the conflict between the cohabitation statute and the North Dakota Human Rights Act was not irreconcilable.[221] Therefore, the court realized that the statutes could be harmonized so that effect could be given to both provisions.[222]

The North Dakota Supreme Court noted that the *Haider* court placed particular emphasis on the fact that the cohabitation statute was not repealed when the North Dakota Fair Housing Act was enacted, nor was it repealed when the attorney general's opinion was issued in 1990.[223] According to the *Haider* court, the term "status with respect to marriage" in the North Dakota Human Rights Act did not lose meaning when interpreted as not including unmarried people who cohabit.[224] The Human Rights Act still protected against several bases of housing discrimination, but it would not extend to protect the rights of unmarried couples intending to cohabit.[225] Finally, the North Dakota Supreme Court acknowledged that by applying North Dakota rules of statutory interpretation, the federal court had

---

218. *Id.* ¶¶ 13-15, 625 N.W.2d 551, 556-57. The North Dakota Supreme Court recognized that in 1991 a measure to repeal the cohabitation statute failed. *Id.* ¶ 15. The cohabitation statute was therefore still valid law in 1991, eight years after the enactment of the North Dakota Human Rights Act in 1983. *Id.* When the North Dakota Supreme Court acknowledged the 1990 North Dakota Attorney General's opinion, it also looked to the reasoning applied by the Washington appellate court in *McFadden v. Elma Country Club*, which was cited to by the attorney general. *Id.* ¶ 14. The North Dakota Supreme Court noted that in *McFadden*, the Washington Appellate Court held that Elma Country Club was allowed to refuse to rent to an unmarried couple regardless of the existence of a statute prohibiting discrimination on the basis of marital status. *Id.* The North Dakota Supreme Court recognized that the Washington appellate court had reached its conclusion by reasoning that the unlawful cohabitation statute was not repealed when the unlawful discrimination statute was enacted. *Id.* Therefore, the North Dakota Supreme Court realized that the Washington appellate court concluded that the legislature did not intend to include unmarried couples within the protection offered against marital status discrimination. *Id.*

219. *Id.* (quoting McFadden v. Elma Country Club, 613 P.2d 146, 150 (Wash. Ct. App 1980)).

220. *Id.* ¶¶ 46-48, 625 N.W. 2d at 563; N.D. Fair Hous. Council, Inc. v. Haider, No. A1-98-77, 1999 WL 33283355, at *3 (D.N.D. Mar. 9, 1999).

221. *Peterson*, ¶ 47, 625 N.W.2d at 563.

222. *Id.* ¶¶ 47-48 (citing N.D. CENT. CODE § 1-02-07 (1987 & Supp. 2001)).

223. *Id.* ¶¶ 46-48.

224. *Haider*, 1999 WL 33283355, at *5.

225. *Id.*

determined that the two statutes could be reconciled.[226] The North Dakota Supreme Court found the federal court decision to be both persuasive and "entitled to respect."[227]

Continuing with its analysis, the court subsequently discussed the meaning of both statutes and looked to their plain meaning to find the legislature's intent.[228] Because the wording of the cohabitation statute was clear and unambiguous, the court concluded the legislature had intended the crime of cohabitation to be committed when an unmarried couple lives openly and notoriously as a married couple.[229]

The court then looked to interpret the term "status with respect to marriage" as it appeared in the North Dakota Human Rights Act.[230] The court needed to define what the term meant because it had not been defined by the legislature when the statute was enacted.[231] The court rejected the simple argument made by the plaintiffs, which proposed that the only necessary inquiry was whether a person was married.[232] Instead, the court reasoned that when considering the term "status with respect to marriage," an inquiry would be necessary to determine whether a person was divorced, widowed, or separated.[233] The court acknowledged that courts in other states have interpreted terms similar to "status with respect to marriage."[234] Some courts have interpreted the term broadly, meaning that protection was offered to anyone subjected to a policy that used marital status

---

226. *Peterson*, ¶ 47, 625 N.W.2d at 563 (stating that the federal court harmonized the statutes by recognizing that the unlawful cohabitation statute could be applied to unmarried people intending to cohabit, maintaining a prohibition on cohabitation while still allowing the North Dakota Fair Housing Act to protect against discrimination based on marital status).

227. *Id.* ¶ 48.

228. *Id.* ¶ 23, 625 N.W.2d at 559.

229. *See id.* ¶ 24, 625 N.W.2d at 560 (providing that when a statute is clear and unambiguous, the court will not read any other meaning into the statute other than what appears on its face because legislative intent is presumed to be clear from the text of the statute itself). When statutes are revised there is a presumption that the legislature did not intend to change the spirit of the law unless there is a clear legislative intent to make such a change. *Id.* at 559-60. Therefore, because no changes are read into the cohabitation statute, an unmarried couple is guilty of cohabitation when they live together openly and notoriously as husband and wife while they are not married. *Id.* ¶ 20, 625 N.W.2d at 559.

230. *Id.* ¶ 27, 625 N.W.2d at 560.

231. *Id.* ¶ 28.

232. *Id.*

233. *Id.*

234. *Id.* ¶ 30, 625 N.W.2d at 560-61. These courts have disagreed regarding the term's definition. *See* State by Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990) (explaining that the Minnesota Supreme Court decided that unmarried cohabitation was a form of conduct and not a "marital status," thereby reserving a permissible ground for a landlord to refuse to rent to an unmarried couple). *But see* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994) (explaining that the Alaska Supreme Court considered unmarried cohabitation a form of marital status, and a landlord who refused to rent to a couple only after finding out that they were not married had discriminated against their marital status).

classifications.[235] Other courts have interpreted the term narrowly so that a landlord was only found guilty of marital status discrimination when the refusal to rent a housing accommodation was based completely on the status of a prospective tenant as single, married, divorced, separated, or widowed.[236]

Marital status, however, was not the ground upon which the Kippens had been refused accommodations.[237] Because common-law marriage is not valid in North Dakota, the Kippens did not collectively have a marital status.[238] At the time they were refused housing, Robert Kippen and Patricia Kippen (DePoe) individually held the marital status of single.[239] Their single statuses were not the grounds upon which the Petersons refused to rent to them.[240] The unmarried couple was refused accommodations because they were unmarried and were seeking to cohabit together as if they were married.[241] The North Dakota Supreme Court concluded that this was a permissible ground for the Petersons to refuse to rent to the Kippens.[242]

The court reasoned that the cohabitation statute was directed at regulating conduct and not status.[243] The criminal cohabitation statute therefore prohibits the conduct of two unmarried people living together openly and notoriously as husband and wife.[244] The cohabitation statute would have been rendered meaningless and would not have been given full effect if the

---

235. *See* John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415, 1422 (1991). The author states that courts that adopt a broad view of marital status discrimination offer protection against policies that use marital status classifications. *Id.* These courts extend protection to marital status discrimination even if the discriminatory policy in issue affects only a portion of people subject to the policy. *Id.* For example, the author cites to *Atkisson v. Kern County Housing Authority*, 130 Cal. Rptr. 375 (Cal. Ct. App. 1976), where a California appellate court held that a county housing authority policy, which prohibited low income housing tenants from living with a member of the opposite sex who was not related by blood, marriage, or adoption, constituted illegal discrimination on the basis of marital status. *Atkisson*, 130 Cal. Rptr. at 380.

236. *See* Beattie, *supra* note 235, at 1419-20 (stating that under the "narrow view" of marital status discrimination, courts find unlawful marital status discrimination only when a person is treated differently on the sole basis of his or her status as single, married, divorced, separated, or widowed). These courts will reject a policy based on marital status only if the policy has the effect of disadvantaging every person within a marital status classification. *Id.*

237. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶ 29, 625 N.W.2d 551, 560.

238. *See* N.D. CENT. CODE § 14-03-01 (1997) (providing only marriages entered into according to law are valid); *see also* Pearson v. Pearson, 2000 ND 20, ¶ 8, 606 N.W.2d 128, 131 (stating a common-law marriage cannot be entered into in North Dakota).

239. *Peterson*, ¶ 29, 625 N.W.2d at 560.

240. *Id.*

241. *Id.*

242. *Id.* ¶ 49, 625 N.W.2d at 563.

243. *Id.* ¶ 37, 625 N.W.2d at 562.

244. *Id.* ¶ 38.

court had decided that the human rights statute regulated status.[245] After interpreting the North Dakota Human Rights Act and the unlawful cohabitation statute, the court concluded the following: in North Dakota it is unlawful for an unmarried couple to live together in an open and notorious manner as husband and wife.[246] It is also unlawful for a landlord to discriminate against a person on the basis of his or her marital status, namely whether he or she is married, single, divorced, widowed, or separated.[247] However, according to the court, it is not unlawful for an unmarried couple to be denied housing accommodations when seeking to cohabit together as husband and wife in an open and notorious fashion.[248]

In accordance with the North Dakota rules of statutory interpretation, the court interpreted the statutes in a way that gave effect to each.[249] The court also interpreted the statutes in order to effectuate their purposes.[250] For example, the court took into consideration that the North Dakota Human Rights Act was enacted by the North Dakota Legislature for the purpose of preventing and deterring discrimination, and that the unlawful cohabitation statute was enacted as a criminal statute to vindicate public norms and to put the public on notice of the cohabitation crime and its corresponding punishments.[251] The court gave effect to the North Dakota Human Rights Act by interpreting the statue as prohibiting a landlord from discriminating against a person on the basis of his or her marital status.[252] The court gave effect to the criminal cohabitation statute by recognizing that North Dakota public policy disfavors unmarried cohabitation, and therefore, it is illegal for an unmarried couple to live together as husband and wife.[253]

---

245. *Id.* ¶ 37.

246. *Id.* ¶ 38.

247. *Id.*

248. *Id.*

249. *Id.* ¶ 32, 625 N.W.2d at 561; *see also* N.D. CENT. CODE § 1-02-07 (1987 & Supp. 2001) (providing: "Whenever a general provision in a statute is in conflict with a special provision on the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions").

250. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶ 33, 625 N.W.2d 551, 561.

251. *Id.*

252. *See id.* ¶ 16, 625 N.W.2d at 558 (stating that the statutes could be construed to give effect to both provisions). The purpose of the North Dakota Human Rights Act is to prohibit discrimination and to deter people who are involved in discriminatory behavior. *Id.* ¶ 33, 625 N.W.2d at 561. Effect is given to the North Dakota Human Rights Act, even when the unlawful cohabitation statute is applied to exclude unmarried cohabitants from protection, because the term "status with respect to marriage" contained in the Act will still regulate against several discriminatory housing practices based on status with respect to marriage. *Id.* ¶ 16, 625 N.W.2d at 558.

253. *Id.* ¶¶ 38-39, 625 N.W.2d at 562.

The court reasoned that without an explicit intent to repeal the cohabitation statute, it had to attempt to harmonize the two statutes.[254] The court declined to be persuaded by the plaintiffs' argument proposing that the Human Rights Act was to govern the issue.[255] Giving greater deference to the North Dakota Human Rights Act would indicate that the court gave a new meaning to the cohabitation statute or that the court had repealed the cohabitation statute.[256] The court also was not persuaded by the plaintiffs' argument that the legislature intended to repeal the cohabitation statute by adopting the North Dakota Human Rights Act.[257] The court subsequently rejected the plaintiffs' proposition that the North Dakota Human Rights Act be given greater deference than the cohabitation statute.[258]

The court looked to the North Dakota Attorney General's opinion issued in 1990, which addressed the conflict between the unlawful cohabitation statute and the North Dakota Human Rights Act.[259] The court acknowledged that although it was not bound by the attorney general's opinion, it found the opinion persuasive because it addressed the specific legal question at hand and was supported in subsequent legislative action.[260] The court was also persuaded by the fact that the legislature demonstrated its approval of the attorney general's opinion because the opinion had not received negative treatment from the legislature since it was published in 1990.[261]

Specifically, the North Dakota Supreme Court observed that the North Dakota Attorney General paid attention to the fact that the unlawful cohabitation statute had not been repealed when the North Dakota Human Rights Act was enacted.[262] Also, the court recognized that the attorney general harmonized the statutes by applying the specific terms of the cohabitation

254. *Id.* ¶ 36, 625 N.W.2d at 561-62.

255. *See id.* ¶ 35, 625 N.W.2d at 561. The court declined to accept the plaintiffs' suggestion that the terms of the North Dakota Human Rights Act be applied, reasoning that an attempt must be made to harmonize the statutes because implied repeal of a statute is not favored in North Dakota. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* ¶ 40, 625 N.W.2d at 562.

260. *See id.* ¶ 41 (reasoning that the opinion was especially persuasive because it had included legislative information about the two statutes and it specifically addressed the conflict between the cohabitation statute and the North Dakota Human Rights Act).

261. *See id.* ¶ 43 (stating that the legislature impliedly approved the attorney general's 1990 opinion because in the five biennial sessions of the legislature since the opinion, there had only been one proposal made suggesting repeal of the cohabitation statute, House Bill 1403, and it was rejected).

262. *Id.* ¶ 44, 625 N.W.2d at 563.

statute to the issue.[263] Finally, the court noted that the attorney general concluded that it was not unlawful discrimination to refuse to rent to an unmarried cohabiting couple under the provision of the North Dakota Human Rights Act.[264]

In summary, the court considered the terms of the Human Rights Act and the unlawful cohabitation statute, the rules of statutory construction, and the legislative history of both provisions to decide whether it was a violation of the North Dakota Human Rights Act when a landlord refused to rent to an unmarried couple because the couple was seeking to cohabit.[265] In doing so, the court concluded that "it is not an unlawful discriminatory practice under [the North Dakota Human Rights Act for a landlord] to refuse to rent to unmarried persons seeking to cohabit."[266]

B. JUSTICE KAPSNER'S DISSENT

Justice Kapsner dissented for two reasons.[267] First, she argued the district court erred by granting summary judgment against the Kippens, and second, she argued the district court erred by dismissing the Housing Council for lack of standing and for not being a real party in interest.[268]

Justice Kapsner argued that the district court erred by granting summary judgment against the Kippens because there was not enough evidence to conclude that their conduct violated the cohabitation statute.[269] Because the majority decided that the cohabitation statute was directed towards regulating conduct, sufficient evidence that the Kippens' conduct violated the cohabitation statute was needed to support the granting of summary judgment.[270] The only evidence the district court had was an admission by Robert Kippen to Mary Peterson that he intended to live together with his fiancé.[271] No further admissions were made to Mary Peterson that Robert Kippen intended to violate all of the elements of the

---

263. *Id.*; *see also* 1990 N.D. Op. Att'y Gen. No. 12, 44. The attorney general then recognized that the cohabitation statute regulated one specific activity, unmarried cohabitation, whereas the North Dakota Human Rights Act regulated several bases for discrimination. 1990 N.D. Op. Att'y Gen. No. 12, 44. Therefore, the attorney general reasoned that because the cohabitation statute contained a particular provision, the conflict between the two statutes was resolved by applying the terms of the cohabitation statute. *Id.*

264. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶ 14, 625 N.W.2d 551, 556-57.

265. *Id.* ¶¶ 8-50, 625 N.W.2d at 555-64.

266. *Id.* ¶ 49, 625 N.W.2d at 563.

267. *Id.* ¶ 53, 625 N.W.2d at 564 (Kapsner, J., dissenting).

268. *Id.* Justice Kapsner argued that the district court erred in applying Rule 12 of the North Dakota Rules of Civil Procedure to dismiss the Housing Council for lack of standing. *Id.*

269. *Id.* ¶ 54, 625 N.W.2d at 564.

270. *Id.*

271. *Id.* ¶ 58, 625 N.W.2d at 565.

cohabitation statute.[272] From this sole admission, the district court and Mary Peterson presumed that the Kippens would engage in unlawful conduct.[273]

Justice Kapsner argued that this evidence was insufficient to conclude that the Kippens could have been prosecuted for unlawful cohabitation in violation of North Dakota Century Code section 12.1-20-10.[274] Justice Kapsner reasoned that the court erred when it took this paltry amount of evidence to presume that the Kippens were unlawfully cohabiting in violation of the unlawful cohabitation statute.[275] The district court did not have evidence that the Kippens would live openly and notoriously in the community or evidence that they would be living as a married couple.[276] Justice Kapsner therefore argued that granting summary judgment was inappropriate because there were questions of material fact regarding whether the Kippens would actually have been living in violation of the cohabitation statute. [277] Justice Kapsner concluded that because summary judgment is only an appropriate method of deciding a matter when there are no genuine issues of material fact, the district court's decision to award summary judgment was erroneous and should have been reversed.[278]

Justice Kapsner further contended that the district court erred in applying Rule 12 of the North Dakota Rules of Civil Procedure to dismiss the Housing Council from the case for lack of standing.[279] In its complaint, the

---

272. *Id.* ¶¶ 59-61, 625 N.W.2d at 566.

273. *Id.* ¶ 58, 625 N.W.2d at 565. Interestingly, Justice Kapsner indicated that Mary Peterson had violated former North Dakota Century Code section 14-02.4-12, the North Dakota Human Rights Act, when she presumed that the Kippens would be engaging in unlawful conduct based on their marital status as unmarried because her presumption discriminated based on status with respect to marriage. *Id.* ¶ 54, 625 N.W.2d at 564.

274. *Id.* ¶ 58, 625 N.W.2d at 565; *see also* N.D. CENT. CODE § 12.1-20-10 (1997).

275. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 ND 81, ¶¶ 59-63, 625 N.W.2d 551, 565-67. The court based its decision to grant summary judgment upon finding that there was no issue of material fact regarding whether the Kippens were seeking to unlawfully cohabit. *Id.* ¶ 60, 625 N.W.2d at 566. The court based its reasoning on the presumption that the Kippens intended to unlawfully cohabit, which was based only on evidence that they were unmarried and that they indicated an intent to live together. *Id.*

276. *Id.* ¶ 61. The district court defined the element of "living together as a married couple" to include "mutual assumption of [] marital rights, duties and obligations [] usually manifested by married people, including but not necessarily dependent on sexual relations." *Id.* (quoting Baker v. Baker, 1997 ND 135, ¶ 13, 566 N.W.2d 806, 811).

277. *Id.* ¶ 62, 625 N.W.2d. at 566-67; *see also* Prod. Credit Ass'n of Minot v. Klein, 385 N.W.2d 485, 487 (N.D. 1986) (providing a court should grant summary judgment only if, after viewing the evidence in the light most favorable to the party against whom summary judgment is sought, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law).

278. *Peterson,* ¶ 62, 625 N.W.2d at 566-67.

279. *Id.* ¶ 63, 625 N.W.2d at 567. In order to have standing, a party must show that it has suffered some threatened or actual injury, which was a result of the illegal action. *Id.* ¶ 65, 625 N.W.2d at 568. The party cannot be asserting a generalized injury; it must be asserting its own

Housing Council alleged that it had suffered economic injuries while investigating the Petersons' alleged discriminatory housing practices.[280] The Housing Council also alleged that it had suffered by not being able to carry out its purpose of eliminating other facets of housing discrimination while it was involved in vindicating the Kippens' right to equal housing.[281] Based on these allegations, Justice Kapsner reasoned that the Housing Council had alleged a personal stake in the case and that it had also suffered specific injuries that were sufficient to satisfy the requirements for standing.[282]

Justice Kapsner then argued that the district court further erred in applying Rule 17 of the North Dakota Rules of Civil Procedure to conclude that the Housing Council was not a real party in interest.[283] Justice Kapsner

---

rights and interests, and its claim cannot be sustained through the rights and interests belonging to third parties. *Id.* When these requirements are satisfied, it is accepted that the party has alleged a personal stake in the outcome of the controversy, and the court should determine its position in the dispute. *Id.*

280. *Id.* ¶ 64, 625 N.W.2d at 567. The Housing Council alleged that it had suffered economic injuries because it had to hire extra investigators to pursue the Kippens' discrimination claim. *Id.*

281. *Id.* The Housing Council alleged that the strain on financial resources led to further injury because it deprived the Housing Council from pursuing other efforts to carry out its purpose of combating unlawful housing discrimination. *Id.*

282. *Id.* ¶ 76, 625 N.W.2d at 572. Justice Kapsner also analogized the pleadings of the North Dakota Fair Housing Council to those of another housing council in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *Id.* ¶ 70, 625 N.W.2d at 569-70. In *Havens*, the Housing Council alleged that it was required to expend significant resources to identify and counteract racially discriminatory practices. *Havens*, 455 U.S. at 379. The Court reversed a prior decision to dismiss because the organization had alleged economic injuries that it suffered while pursuing an investigation of racial steering in a housing discrimination action. *Id.* Justice Kapsner further noted that a majority of the circuits had looked to *Havens* and concluded that a fair housing organization could recover financial losses incurred in the pursuit of prohibiting discrimination. *Peterson*, ¶ 70, 625 N.W.2d at 569-70 (citing Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., 236 F.3d 629, 640 (11th Cir. 2000)).

Justice Kapsner argued there was a difference between granting a motion to dismiss under Rule 12 and granting a motion to dismiss under a summary judgment motion. *Id.* ¶ 73, 625 N.W.2d at 571. As articulated by the United States Supreme Court, during the pleading stage, a party can establish standing through general factual allegations of injury because on a motion to dismiss there is a presumption that the facts asserting the alleged injury consist of those facts necessary to support the claim. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). However, for a summary judgment motion, a "mere allegation" is not sufficient to sustain the party's interest in the action; the party must present "specific facts" which will be understood as true for purposes of the summary judgment motion. *Id.* ¶ 73, 625 N.W.2d at 571. Because the proceedings had not reached the summary judgment stage when the district court dismissed the Housing Council for lack of standing, Justice Kapsner argued that the Housing Council had alleged actual injury in its complaint and had presented enough factual allegations to survive a Rule 12 motion to dismiss. *Id.* ¶ 75. Justice Kapsner, therefore, concluded that because the Housing Council had alleged actual injuries and those injuries were of a specific nature, the district court erred by dismissing the North Dakota Fair Housing Council for lack of standing under Rule 12 of the North Dakota Rules of Civil Procedure. *Id.* ¶ 77, 625 N.W.2d at 572.

283. *Peterson*, ¶ 77, 625 N.W.2d at 572; *see also* N.D. R. CIV. P. 17(a) (stating that "[e]very action must be prosecuted in the name of the real party in interest"). A party is determined to be a real party in interest when it has a "real, actual, material, or substantial interest in the subject of the action." *Id.* (citing Froling v. Farrar, 44 N.W.2d 763, 765 (N.D. 1950)).

reasoned that the Housing Council was a real party in interest because the alleged discrimination claim against the Petersons caused the organization to expend resources, which had been allocated towards educational and outreach pursuits, investigating the allegation.[284] Justice Kapsner found the Housing Council was a real party in interest because it was pursuing recovery for its own claims stemming from the direct injury it had suffered as an organization.[285]

In summary, Justice Kapsner dissented because she disagreed with the district court's decision to grant summary judgment against the Kippens and to dismiss the Housing Council from the action.[286] According to Justice Kapsner, the district court was too hasty in deciding that summary judgment was an appropriate method to dismiss the Kippens' case.[287] Because of the negligible amount of evidence used by the district court to grant summary judgment, Justice Kapsner argued that questions of material fact existed to make the application of summary judgment erroneous.[288] The second portion of Justice Kapsner's dissent was based on procedural issues.[289] She argued that the district court erred by dismissing the North Dakota Fair Housing Council on two counts: first, for lack of standing, and second, for not being a real party in interest.[290] For these reasons, Justice Kapsner dissented and declared that the summary judgment should have been reversed in favor of the Kippens and the dismissal of the Housing Council should have been remanded for further proceedings.[291]

IV. IMPACT

The percentage of people cohabiting in the United States has been increasing exponentially since the 1970s.[292] According to the 2000 United States Census Report, the number of cohabiting couple households has increased by seventy-two percent in the past decade.[293] Interestingly, North

284. *Peterson*, ¶ 78, 625 N.W.2d at 572.

285. *Id.*

286. *Id.* ¶ 53, 625 N.W.2d at 564.

287. *Id.* ¶ 62, 625 N.W.2d at 566.

288. *Id.* ¶ 59, 625 N.W.2d at 565-66.

289. *See id.* ¶¶ 63-75, 625 N.W.2d at 567-72 (explaining the argument that the district court erred in its application of Rule 12 and Rule 17 of the North Dakota Rules of Civil Procedure).

290. *Id.* ¶¶ 63-73, 625 N.W.2d at 567-71.

291. *Id.* ¶ 79, 625 N.W.2d at 572.

292. *See* National Fatherhood Initiative, *Cohabitation Trends, available at* http://www.leaderu.com/fatherfacts/cohabitation.html (last visited May 30, 2002) (citing the *U.S. Census Bureau, Statistical Abstract of the United States: 1997 Census*, finding that "the number of people who cohabit grew from 523,000 in 1970 to 3.96 million in 1996, an increase of over 600%").

293. *See* Alternatives to Marriage Project, *Alternative to Marriage Update: The Census Issue! June 2001, available at* http://www.unmarried.org/june01.html (last visited May 30, 2002)

Dakota was one of the states that reported the greatest increase in the number of cohabiting households between 1990 and 2000.[294] However, cohabitation is still unlawful in North Dakota, and there is no indication that the legislature is going to repeal the unlawful cohabitation statute.[295]

Because the new legislation regulating property rental to unmarried couples only became effective on August 1, 2001, the impact it will have on North Dakota is not yet known.[296] It has been suggested that it will affect couples both young and old who want to live together but do not want to get married.[297] The new law that allows landlords to refuse to rent to unmarried, opposite sex couples could also result in an economic strain on those who live together for financial reasons,[298] and it could stymie the interest an unmarried couple has in receiving equal access to housing.[299]

(referring to the 2000 U.S. Census, which demonstrated an increase in cohabiting couples since the 1990 Census).

294. *See id.* (stating that between 1990 and 2000, the number of unmarried partner households in North Dakota increased by 113.1%, which made it one of the states with the largest increase in percentage of unmarried partner households).

295. N.D. CENT. CODE § 12.1-20-10 (1997).

296. *See* N.D. CENT. CODE § 14-02.5-02 (Supp. 2001) (providing the 2001 amendment regarding unmarried couple property rental became effective August 1, 2001).

297. E-mail from Amy Schauer Nelson, Executive Director, North Dakota Fair Housing Council, to Erin Zasada, student, University of North Dakota School of Law (Sept. 21, 2001) (on file with author). Amy Schauer Nelson stated:

> In rental housing, you tend to see younger couples renting prior to being able to afford their first home. They do not want to be forced into marriage. However, this does not just affect the younger generation, older couples also make the decision to live together outside of marriage rather than lose a social security check.

Id.

298. *See id.* (indicating that some couples cohabit because of financial reasons); *see also* Explanations for Cohabiting *available at* http://members.aol.com/cohabiting/expl.htm (last visited May 20, 2002) (providing reasons why couples cohabit). Economics is the second most common reason people give for living together:

> (1) It is cheaper for two to live together than one; "why pay for two apartments when we can share one?" or (2) "it isn't penalized by welfare (meaning: TANF [Temporary Assistance to Needy Families] grants [which have replaced AFDC])—in fact, it's encouraged, so why not?" (3) Many senior citizens cohabit because of tax disincentives to marry and for inheritance reasons. (4) Some twenty-one million married working couples pay an extra $1,400 in federal income taxes on average, for being married compared to couples who have the same income, but cohabit rather than marry. A single person pays a 15% tax on income up to $25,350. So a cohabiting couple can earn up to $50,000 and remain in the 15% bracket. But a married couple is in the 15% bracket only if their combined income is under $42,350. They must pay a 28% tax on all earnings about that amount. Also, the standard deduction of a single person is $4,250, but a joint return can claim only $7,100, rather than double the $4,250, or $8,500 (5) Marriage is a major financial outlay that many people can not afford.

Id.

299. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 925 (Cal. 1996). When a landlord is permitted to discriminate against an unmarried couple by refusing to rent housing to them, there is the potential that this discrimination will lead to a more expensive

What is known, however, is that by enacting North Dakota Century Code section 14-02.5-02, the legislature has resolved the conflict between the provisions in the North Dakota Century Code relating to housing discrimination with respect to marital status and the North Dakota unlawful cohabitation statute.[300] The recent amendments to the Housing Discrimination Act and the precedent created by the North Dakota Supreme Court's decision in *Peterson* explicitly allow North Dakota landlords to close the door in the face of unmarried cohabitants solely because they are unrelated, of the opposite sex, and plan to live together.[301]

At present, it is still illegal in North Dakota for an unmarried and unrelated man and woman to live together as if they are married.[302] However, the North Dakota Legislature still considers debate over repealing the unlawful cohabitation statute even though there has been no indication that the law will be repealed.[303] As legislation changes to adapt to society's changing morals and attitudes, only time will tell whether the cohabitation trend that has been observed in this state will motivate the legislature to repeal the cohabitation law. [304]

V. CONCLUSION

In *North Dakota Fair Housing Council, Inc. v. Peterson*, the North Dakota Supreme Court held that it was not a discriminatory practice for a landlord to refuse to rent an accommodation to an unmarried, opposite sex

---

housing market. *Id.* at 928. Furthermore, allowing landlords to discriminate on the basis of marital status frustrates a tenant's interest in obtaining equal access to housing. *Id.*

300. *See* SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE, SENATE STANDING COMMITTEE MINUTES, H.B 1448, 57th Sess. at 1 (N.D. 2001) (providing Representative Jim Kasper's statement that Bill 1448 will clarify the potential conflict between the North Dakota Century Code provisions relating to housing discrimination with respect to marital status and the unlawful cohabitation statute).

301. *See* N.D. CENT. CODE §14-02.5-02(4) (Supp. 2001).

302. N.D. CENT. CODE § 12.1-20-10 (1997).

303. *See* REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL 2001, at 157-63. The 2001 Report of the North Dakota Legislative Council contained a study on sexual offender statutes. *Id.* The unlawful cohabitation statute was included in one of the areas reviewed by the committee. *Id.* The committee received testimony in favor of decriminalizing the cohabitation statute. *Id.* It was suggested that there is no need for a statute that makes it a crime for adults of any age to live together. *Id.* The testimony further indicated that the unlawful cohabitation statute was outdated and should be repealed. *Id.* Although the committee did not make a recommendation to repeal the unlawful cohabitation statute at the time, it was considered. *Id.*

304. *See* Lawrence C. Nolan, *Legal Strangers and the Duty of Support: Beyond the Biological Tie—But How Far Beyond the Marital Tie?*, 41 SANTA CLARA L. REV. 1, 35-36 (2000) (proposing that society has accepted cohabitation because the number of people cohabiting has increased dramatically and cohabitation has become commonplace). The author asserts that the demographics of cohabitation support the view that cohabitation laws should change to promote the general welfare of the citizens living in the state. *Id.*

couple who intended to cohabit.[305] This decision was based on analysis that focused upon historical reasons to support the existence of the unlawful cohabitation statute in relation to the North Dakota Human Rights Act.[306]

*Erin P. B. Zasada**

305. N.D. Fair Hous. Council, Inc. v. Peterson, 2001 N.D. 81, ¶ 49, 625 N.W.2d 551, 563.

306. *See generally id.* ¶¶ 9-49, 625 N.W.2d at 555-63 (demonstrating the court's analytical framework).

* First and foremost, I would like to express my sincere appreciation to my family for all of the support they have provided me throughout my academic career. I would also like to thank Allen Brabender for his continued patience and guidance. Lastly, I would like to thank Laurel Hanson and Louann McGlynn for all of the assistance they provided.

***