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PROPERTY RIGHTS OF A SAME-SEX COUPLE: THE OUTLOOK AFTER *MARVIN*

I. INTRODUCTION

Gay or lesbian pairs (hereinafter referred to as "same-sex" couples) have traditionally met with failure in their efforts to gain state legal recognition of their relationships.[1] In some states, they have at best been given only grudging recognition by large segments of the public. Courts have tended to reflect similar societal attitudes in their treatment of couples comprised of the same sex. They have, for instance, consistently limited the benefits of conventional matrimony to heterosexuals.[2]

The case of *Marvin v. Marvin*,[3] decided by the California Supreme Court in 1976, focused attention on the legal and equitable remedies[4] available to couples living outside the bounds of conventional matrimony. It also raised some important questions concerning the possibility of whether those remedies, which are normally reserved for married heterosexual couples, could also apply to same-sex couples. In *Marvin*, plaintiff Michelle Triola alleged that she and actor Lee Marvin had orally agreed to live together and, at the same time, " 'hold themselves

1. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973) (upheld denial of marriage license to female couple); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (held statute governing marriage does not authorize couples of the same sex to marry); Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (1971) (marriage of two males, one of whom was a putative transsexual, was held to be a nullity); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) (same-sex relationships are outside the proper scope of marriage). *See generally* Comment, *Same Sex Marriage and the Constitution*, 6 U.C.D. L. REV. 275 (1973); Comment, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973). *See also* McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976) (held that the Minnesota Supreme Court's decision in the *Baker* case was determinative in prohibiting a same-sex marriage in Minnesota); M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204, *cert. denied*, 71 N.J. 345, 364 A.2d 1076 (1976) (post-operative transsexual was considered to have the capacity to marry because she was no longer the same sex as her partner).

2. Singer v. Hara, 11 Wash. App. 247, 255, 522 P.2d 1187, 1192 (1974). The *Singer* court noted that the same-sex couple was "being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex." *Id.* (footnote omitted).

The California Civil Code was recently modified to define marriage as "a personal relation arising out of a civil contract *between a man and a woman* . . . ." CAL. CIV. CODE § 4100 (West Supp. 1978), *as amended by* 1977 Cal. Stats., ch. 339, § 1 (new language emphasized).

3. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

4. *See* text accompanying note 10 *infra*.

out to the general public as husband and wife.' "[5] The Marvins also allegedly agreed to " 'combine their efforts and earnings and . . . share equally any . . . property accumulated' " while they lived together.[6] In addition, Michelle was to forego her career as a singer and entertainer in order to devote herself to Lee " 'as a companion, homemaker, housekeeper, and cook.' "[7] Lee, in return, undertook to provide for Michelle's financial needs for the remainder of her life.[8] Michelle further alleged that they cohabited under this arrangement for over five years before she was forced to leave defendant Lee's household.[9]

While the *Marvin* court found that Michelle would be entitled to recover under the terms of the couple's alleged express contract, it also noted that even in the absence of such a contract, recovery would be possible under the theories of implied contract, quantum meruit, implied partnership, or constructive trust.[10] In finding that parties to a relationship which had frequently been characterized as "meretricious"[11] might have access to equitable or legal remedies, the court acknowledged that it could no longer impose a standard based on "moral considerations."[12]

In the wake of *Marvin*, commentators were quick to raise questions concerning its applicability to couples of the same sex.[13] Indeed, *Marvin* has subsequently been relied upon in the trial court pleadings of two well publicized California cases involving property rights of gay couples.[14] This comment will examine the possibility that *Marvin*'s le-

5. 18 Cal. 3d at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.

11. *E.g.*, Keene v. Keene, 57 Cal. 2d 657, 664, 371 P.2d 329, 333, 21 Cal. Rptr. 593, 597 (1962).

12. 18 Cal. 3d at 684, 557 P.2d at 112, 134 Cal. Rptr. at 831.

13. *E.g.*, Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 106 (1976) [hereinafter cited as Bruch]; Kay & Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CALIF. L. REV. 937, 967-68 (1977) [hereinafter cited as Kay & Amyx]; Comment, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359, 359 n.4 (1978).

14. Memorandum of Points and Authorities for Plaintiff at 1-3, Richardson v. Conley, No. 416547 (San Diego County Super. Ct., May 17, 1978); L.A. Times, Nov. 10, 1978, § 1, at 26, col. 5. *See* Complaint at 1-3, Jones v. Estate of Daly, No. WEP 14762 (Santa Monica Super. Ct., July 28, 1978).

In view of the fact that a significant minority of the population is gay, the author believes that suits of this nature are latent and forthcoming in the wake of *Marvin*. Recent estimates placed the number of homosexuals in the United States in the neighborhood of 20 million. NEWSWEEK, June 6, 1977, at 16. According to the Kinsey Report, ten percent of the white

gal and equitable remedies would be available to cohabiting couples of the same sex.

II. THE LIMITED OPTIONS PRIOR TO *MARVIN*

Contrary to some popular misconceptions, *Marvin* did not signal a complete break with the judicial past in California.[15] Courts had previously enforced express oral agreements between cohabiting partners as long as sexual services were not the consideration contemplated by the parties.[16] Pooling arrangements and agreements to share assets equally were also readily enforced.[17] Additionally, even in the absence of an express agreement, equitable considerations often dictated that the partners share the combined property accumulations in proportion to their initial contributions.[18]

But the same courts also permitted moral considerations to control many of their decisions.[19] Thus, courts would award a putative spouse (*i.e.*, one who mistakenly, but in good faith believed there was a valid marriage) the reasonable value of her services, but deny the same award to one who "cohabit[ed] with a man in a knowingly meretricious relationship . . . ."[20]

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male population is more or less exclusively homosexual for a three year period or longer. A. KINSEY, W. POMEROY, & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 651 (1948).

15. *See* Kay & Amyx, *supra* note 13, at 954-58.

16. *E.g.*, Trutalli v. Meraviglia, 215 Cal. 698, 701-02, 12 P.2d 430, 431 (1932); Bridges v. Bridges, 125 Cal. App. 2d 359, 363, 270 P.2d 69, 71 (1954); Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 602, 213 P.2d 727, 729 (1950). *See* Marvin v. Marvin, 18 Cal. 3d at 670, 557 P.2d at 113, 134 Cal. Rptr. at 822 and cases cited therein.

17. *E.g.*, Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943); Garcia v. Venegas, 106 Cal. App. 2d 364, 368, 235 P.2d 89, 92 (1951).

18. *E.g.*, Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943). *See also* Garcia v. Venegas, 106 Cal. App. 2d 364, 368, 235 P.2d 89, 92 (1951) (recovery was allowed under pooling arrangement which was likened to a partnership or joint business enterprise).

Assuming that a cohabiting spouse had furnished 50 percent of the initial contributions, she would be entitled to one half of the accumulated assets because of *Vallera*'s equitable considerations. But she would not be entitled to an equal share of the assets *by law* under California's community property system. Legal rights to community property cannot arise in a *Marvin*-type cohabitation situation. *E.g.*, Marvin v. Marvin, 18 Cal. 3d at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819; Estate of Foy, 109 Cal. App. 2d 329, 332, 240 P.2d 685, 687 (1952); Baskett v. Crook, 86 Cal. App. 2d 355, 359, 195 P.2d 39, 42 (1948).

19. *See, e.g.*, Beckman v. Mayhew, 49 Cal. App. 3d 529, 536, 122 Cal. Rptr. 604, 608 (1975) (Paras, J., concurring) (denial of awards to cohabiting spouse was done on the basis of moral grounds); Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 603, 213 P.2d 727, 730 (1950) (law does not award compensation to "concubine" living with a man).

20. *E.g.*, Keene v. Keene, 57 Cal. 2d 657, 664, 371 P.2d 329, 333, 21 Cal. Rptr. 593, 597 (1962). *See, e.g.*, Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943) (because there was no evidence that cohabiting spouse had contributed any funds towards acquisition of property, even though services were involved, she was not entitled to an undivided one-

Decisions prior to *Marvin* also followed Justice Traynor's majority opinion in *Vallera v. Vallera*[21] which held that a woman living with a man and having no genuine belief in the legality of the marriage did not acquire "by reason of cohabitation alone the rights of co-tenant in his earnings and accumulations . . . ."[22] What Justice Traynor appeared to be saying was that a woman in such a situation had to produce evidence that the relationship rested on considerations *other* than the mere fact of cohabitation. If she could have produced such evidence, recovery might have been possible.

But decisions following *Vallera* gave "cohabitation alone" a meaning more equivalent to "if she cohabits at all." Justice Peters sensed this judicial overbreadth when he noted that one state supreme court majority applied this interpretation even in a situation where there were services "in excess of normal marital services."[23] Such a situation would be analogous to the one in *Vallera* in which there were considerations other than the mere fact of cohabitation and where recovery should have been possible.[24]

III. *MARVIN*'S NEUTRAL MORAL STANDARD

The *Marvin* court, too, recognized that a cohabiting spouse might be awarded the reasonable value of his or her services even in the absence

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half interest). *But see* Keene v. Keene, 57 Cal. 2d at 672, 371 P.2d at 338, 21 Cal. Rptr. at 602 (Peters, J., dissenting) ("funds" includes services as well as money or tangible property); Delamour v. Roger, 7 La. Ann. 152, 155 (1852) (equitable considerations entitled a cohabiting spouse to half the property acquired when her capital and labor contributed "a full share toward the results . . . ."); Hayworth v. Williams, 102 Tex. 308, 314, 116 S.W. 43, 46 (1909) (cohabiting woman did not have to prove she produced part of the money that was used to purchase land, but only that she contributed by working with her partner towards a common purpose).

In re Marriage of Cary, 34 Cal. App. 3d 345, 349-53, 109 Cal. Rptr. 862, 863-66 (1973), recognized the inequities of courts giving property awards to putative spouses but denying them to cohabitants. The *Cary* court reasoned that because California's Family Law Act had eliminated fault or guilt as a basis for dividing marital property, it could use this law's policy provisions to eliminate any distinctions between a cohabitant and a putative spouse. Although the *Marvin* court disapproved of *Cary*'s reasoning, it expressly approved of *Cary*'s perception of the unfairness of the *Vallera* and *Keene* decisions. 18 Cal. 3d at 681, 557 P.2d at 120-21, 134 Cal. Rptr. at 829-30.

For a general discussion of the rights of the putative spouse in California, see Laughran & Laughran, *Property and Inheritance Rights of Putative Spouses in California: Selected Problems and Suggested Solutions*, 11 LOY. L.A.L. REV. 45 (1977); Luther & Luther, *Support and Property Rights of the Putative Spouse*, 24 HASTINGS L.J. 311 (1973).

21. 21 Cal. 2d 681, 134 P.2d 761 (1943).

22. *Id.* at 684-85, 134 P.2d at 762-63.

23. Keene v. Keene, 57 Cal. 2d 657, 671, 371 P.2d 329, 338, 21 Cal. Rptr. 593, 602 (1962) (Peters, J., dissenting).

24. *See id.*

of an express agreement between the parties.[25] Additionally, the court recognized that "[t]he mores of society have indeed changed so radically in regard to cohabitation that *we cannot impose a standard based on alleged moral considerations . . . .*"[26] Further, the *Marvin* court noted that "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[27]

The California Supreme Court's express approval of the equivalent of a consenting adult standard and its refusal to impose a moral judgment upon a couple living in what has traditionally been regarded as a "sinful" relationship[28] is noteworthy. The court was, in effect, expressing the same policy that was adopted by the California legislature in 1975 when it passed the Brown Act[29] decriminalizing acts of adulterous

25. 18 Cal. 3d at 675, 557 P.2d at 116, 134 Cal. Rptr. at 825. *See also* Bruch, *supra* note 13, at 110-14 (presumption that household services are intended as a gift is unrealistic).

26. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831 (emphasis added). *See also* Loughran v. Loughran, 292 U.S. 216, 229 (1934) ("Equity does not demand that its suitors [lead] blameless lives.").

27. 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

28. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. *See, e.g., In re* Estate of Thornton, 81 Wash. 2d 72, 77-78, 499 P.2d 864, 867 (1972) (idea that a putative spouse could have an interest in property, but that a spouse who cohabited could not, "has a moralistic aura, but is realistically and objectively questionable."); Omer v. Omer, 11 Wash. App. 386, 391, 523 P.2d 957, 960 (1974) (judgments should not be made based upon illicit nature of relationship).

Marvin's moral neutrality is consistent with the approach taken by the District of Columbia Circuit Court of Appeals in Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). In *Norton*, the Civil Service Commission had discharged an employee for off-duty conduct that was of an "immoral" homosexual nature. The court found that the jurisdiction of the Commission was limited "to the things which are Caesar's," that the Commission had not been ordained to enforce "absolute moral judgments," and that "the notion that . . . the federal bureaucracy [could] enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity." *Id.* at 1165.

The Oregon Federal District Court followed this same standard when it found that a homosexual immigrant was eligible for naturalization on the basis of his "good moral character." *In re* Brodie, 394 F. Supp. 1208, 1211 (D. Or. 1975). The court's opinion was based upon the factual findings that Brodie's sexual activity was no different from that of many twenty-eight year olds, that it was conducted in private, and that " 'no harm to the secular interests of the community [was] involved.' " *Id.* (quoting MODEL PENAL CODE § 207.5, Comments, at 277-78 (Tent. Draft No. 4, 1955)).

29. Law of May 13, 1975, ch. 71, §§ 5, 6, 7, 10, [1975] Cal. Stats. 131 (amending CAL. PENAL CODE §§ 286, 288a; repealing CAL. PENAL CODE §§ 269a, 269b).

As suggested by one author, one of the major reasons for the passage of this bill was the legislature's desire to prohibit governmental interference into the privacy of interpersonal relationships. Comment, *The Property Rights of Meretricious Spouses: The Effect of the New "No Punishment" Policy Indicated by the Consenting Adults Bill*, 16 SANTA CLARA L. REV. 783, 805-06 & n.150 (1976) [hereinafter cited as *Rights of Spouses*].

Many courts, unfortunately, have allowed moral considerations to affect their decisions regarding homosexuals. One of the most recent examples was the case Doe v. Common-

cohabitation, sodomy, and oral copulation between private consenting adults.

In this regard, the reasoning of the Oregon Supreme Court in the case of *Latham v. Latham*[30] is instructive. The plaintiff, who had cohabited with the defendant and had performed normal domestic services, claimed an interest in the defendant's property based on a prior agreement. The defendant demurred on the ground that the contract

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wealth's Attorney for Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976), which upheld the constitutionality of Virginia's sodomy statute. The majority relied upon Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497 (1961) and noted that:

> Adultery, *homosexuality* and the like are sexual intimacies *which the State forbids*
> . . . .
> . . . [E]ven though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, . . . is surely *a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.*

403 F. Supp. at 1201 (quoting Poe v. Ullman, 367 U.S. at 553 (Harlan, J., dissenting)) (emphasis added by court).

The court concluded that private consenting behavior between a same-sex couple was "likely to end in a contribution to moral delinquency." 403 F. Supp. at 1202. This would supposedly justify the need for state regulation. *But cf.* Stanley v. Georgia, 394 U.S. 557, 566-67 (1969) (there was little empirical basis for the State of Georgia to assert that exposure to obscene materials would lead to deviant sexual behavior or crimes of sexual violence).

The approach of the *Doe* court is also seriously undercut by Eisenstadt v. Baird, 405 U.S. 438 (1972) which recognized that a state has no right to intrude into the privacy of an unmarried couple's "immoral" relationship (*i.e.*, fornication or adultery). *Id.* at 453.

The reasoning of the Arizona Supreme Court in State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976) (en banc) reflects a similar tendency to moralize. In overturning a lower court ruling which held that the state's sodomy statute was unconstitutional as it applied to consenting adults, the court noted that: "[w]hile [the Supreme Court] has said in *Griswold* and *Eisenstadt* that the State cannot interfere with the private sexual behavior of two adults, in neither of those opinions did it determine that the State could not regulate sexual *misconduct*." *Id.* at 110, 547 P.2d at 9 (emphasis added).

Thus, the constitutionality of the state's sodomy statute was justified on the basis of the court's own preconceived assumption of what constituted "misconduct." *Id.* Also, the *Bateman* court apparently failed to appreciate that implicit in *Eisenstadt* was the concept that the state had no business attempting to draw lines or to intrude into a person's right to privacy especially when it came to matters of intimate sexual behavior without a compelling state interest. *Id.* at 112, 547 P.2d at 11 (Gordon, J., dissenting). *See* Eisenstadt v. Baird, 405 U.S. at 453 n.10 ("[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

In defining what was sexual misconduct, both the *Doe* and *Bateman* courts relied heavily on the Levitical proscription against sodomy ("Leviticus 18:22: 'Thou shalt not lie with mankind, as with womankind: it is abomination.' "). 403 F. Supp. at 1202 n.2; 113 Ariz. at 111, 547 P.2d at 10. Thus, both decisions conceivably could be challenged on the basis of the establishment clause of the first amendment of the Constitution.

The dissent in *Doe* also aptly noted that the majority had acted on the tacit assumption that concepts of morality and decency rather than the constitutional right to privacy were the central issues in question. 403 F. Supp. at 1205 (Merhige, J., dissenting).

30. 274 Or. 421, 547 P.2d 144 (1976).

was void because the consideration for the agreement was "future illicit cohabitation."[31] The court, however, found the agreement valid. It was directly influenced by the Oregon legislature's prior repeal of a statute which had made "illicit" cohabitation a criminal offense.[32] Thus, in *Latham*, cohabiting partners received recognition because the state no longer had an interest in invoking criminal sanctions against their conduct. Under the same rationale, a same-sex couple should be afforded equivalent legal recognition once a state has decriminalized private sexual activities between consenting adults of the same sex.

Since the Brown Act did just that, one would expect California courts, following the lead of the California legislature, to have little difficulty in extending *Marvin* rights to same-sex couples. In fact, the *Marvin* holding itself could be read as a step in this direction. For instance, the court noted that "no policy" precluded the courts from enforcing agreements between cohabiting partners.[33] The enactment of the Brown Act would also seem to signal an end to any major state policy that could possibly preclude enforcement of agreements between couples of the same sex.

In addition, policy arguments that such an extension would be seen as judicial encouragement of same-sex life styles are suspect. In the wake of *Marvin*, couples might actually be *discouraged* from living together in an intimate relationship because of the realization that they would be held to a higher standard of accountability by the courts.[34]

Nor would an extension of *Marvin*'s remedies necessarily discourage other relationships such as those between heterosexuals or the traditional marriage bond.[35] In some cultures, widespread homosexual behavior has been found to coexist with traditional stable family and marital relationships.[36] Also, since traditional matrimony is by law de-

31. *Id.* at 423, 547 P.2d at 145.

32. *Id.* at 427, 547 P.2d at 147. *See also Rights of Spouses*, *supra* note 29, at 807-08 (since legislature legalized consenting adult sex acts in private, judiciary should no longer bar remedies to cohabiting spouses in name of a policy that has been repudiated).

33. 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

34. *See generally id.* at 685-86, 557 P.2d at 123, 134 Cal. Rptr. at 832 (Clark, J., concurring and dissenting).

35. In *Marvin*, the defendant unsuccessfully argued that granting remedies to non-married cohabitants would discourage tradition marriage. 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. The court, however, observed that "nothing we have said in this opinion should be taken to derogate from that institution [marriage]." *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

36. *See* A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 483 (1953), *quoted in* Hefner, *The Legal Enforcement of Morality*, 40 U. COLO. L. REV.199, 216-17 (1968) [hereinafter cited as Human Female].

nied to same-sex couples,[37] allowing them other legal options could hardly be expected to affect adversely the incidence of marriage throughout the rest of society.

As the *Marvin* court pointed out, any policy designed to promote a particular type of relationship (such as marriage) cannot be justified by the perpetuation of inequities imposed on those living outside that relationship.[38] Judicial intervention in such situations should not only be tolerated but actively encouraged. Justice Finley of the Washington Supreme Court was well aware of this need in *Humphries v. Riveland*,[39] where he noted that:

> The courts have the power, indeed I believe a clear duty, to consider and settle the questions before them concerning the property rights of such persons [cohabiting couples] [citations omitted]. The "washing of hands" device seemed to have satisfied Pontius Pilate. However, the device was simply an effort to put responsibility aside. It failed then to meet and provide real solutions for the real problems of real people.[40]

This need can be just as great in a same-sex relationship as in a heterosexual one. Even though the gender of one of the parties is different, often one of the parties will assume the same dependent "homemaker role" that *Marvin* sought to protect.[41]

IV. *MARVIN*'S SHIFT FROM STATUS TO CONTRACT

Unlike its predecessors, *Marvin* shifted the focus of judicial analysis away from the existence of a couple's martial status and toward the contractual nature of their relationship. However, as the California courts had previously done in *Vallera*[42] and its progeny,[43] *Marvin* acknowledged that the reasonable expectations surrounding the *status* of marriage were not present in a cohabiting spouse situation.[44] But rather than allow the lack of marital status to be a major barrier standing in the way of judicial relief,[45] *Marvin* expanded the scope of avail-

37. *See* notes 1 & 2 *supra* and accompanying text.

38. 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.

39. 67 Wash. 2d 376, 407 P.2d 967 (1965).

40. *Id.* at 398, 407 P.2d at 979 (Finley, J., dissenting). *See* West v. Knowles, 50 Wash. 2d 311, 316, 311 P.2d 689, 693 (1957) (Finley, J., concurring) (practice of leaving property with spouse who has legal title often works to the "advantage of the cunning and the shrewd").

41. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 13 (1977).

42. 21 Cal. 2d at 685, 134 P.2d at 763.

43. *E.g.*, Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 719, 200 P.2d 49, 55-56 (1948).

44. 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

45. *See, e.g.*, Vallera v. Vallera, 21 Cal. 2d at 685, 134 P.2d at 763 (in the absence of an express contract between unmarried cohabitants, there was no justification for trial court's finding that each party owned an undivided one-half interest in property); Hill v. Estate of

able remedies using the rationale that "other expectations and equitable considerations" *outside* the marriage relationship still remained.[46] Finally, considerations of status were virtually eliminated when the court announced that cohabiting parties should be treated as other unmarried persons who enter into contracts.[47]

With marital status no longer at issue, the basic theme developed by the *Marvin* court was that cohabiting partners could assert rights based upon accepted principles of implied contract or equity.[48] Thus, in the absence of express agreements, courts following *Marvin* should look at the nature of the couple's relationship,[49] or their conduct,[50] to determine if property awards should be made on the basis of these remedies. Further, the court mentioned the possibility that economic transactions between the partners should be controlled by principles governing a "confidential relationship."[51] Such a relationship could, as the Oregon Supreme Court observed in *Latham*, contemplate "all the burdens and amenities of married life."[52]

Courts outside California have focused on various factors in determining monetary and property awards. These include whether the parties had indicated by their conduct that they intended to share their property equally,[53] the type of services rendered,[54] whether such serv-

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Westbrook, 95 Cal. App. 2d 599, 602, 213 P.2d 727, 729 (1950) (in the absence of an express agreement between cohabiting spouses, there is no implied obligation for a man to compensate his spouse for value of household services); Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 719, 200 P.2d 49, 56 (1948) (plaintiff spouse could not be compensated for her services in the absence of an express agreement).

46. 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830. *Cf.* Glona v. American Guarantee, 391 U.S. 73, 75 (1968) (illegitimate children given legal recognition in insurance recovery cases, but not to same degree as legitimate offspring).

47. 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

48. *Id.* at 665, 675, 557 P.2d at 110, 116, 134 Cal. Rptr. at 819, 825. In addition to an implied contract theory, *Marvin* mentioned the possibility of using an implied partnership, a constructive trust, or quantum meruit. *Id.* at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.

In moving away from a primary emphasis on marital status, *Marvin* appears to be following a fundamental societal trend. *See generally* Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 709-10 (1976); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1249-58 (1974).

49. 18 Cal. 3d, 675 n.11, 557 P.2d at 117 n.11, 134 Cal. Rptr. at 826 n.11.

50. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. In looking at the nature of the couple's relationship and their conduct, the court would be able to protect their "reasonable expectations." *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

51. *Id.* at 682 n.22, 557 P.2d at 121 n.22, 134 Cal. Rptr. at 830 n.22.

52. Latham v. Latham, 274 Or. at 427, 547 P.2d at 147.

53. Beal v. Beal, 282 Or. 115, 122, 577 P.2d 507, 510 (1978).

54. Roznowski v. Bozyk, 73 Mich. App. 405, 409, 251 N.W.2d 606, 608 (1977).

ices were intended as a gratuity,[55] the duration and stability of the relationship,[56] the degree of dependency experienced by the "homemaking" party,[57] and whether the couple held themselves out as husband and wife.[58]

As applied to the factual circumstances in *Marvin*, these factors may provide some indication of situations where the existence of an implied contract could be found. According to Michelle Triola's allegations, both parties lived together for a number of years[59] and held themselves out as husband and wife.[60] In addition, she assumed the duties of homemaker, cook, and companion,[61] while her partner agreed to provide for her needs.[62]

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55. *See In re* McLain's Estate, 126 Or. 456, 462-63, 270 P. 534, 535-36 (1928) (services of aunt who had moved into home to care for invalid niece were not presumed to be gratuitous, and in absence of express agreement, an implied contract for their payment would arise).

56. *E.g.*, Roznowski v. Bozyk, 73 Mich. App. 405, 409, 251 N.W.2d 606, 608 (1977); *In re* Estate of Thornton, 81 Wash. 2d 72, 75, 499 P.2d 864, 865-66 (1972); Omer v. Omer, 11 Wash. App. 386, 391, 523 P.2d 957, 960 (1974). *See, e.g.*, West v. Barton-Malow Co., 394 Mich. 334, 338, 230 N.W.2d 545, 546 (1975) (court contrasted long and continuing relationship of thirteen years with previous case which had denied relief to a relationship of relatively short duration). *See generally* Note, *Meretricious Relationships—Property Rights: A Meretricious Relationship May Create An Implied Partnership*, 48 WASH. L. REV. 635 (1973).

The Washington courts have utilized the theories of constructive trust, Omer v. Omer, 11 Wash. App. at 393, 523 P.2d at 961, or implied partnership, *In re* Estate of Thornton, 81 Wash. 2d at 80-81, 499 P.2d at 868, in order to circumvent the strictures of Creasman v. Boyle, 31 Wash. 2d 345, 196 P.2d 835 (1948), where the Supreme Court of Washington held that in the absence of some trust relationship, property of cohabiting couple belonged to the partner possessing legal title. *Id.* at 351, 196 P.2d at 841.

The Washington Supreme Court later expressed dissatisfaction with this presumption and its "moralistic aura," but declined to expressly overrule it. *In re* Estate of Thornton, 81 Wash. 2d at 77-79, 499 P.2d at 866-67. A Washington appellate court also took exception to *Creasman* and noted that "certain meretricious relationships of long and durable standing may give rise to community property rights similar to those which prevail between married persons." Omer v. Omer, 11 Wash. App. at 391, 523 P.2d at 960. The appellate court also advocated an approach that would examine the substance of "the relationship itself" in order to determine if "community property laws should be applied by analogy." *Id.*

57. *See, e.g.*, West v. Barton-Malow Co., 394 Mich. 334, 340-41, 230 N.W.2d 545, 547-48 (1975) (plaintiff who had lived with a man for thirteen years, had performed housework, and was totally dependent on him for financial support, was considered an eligible dependent for workmen's compensation benefits).

58. *E.g.*, *In re* Estate of Thornton, 81 Wash. 2d 72, 75, 499 P.2d 864, 865-66 (1972). *See, e.g.*, West v. Barton-Marlow Co., 394 Mich. 334, 340-41, 230 N.W.2d 545, 546 (1975) (fact that plaintiff held herself out as wife of cohabiting spouse was a factor in establishing her eligibility for workmen's compensation benefits as a dependent).

59. 18 Cal. 3d at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819.

60. *Id.*

61. *Id.*

62. *Id.*

V. *MARVIN* APPLIED TO A SAME-SEX COUPLE

Under *Marvin*'s contractually oriented analysis, same-sex couples should be afforded the same remedies as their heterosexual counterparts if their relationship were fashioned along similar lines. This extension of contractual and equitable remedies would be further justified by *Marvin*'s approach which places cohabitants on the same footing as "other unmarried persons,"[63] who are free to contract regardless of their marital status or sexual preferences.

The potential need for this type of extension was aptly illustrated by a recent San Diego County Superior Court case[64] in which a lesbian sought compensation for the reasonable value of her household services from her estranged partner.[65] At the defendant's request, the plaintiff had given up gainful employment in New York and had moved to San Diego to assume the role of companion and homemaker to the defendant.[66] She apparently understood that her efforts would be directed toward furthering the defendant's career and that both partners would share in its financial benefits.[67] The couple had memorialized the terms of their agreement in a written contract and had considered themselves "man" and "wife."[68]

The plaintiff relied heavily on *Marvin* in asking for enforcement of the express agreement and for temporary support pursuant to the reasonable expectations of the parties.[69] She was awarded temporary support pending the final outcome of the litigation,[70] but the issue of whether a *Marvin*-type contract would have been implied was not addressed by the court because of the existence of the written agree-

63. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830. Earlier the court had noted with approval Justice Peters' dissent in Keene v. Keene, 57 Cal. 2d 657, 672, 371 P.2d 329, 338, 21 Cal. Rptr. 593, 602 (1962) which viewed a cohabiting couple's arrangement as a "plain business relationship [where] a contract would be implied." 18 Cal. 3d at 678-79, 557 P.2d at 119, 134 Cal. Rptr. at 828.

In some situations where no express contract has been made, an analysis based on the theory of promissory estoppel and reliance may be appropriate. *See generally* Simitian, *Property Rights and the Unmarried Homemaker: Marvin v. Marvin and the California Experience*, 5 COMMUNITY PROP. J. 3, 9 (1978).

64. Richardson v. Conley, No. 416547 (San Diego County Super. Ct., May 17, 1978).

65. Complaint at 5, Richardson v. Conley, No. 416547 (San Diego County Super. Ct., May 17, 1978).

66. *Id.* at 2.

67. *Id.*

68. *Id.* at 3.

69. Memorandum of Points and Authorities for Plaintiff at 1-3, Richardson v. Conley, No. 416547 (San Diego County Super. Ct., May 17, 1978).

70. L.A. Times, June 7, 1978, § 2, at 1, col. 5.

ment.[71]

Even if there had been no express agreement, an extension of the *Marvin* remedies would seem justified. Based on the plaintiff's allegations, the couple in effect had held themselves out as husband and wife by entering into a "marriage" ceremony.[72] There was a major degree of dependence and reliance by one of the parties. The homemaking spouse had performed valuable services and both partners' efforts were mutally directed toward what appeared to be the joint accumulation of property.[73] Thus, there would appear to be sufficient grounds for finding an implied contract based on the reasonable expectations of the parties and an apparent tacit understanding that their property would be divided.[74] In addition, the observations of the superior court judge who tried the case are noteworthy. He commented that "the fact that [the couple was] of the same sex [was] of *no legal consequence*."[75]

VI. THE NEED FOR A CONSISTENT CONSTITUTIONAL STANDARD

Whether same-sex couples will be afforded this degree of legal recognition in other courts is highly questionable. Courts have sometimes been reluctant to redress grievances where the civil rights of gays are invaded.[76] And in actions involving overt discrimination, courts have refused to extend legislation such as Title VII of the Civil Rights Act[77] beyond enumerated categories such as sex and race to encompass that of sexual preference.[78]

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71. *See id.* at 2, col. 4.

72. Complaint at 3, Richardson v. Conley, No. 416547 (San Diego County Super. Ct., May 17, 1978).

73. *See id.* at 2. According to *Marvin* "[t]he parties may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort." 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

74. *See* 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830. The one major difference between *Richardson v. Conley* and *Marvin* was the relatively short duration of the relationship in San Diego—September 1977 to March 1978. Complaint at 2, 3, Richardson v. Conley, No. 416547 (San Diego County Super. Ct., May 17, 1978).

75. L.A. Times, June 7, 1978, § 2, at 1, col. 5 (emphasis added).

76. *See, e.g.*, Doe v. Commonwealth's Attorney for Richmond, 403 F. Supp. 1199, 1202-03 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (court upheld validity of Virginia's sodomy statute as it applied to consenting adult sexual activities done in private); State v. Bateman, 113 Ariz. 107, 110-11, 547 P.2d 6, 9-10 (1976) (en banc) (state has power to regulate private sexual "misconduct" including sodomy). *But see, e.g.*, Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969) (Civil Service Commission could not enforce moral judgments against off-duty homosexual activity).

77. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241 (codified at 42 U.S.C.A. § 2000e-2(a)(1) (1970)).

78. *See* Powell v. Read's, Inc., 436 F. Supp. 369, 370 (D. Md. 1977) ("Title VII does not

But such discrimination can be challenged if it involves a classification of an inherently suspect nature[79] or if it infringes on the exercise of a fundamental right.[80] It would then be subject to strict judicial scrutiny[81] and could only be justified by a "compelling state interest."[82]

Under this type of analysis, an allegedly supect class or a fundamental right need not be summarily rejected simply because it has not been recognized by statute or prior case law. For instance, in *Serrano v. Priest*,[83] the plaintiff's contention that education was a fundamental interest was not supported by any direct authority.[84] Nevertheless, the California Supreme Court found that education was a fundamental right and dealt with it under a strict scrutiny standard.[85]

Discrimination involving same-sex couples could conceivably face similar challenges under this type of analysis because it would appear

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reach situations involving transsexuals, homosexuals, or bisexuals"). *Cf., e.g.*, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 (5th Cir. 1978) (Title VII did not apply when male employee was discharged because of "effeminacy"); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977) (the term "sex" in Title VII of the 1964 Civil Rights Act should be given its traditional meaning regarding discrimination between male and female and did not extend to transsexualism); Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (discrimination because of transsexualism not covered by the 1964 Civil Rights Act).

A much broader standard of interpretation has been used by California courts in cases involving discrimination in business practices. The California Supreme Court in the case of *In re* Cox, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970) noted that the state's civil rights legislation, the Unruh Civil Rights Act, ch. 1193, § 1, 1974 Cal. Stats. 2568 (codified at CAL. CIV. CODE § 51), should be interpreted broadly to include "all arbitrary discrimination by a business enterprise." 3 Cal. 3d at 212, 474 P.2d at 995, 90 Cal. Rptr. at 27. The *Cox* court reasoned that the traditional enumeration of color, race, ancestry, sex, and national origin contained in the statute was illustrative rather than restrictive. *Id.* at 216, 474 P.2d at 999, 90 Cal. Rptr. at 31. This rationale was based on the earlier cases of Stoumen v. Reilly, 37 Cal. 2d 713, 234 P.2d 969 (1951) and Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P.2d 449 (1951) which had invalidated discrimination against a homosexual and a person of "immoral character," respectively. 37 Cal. 2d at 716, 234 P.2d at 971; 36 Cal. 2d at 738, 227 P.2d at 452.

The *Cox* court reasoned that since the Unruh Act was written after *Orloff* and *Stoumen* had been decided, the California legislature was undoubtedly aware of these decisions and had given no indication that it wished to overturn or disregard their effects. 3 Cal. 3d at 215-16, 474 P. 2d at 998, 90 Cal. Rptr. at 30.

79. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971) (sex).

80. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

81. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

82. *E.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

83. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

84. *Id.* at 604, 487 P.2d at 1255, 96 Cal. Rptr. at 615.

85. *See id.* at 608-10, 614, 487 P.2d at 1258-59, 1263, 96 Cal. Rptr. at 618-19, 623.

to interfere directly with an individual's fundamental right to privacy in sexual matters. This right has been emphatically recognized by the United States Supreme Court in *Griswold v. Connecticut*[86] and *Eisenstadt v. Baird*.[87] In addition, the Supreme Court in *Stanley v. Georgia*[88] extended this right by holding that the state could not infringe on an individual's right to view "obscene" films in the privacy of his own home.[89] Although it is arguable that *Stanley* can be distinguished on the ground that it involved free speech, the case is instructive because it protected an individual's right to privacy in matters that the state viewed as being immoral.[90] *Stanley* also recognized an individual's right "to satisy his intellectual and emotional needs in the privacy of his own home."[91]

Measured against these standards, a state's justification for regulating consensual behavior between couples of the same sex in the privacy of their own homes becomes rather hollow. If the state cannot invade a person's right to view "obscene" films, it is difficult to understand how it could also justify discriminatory regulations aimed at discouraging the activities of same-sex couples in the same private setting.

It also becomes difficult to account for any "compelling state interest" in regard to gays when one makes a comparison with the precedent established in *Roe v. Wade*.[92] *Roe* prohibits state interference with a woman's election to have an abortion during the first trimester of her pregnancy because of her overriding right to privacy, even though a potential life (as some would view it) may hang in the balance.[93] Thus, if under *Roe*, state interest were insufficient to justify interference with a person's right to privacy, surely a same-sex couple should have an even stronger claim for the same consideration.

Nor would it seem permissible under the equal protection clause[94] to establish one standard of property right laws for heterosexual couples and another for couples of the same sex. Otherwise the state would be "providing dissimilar treatment," analogous to what the state of Connecticut attempted to do in *Eisenstadt* when it adopted one standard of regulations for married couples and another for those living outside of

86. 381 U.S. 479 (1961).
87. 405 U.S. 438 (1972).
88. 394 U.S. 557 (1969).
89. *Id.* at 565-66.
90. *Id.*
91. *Id.* at 565.
92. 410 U.S. 113 (1973).
93. *See id.* at 153, 162.
94. U.S. CONST. amend. XIV, § 1.

wedlock.[95]

VII. CONCLUSION

In view of the paucity of *Marvin*-type precedents involving same-sex cohabitation, this area of the law will undoubtedly remain unsettled for the immediate future. Although numerous federal and state courts, as well as state legislatures, still feel that questionable standards of morality justify denial of rights to homosexuals,[96] arguments can be made that *Marvin*'s contractual and equitable remedies should extend to couples of the same sex. With courts in some states[97] focusing on the nature, scope, and merits of the heterosexual cohabitant's relationship rather than on their lack of marital status or their "immoral" life style, consistency would seem to demand that, at least in those jurisdictions, same-sex couples be afforded similar treatment. There is additionally a growing recognition that many same-sex couples lead relatively stable and conventional life styles[98] which would tend to further justify a more even-handed approach by the courts. Perhaps with increased understanding will come increased legal recognition.

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95. *See* 405 U.S. at 454-55.

96. *See, e.g.*, Doe v. Commonwealth's Attorney for Richmond, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). *See also* Annot., 58 A.L.R.3d 636, 643-48 (1978).

97. California, Washington, Oregon, Michigan, and Minnesota appear to have made the greatest strides in this direction. *See, e.g.*, Carlson v. Olson, 256 N.W.2d 249, 252-55 (1977) (Minnesota court relied heavily on *Marvin*, *Estate of Thornton*, and *Omer* to find that property accumulated between cohabiting couple should be divided equally. *See* notes 51-57 *supra* and accompanying text. *But cf.*, *e.g.*, Rehak v. Mathis, 239 Ga. 541, 543, 238 S.E.2d 81, 82 (1977) (illicit cohabitation constituted immoral consideration for an agreement between cohabitants and such agreement was unenforceable at law or in equity). *Rehak* was strongly criticized in a casenote in 12 GA. L. REV. 361 (1978).

98. NEWSWEEK, March 27, 1978, at 98. *See generally* Human Female, *supra* note 36, at 458 (of females sampled who had experienced homosexual relations, 51 percent had had only a single partner).