

COMMENTS

Applying *Marvin v. Marvin* to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute

INTRODUCTION

Imagine for a moment that the state you live in will not recognize your marriage to someone with whom you want to make a legal commitment.¹ Among other consequences,² this means you cannot automatically gain significant tax advantages.³ In an emergency, a doctor would not ask you to make medical decisions for your loved one.⁴ The hospital could also forbid you to visit

¹ See *infra* notes 21-25 (describing denial of legal marriage to same-sex couples).

² See *infra* note 26 and accompanying text (describing benefits marital status yields).

³ E.g., I.R.C. § 6013(a) (West Supp. 1991) (allowing married couples to file joint tax returns); see Daniel J. Lathrope, *State-Defined Marital Status: Its Future as an Operative Tax Factor*, 17 U.C. DAVIS L. REV. 257, 257 (1983). Professor Lathrope explains that married couples may avoid overall tax liability by filing a joint return because the rate tables are structured so that separate filing almost always results in increased tax liability. *Id.* at 258 n.5; see also I.R.C. § 2056(a) (West Supp. 1991) (allowing for estate tax marital deduction); I.R.C. § 2523 (West Supp. 1991) (allowing for gift tax marital deduction).

⁴ See HAYDEN CURRY & DENIS CLIFFORD, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES 8:1, :2, :11 (6th ed. 1991). Curry and Clifford describe the harshness of denying a homosexual the right to make medical decisions for her loved one. *Id.* at 8:1 to :2. For instance, there may be situations in which the biological family members have religious beliefs that the person who is

your loved one.⁵ Furthermore, if your loved one is not a citizen, immigration authorities will not consider her your "immediate family member," and she could be deported.⁶ If you are heterosexual, this imaginative moment has passed. For homosexuals, however, it remains a life-long reality because the law does not recognize same-sex marriages.⁷

Although the law restricts marriage to heterosexual couples, same-sex couples may use the law to obtain some of the benefits that marriage automatically provides.⁸ The contract, for example, is a tool used to structure a problematic area that marriage auto-

ill has rejected. *Id.* at 8:2. Because the hospital and doctor look to the immediate family for medical authorization, the lover is sometimes forced to look on while the family instructs the doctor to give or withhold medical procedures or tests that the lover knows are contrary to her mate's wishes. *Id.*

⁵ See *id.* at 8:2, :11. Curry and Clifford note that homosexuals are often "shut off" from visiting their lovers in a medical emergency. *Id.* at 8:11. Most hospitals permit only family members to visit during emergency situations, and lesbian/gay lovers do not fall into the category of family member. See *id.*

⁶ See Aliens and Nationality Act, 8 U.S.C. § 1151(a)-(b) (Supp. II 1990). Section 1151(a) provides that, among other persons, "immediate relatives" are exempt from the yearly numerical limitations on the number of persons who may be issued immigrant visas or otherwise granted legal alien status. *Id.* Section 1151(b)(2)(A)(i) defines "immediate relatives" as the "children, spouses, and parents of a citizen of the United States." *Id.*; see also *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (holding that homosexual alien who marries person of same sex is barred from achieving "immediate family" status). In *Adams*, a male United States citizen and an alien male were "married" by a Colorado minister. *Id.* at 1038. *Adams* petitioned to obtain the alien status as an "immediate relative." *Id.* The court rejected the § 1151(b) claim because it interpreted congressional intent to exclude same-sex marriages. *Id.* at 1040-41.

⁷ See *infra* notes 21-25 and accompanying text (describing denial of legal marriage to same-sex couples).

⁸ See generally CURRY & CLIFFORD, *supra* note 4. The authors offer same-sex couples a practical step-by-step guide on using legal tools to structure their relationships. *Id.* This guide includes topics such as cohabitation contracts, joint child rearing, and estate planning. *Id.* at 2:1 to 3:27, 7:2 to :36, 9:1 to :21; see also NATIONAL LAWYERS GUILD ANTI-SEXISM COMMITTEE OF SAN FRANCISCO BAY AREA CHAPTER, SEXUAL ORIENTATION AND THE LAW (Roberta Achtenberg ed., 1st & 2d Releases, Mary Newcombe ed., 3d & 4th Releases, 1991) [hereafter NLG] (offering advice to attorneys representing homosexual clients). This practice manual includes topics such as structuring cohabitation contracts, rearing children in a homosexual family, and preparing for illness, incapacity, and death. *Id.* at § 2.04, § 1.04, § 13.03.

matically arranges: property distribution upon separation or death.⁹ In 1976, the California Supreme Court decided *Marvin v. Marvin*,¹⁰ the landmark palimony case that recognized the right of cohabitants to contractually agree on the distribution of their property.¹¹ Although *Marvin* involved a heterosexual couple, the court's decision theoretically opened the door for same-sex couples to enter into enforceable contracts for distribution of their property.¹²

This Comment analyzes the judicial application of *Marvin* principles to same-sex couples. Part I introduces the social and legal context of marriage. Part I also describes the benefits that marital status confers, and the denial of both marital status and benefits to same-sex couples.¹³ Part II explains general contract theory and its application in *Marvin*.¹⁴ Part III looks at the judicially inconsistent application of *Marvin* to same-sex couples.¹⁵ Finally, Part IV proposes that the California Legislature address this judicial inconsistency by enacting, in sex-preference neutral language, a cohabitation contract statute codifying the *Marvin* court's reasoning.¹⁶

I. SOCIAL AND LEGAL CONTEXT

The law has never recognized the right of same-sex couples to marry.¹⁷ The denial of the legal status of marriage deprives same-sex couples who wish to live together of a choice between nonmarital cohabitation and marriage.¹⁸ Forced into a nonmarital status, same-sex cohabitants are left without the legal distribution of property upon separation or death that comes automatically with marriage.¹⁹

⁹ See *infra* notes 29-30 and accompanying text (describing statutory marital property rights).

¹⁰ 557 P.2d 106 (Cal. 1976); see *infra* notes 53-60 and accompanying text (describing facts of *Marvin* case).

¹¹ See *infra* note 64 and accompanying text.

¹² See *infra* notes 84-85 and accompanying text.

¹³ See *infra* notes 17-37 and accompanying text.

¹⁴ See *infra* notes 38-77 and accompanying text.

¹⁵ See *infra* notes 78-120 and accompanying text.

¹⁶ See *infra* notes 121-52 and accompanying text.

¹⁷ See *infra* notes 21-25 and accompanying text (describing denial of legal marriage to same-sex couples).

¹⁸ See *infra* notes 21-25 and accompanying text.

¹⁹ See *infra* notes 29-30 and accompanying text (describing statutory marital property distribution rights).

A. *Marriage: A Strictly Heterosexual Institution*

Tradition and the homophobia inherent in tradition²⁰ dictate

²⁰ See Donna J. Hitchens, *Foreword to CURRY & CLIFFORD, supra* note 4. Ms. Hitchens describes the societal tradition of homophobia as follows:

There are only two things all lesbians and gay men have in common. The first is that solely on the basis of their sexual identity and who they chose to love, they are feared and despised by many people in our society. An inevitable result of these intense negative feelings has been the development of numerous stereotypes about lesbians and gay men The second commonality is that for centuries these false assumptions have been the underpinnings of institutionalized discrimination against lesbians and gays. The ugly heritage of all this is still with us.

Id.; see also John C. Hayes, Note, *The Tradition of Prejudice versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C. L. REV. 375, 375-405 (1990) (discussing prejudices and stereotypes facing homosexuals in United States). An example of an extreme stereotype about homosexuals is the claim by a seventeenth-century Lutheran professor that homosexuality results in "earthquakes, famine, pestilence, Saracens, floods, and very fat, voracious field mice." *Id.* at 396 n.106 (quoting B. CARPZOV, PRACTICA RERUM CRIMINALIUM); see also Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1793 n.61 (1988) (noting that contrary to perception of homosexuals as promiscuous, a high percentage of homosexuals live in monogamous unions with their same-sex partners); Harris R. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 823-24 (1984) (discussing common perceptions of homosexuals as psychotics).

Another common stereotype about homosexuals is that they lure children into homosexuality. Hayes, *supra*, at 396; Miller, *supra*, at 821-22. This stereotype is reflected in cases in which courts upheld the firing of school teachers who were dismissed because of their homosexuality. See, e.g., *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1346-47 (Wash. 1977). In *Gaylord*, the school district fired Mr. Gaylord, who had taught at the same school for twelve years. *Id.* at 1346. The district fired Mr. Gaylord on the ground of immorality because he was a homosexual. *Id.* The court found that homosexuality was immoral, citing the long tradition of condemnation of homosexuality dating back to biblical times. *Id.* But see *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 386 (Cal. 1969) (finding school teacher's homosexuality did not automatically render him unfit to teach). See generally RONALD A. RUBINSTEIN & PATRICIA B. FRY, *OF A HOMOSEXUAL TEACHER: BENEATH THE MAINSTREAM OF CONSTITUTIONAL EQUALITIES* (1981) (detailing judicial treatment of homosexual teachers).

In addition to unfounded stereotypes about homosexuals, the tradition of homophobia results in "institutionalized discrimination" against homosexuals. Hitchens, *supra*. Laws against sodomy operate as forms of "de jure discrimination" against homosexuals by criminalizing their form of intimate

that marriage is a strictly heterosexual union.²¹ Some marriage

sexual relations. Miller, *supra*, at 801-02. Although the name "sodomy" is derived from the Biblical figure Sodom, opposition to homosexual conduct dates to pre-biblical times. Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986) (discussing ancient underpinnings of opposition to sodomy).

Blackstone characterized sodomy as a crime "not fit to be named"; of a "deeper malignity" than rape; and a "disgrace to human nature." 4 WILLIAM BLACKSTONE, COMMENTARIES 215-16 (William G. Hammond ed., 1890). Early sodomy statutes in the United States were patterned after Blackstone's characterization. Apasu-Gbotsu et al., *supra*, at 526. At one time, every state in the United States criminalized sodomy by statute. *Id.* at 523. Today, 24 states still criminalize sodomy by statute. *Id.* at 523-24. Current sodomy statutes generally do not distinguish between homosexual sodomy and heterosexual sodomy. *Id.* at 525. The sodomy statutes in seven states, however, specifically proscribe homosexual sodomy. *See id.* (listing six of seven states, excluding MONT. CODE ANN. § 45-2-101(20) (1991)). The seven states are Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, and Texas. *Id.*; e.g., MO. REV. STAT. § 566.090.1(3) (Vernon 1979) (including in its definition of sexual misconduct "deviate sexual intercourse with another person of the same sex"). In practice, moreover, sex-preference neutral sodomy statutes are aimed primarily at homosexuals. Apasu-Gbotsu et al., *supra*, at 525.

In homosexual sodomy cases, courts adhere to the long tradition of opposing homosexuality. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the state charged Mr. Hardwick, an adult homosexual, with violating Georgia's sodomy statute because he engaged in consensual homosexual activity with another adult male in the bedroom of Mr. Hardwick's home. *Id.* at 187-88. In a subsequent, separate suit, Mr. Hardwick challenged the constitutionality of Georgia's sodomy statute insofar as it criminalized consensual sodomy. *Id.* at 188. The United States Supreme Court upheld Georgia's sodomy statute. *Id.* at 190-96. Relying on tradition, the Supreme Court found that homosexuals do not have a fundamental right to engage in consensual sodomy, and that to suggest such a right is "at best, facetious." *Id.* at 192, 194. Justice Burger wrote a concurring opinion to underscore the traditional condemnation of homosexual conduct. *Id.* at 196. Citing Blackstone's characterization of sodomy, *see* BLACKSTONE, *supra*, Justice Burger stated that condemnation of homosexual conduct is "firmly rooted in Judeo-Christian moral and ethical standards." 478 U.S. at 196. Justice Burger concluded, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197. Decisions such as *Bowers* reveal not only the tradition of opposition to homosexual sexual conduct, but a fear of homosexual sexual orientation generally.

²¹ *See Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (denying same-sex couple right to marry). The *Baker* court adhered to heterosexual tradition by stating that marriage is "a union of *man and woman*, uniquely involving the procreation and rearing of children within a family, [that] is as

statutes specifically adhere to this tradition by defining marriage as a relationship between a man and a woman.²² Other marriage statutes do not specifically define marriage as a heterosexual union.²³ Judicial interpretation, however, has prevented sex-preference neutral marriage statutes from providing an opportunity for same-sex couples to marry. Same-sex couples petitioning for a marriage license under sex-preference neutral marriage statutes have faced rejection from courts.²⁴ Although these statutes do not expressly require that marriage be a union between a man and a woman, courts have found that the requirement is implicit, thus reinforcing the heterosexual norm.²⁵

old as the book of Genesis." *Id.* (emphasis added); see also SIR JAMES DALRYMPLE OF STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND 104 (David M. Walker ed., 1981). Dalrymple observes that "[t]he first obligations, God put upon man toward man, were the conjugal obligations, which arose from the constitution of marriage before the fall . . . [f]rom whence have arisen rights of the greatest consequence; as the husband's power over the wife and her goods." *Id.*; see BLACK'S LAW DICTIONARY 972 (6th ed. 1990) (defining marriage as a "[l]egal union of one man and one woman as husband and wife"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1384 (3d ed. 1986) (defining marriage as "state of being united to a person of the opposite sex as husband or wife").

²² See, e.g., CAL. CIV. CODE § 4100 (West 1983). Section 4100 defines marriage as "a personal relation arising out of a civil contract between a man and a woman." *Id.* Until its amendment in 1977, § 4100 defined marriage, using sex-preference neutral language, as "a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary." *Id.* Interestingly, the 1977 amendment that added gender-specific terms came at the time when same-sex couples began to petition courts for the right to marry under sex-preference neutral marriage statutes. See *infra* note 25 and accompanying text (describing cases that hold that marriage is an inherently heterosexual relationship).

²³ See, e.g., WASH. REV. CODE § 26.04.010 (West 1986) (stating that marriage "may be entered into by *persons*" (emphasis added)).

²⁴ See *infra* note 25 (describing judicial denial of marriage to same-sex couples).

²⁵ See, e.g., *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (finding that Minnesota legislature, in enacting sex-preference neutral marriage statute, did not intend to permit same-sex marriage). The *Baker* court rejected petitioners' due process claim by holding that marriage is traditionally a heterosexual union, and that the court is not a vehicle for changing this tradition. *Id.* Following *Baker*, the Minnesota legislature amended its marriage statute so that it no longer contained sex-preference neutral language. See MINN. STAT. ANN. § 517.01 (West 1990). The amended statute defines marriage as "a civil contract between a *man and a woman*." *Id.* (emphasis added). This legislative response resembles that of the California Legislature described note 22, *supra*. See also *Jones v.*

B. Lack of the Marriage Option: The Denial to Same-Sex Cohabitants of Automatic Property Distribution

Neither heterosexual cohabitants who choose not to marry, nor same-sex cohabitants, receive the numerous benefits that marital status automatically yields.²⁶ For heterosexual cohabitants, how-

Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (finding two lesbian women could not marry because they were incapable of marriage as state defined the term); *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (finding that Washington Legislature intended its sex-preference neutral marriage statute to apply only to heterosexuals).

In finding that marriage is a strictly heterosexual union, courts rely on the presumption that only heterosexuals can have children. *See, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185, 186 (describing marriage as "union of man and woman, *uniquely* involving the procreation and rearing of children" (emphasis added)); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (stating that marriage is a protected legal institution primarily because propagation is associated with marriage). The *Singer* court denied marital eligibility to a same-sex couple in part because "no same-sex couple offers the possibility of [the birth of children by] their union." 522 P.2d at 1195.

Modern reproductive technology, however, refutes the *Singer* court's presumption that same-sex couples cannot have children. *See Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1608, 1648-52 (1989) (stating that allowing marital status to same-sex couples is not inconsistent with policies favoring procreation because of medical advances such as artificial insemination and surrogacy); *see also* CAL. CIV. CODE § 7005(b) (West 1983). Section 7005(b) states that a "donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." *Id.* Section 7005(b) is not restricted to heterosexuals and therefore affords lesbians who receive donated semen through a licensed physician assurance that semen donors will not be granted custody. *Cf. Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 537 (Ct. App. 1986) (recognizing that § 7005(b) affords unmarried women statutory right to have children).

Despite modern medical advances enabling homosexuals to have children, courts continue to equate marriage and family with heterosexuality. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (finding no connection between family, marriage, or procreation, and homosexual activity); *supra* note 20 (stating facts of *Bowers*). *But see* Lewis, *supra* note 20, at 1791 (contending that human inclination for forming family bonds is socially ingrained and not dependent on sexual orientation). Lewis urges courts to recognize that, just like heterosexuals, homosexuals were born into and raised by families. *Id.* Lewis concludes, therefore, that courts should recognize that homosexuals share the values of intimacy, warmth, and security with heterosexuals. *Id.*

²⁶ *See supra* note 3 and accompanying text (discussing tax benefits for

ever, this situation is a matter of choice because the law permits them to marry and obtain marital benefits.²⁷ In contrast, the deprivation of marital benefits is forced upon same-sex couples because the law does not permit them to choose between cohabitation and marriage.²⁸

Among the numerous marital benefits denied to same-sex couples is the automatic distribution of property rights between a married couple upon divorce²⁹ or death.³⁰ This automatic establishment of property rights occurs even if the married couple has not taken the time to address this "nonromantic," economic aspect of their relationship.³¹ Some members of the homosexual community view automatic property rights as one of the primary reasons, if not the sole reason, to seek the legalization of same-sex marriage.³²

married couples); *supra* note 4 and accompanying text (discussing medical decision-making for an incapacitated spouse); *supra* note 6 and accompanying text (discussing granting of spousal exemption from immigration quotas); *see also* 42 U.S.C. § 402(b) (1988) (providing old-age insurance benefits for wife); 42 U.S.C. § 402(c) (1988) (providing old-age insurance benefits for husband); *supra* note 5 and accompanying text (noting that visiting rights in hospitals are restricted to family members). Courts have also denied homosexuals state law insurance benefits based on marital status. *See, e.g.,* *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 416 (Ct. App. 1985) (denying homosexual state employee medical insurance coverage for his same-sex cohabitant).

²⁷ *See supra* notes 21-25 (describing denial of legal marriage to same-sex couples).

²⁸ *See supra* notes 21-25.

²⁹ *See CAL. CIV. CODE* § 4801(a) (West Supp. 1992) (providing that upon dissolution of marriage or legal separation, court may order spouse to pay for support of other spouse).

³⁰ *See CAL. PROB. CODE* § 6401(a) (West 1991) (giving surviving spouse, in absence of will, one-half of decedent's community property); *CAL. PROB. CODE* § 6401(c)(1) (stating that in absence of will, if decedent leaves no issue, parent, sibling, or descendant of deceased sibling, surviving spouse receives all of decedent's separate property).

³¹ *See CURRY & CLIFFORD, supra* note 4, at 3:4. The authors note that same-sex couples must confront "mundane economic realities" when structuring their cohabitation agreements. *Id.* Married couples, however, are not necessarily faced with this mundane task because the law automatically provides them with property rights. *See supra* notes 29-30.

³² *CURRY & CLIFFORD, supra* note 4, at 2:2. Members of the homosexual community dispute whether the legalization of same-sex marriage is a desirable goal. *See generally* Thomas B. Stoddard & Paula L. Ettelbrick, *Gay Marriage: A Must or a Bust?*, *OUT/LOOK: NAT'L GAY AND LESBIAN Q.*, Fall 1989, at 8-17 (presenting arguments between the authors about whether

Married couples can opt against the statutory disposition of their property, and contract³³ or devise³⁴ otherwise. Either through their default statutory rights, or through contract or devise, married couples have a secure legal ordering of property distribution. Although property distribution between unmarried cohabitants is not automatic, heterosexual couples can always choose to get married and obtain an automatic legal ordering of their property.³⁵ In addition, the California Supreme Court's decision in *Marvin v. Marvin* provided heterosexual cohabitants with another option: the right to contractually agree on their chosen form of property distribution.³⁶ The *Marvin* decision, how-

homosexuals should seek right to marriage). Homosexual proponents of same-sex marriage argue that marriage offers practical, economic advantages. *Id.* at 10. Legalizing same-sex marriage, these proponents argue, will help alleviate discrimination against gays and lesbians by validating their relationships. *See id.* at 12. Finally, homosexual proponents of same-sex marriage argue that same-sex marriage will transform the existing institution of marriage by divesting marriage of its "sexist trappings." *Id.* at 13.

Homosexual opponents of same-sex marriage, however, argue that legalizing same-sex marriage will force homosexuals into the "mainstream" and silence the gay "voice" by assuming that homosexual couples share the same values as heterosexual couples. *Id.* at 14. Additionally, legalizing same-sex marriage will increase oppression against those homosexuals who choose not to marry and remain outside the "mainstream." *Id.* at 16. Finally, homosexual opponents of same-sex marriage argue that members of the homosexual community should focus their efforts on changing the law so that intimate relationships other than marriage receive legal protection. *See id.* at 17.

³³ The most common forms of contracts among married couples include premarital and separation agreements. *See* CAL. CIV. CODE § 4802 (West 1983) (permitting husband and wife to enter into separation agreement and contract for division of their property); *see also* CAL. CIV. CODE §§ 5300-17 (West Supp. 1992) (governing nature and scope of agreements made between couples in contemplation of marriage concerning their property rights after marriage); *In re Dawley*, 551 P.2d 323 (Cal. 1976) (upholding parties' premarital agreement).

³⁴ Devise means "to dispose of real or personal property by will." BLACK'S LAW DICTIONARY 452 (6th ed. 1990); *see* CAL. PROB. CODE § 6100 (West 1991) (stating that all persons of sound mind and at least eighteen years of age may dispose of their separate property by will); CAL. PROB. CODE § 6101(b) (stating that testators may dispose of their one-half of community property by will).

³⁵ *See supra* notes 21-25 and accompanying text (describing denial of legal marriage to same-sex couples).

³⁶ *See infra* text accompanying note 64 (stating *Marvin* holding).

ever, is particularly important for same-sex cohabitants because it brings them closer to parity with heterosexual couples by providing them with a legal framework to order their property distribution.³⁷

II. *MARVIN V. MARVIN*

The *Marvin* decision resolved a conflict in the California courts regarding the enforceability of cohabitation agreements.³⁸ The *Marvin* court recognized the enforceability of these agreements by applying basic contract law.³⁹ Adhering to contract principles, the court upheld the legal, enforceable provisions of the parties' cohabitation agreement, and disregarded the illegal, unenforceable provisions.⁴⁰

A. *Historical Background and General Contract Theory*

Prior to the *Marvin* decision, California courts had reached conflicting outcomes on the enforceability of cohabitation agreements.⁴¹ Some courts enforced cohabitation contracts.⁴² Other courts declined to enforce cohabitation contracts on the ground that the parties were engaged in an immoral living arrangement.⁴³ In refusing to enforce cohabitation contracts, the latter

³⁷ See *infra* notes 86-87 and accompanying text (discussing inconsistency among courts in their willingness to enforce property distribution agreements between homosexuals).

³⁸ See *infra* notes 41-44 and accompanying text (discussing conflict over enforceability of cohabitation contracts prior to *Marvin*).

³⁹ See *infra* notes 70-75 and accompanying text.

⁴⁰ See *infra* notes 70-75 and accompanying text.

⁴¹ *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976). The *Marvin* court was aware of the need to resolve the conflict over the validity of cohabitation contracts. *Id.* The court noted that it would use the *Marvin* case as an opportunity to establish a principle governing distribution of property acquired in nonmarital relationships. *Id.*

⁴² See, e.g., *Trutalli v. Meraviglia*, 12 P.2d 430, 431 (Cal. 1932) (holding that if woman and man cohabit under express agreement to combine their efforts and earnings equally, equity will protect their interests); *Vallera v. Vallera*, 134 P.2d 761, 763 (Cal. 1943) (holding that equity will protect similar agreement between cohabiting putative spouses).

⁴³ See, e.g., *Hill v. Westbrook's Estate*, 247 P.2d 19, 20 (Cal. 1952) (refusing to sever parties' sexual relationship from their otherwise valid cohabitation contract); *Heaps v. Toy*, 128 P.2d 813, 815 (Cal. Ct. App. 1942) (refusing to enforce cohabitation agreement, in part because agreement was "contrary to good morals").

courts were also refusing to apply basic contract principles.⁴⁴

Generally, contract law permits an agreement containing legal and illegal provisions to be enforced without the illegal provisions.⁴⁵ Courts accomplish this by severing the illegal provisions from the legal provisions, and allowing the legal provisions to stand on their own.⁴⁶ There is a limit on the enforcement of the legal provisions of contracts containing illegal provisions: the illegal provisions must not form the central basis of the agreement.⁴⁷ A provision forms the central basis of an agreement if the parties would not have entered into the agreement without the provision.⁴⁸

A contract exclusively for sexual services is illegal.⁴⁹ If, however, a contract contains both promises for sexual services and legally enforceable promises, the legal promises are enforced, and the sexual services promises are severed and disregarded.⁵⁰ The *Marvin* court recognized the applicability of this contract principle to cohabitation agreements.⁵¹ The court simply severed the parties' underlying sexual relationship from their valid property distribution contract.⁵²

⁴⁴ See *infra* text accompanying notes 49-50 (discussing application of contract principles to agreements containing sexual service provisions).

⁴⁵ See CAL. CIV. CODE § 1599 (West 1982). Section 1599 describes the effect an illegal provision has on the legal provision of an agreement. The statute states that when a contract has several provisions, at least one of which is legal, and at least one of which is illegal, the contract is void as to the illegal provision or provisions and valid as to the rest. *Id.*

⁴⁶ See, e.g., *Keene v. Harling*, 392 P.2d 273, 275 (Cal. 1964) (holding that if illegal portion of contract is severable, legal portion is enforceable by disregarding illegal provision).

⁴⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 184 (1979). The Restatement instructs that if a provision of an agreement is unenforceable, a court can still enforce the rest of the agreement, provided the unenforceable provision is not an essential part of the agreement. *Id.*

⁴⁸ See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 22-2(d) (3d ed. 1987). The authors provide a test to determine whether an illegal provision forms the central basis of a contract. *Id.* at 894. The authors state that a provision is not central to the agreement if the parties would have entered into the agreement irrespective of the offending provision. *Id.*

⁴⁹ See *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (stating that agreement for payment of sexual services is agreement for prostitution and therefore unlawful).

⁵⁰ See *supra* notes 45-46 and accompanying text.

⁵¹ See *infra* notes 65-67 and accompanying text.

⁵² See *infra* notes 68-72 and accompanying text.

B. Facts of the Marvin Case

In *Marvin*, Michelle Triola Marvin sued actor Lee Marvin, with whom she had cohabited for six years.⁵³ In 1964, the couple orally agreed that while they lived together, they would share their efforts and earnings equally, and would hold themselves out to the public as husband and wife.⁵⁴ In consideration, Michelle agreed to render her services as Lee's companion, homemaker, housekeeper, and cook.⁵⁵ Lee agreed to financially support Michelle for the rest of her life.⁵⁶

Michelle and Lee lived together in accordance with their oral agreement for six years.⁵⁷ During this time, they accumulated a substantial amount of property in Lee's name.⁵⁸ In 1970, Lee forced Michelle to leave his household.⁵⁹ Michelle brought an action for declaratory relief and sought to impose a constructive trust on one-half of the property accumulated during her cohabitation with Lee.⁶⁰

C. The Marvin Court's Application of Contract Principles

Lee, relying on previous court decisions, contended that his cohabitation agreement with Michelle was invalid because it involved a sexual relationship.⁶¹ The court, however, declined to follow a standard that would render cohabitation contracts invalid if they involve sexual relationships.⁶² The court found that such a

⁵³ 557 P.2d at 110-11.

⁵⁴ *Id.* at 110.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* Lee continued to financially support Michelle for approximately 18 months after he forced her to leave his home. *Id.*

⁶⁰ *Id.* at 110-11.

⁶¹ *Id.* at 112. Lee contended that the agreement between him and Michelle was so closely related to the "immoral" character of their relationship that enforcement of their contract would violate public policy. *Id.* To support this contention, Lee relied upon previous appellate court decisions that struck down cohabitation contracts solely because the parties engaged in a sexual relationship. *Id.* Lee's complaint, for example, cited *Hill v. Westbrook's Estate*, 247 P.2d 19 (Cal. 1952). *Hill* supported Lee's contention that the *Marvin* court should not enforce his cohabitation agreement with Michelle solely because they engaged in a nonmarital sexual relationship. 557 P.2d at 113-14.

⁶² 557 P.2d at 114-15.

standard would be unworkable because cohabitation between couples usually includes a mutual sexual relationship.⁶³ Rather, the *Marvin* court held that unmarried cohabitants may structure their economic affairs as they choose. Thus, the court recognized the enforceability of cohabitation contracts that order couples' property, earnings, and income.⁶⁴ According to the court, unless a cohabitation contract is *explicitly* and *inseparably* based upon an illicit sexual relationship, the mere fact that the cohabitants engage in sexual relations does not invalidate their entire agreement.⁶⁵ This, according to the court, provides a workable standard for determining the validity of cohabitation contracts.⁶⁶ In effect, then, the court acknowledged the applicability of contract law to cohabitation contracts because the court recognized that

⁶³ *Id.* at 114. The *Marvin* court provided the following reason for rejecting a standard of validity that focuses on whether the cohabitants engaged in a sexual relationship:

[A] standard which inquires whether an agreement is "involved" in or "contemplates" a nonmarital relationship is vague and unworkable. Virtually all agreements between nonmarital partners can be said to be "involved" in some sense in the fact of their mutual sexual relationship, or to "contemplate" the existence of that relationship Moreover, those standards offer no basis to distinguish between valid and invalid agreements.

Id.

⁶⁴ *Id.* at 116. The court recognized the freedom of unmarried cohabitants to contractually choose a property distribution arrangement. *Id.* The choices available to cohabitants, the court noted, include structuring their property along community property principles, separate property principles, or any other economic arrangement the parties choose. *Id.*

⁶⁵ *Id.* at 114. The court recognized the applicability of contract law, which provides that an agreement containing legal and illegal provisions is enforceable without the illegal provision if the illegal provision does not form the central basis of the agreement. *Id.* The *Marvin* court concluded that "a contract between nonmarital partners will be enforced unless expressly and inseparably based upon an illicit consideration of sexual services. . . ." *Id.*; see *supra* notes 45-50 and accompanying text (discussing contract law, including its application to agreements containing illegal sexual service provisions).

The court rejected the notion that sexual activity between unmarried cohabitants automatically invalidates an otherwise valid contract: "The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses." 557 P.2d at 113.

⁶⁶ 557 P.2d at 114-15; see *supra* note 63.

illegal provisions of cohabitation agreements can be severed from legal provisions.⁶⁷

Applying its premise that cohabitation contracts are legally enforceable unless inseparably and explicitly based upon a sexual relationship, the *Marvin* court looked to whether sexual favors were central to Michelle and Lee's agreement.⁶⁸ The court found that the validity of their agreement did not depend upon unlawful sexual consideration.⁶⁹ In reaching this conclusion, the court did not focus on what Michelle and Lee intended by including the words "companion" and "husband and wife" in their agreement.⁷⁰ The court looked, rather, to the legally enforceable provisions of their agreement, including Michelle's homemaking services, Lee's promise to financially provide for her, and their agreement to share their efforts and earnings equally.⁷¹ Nothing in Michelle and Lee's ordering of their economic affairs rested upon sexual services.⁷²

Although Michelle's alleged contract was based on an express oral agreement, the court did not limit its holding to express contracts. Instead, consistent with its holding that cohabitants have the same right to make and enforce contracts as other unmarried adults,⁷³ the court noted that contract principles would also apply to implied cohabitation agreements.⁷⁴ Thus, in the absence of an express contract, the cohabitants' conduct may demonstrate an implied agreement, and courts may impose equitable remedies based on the parties' reasonable expectations.⁷⁵

The *Marvin* court reached this progressive result in part

⁶⁷ See *supra* notes 45-50 and accompanying text (discussing contract law, including its application to agreements containing sexual service provisions).

⁶⁸ 557 P.2d at 116.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 122 n.24. The court recognized that Michelle had the same right to make and enforce a contract, and to assert an equitable interest in property she helped to accumulate, as any other unmarried person. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 123 n.25. As possible equitable remedies under implied cohabitation contracts, the court listed constructive trusts, resulting trusts, quantum meruit for household services, and additional equitable remedies that may be appropriate. *Id.* at 122-23 & n.25; see *Hill v. Westbrook's Estate*, 247 P.2d 19 (Cal. 1952) (employing quantum meruit principles); *Hyman v. Hyman*, 275 S.W.2d 149, 151 (Tex. Civ. App. 1954) (employing resulting

because it was aware of the increasing number of unmarried couples living together.⁷⁶ The court recognized that striking down cohabitation agreements simply because the parties engaged in sexual relations would deprive cohabitants of a legal way to structure their property distribution.⁷⁷ By finding Michelle and Lee's sexual relationship irrelevant to their property distribution agreement, the *Marvin* court provided a legal framework for cohabitants to ensure enforcement of their chosen form of property distribution upon separation or death.

III. APPLICATION OF *MARVIN* PRINCIPLES TO SAME-SEX COUPLES

The *Marvin* court's application of contract law to cohabitation agreements theoretically provides same-sex cohabitants in California with a legal framework to structure their property distribution upon separation or death.⁷⁸ Subsequent California case law, however, does not consistently apply *Marvin*'s standards to same-sex cohabitation agreements.⁷⁹ Worse, not all state courts have adopted *Marvin* to protect even cohabiting heterosexual couples who attempt to contractually order their property disposition.⁸⁰

A. General Application of Marvin

Since *Marvin*, courts throughout the United States have grappled with whether to adopt the *Marvin* court's reasoning and recognize the enforceability of cohabitation agreements. Some jurisdictions apply the *Marvin* court's reasoning by enforcing legal provisions of cohabitation contracts and disregarding illegal

trust principles); *Omer v. Omer*, 523 P.2d 957, 961 (Wash. Ct. App. 1974) (employing constructive trust principles).

⁷⁶ 557 P.2d at 122. The court emphasized that the increasing number of cohabiting couples, and the increasing social acceptance of them, made the time ripe for departing from previous cases that automatically invalidated cohabitation contracts because the parties engaged in a sexual relationship. *Id.* The court also noted that it did not equate the nonmarital relationship of today to prostitution because cohabitation is an accepted and wholly different practice. *Id.*

⁷⁷ *Id.* The court recognized that invalidating cohabitation contracts simply because the parties engaged in sexual relations is unfair because it results in an "inequitable distribution of property accumulated during a nonmarital relationship." *Id.*

⁷⁸ See *infra* notes 84-85 and accompanying text (discussing employment of sex-preference neutral language by *Marvin* court).

⁷⁹ See *infra* notes 88-120 and accompanying text.

⁸⁰ See *infra* notes 81-82 and accompanying text.

provisions for sexual services.⁸¹ Other jurisdictions reject the *Marvin* court's approach, finding that enforcement of cohabitation contracts would violate public policy because of the parties' sexual relationship.⁸² Heterosexual cohabitants at least have the option to marry and bypass their state court's unwillingness to adopt *Marvin*.⁸³ But the problem of inconsistent judicial application of *Marvin* is magnified for same-sex cohabitants because the law does not afford them an opportunity to choose between cohabitation and marriage.

B. *Marvin's Sex-Preference Neutral Contract Standard*

While the *Marvin* case involved an agreement between a heterosexual couple, the *Marvin* court employed expansive language in recognizing the enforceability of cohabitation contracts. The court's use of sex-preference neutral language encompassed the right of all adult cohabitants to contract for their property distribution and ordering of their economic affairs.⁸⁴ The neutral language employed in *Marvin*, as well as the case's underlying rationale, applies equally well to adult same-sex cohabitants as it does to heterosexual cohabitants.⁸⁵

⁸¹ See, e.g., *Carroll v. Lee*, 712 P.2d 923, 927 (Ariz. 1986) (enforcing cohabitation agreement by severing parties' sexual relationship from their otherwise valid contract); *Kinkenon v. Hue*, 301 N.W.2d 77, 80 (Neb. 1981) (enforcing cohabitation agreement by finding sexual services did not form basis of parties' agreement); see also *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978) (looking to cohabitants' intent to pool their resources in absence of written agreement).

⁸² See, e.g., *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977) (refusing to enforce cohabitation agreement because parties' cohabitation without marriage involved "immoral consideration"); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207-11 (Ill. 1979) (refusing to enforce cohabitation agreement because doing so would contravene public policy of encouraging marriage); see also *supra* notes 42-43 and accompanying text (discussing California appellate court decisions prior to *Marvin* that refused to enforce cohabitation agreements solely because of parties' sexual relationship).

⁸³ Cf. *supra* notes 21-25 (describing denial of legal marriage to same-sex couples).

⁸⁴ 557 P.2d 106, 116 (Cal. 1976). The court recognized the right of all unmarried adults to contract: "In summary, we base our opinion on the principle 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." *Id.* (emphasis added).

⁸⁵ See *id.* Not surprisingly, legal commentators responded optimistically to the prospect of judicial application of *Marvin* principles to agreements between same-sex cohabiting couples. See Carol S. Bruch, *Property Rights of*

Subsequent California case law, however, reveals that courts have inconsistently applied *Marvin* to same-sex cohabitation agreements.⁸⁶ This inconsistency translates into uncertainty for

De Facto Spouses Including Thoughts on the Value of Homemakers' Services, 10 FAM. L.Q. 101 (1976); see also Herma H. Kay & Carol Amyx, *Marvin v. Marvin: Preserving The Options*, 65 CAL. L. REV. 937, 967 (1977) (applying *Marvin*'s logic to same-sex couples); George P. Ritter, Note, *Property Rights of a Same-Sex Couple: The Outlook After Marvin*, 12 LOY. L.A. L. REV. 409 (1979). Professor Bruch's article is an outgrowth of an amicus curiae brief filed with the California Supreme Court in *Marvin*. Bruch, *supra*, at 101 n.*. Professor Bruch states: "[T]here is little in the legal or economic rationales described in this article that restricts their use to the monogamous heterosexual unit." *Id.* at 106. Mr. Ritter's Note states that, under the *Marvin* court's contract analysis, same-sex couples should be afforded remedies if their agreements are similar to the contract at issue in *Marvin*. Ritter, *supra*, at 419. This result would be logical, according to Mr. Ritter, because the *Marvin* court recognized the right of all unmarried persons to contract. *Id.* Courts recognize that public policy should not bar homosexuals from recovering property, or its monetary equivalent, from their cohabitants when either both parties or the claimant alone paid for the property. See, e.g., *Bramlett v. Selman*, 597 S.W.2d 80, 85 (Ark. 1980) (recognizing that equity should not deny claimant from recovering property he purchased in his same-sex cohabitant's name); *Weeks v. Gay*, 256 S.E.2d 901, 904 (Ga. 1979) (allowing gay claimant to recover from his same-sex cohabitant property that claimant helped pay for because nature of parties' relationship was "inconclusive"); *Ireland v. Flanagan*, 627 P.2d 496, 500 (Or. Ct. App. 1981) (finding that agreement between cohabiting lesbians to pool their earnings indicated intent to be joint owners, and allowing each party to recover amount she invested).

⁸⁶ Compare *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Ct. App. 1988) (enforcing only those portions of cohabitation agreement between same-sex couple that did not contain sexual or homemaking services) with *Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Ct. App. 1981) (refusing to enforce cohabitation agreement between same-sex couple because parties used word "lover" in agreement). But see Carol S. Bruch, *Cohabitation in the Common Law Countries a Decade After Marvin: Settled In or Moving Ahead?*, 22 U.C. DAVIS L. REV. 717 (1989). Professor Bruch believes that *Marvin* is working for same-sex couples: "As anticipated, same-sex couples have been accorded relief under *Marvin* principles in increasing numbers." *Id.* at 723 n.19 (citations omitted). Professor Bruch cites two cases to support this proposition: *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988), see *infra* notes 97-108 and accompanying text (discussing *Whorton*), and a Texas case, *Small v. Harper*, 638 S.W.2d 24 (Tex. Ct. App. 1982). Bruch, *supra*, at 723 n.19. *Small* recognized that public policy considerations would not prevent a claimant from recovering on the basis of a partnership agreement with her lesbian cohabitant. 638 S.W.2d at 28 (Tex. Ct. App. 1982); see also CURRY & CLIFFORD, *supra* note 4, at 2:12, :3, :5. Curry and Clifford foster a belief similar to Professor Bruch's: "Indeed, in California and many other

same-sex couples as to whether the law will recognize their property distribution agreements.⁸⁷ Thus, same-sex cohabitants are not only denied marriage, but also the security of knowing that their property distribution contracts will be judicially enforced.

1. Two Case Examples of *Marvin*-Styled Agreements Between Same-Sex Cohabitants

The two California cases this section describes are factually similar to *Marvin* and exemplify the judicial inconsistency in applying *Marvin* to same-sex cohabitants.⁸⁸ In *Jones v. Daly*,⁸⁹ Randal Jones and James Daly orally agreed that while they lived together they would share equally their efforts and earnings.⁹⁰ For consideration, Randal agreed to be James's lover, companion, housekeeper, and cook, while James agreed to financially support Randal for Randal's life.⁹¹ Randal and James abided by their agreement from March 1976 until James's death in July 1978.⁹² Randal brought a cause of action against the executor of James's estate for declaratory relief and a division of the property acquired through the agreement.⁹³

The second district court of appeal refused to enforce the *Marvin*-styled cohabitation agreement, finding that sexual services were not a separable part of the agreement.⁹⁴ In reaching this conclusion, the court relied only on James and Randal's agreement to hold themselves out to the public as cohabiting mates and Randal's agreement to be James's lover.⁹⁵ The court refused to sever any illegality conveyed by the terms "lover" and "cohabiting mate" from Randal's promises to be James's housekeeper and cook.⁹⁶

states that have adopted the *Marvin* reasoning, the right to contract extends to both straight and gay/lesbian couples." *Id.* at 2:5.

⁸⁷ See *supra* note 86 (demonstrating judicial inconsistency in applying *Marvin* to same-sex cohabitation agreements).

⁸⁸ See *infra* notes 90-120 and accompanying text.

⁸⁹ 176 Cal. Rptr 130 (Ct. App. 1981).

⁹⁰ *Id.* at 131-32.

⁹¹ *Id.* at 131.

⁹² *Id.* at 131-32.

⁹³ *Id.*

⁹⁴ *Id.* at 134.

⁹⁵ *Id.* at 133-34. The court found that the words "cohabiting" and "lover" did not have "innocuous meanings," and could pertain only to the rendition of sexual services. *Id.* at 133.

⁹⁶ *Id.* at 134.

In contrast to *Jones*, the fourth district court of appeal in *Whorton v. Dillingham*⁹⁷ recognized the enforceability of a *Marvin*-styled oral cohabitation agreement between a same-sex couple.⁹⁸ Donnis Whorton and Benjamin Dillingham orally agreed that while they lived together Donnis would act as Benjamin's chauffeur, bodyguard, and social and business partner.⁹⁹ Donnis also agreed to be Benjamin's companion, confidant, and lover.¹⁰⁰ In return, Benjamin agreed to financially support Donnis for life and to give Donnis a one-half interest in any property acquired during their relationship.¹⁰¹ Benjamin also agreed to engage in a homosexual relationship with Donnis.¹⁰² Donnis and Benjamin complied with the terms of their agreement from 1977 until 1984.¹⁰³ In 1984 the relationship ended and Benjamin forced Donnis to leave his household.¹⁰⁴ Donnis sued Benjamin for the property rights he acquired under their agreement.¹⁰⁵

The court found that a lawful contract existed only to the extent that Donnis agreed to serve as Benjamin's chauffeur, bodyguard, secretary, and business partner because these services were independent of any unlawful consideration for sexual favors.¹⁰⁶ The court distinguished *Jones* by finding that Randal Jones provided services that were intrinsically a part of sexual cohabitation.¹⁰⁷ Donnis Whorton, however, provided services sufficiently distinct from the parties' cohabitation, to which a monetary value could be attached and for which compensation is normally expected.¹⁰⁸

⁹⁷ 248 Cal. Rptr. 405 (Ct. App. 1988).

⁹⁸ *Id.* at 409.

⁹⁹ *Id.* at 406.

¹⁰⁰ *Id.* at 407.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 406-07.

¹⁰⁴ *Id.* at 407.

¹⁰⁵ *Id.* at 406.

¹⁰⁶ *Id.* at 409. Contract law accords with *Whorton* because Donnis and Benjamin's illegal sexual service provision was severed from their otherwise valid contract. *Id.*; see *supra* notes 45-50 and accompanying text (explaining that if illegal sexual service provisions are severable from legal contract provisions, agreement can be enforced by disregarding illegal provisions).

¹⁰⁷ 248 Cal. Rptr. at 410.

¹⁰⁸ *Id.* at 410. By refusing to recognize Donnis' homemaking services, the *Whorton* court implied that these services are not valuable consideration separate from sexual services. See *id.* This implication is inconsistent with *Marvin*, where Michelle Marvin promised only homemaking services. See

2. Analysis of *Jones* and *Whorton* Under *Marvin*'s Contractual Standard

Both *Jones* and *Whorton* depart from *Marvin* in two significant ways. First, both cases imply that homemaking and other services normally a part of cohabitation cannot be given as valuable consideration in a cohabitation agreement.¹⁰⁹ The *Jones* court implies this because, like Michelle Marvin, the only nonsexual services Randal promised were homemaking services.¹¹⁰ Unlike *Marvin*, however, the *Jones* court refused to sever the parties' sexual relationship from these homemaking services.¹¹¹ The *Whorton* court, in recognizing only those provisions of the cohabitation agreement that the court considered to have monetary value and for which compensation is normally expected, similarly implies that homemaking services cannot be valuable consideration.¹¹² The *Whorton* court did not recognize the promise to provide homemaking services, but only the promises to act as chauffeur, business partner, and bodyguard.¹¹³ In *Marvin*, by contrast, the court found that a promise to provide homemaking services constituted lawful consideration to which a value could be attached.¹¹⁴ The *Marvin* court applied this finding to Michelle's claim because the court recognized the validity of Michelle's nonsexual services, which were strictly related to homemaking and companionship.¹¹⁵

Second, in recognizing that an increasing number of couples cohabit, the *Marvin* court carefully noted that courts should not draw on traditional notions of morality to strike down otherwise

supra note 55 and accompanying text; *see also infra* notes 112-15 and accompanying text (discussing how *Whorton* court departs from *Marvin* by refusing to recognize valuable homemaking services).

¹⁰⁹ *See infra* notes 110-15 and accompanying text.

¹¹⁰ *See supra* note 95 and accompanying text.

¹¹¹ *See supra* note 94 and accompanying text.

¹¹² *See supra* notes 106-08 and accompanying text.

¹¹³ *See supra* notes 106-08 and accompanying text.

¹¹⁴ *Marvin v. Marvin*, 557 P.2d 106, 113 n.5 (Cal. 1976). The *Marvin* court recognized that homemaking services are legally valuable consideration when it found that a cohabitation agreement in which one partner contributed only homemaking services was valid. *Id.* The court also recognized that homemaking services have value when it found that a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered. *Id.* at 122-23; *see also* Bruch, *supra* note 85, at 112-13 (stating that idea that services rendered within the home in a relationship are a gift is a "fiction").

¹¹⁵ *See supra* notes 71-72 and accompanying text.

valid contracts.¹¹⁶ Thus, the court rejected a standard that would automatically invalidate cohabitation contracts because the parties engaged in a sexual relationship.¹¹⁷ The court adopted a standard for determining validity that severs the cohabitants' sexual relationship from the enforceable, legal provisions of a property distribution contract.¹¹⁸ Applying this standard, the *Marvin* court focused on the legally enforceable provisions of Michelle and Lee's contract, such as Michelle's homemaking services and Lee's promise to financially provide for her.¹¹⁹ The *Jones* court, however, deviated from the *Marvin* standard. Instead of severing the parties' sexual relationship from Randal's services as James's traveling companion, housekeeper, and cook, the *Jones* court focused on the word "lover" in the cohabitation agreement.¹²⁰ Thus, the *Jones* court invalidated the parties' agreement because they engaged in a sexual relationship.

IV. A PROPOSAL FOR CODIFYING THE CONTRACT PRINCIPLES ACKNOWLEDGED IN *MARVIN*

The *Marvin* case theoretically provides an opportunity for same-sex cohabitants to order their affairs with legally enforceable contracts.¹²¹ In the fifteen years since the *Marvin* decision, however, appellate courts have refused to uniformly provide this opportunity to same-sex couples.¹²² The time is ripe for the California Legislature to ensure that the theory behind the *Marvin* decision becomes a reality for same-sex couples.¹²³ Section A of

¹¹⁶ See *supra* note 77 and accompanying text.

¹¹⁷ See *supra* note 63 and accompanying text. The *Marvin* court rejected a sexual relationship standard as the sole criterion for determining the validity of cohabitation contracts because the court recognized most of these living arrangements will involve a sexual relationship. 557 P.2d at 114.

¹¹⁸ See *supra* notes 64-67 and accompanying text.

¹¹⁹ See *supra* notes 68-72 and accompanying text.

¹²⁰ See *supra* notes 94-95 and accompanying text.

¹²¹ See *supra* note 84 and accompanying text (noting that by employing sex-preference neutral language, *Marvin* court encompassed right of all adults to contract).

¹²² See *supra* note 86 (demonstrating judicial inconsistency in applying *Marvin* to same-sex cohabitation agreements).

¹²³ See *supra* note 86. This Comment urges the California Legislature to adopt the cohabitation contract statute because California is the situs of *Marvin*. See *supra* note 53. Additionally, reported California cases confront *Marvin*-styled same-sex cohabitation agreements, and markedly demonstrate the judicial inconsistency in applying *Marvin*. See *supra* notes 88-108. Although the proposal in this Comment is directed at the

this proposal discusses the legal and policy justifications for enacting a cohabitation contract statute.¹²⁴ Section B presents a model statute to codify the *Marvin* principle.¹²⁵

A. Legal and Policy Justifications for a Cohabitation Contract Statute Encompassing the Right of Same-Sex Couples to Contract

A properly drafted cohabitation contract statute will accord with basic contract law.¹²⁶ Contract law permits a court to enforce legal provisions of a contract if it is possible to sever any illegal sexual service provisions, assuming the latter provisions are not central to the agreement.¹²⁷ The *Marvin* court correctly applied this principle to a cohabitation contract.¹²⁸ Appellate courts, however, do not consistently apply basic contract law to same-sex cohabitation contracts.¹²⁹

The conflicting outcomes of *Jones* and *Whorton* demonstrate judicial inconsistency in applying the *Marvin* court's application of basic contract principles to same-sex cohabitation contracts.¹³⁰ The inconsistency unjustly affects same-sex couples who wish to live together, because the law does not allow them to choose between cohabitation and marriage.¹³¹ Forced into cohabitation, same-sex couples are without an automatic legal ordering of their property upon separation or death.¹³² Relying upon the *Marvin* rationale that adult cohabitants can contract,¹³³ same-sex cohabitants may choose to enter into agreements governing their property distribution.¹³⁴ These couples are faced with the possibility,

California Legislature, other states would serve the interests of both heterosexual and homosexual cohabitants if they adopted similar statutes.

¹²⁴ See *infra* notes 126-38 and accompanying text.

¹²⁵ See *infra* notes 139-50 and accompanying text.

¹²⁶ See *supra* notes 45-48 and accompanying text (discussing general contract law).

¹²⁷ See *supra* notes 49-50 (explaining that disregarding sexual service provisions renders legal contract provisions enforceable).

¹²⁸ See *supra* notes 65-72 and accompanying text.

¹²⁹ See *supra* notes 88-120 (demonstrating judicial inconsistency in applying *Marvin* to same-sex cohabitation agreements).

¹³⁰ See *supra* notes 88-120 and accompanying text.

¹³¹ See *supra* notes 21-25 and accompanying text (describing denial of legal marriage to same-sex couples).

¹³² See *supra* notes 29-30 and accompanying text (indicating that denying legal marriage to same-sex couples denies them statutory marital property rights).

¹³³ See *supra* note 84 and accompanying text.

¹³⁴ See *supra* notes 86-88 and accompanying text.

however, that their agreements will not be judicially recognized.¹³⁵

To ensure consistent judicial application of *Marvin* to same-sex cohabitation agreements, the California Legislature should enact a sex-preference neutral statute recognizing the right of all cohabitants to contract for their property distribution. A cohabitation contract statute would provide greater assurance to same-sex cohabitants that their property distribution contracts will be enforced.¹³⁶ By taking the decision of enforceability out of the courts' sole discretion, a statute would provide a legal foundation on which same-sex couples could structure their property distribution.¹³⁷ Because California courts have been unwilling to apply *Marvin* consistently to same-sex cohabitation contracts, a statute will provide the solution that same-sex couples need to protect their right to legally structure their property distribution.¹³⁸

B. Model Statute: Cohabitation Contracts

This Comment proposes that the California Legislature enact the following model cohabitation contract statute:¹³⁹

§ 1. POLICY DECLARATION

It is the policy of the people of the state of California to respect the right of all adults to contract. In accord with this policy, the state shall not discourage adult cohabiting couples from entering into valid property distribution contracts, regardless of sexual relations between the cohabitants.¹⁴⁰

¹³⁵ See *supra* notes 86-87 and accompanying text.

¹³⁶ See *infra* notes 139-50 and accompanying text.

¹³⁷ See *infra* notes 139-52 and accompanying text.

¹³⁸ See *infra* notes 139-52 and accompanying text.

¹³⁹ The language used in the cohabitation contract statute is intentionally sex-preference neutral to encompass the right of same-sex couples to contract. This language is in accord with the *Marvin* court's holding that all adult cohabitants may contract for their property distribution. See *supra* notes 84-85 and accompanying text.

¹⁴⁰ See CAL. CIV. CODE § 1556 (West 1982) (providing that all persons may contract except minors, persons of unsound mind, and persons deprived of civil rights). The first sentence of the Policy Statement accords with § 1556 by declaring that the state respects current statutory law permitting adults to contract. *Id.* The second sentence of the Policy Statement declares that the right of adult cohabitants to contract is encompassed within the right of adults to contract. This policy accords with the *Marvin* holding that cohabitants may contract even though they engage in sexual relations. See *supra* notes 62-65 and accompanying text (discussing *Marvin* holding).

§ 2. DEFINITIONS

(1) "Contract" is an agreement, containing legal consideration, to do or not do a certain thing.¹⁴¹

(2) "Property" means a present or future interest in real or personal property, including income and earnings.¹⁴²

(3) "Cohabitants" means two people living together without marriage, and is not restricted to the heterosexual unit.¹⁴³

(4) "Sexual Relations," insofar as this statute is concerned, incorporates only a sexual relationship between cohabitants, and in no event shall include prostitution.¹⁴⁴

(5) "Severable" means capable of being separated or divided from other things, and maintaining an independent existence.¹⁴⁵

§ 3. COHABITATION CONTRACTS

(1) An express or implied contract¹⁴⁶ for the distribution of property between cohabitants is valid if it contains a provision for homemaking or other legally enforceable consideration.¹⁴⁷ Such a contract is not invalid solely because it contains a provi-

¹⁴¹ See CAL. CIV. CODE § 1549 (West 1982) (defining contract as "an agreement to do or not to do a certain thing"); see also CAL. CIV. CODE § 1550 (West 1982) (providing that lawful object and sufficient cause or consideration are among essential elements of a contract).

¹⁴² See CAL. CIV. CODE § 5310(b) (West Supp. 1992) (defining property for purposes of premarital agreements as including real and personal property, income and earnings).

¹⁴³ Cf. BLACK'S LAW DICTIONARY 260 (6th ed. 1990) (using heterosexual language, defines cohabitation as "living together as husband and wife"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 440 (3d ed. 1986) (same). Because the cohabitation contract statute encompasses the right of same-sex couples to contract, "cohabitants" is defined using sex-preference neutral language.

¹⁴⁴ See *supra* note 76. The *Marvin* court distinguished the socially acceptable nonmarital relationship of today from prostitution. *Marvin v. Marvin*, 557 P.2d 106, 122 (1976). The cohabitation contract statute adopts *Marvin's* definition of "sexual relations." See *id.*

¹⁴⁵ See *supra* note 46 and accompanying text (explaining severability in contract context). The definition of "severable" in the cohabitation contract statute accords with contract doctrine.

¹⁴⁶ See *supra* note 75 and accompanying text. The *Marvin* court held that, in the absence of an express agreement, courts may look to the parties' conduct to find an implied cohabitation agreement. 557 P.2d at 122. The cohabitation contract statute accords with *Marvin* because it recognizes express or implied cohabitation contracts. *Id.*

¹⁴⁷ See *supra* note 114 and accompanying text. The cohabitation contract statute's recognition of homemaking services as legal consideration accords with *Marvin*. 557 P.2d at 113 n.5. This recognition rejects the implications made by the *Jones* and *Whorton* courts that homemaking services, without other legal promises, cannot be enforced. See *supra* notes 86, 120 and accompanying text.

sion acknowledging sexual relations between the parties.¹⁴⁸ If sexual relations did not form the central basis of the agreement, then the sexual relations provision is severable, and the remaining provisions of the contract are enforceable to the extent that they are supported by legal consideration.¹⁴⁹

(2) A provision for sexual services did not form the central basis of the agreement if the parties would have entered into the agreement without the provision.¹⁵⁰

Same-sex couples, traditionally denied marital status and marital benefits, face uncertainty as to judicial recognition of their property distribution agreements.¹⁵¹ By enacting the cohabitation contract statute, the California Legislature would alleviate this uncertainty by providing same-sex couples with statutory protection ensuring the enforceability of their cohabitation agreements.¹⁵²

CONCLUSION

Tragically, homophobia plays a prominent role in our society's marital traditions.¹⁵³ The result for same-sex couples is denial of marriage¹⁵⁴ and denial of the benefit of property distribution that

¹⁴⁸ See *supra* notes 65-66 and accompanying text. The *Marvin* court rejected a sexual relationship standard of validity for cohabitation contracts. 557 P.2d at 114. Because it is the policy of California not to discourage cohabiting couples from contracting, the cohabitation contract statute also does not strike down cohabitation contracts solely because the parties engage in sexual relations. See *supra* note 140 and accompanying text.

¹⁴⁹ See *supra* notes 62-66 and accompanying text. The *Marvin* court rejected a sexual relationship standard of validity for cohabitation contracts because most of these agreements involve sexual relations between the parties. 557 P.2d at 114. The cohabitation contract statute also rejects this standard and adopts general contract theory to determine validity. See *supra* notes 45-48 (discussing severing of illegal provisions, including sexual services, if they are not central to agreement, and enforcing legal provisions). This standard is consistent with the state's policy not to discourage cohabitants from contracting. See *supra* note 140 and accompanying text.

¹⁵⁰ See *supra* note 48 and accompanying text.

¹⁵¹ See *supra* note 86 (demonstrating judicial inconsistency in applying *Marvin* to same-sex couples).

¹⁵² See *supra* notes 143-150 and accompanying text.

¹⁵³ See *supra* notes 20-25 and accompanying text (describing traditional denial of legal marriage to same-sex couples).

¹⁵⁴ See *supra* notes 22-25 and accompanying text (describing denial of legal marriage to same-sex couples).

automatically comes with marriage.¹⁵⁵ Courts perpetuate the tradition of homophobia by refusing to apply basic contract law to cohabitation contracts between same-sex couples.¹⁵⁶

Because of inconsistent judicial application of the *Marvin* principle to same-sex cohabitation agreements,¹⁵⁷ the California Legislature should enact a statute recognizing the right of adult cohabitants to contract. Same-sex couples need assurance that courts will enforce their property distribution agreements. Unlike heterosexual couples, they do not have the alternative to bypass the courts to obtain a legal ordering of their property upon separation or death.¹⁵⁸

A statute codifying the application of contract principles to cohabitation contracts is the best solution at this time to meet the need of same-sex couples to legally structure their property distribution. By codifying existing contract doctrine as it relates to cohabitation agreements, the California Legislature would not create new law. The legislature would simply ensure that the existing law works for everyone, regardless of their sexual orientation.

Kristin Bullock

¹⁵⁵ See *supra* notes 29-30 and accompanying text (describing statutory marital property rights).

¹⁵⁶ See *supra* note 20 and accompanying text (describing law's tradition of homophobia); see also *supra* notes 88-120 (demonstrating general judicial inconsistency in applying *Marvin*). The conflicting cases of *Jones* and *Whorton*, *supra* notes 89-120 and accompanying text, exemplify this judicial inconsistency.

¹⁵⁷ See *supra* note 86 (demonstrating judicial inconsistency in applying *Marvin* to same-sex cohabitation agreements).

¹⁵⁸ See *supra* notes 22-30 (indicating that denying legal marriage to same-sex couples results in denial of statutory marital property rights).