The Yellow Brick Road to Nowhere: California Same-Sex *Marvin* Rights After Proposition 8

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INTRODUCTION

Shortly after Dorothy Gale begins her journey down the yellow brick road in *The Wizard of Oz* she comes to a crossroads that extends in two different directions.[1] She wonders aloud which way to go, when the Scarecrow confuses her by saying that one way is nice, but the other way is nice too, and some people go both ways, which he punctuates by simultaneously pointing in both directions.[2] California's gay and lesbian population can sympathize with Dorothy's confusion, having been at the mercy of the courts for their property and support agreements, while the courts were metaphorically pointing both ways.[3] The picture is not any clearer today—the contractual rights of same-sex couples that have forgone the domestic partnership option remain vague in light of the outcome of Proposition 8.[4]

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1 THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

2 *Id.*

3 As discussed *infra*, California's same-sex couples do not have the same rights to marry as heterosexual couples; whether unmarried same-sex couples have the same ability to enforce contracts for property and support is the question that sparked this Comment. The "signs" pointing both ways symbolize California cases that have split on whether same-sex couples can enforce cohabitation agreements.

4 The ballot measure known as Proposition 8, which was approved by a majority of California voters at the November 4, 2008 election, proposed to add a new section to the California Constitution which provides, "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5; Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009). For more information on Proposition 8, see CALIFORNIA PROPOSITION 8: GET THE FACTS ON PROP. 8, http://www.whatisprop8.com/ (last visited Nov. 22, 2010). Unofficial results showed that the measure passed 52.3% to 47.7%, and a color-coded map of the results indicates that only citizens in the coastal areas north of Los Angeles County and a small swath near the California-Nevada border were more likely than not to have voted "no" on Proposition 8, whereas voters in all inland areas and nearly all of Southern California were more likely to have voted "yes" on the measure and thereby approve the state constitutional amendment restricting marriage. *Proposition 8—Eliminates Right of Same-Sex Couples to Marry*, CALIFORNIA SECRETARY OF STATE,

Proposition 8 has been cast as a same-sex *marriage* issue, but it is more than that. Inasmuch as Proposition 8 reiterates the state's public policy favoring marriage, it also casts into stark relief the fact that unmarried couples lack the legislative and judicial protections marriage confers—particularly the right to freely contract with one another for support and property.[5] California's approval of so-called "cohabitation contracts," or contracts between parties who live together, seemed clear after *Marvin v. Marvin*.[6] But subsequent California courts have chipped away at the definitive *Marvin* decision[7] to the point where it is unclear whether same-sex cohabitants can contract with one another for property and support.[8]

This Comment argues that Proposition 8 should spur the California legislature to clarify same-sex couples' cohabitation rights because judicial precedents are inconsistent.[9] Part I will explore the history and growing popularity of cohabitation in the United States, with particular attention given to sociological factors that have led heterosexuals and homosexuals alike to opt for living together before marriage—or even instead of marriage. Part II will turn to California's community property scheme as it affects unmarried cohabiting partners, since property division is a crucial aspect of cohabitation agreements, and it will examine

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ELECTION RESULTS (Nov. 26, 2008, 1:34 PM), http://vote2008.sos.ca.gov/Returns/props/map190000000008.htm (move cursor around the map for voting results by county).

5 Estimates suggest that married couples enjoy nearly 2,500 combined state and federal rights that unmarried couples do not. *Pittsburgh Considers Domestic Partnership Law*, 2 WESTERN PA FREEDOM TO MARRY COAL. 1, 3 (1997), *available at* http://www.cs.cmu.edu/afs/cs/user/scotts/ftp/wpaf2mc/newsletter2-4.pdf. *See* Kitty Mak, *California's New Domestic Partner Registration Act May Aid Same-Sex Partners in Providing a Legal Basis for Their Life Relationships*, L.A. CNTY. BAR ASS'N, http://www.lacba.org/showpage.cfm?pageid=1105 (last visited Oct. 3, 2010) ("there are limits to what [same-sex] couples may be able to accomplish via contract. Private contracts have no legal effect on government-conferred rights and obligations such as tax benefits, parentage, custody and visitation arrangements, and child support obligations").

6 *See generally* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). The *Marvin* decision essentially allows cohabitants to contract with one another for property and services, provided the agreement is not based primarily on sexual services. *Id.* at 110, 113. *See also* People v. Siravo, 21 Cal. Rptr. 2d 350, 353 (Cal. Ct. App. 1993) ("'Cohabitation' means simply to live or dwell together in the same habitation").

7 The pair of cases that threw the *Marvin* standard into chaos are *Jones v. Daly*, 176 Cal. Rptr. 130 (Cal. Ct. App. 1981) and *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988). The cases were confusing because they centered on nearly identical agreements between same-sex partners, but the latter was upheld while the former was not. *Jones*, 176 Cal. Rptr. at 131, 134; *Whorton*, 248 Cal. Rptr. at 406–07, 409–10.

8 Opposite-sex couples could theoretically face the same difficulties enforcing cohabitation contracts after Proposition 8. This Comment focuses on same-sex couples for two reasons: one, *Marvin v. Marvin* remains good law for opposite-sex cohabitation contracts, despite plaintiff Michelle Triola's inability to recover damages; two, it is the author's belief that Proposition 8 served more to reject homosexual relationships than establish a hierarchy of heterosexual relationships.

9 *See supra* note 8.

how courts have settled past property issues between unmarried cohabitants. Part III will address the unique aspects of same-sex cohabitation agreements. Part IV will argue that California courts may look at same-sex *Marvin* agreements differently following Proposition 8. Part IV will also illustrate how Illinois brought public policy directly to bear on cohabitation agreements, and will argue that federal or state legislation is crucial in clarifying and protecting the rights of same-sex couples as cohabiting partners. Finally, Part V provides drafts of two potential cohabitation-agreement statutes, one in favor and one against, to show what such statutes might look like, and to urge the legislature to devise meaningful cohabitation statutes that are compatible with existing public policy.

I. COHABITATION AS A SOCIAL TREND

A. Despite its Popularity, Cohabitation Presents Practical and Sociological Challenges, Especially for Same-Sex Couples

Numerous studies suggest the rate of "cohabitation," i.e., unmarried couples living together, has spiked since the 1960s.[10] The Census Bureau has estimated there were about 6.8 million opposite-sex cohabiting couples in the United States in 2008,[11] and an additional 741,000 same-sex cohabiting couples.[12] Although cohabitation has been traced back to the early 1800s in Australia and many European countries, historically it was less

10 MARY ANN LAMANNA & AGNES RIEDMANN, MARRIAGES & FAMILIES: MAKING CHOICES IN A DIVERSE SOCIETY 189–90 (Chris Caldeira et al. eds., 2009). *See also* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 177 (2008) (noting that cohabitation rates have grown significantly since *Marvin v. Marvin*).

11 U.S. CENSUS BUREAU, *As Baby Boomers Age, Fewer Families Have Children Under 18 at Home*, NEWSROOM (Feb. 25, 2009). http://www.census.gov/newsroom/releases/archives/families_households/cb09-29.html.

12 MARTIN O'CONNELL & DAPHNE LOFQUIST, U.S. CENSUS BUREAU, CONFERENCE REPORT, COUNTING SAME-SEX COUPLES: OFFICIAL ESTIMATES AND UNOFFICIAL GUESSES 6–20 (2009), *available at* http://www.census.gov/population/www/socdemo/files/counting-paper.pdf. The 2007 estimate of 741,000 figure for same-sex couples is up from the estimated 594,000 in the 2000 Census. *Id.* Earlier estimates of same-sex couples were unreliable; for example, 253,000 same-sex couples were reported as spouses in the 2000 Census, which was troubling because same-sex marriage was only legalized in 2004, and at that point only in Massachusetts. *Id.* The authors speculate that couples may have selected the "spouse" option because it best represented how they felt, or because it most resembled their civil union or domestic-partnership status. *Id.* The rate of unmarried cohabitation among opposite-sex and same-sex couples has risen more rapidly than first thought. CATHERINE FITCH ET AL., POPULATION ASS'N OF AMERICA, THE RISE OF COHABITATION IN THE UNITED STATES: NEW HISTORICAL ESTIMATES 1 (2005), *available at* http://www.hist.umn.edu/~ruggles/cohab-revised2.pdf. Flaws in defining cohabiting couples led the Census Bureau, as well as scholars relying on Census Bureau figures, to dramatically understate the true number of cohabiting couples in the 1960s and 1970s. *Id.*

common in the United States.[13] Likewise, a late-1980s study indicated that only two percent of adults reaching adulthood just prior to or shortly after World War II reported having cohabited before their first marriage.[14] Since then, the stigmatization of unmarried cohabitation has lessened considerably, a change that marriage researcher David Popenoe attributes primarily to the sexual revolution in the late-1960s, which essentially endorsed premarital sex.[15]

In light of an increasing number of cohabiting couples in America and many European nations, proponents of cohabitation advance a number of reasons why cohabitation is desirable—measuring readiness for, interest in, or compatibility for, marriage.[16] Cohabitation is positively deemed an alternative to dating or being single,[17] thus allowing the partners to develop a mature relationship and share finances.[18] As such, while

13 ARLAND THORNTON ET AL., MARRIAGE AND COHABITATION 72 (2007). David Popenoe, co-director of the National Marriage Project at Rutgers University, has written that "[i]n America before 1970, for example, cohabitation was uncommon, a deviant and unlawful practice found only among people at the margins of our society." DAVID POPENOE, NATIONAL MARRIAGE PROJECT, COHABITATION, MARRIAGE AND CHILD WELLBEING: A CROSS-NATIONAL PERSPECTIVE 1 (2008), *available at* http://www.virginia.edu/marriageproject/pdfs/NMP2008CohabitationReport.pdf.

14 THORNTON ET AL., *supra* note 13 (noting, however, that the population of cohabitation increased significantly after World War II and even began to affect children; by the late 1990s, about 40% of all out-of-wedlock births were to cohabiting parents).

15 *See* POPENOE, *supra* note 13. Popenoe's research has indicated that since 1970, cohabitation has increased more than 1,000%, and cohabiting couples now comprise about 10% of all couples. *Id.* One study indicated that by 1995, 45% of women between the ages of nineteen and forty-four had lived with an unmarried partner. Larry Bumpass & Hsien-hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 32 (2000). Likewise, a 2002 report indicated 48.8% of men and 50% of women between the ages of fifteen and forty-four had cohabited at some point with an opposite-sex partner. *See, e.g.*, CENTERS FOR DISEASE CONTROL AND PREVENTION, FERTILITY, CONTRACEPTION, AND FATHERHOOD: DATA ON MEN AND WOMEN FROM CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 61 (2006), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_026.pdf; CENTERS FOR DISEASE CONTROL AND PREVENTION, FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 86 (2005), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf. One scholar has argued that the popularity of unmarried cohabitation helps explain the drop in the marriage rate since the 1970s. KATHLEEN HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 4 (2006).

16 THORNTON ET AL., *supra* note 13, at 72–73. Recent studies suggest more than 60% of young men and women would want to live with a partner before marrying them, to make sure they are compatible. *Id.* *See also* POPENOE, *supra* note 13 (reporting that in a national survey of young adults aged twenty to twenty-nine, 43% agreed that "you would only marry someone if he or she agreed to live together with you first, so that you could find out whether you really get along").

17 LAMANNA & RIEDMANN, *supra* note 10, at 190. There are different motivations for living with someone; partners who live together because they don't want to be single are "uncommitted cohabitors," while partners who live together in a marriage-like relationship are "committed cohabitors." *Id.* at 190–91.

18 Valarie King & Mindy E. Scott, *A Comparison of Cohabiting Relationships Among Older and Younger Adults*, 67 J. MARRIAGE & FAM. 271, 282 (2005) (noting that sharing

cohabitation is gaining recognition socially and legally,[19] hurdles remain. Historian Stephanie Coontz has concluded that the United States has not yet completed a transition from a society where cohabitation was a form of courtship before marriage to one where cohabitation is acceptable but remains socially and legally different than marriage.[20] Other research indicates that marriages preceded by cohabitation tend to break up at higher rates, and cohabitation leads to a higher rate of breakups overall, even when the couple does not marry.[21] Cohabitants are generally younger, less educated, less religious, earn less income, and are more likely to have experienced parental divorce or marital problems during childhood.[22] In contrast, married people are happier, healthier, wealthier, and live longer.[23]

II. COHABITATION AND COMMUNITY PROPERTY

A. A Brief History of Community Property

With cohabitation gaining popularity among the population at large, it was inevitable that by the early 1970s, California courts would have to start determining how property should be divided when cohabitation relationships end.[24] California is one

living expenses was a popular reason for cohabitation among both older and younger survey subjects).

19 POLIKOFF, *supra* note 10, at 177–78 (noting that the American Law Institute (ALI) created a "domestic partners" category in its 2006 *Principles of the Law of Family Dissolution* that applies marital dissolution rules to qualifying cohabiting couples). A number of commentators sharply criticized the ALI's move, including Ron Haskins, welfare policy adviser to President George W. Bush, who said that "[c]ohabitation is a plague . . . and we should do what we can [to] discourage it." *Id.* at 179. *See generally* Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles are One Step in the Right Direction*, U. CHI. LEGAL F. 353, 358–80 (2004). For another perspective on cohabitation, see HEATHER BROOK, CONJUGAL RITES: MARRIAGE AND MARRIAGE-LIKE RELATIONSHIPS BEFORE THE LAW 153 (2007) ("[Cohabitation] is simultaneously romantic and mundane; a scene of potential liberation and regulation. For some, cohabitation is shameful, even sinful. For others, it is a situation arising almost accidentally, out of apathy or convenience rather than by design.").

20 LAMANNA & RIEDMANN, *supra* note 10. *See also* BROOK, *supra* note 19, at 165 (describing marriage as a sign of actively accepting state regulation and cohabitation as passively being regulated by the state).

21 Bumpass & Lu, *supra* note 15, at 33.

22 NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2007: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA, http://www.virginia.edu/marriageproject/pdfs/SOOU2007.pdf. At least one study has suggested that same-sex couples break up no more often than heterosexual couples. DONALD J. CANTOR ET AL., SAME-SEX MARRIAGE: THE LEGAL AND PSYCHOLOGICAL EVOLUTION IN AMERICA 75 (2006) (concluding that "the factors that can contribute to relationship quality, satisfaction and stability are similar for heterosexual and homosexual couples").

23 LAMANNA & RIEDMANN, *supra* note 10. *See also* NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2007, *supra* note 22.

24 *See generally* In re Marriage of Cary, 109 Cal. Rptr. 862 (Cal. Ct. App. 1973). *See also* Beckman v. Mayhew, 122 Cal. Rptr. 604 (Cal. Ct. App. 1974). Both of these cases were superseded by *Marvin v. Marvin*. For more explanation, see *infra* note 51.

of eight "community property" states,[25] where certain property acquired during a marriage is presumably dedicated to the maintenance of the relationship and is hence "community" property.[26] Community property is owned equally by both spouses and is divided equally if the marriage is dissolved.[27] California's community property system likely originated with the Visigoth tribes in Europe; it then moved to Spain and the Spanish territories and, finally, the United States.[28] California, in its first Constitution of 1849, referred to a wife's separate and community property rights for the first time.[29] The following year, the California legislature enacted a statute that defined the contours of California community property law[30]—a statute that remains largely intact today.[31]

25 *See* GAIL BOREMAN BIRD, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 15 n.21 (2008). Community property states include California, Arizona, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington. *Id.* Wisconsin is often considered the ninth community property state because it adopted a version of the Uniform Marital Property Act in 1986. *Id. See also* Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L REV. 769, 769 (1990).

26 Erlanger & Weisberger, *supra* note 25.

27 *Id.* at 71 n.10. In this regard, community property is an equitable system that protects the less affluent spouse's interests, at least as compared to the common-law property system used in the vast majority of states. One scholar suggests that in common-law property jurisdictions, property is divided at divorce as if the parties had never been married at all. Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 87 (2008).

28 *See supra* note 25. One scholar, in tracing community property back to warrior tribes such as the Visigoths, maintains the community property system promoted a type of marriage partnership, whereby "community property regimes . . . provide a way to recognize the contribution of both spouses to the success of the family unit." Scalise, *supra* note 27.

29 BIRD, *supra* note 25, at 15–16. For years in California, men were believed to control a married couple's community property. Erlanger & Weisberger, *supra* note 25, at 773 n.17 (explaining that until 1927, a wife only had an "expectancy interest" in community property because her husband had more meaningful control over her separate or community property). Section 803 of the California Family Code, known colloquially as the Married Women's Separate Property Presumption, provided that real or personal property held in a wife's name alone, which was acquired via a written instrument before January 1, 1975, was presumed to be the wife's separate property. CAL. FAM. CODE § 803 (Deering 2010). Currently, a husband's and wife's interests in community property are considered present, equal and existing. CAL. FAM. CODE § 751 (Deering 2010).

30 Kelly M. Cannon, *Beyond the 'Black Hole'—A Historical Perspective on Understanding the Non-Legislative History of Washington Community Property Law*, 39 GONZ. L. REV. 7, 14 (2004).

31 *See* CAL. FAM. CODE § 760 (Deering 2010). *See also supra* note 25. For an early perspective on California's community property system, see Meyer v. Kinzer, 12 Cal. 247, 251–52 (Cal. 1859) (holding that "[t]he statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution"). California's community property statute was so influential that Washington copied it nearly word-for-word nineteen years later. Cannon, *supra* note 30, at 14–15.

B. California Courts Tackle Cohabitation Agreements

Amid cohabitation's growing popularity, the California Court of Appeal issued two rulings in a two-year period that oscillated between setting a clear standard for enforcing cohabitation agreements and expressing a disdain for nonmarital relationships in general.[32] In 1973, a California court applied marriage-like property principles to a cohabitation case, revealing that the judiciary had an active and valid interest in enforcing cohabitants' property rights.[33] In *In re Marriage of Cary*, an unmarried couple lived together for more than eight years, had four children together, and held themselves out as married in all their financial and social dealings, although they were not legally married.[34] When the male partner moved to dissolve the arrangement and divide the property, the trial court awarded his partner half of the marital property, and the appellate court subsequently affirmed the decision.[35] According to the California Court of Appeal, three sections of the Family Law Act[36] provided that each party should receive an equal distribution of the community property as if the couple had been validly married.[37] The *Cary* court clarified that "the Family Law Act applies not only to valid marriages. It expressly covers a family relationship based on a void or voidable marriage where 'either party or both parties believed in good faith that the marriage was valid.'"[38] The male partner argued that *neither* he nor his partner believed

32 *See* In re Marriage of Cary, 109 Cal. Rptr. 862, 862 (Cal. Ct. App. 1973). *See also* Beckman v. Mayhew, 122 Cal. Rptr. 604, 604 (Cal. Ct. App. 1974).

33 *See Cary*, 109 Cal. Rptr. at 862. While California courts had settled cohabitants' property claims for years before *Cary*, the case is significant because it showed some of the social forces in motion that led to *Marvin v. Marvin* three years later, which was a landmark case in California property law. *See infra* note 51.

34 *Cary*, 109 Cal. Rptr. at 863.

35 *Id.* at 863, 867. In upholding the marriage-like relationship in this case, the *Cary* trial court essentially adopted a "de facto approach to marriage." Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1847 n.75 (1987).

36 *See* CAL. CIV. CODE §§ 4000–5137 (Deering 2010). Effective January 1, 1994, the Family Law Act sections of the California Civil Code were repealed and replaced with equivalent provisions in the California Family Code. Jennifer Klein Mangnall, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399, 399 (1997).

37 *Cary*, 109 Cal. Rptr. at 865. One scholar has opined, "*Cary* effectively asked: 'Has this nonmarital family behaved like a marital family? If so, why not apply our already well-developed family law?'" Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L.REV. 1265, 1293 (2001).

38 *Cary*, 109 Cal. Rptr. at 865–66. The *Cary* court likened the couple's relationship to that of a "putative spouse," a legal status that effectuates equitable property division when there is a good-faith belief in an otherwise invalid marriage. *See* CAL. FAM. CODE § 2251 (Deering 2010). Other scholars have compared the Carys' relationship to a common-law marriage, which California abolished in 1895. Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 487–88 (2007).

in good faith that their union was a valid marriage, and the Family Law Act did not address a scenario where the parties had *no* good-faith belief in the validity of their union—so the court should leave the parties where it found them.[39]

The court disagreed, noting that Mr. Cary's argument would force the Legislature to basically endorse deceit.[40] A "spouse" who deceived his partner into believing they were married would get half of the community property, while two partners who already knew they were not validly married would be left to fend for themselves with no help from the courts.[41] The *Cary* decision was significant because it elevated some cohabitants from just "living together" to a quasi-married status, affording those cohabitants the same community property protections as putative spouses.[42] In its closing remarks, the *Cary* court explained how closely a cohabitation relationship had to resemble a marriage in order to gain enforcement from the courts:

> It should be pointed out that the criteria for application of the rule we apply to the case before us is much more than that of an unmarried living arrangement between a man and woman. The Family Law Act obviously requires that there be established not only an ostensible marital relationship but also an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage.[43]

Although the Family Law Act has since been repealed,[44] the *Cary* court clearly threw its weight behind cohabitation relationships that approached, mimicked, or became nearly synonymous with marriage, and disdained cohabitation relationships that represented temporary, casual lifestyle choices. But subsequent courts, including the California Court of Appeal just two years later, rejected *Cary's* "marriage-like"

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39 *Cary*, 109 Cal. Rptr. at 865. The Family Law Act of 1970 ushered in California's no-fault divorce regime, whereby spouses could seek a divorce based on "irreconcilable differences," without having to prove the other spouse was responsible. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 291 (1987). "Fault" was likewise not considered in spousal support and property-division awards. *Id.* By ascribing fault to *both* partners, Mr. Cary attempted to circumvent the Family Law Act, which provided relief in the (far more common) cases where one partner had a good-faith belief that the marriage was valid but the other did not. *Cary*, 109 Cal. Rptr. at 865.

40 *Cary*, 109 Cal. Rptr. at 865.

41 *Id.* at 865–66.

42 Although the Carys lived together for a number of years, the court did not consider them to have a common-law marriage, nor was the decision based in any way on that prospect. *Cary*, 109 Cal. Rptr. at 867. California abolished common-law marriage in 1895. *See infra* note 129.

43 *Cary*, 109 Cal. Rptr. at 867.

44 *See supra* note 36.

standard in favor of clear distinctions between cohabitation and marriage, and a firmer anti-cohabitation stance overall.[45]

Two years later, a different California Court of Appeal cited precedent for taking a stricter view of cohabitation arrangements.[46] In *Beckman v. Mayhew*, the court held that absent an agreement between the partners, a cohabiting partner would not automatically assume a share of the couple's earnings, and thereby rejected the *Cary* court's reliance on the then-valid Family Law Act.[47] As the *Beckman* court noted:

> The Family Law Act deals with divisions of property at the termination of solemnized marriages and . . . at the termination of putative marriages. Neither in terms nor by implication does it deal with non-marital family relationships of the kind involved in Vallera, Keene and the present case.[48]

The *Beckman* decision was significant because it tightened the judicially-created rules for when a cohabiting partner could

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45 *See infra* note 48.

46 Beckman v. Mayhew, 122 Cal. Rptr. 604, 608 (Cal. Ct. App. 1974). The *Beckman* court's "stricter view" of cohabitation relationships was not unilaterally grounded in precedent, however. Notably, the *Beckman* court did *not* heed the precedent that *Cary* had set two years earlier, making the *Beckman* court's reference to *stare decisis* a curious one indeed.

47 *Id.*

48 *Id.* at 607. One scholar has suggested the *Beckman* court sympathized with the female partner's plight but felt "constrained by precedent" in denying relief. Christina M. Fernandez, *Beyond* Marvin*: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359, 363 n.14 (1978). As the *Beckman* court noted, perhaps less elegantly, "[w]e are not permitted to violate *stare decisis* for the sake of straws in the wind." *Beckman*, 122 Cal. Rptr. at 608. The precedent relied upon by the *Beckman* court included *Vallera v. Vallera*, 134 P.2d 761, 762–63 (Cal. 1943), and *Keene v. Keene*, 371 P.2d 329, 330 (Cal. 1962), which held that cohabiting partners who knew they were not validly married to their partners (i.e., the opposite of putative spouses), did not earn the right to share in the couple's earnings and accumulations simply by virtue of their cohabitation. A written agreement would likely be a different matter. In its decision, the *Beckman* court rejected not only *Cary*, but also *In re Estate of Atherley*, a case where a woman who lived with a married man for twenty-two years was awarded half of his estate. The court found that she was entitled to the property because they had "cohabited, pooled resources, resided together continuously, contributed services to joint projects, and otherwise conducted business as if they were man and wife." In re Atherley, 119 Cal. Rptr. 41, 48 (Cal. Ct. App. 1975). The *Atherley* court agreed with *Cary* that a partner in a so-called "meretricious" relationship, who knew he or she was not actually married, deserved the same property rights as a putative spouse—those who *do* believe in good faith, but incorrectly, that they are married to their partners. *Id.* at 46–48. The *Atherley* court, like *Cary*, grounded its decision in the Family Law Act. The court cautioned that

> all meretricious relationships, however, do not automatically trigger this rule . . . the criteria for application of the rule . . . is much more than . . . an unmarried living arrangement between a man and woman. The Family Law Act . . . requires . . . there be established not only an ostensible marital relationship but also an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage.

Id. at 48.

expect to recover a share of the couple's resources and injected a sense that unmarried relationships could create inequality between cohabitating partners.[49] The *Beckman* court was reluctant to protect what it called "non-marital family relationship," clarifying that its "descriptive term applies to a relationship which [many call] *meretricious*."[50]

C. The Advent of the *Marvin* Agreement

Whatever concerns the California Court of Appeal had about cohabitation were blown away in 1976 when the California Supreme Court's decision in *Marvin v. Marvin* set a standard for contractual agreements between intimate partners that still resonates today.[51] In 1964, the actor Lee Marvin and his girlfriend Michelle Triola made an oral contract that, while they lived together, they would pool their earnings, share equally any property acquired during the relationship, and "hold themselves out to the general public as husband and wife."[52] Additionally, Triola agreed to furnish her services as a homemaker,

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49 This view is supported by Justice Paras' concurring opinion in *Beckman*, when he noted that the decision "promotes a public policy favoring legally binding marriages, with consequent sounder and more secure familial ties. This public policy has not changed and should not change." *Beckman*, 49 Cal. Rptr. at 608 (Paras, J., concurring).

50 *Id.* at 605 n.1. For one definition of "meretricious," see *Atherley*, 119 Cal. Rptr. at 44 n.6, which states that "a meretricious relationship exists if unmarried persons knowingly live together." Generally, "meretricious" is defined as "relating to prostitution," but the term is also used to mean "unmarried persons knowingly live together," as it does in *Atherley*. Eric Olsen, *How Do Courts Divide Property Acquired During a Pseudomarital (Meretricious) Relationship?* Foster v. Thilges, *61 Wash. App. 880, 812 P.2d 523 (1991)*, 28 IDAHO L. REV. 1091, 1091 n.1 (1992); *Atherley*, 119 Cal. Rptr. at 44 n.6. Of the community property states, only Washington treats unmarried cohabitants as equivalent to marital spouses. Olsen, *supra* at 1092. Arizona, New Mexico, Nevada, California and Wisconsin treat unmarried cohabitants as contractual partners and divide assets based on whatever agreement the parties had. *Id.* at 1902–93, 1096.

51 *See generally* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). *Marvin* added to the lexicon an enduringly popular but non-legal term, "palimony," which puns on the support, or "alimony," which one might pay to a cohabitant, or "pal," rather than an ex-spouse. Some have questioned the case's impact, noting that the available contractual and equitable remedies it endorsed were the same ones available beforehand. Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1381 (2001). "With all its celebrity, the *Marvin* decision stands more as a cultural icon than as a legal watershed." *Id.* at 1383. Indeed, *Marvin* did not clear up the question regarding which cohabitation agreements were enforceable. There is a line of cases that involving same-sex partnership agreements that are uncommon in California and seem to have undergone greater judicial scrutiny compared to their opposite-sex partnership counterparts. *See generally* Jones v. Daly, 176 Cal. Rptr. 130 (Cal. Ct. App. 1981); Whorton v. Dillingham, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988). *See also infra* note 68.

52 *Marvin*, 557 P.2d at 110. Inasmuch as the Marvin-Triola agreement spelled out the financial terms of their union, at least one scholar would liken it to "first-degree promising," an early stage along the relationship continuum that emphasizes the actors' self-interested, economic well-being. Eric G. Andersen, *Three Degrees of Promising,* 2003 BYU L. REV. 829, 832 (2003). Second-degree and third-degree promising are comparatively more spiritual and less financial in nature. *Id.* at 832–33.

housekeeper, cook, and companion in exchange for Marvin's agreement to "provide for all of [Triola's] financial support and needs for the rest of her life."[53] During the cohabitation, which lasted until May 1970, Marvin acquired significant amounts of property that included motion picture rights worth more than $1 million.[54] The cohabitation ended when Marvin made Triola leave the residence in May 1970 after about a year and a half of financially supporting her.[55] Marvin was married during much of his cohabitation with Triola, and his final divorce decree from Betty Marvin was not filed until January 1967.[56] Triola sought declaratory relief to ascertain her contractual and property rights, and sought a constructive trust over half of the property the couple acquired during the cohabitation.[57] Marvin claimed the agreement was unenforceable because their relationship was illicit, adulterous, and illegally promoted divorce. He also analogized between their agreement and a breached promise to marry, noting that the promises were basically the same in the two agreements and a breached promise to marry was not actionable.[58]

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53 *Marvin*, 557 P.2d at 110. *See also* Brook, *supra* note 19, at 164 (disputing the contention that cohabiting partners have no duty to support one another financially).

54 *Marvin*, 557 P.2d at 110.

55 *Id.* Oral agreements, such as the one in *Marvin*, present particular problems. As one scholar points out:

> Unfortunately, few cohabiting couples make such express contracts. Especially in states which limit the *Marvin* remedy to express agreements, this contract-law approach invites outright perjury concerning an oral understanding, or what might be called quasi-perjury, by which one of the cohabitants, after the breakup of the couple, 'recalls' a conversation about their agreeing to share their lives together which he or she after-the-fact contorts (perhaps even in good faith) into a community-property type pooling contract.

William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1687 (1984). After her relationship with Marvin ended, Triola began a cohabitation relationship with actor Dick Van Dyke that lasted until her death in 2009 at age seventy-five. Elaine Woo, *Lawsuit Against Well-Known Actor Made Palimony a Fact of Life*, WASH. POST, Nov. 1, 2009, at C8, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/10/31/AR2009103102007.html. In 1983, Triola told the press that she had a written contract with Van Dyke to avoid further legal problems. *Id.*

56 *Marvin*, 557 P.2d at 111.

57 *Id.* at 110–11.

58 *Id.* at 112–15. Specifically, Marvin claimed his agreement with Triola and the typical breached promise to marry each included implied promises of support and pooled resources. *Id.* Because an action based on a breached promise to marry was barred by section 43.5(d) of the Civil Code, an agreement (like Marvin and Triola's) that included the same implied promises, but did *not* include a promise to marry, should not be actionable either. *Id.* at 115–16. Marvin did not prevail on this line of reasoning, and the court noted that since the statute's enactment in 1939, no lawyer had ever invoked that line of reasoning. *Id.* at 116. Other courts have adopted the *Marvin* court's conclusion that promises between unmarried partners that are *independent* of a breach of promise to marry are enforceable. *See* Miller v. Ratner, 688 A.2d 976, 976 (Md. Ct. Spec. App. 1997); Kozlowski v. Kozlowski, 403 A.2d 902, 908 (N.J. 1979) (noting that "[w]e do no more than

The court rejected each of Marvin's claims and held that unmarried cohabitants could make and enforce contracts regarding earnings and property, although in this case, the court had found no agreement, express or otherwise, between Marvin and Triola.[59] The court ruled that generally, agreements "expressly and inseparably based upon an illicit consideration of sexual services" were invalid, while relationships like the one in *Marvin*, which merely "contemplated" a nonmarital relationship, were valid and severable.[60] Finally, the court rejected *Cary*'s reliance on the Family Law Act of 1970, deciding instead that courts and not the legislature should sort out property claims among cohabitants: "provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship . . . [which] remains subject solely to judicial decision."[61]

recognize that society's mores have changed, and that an agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law, or on a promise to marry").

59 *Marvin*, 557 P.2d at 116. Some sources suggest the *Marvin* decision reflected a newfound judicial tolerance of nontraditional family relationships, inasmuch as the decision declined to find the couple's agreement based upon illegal consideration. *See* HARV. LAW REVIEW ASS'N, *Property Rights Upon Termination of Unmarried Cohabitation:* Marvin v. Marvin, 90 HARV. L. REV. 1708, 1713–14 (1977).

60 *Marvin*, 557 P.2d at 113–14. "Meretricious" has been defined several ways by California courts. The *Marvin* court used "nonmarital" and "meretricious" interchangeably throughout the decision. Other courts have found that "meretricious" simply means "of or relating to prostitution," while acknowledging that other states have widened the definition to mean "unmarried cohabitants." *See* Zoppa v. Zoppa, 103 Cal. Rptr. 2d 901, 905 (Cal. Ct. App. 2001). *See also supra* note 50.

61 *Marvin*, 557 P.2d at 106, 110. Significantly, the *Marvin* court here used the term "nonmarital relationship" rather than "cohabitation," possibly anticipating the questions about what qualified as "cohabitation." *Id.* In *Cochran v. Cochran*, Patricia Cochran (whose last name was changed to match with her boyfriend's) sued her boyfriend and sometimes live-in lover—the late, infamous attorney Johnnie Cochran—for breach of a *Marvin* agreement. Cochran v. Cochran, 106 Cal. Rptr. 2d 899, 900–01 (Cal. Ct. App. 2001). Mr. Cochran moved for summary judgment on Ms. Cochran's claim that he breached their *Marvin* agreement, arguing that he was not cohabiting with her when the agreement was made—the couple spent an average of two to four nights together per week. *Id.* at 902–05. In denying Mr. Cochran's motion, the court decided to

> save for another day the issue whether consenting adults need cohabit [sic] *at all* in order to enter an enforceable agreement regarding their earnings and property. Assuming for discussion's sake that cohabitation is required, [the court] conclude[s] that the rationale of *Marvin* is satisfied in appropriate cases by a cohabitation arrangement that is less than full-time. Here, as so construed, there was sufficient evidence to raise a triable issue of fact on the cohabitation element.

Id. at 905.

III. SAME-SEX PARTNERS AND *MARVIN* AGREEMENTS

A. *Jones v. Daly* (1981) and *Whorton v. Dillingham* (1988)

The *Marvin* case set a contractual standard[62] for heterosexual couples that same-sex couples soon began to test. Despite the courts' exclusive power to adjudicate *Marvin* agreements, California appellate courts did little to clarify the *Marvin* holding for same-sex couples.[63] In essence, courts have determined that same-sex cohabitation agreements are enforceable when they include agreements for services separate from the "cohabitation state."[64] However, courts have not fully defined which activities *are* or *are not* naturally part of the

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62 Not every commentator looks favorably upon contractual relationships between intimate partners. JONATHAN GOLDBERG-HILLER, THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS 81 (2002) (stating that it "connotes a worldview in which the accretion of social obligation is dissolved in the intentional arrangements of the autonomous individual of the marketplace").

63 *See* Jones v. Daly, 176 Cal. Rptr. 130, 130 (Cal. Ct. App. 1981); Whorton v. Dillingham, 248 Cal. Rptr. 405, 405 (Cal. Ct. App. 1988). While *Marvin* likened "meretricious" relationships to prostitution, other courts (like *Zoppa)* have defined "meretricious" relationships simply as those between unmarried, committed partners. *See supra* note 60; Soltero v. Wimer, 150 P.3d 552, 555 (Wash. 2007) (holding that "[a] 'meretricious relationship' is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist"). In *Gormley v. Robertson*, a Washington appellate court, in holding that the meretricious relationship doctrine was applicable to same-sex couples, noted that:

> [A] same-sex relationship cannot be a meretricious relationship because such persons do not have a 'quasi-marital' relationship . . . . Because persons of the same sex cannot legally marry, they are 'not entitled to the rights and protections of a quasi-marriage, such as community property-like treatment . . . . But it is of no consequence to the cohabitating couple, same-sex or otherwise, whether they can legally marry. Indeed, one of the key elements of a meretricious relationship is knowledge by the partners that a *lawful* marriage between them does not exist. . . . [Although] the ability of same-sex couples to legally marry is for the legislature to decide, . . . the rule that courts must 'examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property' is a judicial, not a legislative, extension of the rights and protections of marriage to intimate, unmarried cohabitants.

Gormley v. Robertson, 83 P.3d 1042, 1045–46 (Wash. Ct. App. 2004). Delaware courts have used "meretricious" to refer to a married person cohabiting with an unmarried person. *See, e.g.*, Williamson v. Williamson, 104 A.2d 463, 464–64 (Del. Super. Ct. 1954). Meanwhile, some courts seem unsure of how to classify unmarried *same-sex* cohabitants. For example, the Georgia Supreme Court has ruled that a "live-in lover" statute permitting modification of alimony does not apply to a same-sex lover. *See* Van Dyck v. Van Dyck, 425 S.E.2d 853, 854–55 (Ga. 1993). Similarly, an Alabama court found that while alimony can be terminated when a spouse is living with an opposite-sex partner, the termination clause does not apply to a same-sex lover. *See* J.L.M. v. S.A.K., 18 So.3d 384, 388–89 (Ala. Civ. App. 2008).

64 *Whorton*, 248 Cal. Rptr. at 409–10. Despite the court's careful explanation about compensable services, the court in *Chiba v. Greenwald*, 67 Cal. Rptr. 3d 86, 92 (Cal. Ct. App. 2007) suggested that homemaking services were not the operative factor in *Whorton*, which suggests that the *Jones* agreement failed because of the explicit reference to serving as a "lover." *See infra* note 69. *See also* Jones, 176 Cal. Rptr. at 130–31.

cohabitation state, thus leaving open the question which services make a cohabitation contract enforceable. For example, in *Jones v. Daly*, one same-sex partner sued for declaratory relief entitling him to half of his deceased partner's estate.[65] Three months into their relationship, the pair made an oral agreement that they would combine their earnings and efforts, share any and all property, "hold themselves out to the public at large as cohabiting mates, and [plaintiff] would render his services as a lover, companion, homemaker, traveling companion, housekeeper and cook."[66] In return, the decedent agreed to support the plaintiff financially for the rest of the plaintiff's life, an arrangement that lasted until the decedent's death approximately two years later.[67]

The California appellate court dismissed the plaintiff's action for declaratory relief and sustained the defendant's demurrer to the complaint, finding that the cohabitation agreement was inescapably based upon the couple's sexual relationship.[68]

The court noted that "[n]either the property sharing nor the support provision of the agreement rests upon plaintiff's acting

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65 *Jones*, 176 Cal. Rptr. at 130–31.

66 *Id.* at 131–33 (noting that sexual services were an inseparable part of the consideration for the contract).

67 *Id.* at 131.

68 *Id.* at 134. *See, e.g.*, Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 205 n.89 (2008) (noting that the *Jones* agreement foundered because it explicitly referred to the same-sex couple as "lovers"); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1103 n.473 (1985) (indicating that the *Jones* court's conclusion that sexual services could not be severed from the other services under the agreement was essentially the same as the conclusion in *Marvin*, despite the court's attempt to distinguish *Jones* from *Marvin*). Looking at the *Marvin* decision in terms of *Jones*, it is unclear what made Triola's services severable where Jones' were not, other than the gender of the parties involved. One possibility is that homosexual relationships are, fair or not, considered to be based primarily on sex. In *Lawrence v. Texas*, a landmark 2003 case that struck down Texas' anti-sodomy law, Justice O'Connor suggested that Texas' law was based on the presumption that same-sex intimate relationships were irreducibly based on sex:

> [B]ecause Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior . . . . Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is *closely correlated with being homosexual*. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward *gay persons as a class*.

Lawrence v. Texas, 539 U.S. 558, 583 (2003) (emphasis added). Justice Scalia's dissent in *Lawrence*, inasmuch as it goes right to the sexual question, echoes the viewpoint Justice O'Connor criticized. His dissent frames *Lawrence* in terms of a "fundamental right" to engage in homosexual sodomy, as noted in the *Bowers v. Hardwick* decision some seventeen years prior. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

as [decedent's] traveling companion, housekeeper or cook as distinguished from acting as his lover. The latter service forms an inseparable part of the consideration for the agreement and renders it unenforceable in its entirety."[69]

Seven years later, the California Court of Appeal found that a cohabitation agreement was enforceable when the services in question included bodyguard, business partner, chauffeur, and secretary.[70] The court reasoned that those services were separate from the sexual relationship and thus comprised separate consideration for the agreement.[71] The court reached that result although the sexual services were an *express* part of a same-sex couple's cohabitation agreement, unlike the agreements in *Marvin* and *Jones*.[72] Distinguishing its holding from the *Jones* decision, the *Whorton* court found that "*Jones* is factually different in that the complaining party did not allege contracting to provide services apart from those normally incident to the state of cohabitation itself."[73] In contrast, the *Whorton* couple had an agreement that included for-pay and gratuitous services, where they were severable and able to serve as consideration for their agreement.[74] Basically, California appellate courts have

69 *Jones*, 176 Cal. Rptr. at 134. Nonmarital agreements that "facilitate adultery" were considered so immoral that nothing, even a written agreement, could make them enforceable. *See* McCall v. Frampton, 438 N.Y.S.2d 11, 13 (N.Y. App. Div. 1981). To mitigate the illegal or immoral nature of the cohabitation contract, an agreement had to include non-domestic services that could form an independent basis for the contract, allowing the non-sexual services to be severed from the sexual ones. *See id.* at 13 (finding that "where the [cohabitation] agreement consists in part of an unlawful objective and in part of lawful objectives, under certain circumstances the illegality may be severed and the legal components enforced"). Despite the *Marvin* court's assertion that domestic services comprised lawful and adequate consideration, the *Jones* plaintiff failed to recover. *Jones*, 176 Cal. Rptr at 134.

70 Whorton v. Dillingham, 248 Cal. Rptr. 405, 409 (Cal. Ct. App. 1988).

71 *Id.* at 408–09.

72 *Id.* at 408.

73 *Id.* at 410. The court here may be referencing the "lovers" issue raised by Braucher. *See supra* note 68. Denying relief to the *Jones* plaintiff for, essentially, cohabitating is curious because he was as close to married as he could get in the days before domestic partnerships. As one commentator said of the decision, "The *Jones* holding makes even less sense than holdings declining enforcement in a heterosexual context, since in the context of homosexual cohabitation no option to marry exists." Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 286 n.305 (1982).

74 The *Whorton* court explained that the chauffeur and business partner duties were "significantly different than those household duties normally attendant to nonbusiness cohabitation and are those for which monetary compensation ordinarily would be anticipated." *Whorton*, 248 Cal. Rptr. at 410. But, over time, California courts changed their stance on homemaking services functioning as consideration for a *Marvin* agreement. Nearly twenty years after *Whorton*, the California Court of Appeal said of contracts that centered on one party's homemaking services:

> [A] 'promise to perform homemaking services is, of course, a lawful and adequate consideration for a contract . . . otherwise those engaged in domestic employment could not sue for their wages . . . .' *Marvin* expressly rejected the

determined that same-sex cohabitation agreements are enforceable when they include "for-pay" services, but it is unclear which services are for-pay and which are not, and whether domestic duties should qualify as paid services, or are simply an expected part of a sexual relationship.

B. Same-Sex Cohabitants and the Severability Problem

The enforceability of cohabitation agreements is particularly important for California's same-sex couples, who have a major stake in such agreements,[75] because same-sex couples cannot legally marry in California.[76] Shortly after the *Marvin* decision, the California Legislature drew a sharp distinction between heterosexual and same-sex couples when it amended section 300 of the California Family Code to exclude same-sex partners from entering a lawful marriage.[77] That distinction was reinforced in 2000 when California voters approved Proposition 22, which likewise restricted California to recognizing only marriages between a man and a woman.[78] Same-sex couples had gained

> argument that the partner seeking to enforce the contract must have contributed either property or services additional to ordinary homemaking services.

Chiba v. Greenwald, 67 Cal. Rptr. 3d 86, 92 (Cal. Ct. App. 2007) (internal citation omitted).

75 At least one critic argues that same-sex marriage might restrict same-sex couples' freedom rather than enhance it. *See* David L. Chambers, *What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 487 (1996). *See also* Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97, 107 (Robert Wintemute et al. eds., 2001) (interpreting Chambers' ideas to mean "the danger to gay liberty [from marriage] is mitigated by the increasing availability of antenuptual agreements and other contractual inroads on marriage as a rigidly state-defined status").

76 The California Family Code states that "only marriage between a man and a woman is valid or recognized in California." CAL. FAM. CODE § 308.5 (Deering 2010). However, same-sex couples can register as domestic partners, a status that confers many of the same rights and privileges as those of marriage. CAL. FAM. CODE § 297.5 (Deering 2010).

77 Lockyer v. City of San Francisco, 95 P.3d 459, 468 n.11 (Cal. 2004) (finding that "the language in Family Code section 300 specifying that marriage is a relation 'between a man and a woman' was adopted by the Legislature in 1977, when the provision was set forth in former section 4100 of the Civil Code . . . . The legislative history of the measure makes its objective clear").

78 Proposition 22, passed in 2000 but struck down by the California Supreme Court in May 2008, added section 308.5 to the California Family Code, which defined legal marriage as only between a man and a woman. CAL. FAM. CODE § 308.5 (Deering 2010). *See also* Bird, *supra* note 25, at 203. Some scholars have argued that section 308.5 merely clarified which out-of-state marriages California would recognize, and thereby did not affect the possibility of same-sex marriage *within* California, since the section was part of section 308 of the California Family Code, "validity of foreign marriages." *See* Enrique A. Monagas, *California's Assembly Bill 205, the Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality?*, 17 HASTINGS WOMEN'S L.J. 39, 46–47 (2006).

only a limited form of recognition in 1999, when the California Legislature enabled same-sex couples to register as domestic partners.[79] While the rights domestic partners enjoy echo some of the protections that traditional married couples enjoy,[80] some note, accurately, that domestic partnerships are not the functional equivalent of marriage for same-sex couples.[81] Others have argued that the registration requirements for domestic partner-ships will invalidate already-existing *Marvin* agreements.[82] And, whether a same-sex couple has opted for their lone "marriage" option may well determine whether one partner can enforce a cohabitation agreement in today's post-Proposition 8 political landscape.[83]

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79 Section 297 of the California Family Code defines domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." CAL. FAM. CODE § 297 (Deering 2010). To qualify, the partners must file a Declaration of Domestic Partnership with the Secretary of State, and must meet the following requirements: 1) Each partner is at least eighteen years of age; 2) they share a common residence; 3) neither partner is married to or involved in an active domestic partnership with anyone else; 4) the partners are not related by blood in a way that would disallow them from marrying otherwise; and 5) they are of the same sex or one or both partners is over the age of sixty-two. *Id.*

80 *See* CAL. FAM. CODE §§ 297, 297.5 (Deering 2010).

81 *See* Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 690 (Cal. Ct. App. 2005) (holding that by creating domestic partnerships, the Legislature had not created same-sex marriage by a different name thereby rejecting the argument that domestic partnership is the functional equivalent of marriage). In fact, domestic partners do not receive a number of marital rights and benefits. For example, they may not file federal joint tax returns and they are not entitled to numerous benefits provided to married couples by the federal government, such as marital benefits relating to Social Security, Medicare, federal housing, food stamps, veterans' benefits, military benefits, and federal employment benefit laws. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf. The *Knight* court went on to highlight other differences between domestic partnerships and traditional marriage: minors may marry with parental consent but cannot become domestic partners, heterosexual prisoners may marry but their homosexual counterparts may not become domestic partners, domestic partnerships are much more easily dissolved than marriages, and, unlike traditional marriage, domestic partnerships may not be recognized by other states, nor may other states recognize domestic partners' rights to visit their hospitalized partner and to make medical decisions for him or her. The court concluded, "The numerous dissimilarities between the two types of unions disclose that the Legislature has not created a 'same-sex marriage' under the guise of another name" (citations omitted). *Id. See also* Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1566 (2004) ("[D]omestic partnership legislation may be surer and less socially divisive than constitutionally compelled same-sex marriage or civil union . . . [but] the choice is not society's or the state's to make. Only gay men and lesbians can choose to forgo ultimate rights in favor of a surer, *but lesser*, alternative.") (emphasis added).

82 *See* Monagas, *supra* note 78, at 50 (explaining that Assembly Bill 205 could void same-sex couples' cohabitation agreements once those couples seek to register with the state as domestic partners).

83 *See infra* Part IV.C and note 113. Some commentators noted in the wake of *Marvin* that marriage as a concept was in flux, and courts were backing away from

Historically, gender has not impacted couples' abilities to enforce cohabitation agreements, as courts have not considered the gender of the parties when determining the enforceability of a cohabitation agreement.[84] Rather, the relative severability of the sexual relationship—the extent to which the sexual relationship can be considered separately from the other bases for the agreement—has been determinative in the enforceability of cohabitation agreements, a point emphasized by the *Marvin* court.[85] The underlying assumption in *Marvin* and its progeny, which includes *Jones* and *Whorton*, is that sexual relations are an implicit aspect of an intimate relationship, and sex is one of the things an intimate partner is expected to provide for his or her partner.[86] Accordingly, an agreement where one partner's sexual performance makes up most or all of that partner's consideration under the contract would be an illegal contract and void as against public policy.[87] However, if a court determines that the sexual relationship is tangential to the agreement, then the agreement can be upheld.[88] A California court confronted with a *Marvin*-type agreement that implicitly or explicitly includes sexual relations has the *option* to sever the sexual relationship—which represents illicit consideration—from the other services in the contract, and uphold the rest.[89] In deciding

defining it. *See* Homer H. Clark, Jr., *The New Marriage*, 12 WILLAMETTE L. J. 441, 442 (1976).

84 However, the *Jones* decision casts some doubt upon this conclusion. *See supra* note 66.

85 Marvin v. Marvin, 557 P.2d 106, 114 (Cal. 1976).

86 *Id.* *But see* Hall v. Duster, 727 So. 2d 834, 837 (Ala. Civ. App. 1999) (holding that "[s]exual relations between the parties is not an indispensable element of cohabitation").

87 Just as the *Marvin* court's rationale has been questioned in light of *Jones*, so too has the *Marvin* court's view of the illegality of sexual services in a cohabitation agreement. *See* William Van Alstyne, *The Unbearable Lightness of Marriage in the Abortion Decisions of the Supreme Court: Altered States in Constitutional Law*, 18 WM. & MARY BILL RTS. J. 61, 72 n.53 (2009) (arguing that "[cohabitation] agreements were formerly void on public policy grounds (akin to contracts of prostitution or meretricious criminal cohabitation). But nonmarital cohabitation is currently not merely lawful in most jurisdictions, rather, it is on its way to becoming a protected *civil* right").

88 California courts have held for years that cohabiting adults may have an ongoing sexual relationship, even a meretricious one, at the time they make a property agreement and still make an enforceable contract. *See* Bridges v. Bridges, 270 P.2d 69, 71 (Cal. Ct. App. 1954). In *Alderson v. Alderson*, the court held that a relationship based on "many . . . things," including but not limited to sex, was *not* a relationship expressly based on meretricious considerations. 225 Cal. Rptr 610, 616 (Cal. Ct. App. 1986). The petitioner's consideration for the contract was being respondent's wife and doing "whatever a wife does," not just sex. *Id.*

89 *See* Yoo v. Robi, 24 Cal. Rptr. 3d 740, 751 (Cal. Ct. App. 2005) (reiterating that "although Civil Code section 1599 authorizes a court to sever the illegal object of a contract from the legal[,] it does not require the court to do so"). *See also* Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 696 (Cal. 2000) ("[T]he doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme [where t]he overarching inquiry is whether 'the interests of

whether to enforce a contract with illegal and legal elements, the court must be guided by equitable considerations.[90] In sum, California courts have held that the enforceability of a cohabitation agreement, for same-sex or opposite-sex couples alike, depends upon the degree to which the agreement contemplates one party furnishing sexual services as consideration; the less this is so, the more enforceable the agreement becomes.[91] This gender-neutral view has led some commentators to call California's enforcement of cohabitation agreements a "pure contract" approach.[92]

IV. WHAT LIES AHEAD: THE CHANGING FACE OF THE *MARVIN* AGREEMENT

A. California Courts May Treat Same-Sex Agreements Differently Post-Proposition 8

Although California courts have been gender-disinterested, the trend could change in light of Proposition 8, despite the courts' attempt to claim otherwise.[93] A "*Marvin* agreement," as used here, is a gender-irrelevant term.[94] However, prior to Proposition 8, California courts upheld many of the *Marvin*-type cohabitation agreements under a public-policy regime that, while defining the allowable limits of same-sex relationships, had done so in a way that provoked much less controversy than the

justice . . . would be furthered' by severance.") (citation omitted). *Cf.* Marathon Entm't v. Blasi, 174 P.3d 741, 753 (Cal. 2008) (echoing *Yoo* that courts have the power but not the duty to sever illegal aspects of a contract).

90 *See* Yoo, 24 Cal. Rptr. 3d at 751. *See also* Chiba v. Greenwald, 67 Cal. Rptr. 3d 86, 93 (Cal. Ct. App. 2007) (holding that despite equitable considerations, petitioner did not deserve to have the legal and illegal aspects of her *Marvin* agreement severed because "[e]quity does not demand acceptance of the most favorable set of multiple conflicting versions of the facts set forth by a party in her pleadings").

91 *See* Marvin v. Marvin, 557 P.2d 106, 114–15 (Cal. 1976).

92 Hewitt v. Hewitt, 394 N.E.2d 1204, 1207 (Ill. 1979).

93 *See* Strauss v. Horton, 207 P.3d 48, 76 (Cal. 2009) (finding that "Proposition 8 reasonably must be interpreted in a limited fashion as eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship").

94 Notably, the *Marvin* decision uses gender-neutral language throughout, referring to "nonmarital partners" rather than "man" and "woman," which has led some to conclude the court felt *Marvin* applied equally to same-sex couples. *See* Sharmila Roy Grossman, Comment, *The Illusory Rights of* Marvin v. Marvin *for the Same-Sex Couple Versus the Preferable Canadian Alternative—M. v. H.*, 38 CAL. W. L. REV. 547, 550 (2002); Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family*,*"* 29 J. FAM. L. 497, 512 (1990–1991). More likely, the *Marvin* court's language reflected a desire to erase gender from its decision rather than surreptitiously beckon to same-sex couples, considering the pure contractual approach of California courts described in *Hewitt*.

Proposition 8 debate that polarized the California community.[95] It is important to realize that, while California has moved away from bringing gender to its discussion of cohabitation agreements,[96] or other rights that have been granted to homosexual partners,[97] the state's courts have also not faced a spate of *Marvin* agreements under the current public policy that the marriage designation is reserved solely for a man and a woman.[98] California courts have already reflected in their decisions the electorate's will that same-sex relationships cannot enjoy traditional marriage.[99] Until and unless the Legislature clarifies same-sex couples' cohabiting rights, California courts will probably have to shape the contours of cohabitants' property rights, in terms of what the Legislature and voters have already decided.[100]

95 *See, e.g.*, Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1, *available at* http://www.nytimes.com/2008/11/06/us/politics/06marriage.html. Some have argued that California's Proposition 8 electorate was a unique population, where African American voters voted for Proposition 8's ban on same-sex marriage in much greater numbers than Latino voters. *See* Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523, 1535 (2009) (estimating that seventy percent of African American voters and fifty-three percent of Latino voters supported Proposition 8's ban on same-sex marriage). The measure passed by a fifty-two percent to forty-eight percent margin overall and a majority of white voters did not vote for it. *See* Joe Von Kanel & Hal Quinley, *Exit Polls: Gay Marriage in CA*, CNNPOLITICS (Nov. 5, 2008, 12:25 AM), http://politicalticker.blogs.cnn.com/2008/11/05/exit-polls-gay-marriage-in-california/. Others have argued that black voters did not cause Proposition 8 to pass, and have derided the so-called "scapegoating" of blacks stemming from the vote. *See, e.g.*, Jennifer Holladay & Catherine Smith, *A Cautionary Tale: The Obama Coalition, Anti-Subordination Principles and Proposition 8*, 86 DEN. U. L. REV. 819, 828 (2009).

96 *See* Marvin, 557 P.2d at 116. *See also* Grossman, *supra* note 94.

97 *See Strauss*, 207 P.3d 48 at 78 (holding that "although Proposition 8 changes the state Constitution . . . in all other respects same-sex couples retain the same substantive protections embodied in the state constitutional rights of privacy and due process as those accorded to opposite-sex couples and the same broad protections under the state equal protection clause").

98 CAL. FAM. CODE § 308.5 (Deering 2010). *See also Strauss*, 207 P.3d at 75.

99 *See Strauss*, 207 P.3d at 75. The *Strauss* decision was careful to note that Proposition 8 simply reserved the designation "marriage" for unions between one man and one woman, and did not affect "the constitutional right to establish an officially recognized family relationship with the person of one's choice." *Id.* at 74.

100 For commentary on the courts' role as interpreters, not progenitors, of policy, see *Vierra v. Workers' Comp. Appeals Bd.* 65 Cal. Rptr. 3d 423, 430 (Cal. Ct. App. 2007) (holding that the "[courts'] function is not to make policy, but to interpret the law as it is written"). *See also* Cal. Teachers' Ass'n v. Governing Bd. of Rialto Unified Sch. Dist., 927 P.2d 1175, 1177 (Cal. 1997) ("[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government.") (internal citations omitted).

B. *Hewitt v. Hewitt* and the Role of Public Policy in *Marvin* Agreements

Those courts will someday have to answer a question unfathomable in 1976: should same-sex couples even *have the right* to make enforceable *Marvin* agreements? That the answer is probably "yes" obscures the real point, which is that the question can even be posed. That question was not in play in 1981 for *Jones*,[101] nor in 1988 for *Whorton*,[102] but it is in play now because of California's newly-reiterated public policy defining the limits of same-sex relationships.[103] While it is difficult to predict the success of a same-sex *Marvin* agreement in the wake of Proposition 8, California courts have already made clear that opposite-sex cohabitation relationships enjoy limited recognition rights.[104] It is easy to assume a California court, confronted with a same-sex *Marvin* agreement at some future date, would enforce the agreement by the same guidelines dictated by *Jones* or *Whorton*, as vague as those might be.[105] Yet, the playing field is different now than it was then, insofar as California voters decisively enacted their own public policy regarding same-sex relationships through the Proposition 8 campaign and ballot measure. Consequently, it is perhaps too easy to assume California courts will tune out public policy in making future decisions about same-sex couples—up to and including enforcement of *Marvin* agreements.[106]

To ascertain how California courts might treat a same-sex *Marvin* case after Proposition 8, it is instructive to see how other states treat *Marvin* agreements, considering that same-sex marriage ballot initiatives have appeared on thirty-one state

101 *See supra* note 8 and accompanying text.

102 *See supra* note 8 and accompanying text.

103 Proposition 8 was called the "Marriage Protection Act," which relates to the similar Illinois legislation defining the rights and responsibilities of married partners at issue in *Hewitt*. *See infra* note 106.

104 *See* Elden v. Sheldon, 758 P.2d 582, 586 (Cal. 1988). In *Elden*, an unmarried cohabitant sued to recover damages resulting from the death of his partner in a car accident, arguing their committed cohabitation relationship resembled a marriage. *Id.* at 582–83. The court declined to equate their cohabitation with a marriage, noting that "the state has a strong interest in the marriage relationship; to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited." *Id.* at 586.

105 *See supra* note 74.

106 In 1979, the Illinois Supreme Court held in *Hewitt v. Hewitt* that an opposite-sex cohabitation agreement was invalid. What was notable about the decision was the court's acknowledgement that public policy had played a role in its decision, inasmuch as strengthening marriage was the purpose of the then-recently enacted Illinois Marriage and Dissolution of Marriage Act. *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1209 (Ill. 1979).

ballots, including California's, and lost each time.[107] The closest analogy to California's post-Proposition 8 public policy is Illinois, whose Supreme Court decided a cohabitation case three years after *Marvin* that continues to affect cohabiting couples there regardless of gender.[108] In *Hewitt v. Hewitt*, the Illinois Supreme Court held that the cohabitation agreement in question was unenforceable because agreements with sexual relations (of any level, presumably) as an explicit consideration were invalid under Illinois law.[109] The court also held that the agreement violated public policy; to wit, enforcing the agreement would mean endorsing a nonmarital relationship at odds with the state's public policy promoting marriage.[110] The first part of the holding is typical of other states' decisions, including California's, although in California sexual relations can be part of the agreement as long as they are not an inseparable aspect.[111] The second part of the holding is significant, not *because* the Illinois court disfavored the agreement but *why*: the court cited public policy grounds for declining to enforce a contract between two consenting adults, thereby augmenting (if not outright replacing) contract law with public policy.[112]

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107 Glenn Adams & David Crary, *Maine Voters Reject Same-Sex Marriage Law*, CNSNEWS.COM (Nov. 4, 2009), http://www.cnsnews.com/node/56583. Same-sex marriage initiatives have appeared on thirty-one state ballots, with all thirty-one states voting to ban or otherwise restrict same-sex marriage. The states include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wisconsin. *State Policies on Same-Sex Marriage*, PEW FORUM ON RELIGION & PUB. LIFE, http://pewforum.org/Gay-Marriage-and-Homosexuality/State-Policies-on-Same-Sex-Marriage.aspx (last visited Nov. 8, 2010). One factor in Proposition 8's success in California was the relative ease with which the California Constitution could be amended. The California Constitution is far easier to amend than its federal counterpart, while the state constitutions of Connecticut and Iowa—two states that offer same-sex marriage—cannot be amended through the initiative process. Strauss v. Horton, 207 P.3d 48, 64 (Cal. 2009).

108 *Hewitt*, 394 N.E.2d at 1208. It bears noting that *Hewitt* involved an opposite-sex relationship, but the general policy points are instructive. "It is generally agreed that *Hewitt* in no small measure was decided in light of, and perhaps in response to, *Marvin* . . . nearly all reported cases from other jurisdictions since 1979 fall somewhere in between, and most cite, as persuasive authority, one or the other." Richard A. Wilson, *The State of the Law of Protecting and Securing the Rights of Same-Sex Partners in Illinois Without Benefit of Statutory Rights Accorded Heterosexual Couples*, 38 LOY. U. CHI. L.J. 323, 323 n.62 (2007).

109 *Hewitt*, 394 N.E.2d at 1208.

110 *Id.* See also Wilson, *supra* note 108, at 337, 335 (arguing that the pro-marriage public policy that dictated *Hewitt* also continues to foreclose same-sex couples' *Marvin* rights, although Wilson notes that Illinois does not offer same-sex couples a domestic partnership option).

111 Yoo v. Robi, 24 Cal. Rptr. 3d 740, 751 (Cal. Ct. App. 2005); Chiba v. Greenwald, 67 Cal. Rptr. 3d 86, 93 (Cal. Ct. App. 2007).

112 *Hewitt*, 394 N.E.2d at 1209.

Since *Hewitt* is not a gender-based decision, it's rationale could be adopted by a state that has a strong public policy against unmarried, unregistered[113] same-sex couples entering into a marriage-like relationship—a state like California.[114] To return to the question that started this section, then, should same-sex couples even have their *Marvin* agreements enforced, and if so, how? Clearly, if *Marvin* agreements are to be enforced at all, they must be available to, and subject to the same requirements for, same-sex couples as well as their opposite-sex counterparts, or else equal protection issues will arise.[115] More difficult is deciding how to enforce *Marvin* rights to ensure consistency and fairness. The answer lies in legislation, federal or state, with the caveat that state legislation in this regard is susceptible to repeal.[116]

113 Here, "unregistered" means same-sex couples that have opted not to become domestic partners. The logic is that same-sex couples that have not taken advantage of the most "marriage-like" relationship still sanctioned by the state may be at the mercy of a pro-marriage (or failing that, pro-domestic partner) public policy similar to *Hewitt*. An unmarried, unregistered same-sex partner, by asking a court to enforce a nonmarital cohabitation contract, is asking the court on some level to recognize and protect that partner's interest in a type of relationship contrary to public policy.

114 *See* Wilson, *supra* note 108, at 339–40 (arguing that the *Hewitt* could be applied to a same-sex cohabitation agreement). The author noted:

> Although the holding in *Hewitt* is in fact cognizant of the gender of the parties and the availability of marriage to them, it depends upon neither . . . Illinois courts would not enforce what in effect are private contracts for marriage-like relationships . . . [b]ecause [*Hewitt*'s] holding is not dependent upon the gender of the parties being different (or "opposite sex"), its applicability is likely not so restricted either. Such contracts between unmarried, same-sex couples likely cannot withstand a challenge raising *Hewitt* as a defense.

Wilson, *supra* note 108, at 339–40. California's same-sex cohabitation agreements are vulnerable to Wilson's warning about *Hewitt* because Proposition 8 parallels the comparable Illinois legislation in making a strong statement about public policy. *See Maine Voters Repeal Gay-Marriage Law*, MSNBC.COM (Nov. 4, 2009, 8:58 AM), http://www.msnbc.msn.com/id/33609492/ns/politics-more_politics/. *See also State Policies on Same-Sex Marriage*, *supra* note 107. Subsequently, other states' voters have approved ballot measures banning same-sex marriage. For example, Maine's vote to repeal same-sex marriage was surprising not only because Maine is a relatively progressive state, but also because the November 3, 2009 vote marks the first time an electorate has rejected a same-sex-marriage measure enacted by a *legislature*. All of the previously-rejected same-sex marriage initiatives had been put forth by courts. Strauss v. Horton, 207 P.3d 48, 63–64 (Cal. 2009). When even legislative pronouncements can be whisked away by voters, California's "pure contractual" approach may only be a ballot measure away from extinction.

115 Inasmuch as requiring any additional requirements for *same-sex* couples, *Marvin* agreements would impose special hardships not experienced by similarly-situated opposite-sex partners, thereby triggering equal protection issues. *See* Romer v. Evans, 517 U.S. 620, 633 (1996).

116 *See Hewitt*, 394 N.E.2d, at 1209; Wilson, *supra* note 108, at 336.

C. The Need for Legislative Recognition of Same-Sex Cohabiting Couples

If same-sex cohabiting partners wish to have their *Marvin* agreements consistently enforced, free from the vagaries of state electorates and courts and without the public-policy sword of Damocles[117] hanging over their heads, they might pin their hopes on federal legislation.[118] However, two obstacles exist that, if taken together, may render the option of federal intervention moot. First, and most significantly, if Congress has the authority to regulate cohabitation agreements, then the issue becomes one of federal law, not state law. However, *Marvin* agreements are essentially contracts, a subject that is typically the domain of state courts.[119] In this regard, hoping for federal intervention is something of a Catch-22.[120] Second, if marriage is solely a state question, many states (like California) do not support same-sex relationships, thus either disallow same-sex marriages or fail to offer domestic partnerships, or both.[121] It is possible that states that offer neither same-sex marriage nor domestic partnerships will nevertheless enforce *Marvin* agreements; however, as *Hewitt* illustrates, public policy lurks in the background of nonmarital

117 Defined as "an impending disaster," this idiom (first recorded in 1747) refers to the legend of Damocles, a courtier to King Dionysius. The king, tired of Damocles' incessant flattery, seated Damocles in a chair over which hung a sword suspended by a single hair to impress upon Damocles the precariousness of his position. THE AMERICAN HERITAGE DICTIONARY OF IDIOMS 629 (Christine Ammer ed., 1997).

118 When states' voters are 31-for-31 in rejecting same-sex marriage initiatives, and Maine voters make history by overturning a legislatively-produced same-sex marriage law, it seems that federal intervention is not only warranted, but necessary. *But see infra* note 126. Such federal recognition would take the form of a statute, but it would have to clear several hurdles that are discussed in Part V.B.

119 Federal courts acquire jurisdiction in cases that present a federal question under the Constitution or federal law, or cases where the parties are from different states and more than $75,000 is at issue. *See* 28 U.S.C. §§ 1331, 1332 (2006). By this definition, most cohabitation agreements will be relegated to state court.

120 The term "Catch-22," first coined in Joseph Heller's 1961 novel of the same name, is defined as "[a] situation in which a desired outcome or solution is impossible to attain because of a set of inherently illogical rules or conditions." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 292–93 (4th ed. 2000). *See also* THE AMERICAN HERITAGE DICTIONARY OF IDIOMS, *supra* note 117, at 108.

121 As of November 5, 2009, thirty-five states offered neither same-sex marriage nor domestic partnerships. Same-sex marriage is currently available in Connecticut, Iowa, Massachusetts, Maine, Vermont, and most recently New Hampshire, where same-sex marriage has been legal since the beginning of 2010. Christine Vestal, *Gay Marriage Legal in Six States*, STATELINE.ORG (June 4, 2009; 4:40 PM), http://www.stateline.org/live/details/story?contentId=347390. Domestic partnerships (also called civil unions) are available in some form in California, Colorado, Hawaii, Maine, Maryland, Nevada, New Jersey, Oregon, Washington and Wisconsin, plus the District of Columbia. FREEDOMTOMARRY, http://www.freedomtomarry.org/states.php (last visited Nov. 10, 2010).

relationship questions.[122] Third, and most troubling, federal legislation has effectively foreclosed meaningful recognition of same-sex cohabitating relationships. It not only defines marriage as a union between a man and a woman, but also allows states to refuse to recognize a "marriage" performed in any other state, thereby ensuring that "marriage" will mean whatever the enforcing state wants it to mean.[123] Thus, in many states, unmarried couples must overcome the presumption that their relationships are unworthy of protection because public policy favors a marriage relationship—the same point made in *Hewitt*.[124]

Despite the Maine debacle,[125] state legislation is a more promising option for same-sex cohabiting couples, particularly in a state like California that already recognizes same-sex couples through domestic partnerships.[126] The first step in devising proposed legislation is to understand the contours of the issue; in California, the *Jones* case showed that same-sex cohabiting

122 Public policy does not always weigh in on *Marvin* decisions, perhaps because such agreements—particularly among same-sex couples—are comparatively rare. But *Hewitt* is an example of how a court can look at a *Marvin* decision through a public-policy lens, without promising results. States vary widely in their treatment of cohabitation contracts. A sampling shows that Georgia, Illinois and Louisiana hold such agreements unenforceable due to their immoral nature. In contrast, Kansas, Washington and West Virginia require no formal or implied agreement, oral or written, but ask only that the partners have lived together for some period of time in a stable domestic relationship. Texas and Minnesota (to some degree) require express agreements to satisfy the Statute of Frauds, while others, including Michigan, New Hampshire, New York and North Dakota require express agreements and will not enforce implied contracts. In states where cohabitation agreements are not subject to the Statute of Frauds, including Arizona, Colorado, Florida and North Carolina, courts tend to follow the *Marvin* rationale of enforcing agreements that are not based upon sexual considerations, or at least have considerations other than sexual services. Furthermore, some states, such as Arizona, Connecticut, Hawaii, Missouri, Nevada, New Jersey and Wisconsin, recognize implied agreements. William A. Reppy, Jr., *Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile*, 55 SMU L. REV. 273, 275–90 (2002).

123 The federal Defense of Marriage Act, passed in 1996, announces itself as "an Act to define and protect the institution of marriage." Defense of Marriage Act, Pub. L. No. 104-199, § 1738C, 110 Stat. 2419, 2419 (1996). Under the heading "Powers Reserved to the States," the Act provides that:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. . . . [T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act § 1738C.

124 Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979).

125 *See* Wilson, *supra* note 108.

126 The idea here is that a state offering neither same-sex marriage nor domestic partnerships has no compelling policy reason to enforce *Marvin* agreements, insofar as those agreements endorse unmarried relationships.

partners face severability issues, while Proposition 8 and California's domestic partner statutes show that California's public policy strongly favors formally-recognized relationships regardless of sex.[127] Thus, a proposed statute must accomplish two primary things if it is to afford same-sex couples a consistent, uniform method of enforcing *Marvin* agreements. First, it must specifically enumerate under what circumstances a same-sex couple may contract for property and services, and particularly when sexual services become severable.[128] Second, it must ratify the same-sex cohabiting relationship in a way that neither infringes upon the state's public policy favoring marriage, nor seeks to resurrect common-law marriage.[129]

In the end, whether it favors or disfavors same-sex cohabitation agreements, the California Legislature must clarify the rights of same-sex cohabiting couples because the case law is sparse and inconsistent[130] and Proposition 8 has ushered in a public policy unfavorable to same-sex couples.[131] Just as Proposition 8 defines the rights of same-sex couples wishing to marry, a same-sex cohabitation statute should define the rights of same-sex couples who do *not* wish to marry, or its equivalent.[132] In an effort to urge the Legislature to decide the issue, this article thus proposes two statutes, one favoring same-sex cohabitation agreements and one disfavoring such agreements. A statute designed to enforce same-sex *Marvin* agreements on a purely contractual basis has already been proposed, but came at a time when California's public policy landscape was vastly different.[133] Therefore, each proposed

127 Both traditionally solemnized marriage and domestic partnerships have been sanctioned by the Legislature, and hence qualify as "formally recognized."

128 *See supra* note 89 and accompanying text.

129 *See* Norman v. Norman, 54 P. 143, 146 (Cal. 1898) ("Prior to 1895, section 75 [of the California Civil Code] provided for marriages by declaration, without the solemnization required by section 70; however, the act of March 26, 1895, swept away that easy process of marriage.").

130 "Sparse and inconsistent" refers to the relative dearth of *Marvin* decisions, and the clashing *Jones* and *Whorton* decisions in particular.

131 *See supra* note 98 and accompanying text.

132 "Marriage equivalent" refers to domestic partnerships as a marriage-like option for same-sex couples.

133 *See generally* Kristin Bullock, Comment, *Applying* Marvin v. Marvin *to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029 (1992). When Bullock published her Comment, the prevailing sign of California's public policy was section 308.5 of the California Family Code which restricted California's recognition of marriage to those between a man and a woman and was enacted following the passage of Proposition 22. Since Bullock's article in 1992, Proposition 8 and the domestic partnership statutes have changed California's views on same-sex relationships considerably.

statute will reflect the public policy aspect implicit in California's same-sex relationships, which the earlier statute did not.[134]

V. TWO PROPOSED CALIFORNIA COHABITATION STATUTES REFLECTIVE OF PUBLIC POLICY

A. Proposed California Family Code Sections 297.6 and 297.7: Rights of Same-Sex Couples to Make Enforceable Cohabitation Agreements[135]

The following are two proposed statutes for the California legislature to consider in order to clarify the uncertainty surrounding Proposition 8. One statute allows California's same-sex cohabiting couples to make enforceable property and support agreements, while respecting the state's public policy favoring marriage as expressed in Proposition 8. The other statute disallows same-sex couples that are not registered as domestic partners from making cohabitation agreements, with the domestic-partner restriction likewise reflective of California's public policy.

> **§ 297.6:** Unmarried couples, regardless of sex, shall have the full and exclusive right to make enforceable agreements for support and division of property, their marital status notwithstanding, as part of any committed relationship, whether including sexual relations or not, where the agreement expressly or impliedly lists any reasonable consideration for the services rendered other than the mere instance of sexual relations.
>
> This section recognizes that such agreements arise from relationships that in no way resemble traditional marriage between a man and a woman, and in enforcing this section and respecting the current public policy of this state, the Legislature in no way approves of or endorses such relationships for their moral character, or for any other reason. Furthermore, this section in no way grants unmarried same-sex couples any of the rights

134 While Bullock's statute is intelligently fashioned, it treats same-sex cohabitation contracts as solely a contract issue, while Proposition 8 and other California legislation clearly indicates the state has a strong public policy favoring traditional marriage. Furthermore, Bullock supports her contention that California is increasingly amendable to same-sex *Marvin* agreements by citing only *Whorton* and one Texas case, which does not represent a resounding mandate. Simply put, no one knows whether California courts will continue to enforce same-sex *Marvin* agreements at all, particularly in light of Proposition 8's seismic shift of the public-policy landscape. California courts may continue to treat *Marvin* agreements as purely contractual issues divorced from public policy, but this Comment argues that it is shortsighted to assume that what were once purely contractual considerations will always remain so.

135 These section numbers were chosen so the proposed statutes would immediately follow the first domestic partnership statute in the California Family Code.

enjoyed by married persons or domestic partners, nor should any provision of this section impair or otherwise affect the rights of traditional married couples to enjoy any of the rights afforded them under California law.

(a) For the purposes of this section, the following definitions shall apply:

(1) "Unmarried couple" shall refer to the committed relationship of two persons, regardless of sexual orientation, who live full-time with one another in the same residence but have not solemnized their union with formal state recognition, either traditional marriage or a domestic partnership.

(2) "Sex" shall refer to the biological orientation of each partner, with transgendered individuals to be classified according to their biological sex at the time when the agreement was made.

(3) "Agreement" shall refer to an enforceable contract with ample consideration, according to generally accepted principles of California contract law.

(4) "Marital status" shall refer to a traditional marriage as defined in the California Constitution and section 300 of the California Family Code ,[136] or a domestic partnership as set forth in section 297 of the California Family Code, or the absence of either relation thereof.

(5) "Committed relationship" shall refer to relationships where both partners have been exclusively domiciled with one another in a common residence, and where the partners have engaged in sexual relations and other indicia of an exclusive, intimate relationship, for a period of no less than ten (10) years.[137] Partners whose relationships do not meet the ten year standard, yet who seek to enforce such property or support agreements, will have their recovery, if any, prorated according to a percentage commensurate with the length of their relationship under this section.[138]

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136 "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making the contract is necessary." CAL. FAM. CODE § 300 (Deering 2010).

137 This provision is intended to reflect section 4336 of the California Family Code regarding spousal support, where the legislature defines a "long marriage" as one of ten year duration or more. CAL. FAM. CODE § 4336 (Deering 2010). Just as a long marriage has different spousal support requirements than a short one, so too should cohabiting partners have different obligations to one another depending on the length of their cohabitation.

138 Likewise, this proposed term is based upon the California Family Code's spousal support provisions. Among the factors governing spousal support is the expectation that a party seeking support will be self-supporting within a time equivalent to one-half of the

(6) "Sexual relations" shall refer to the physical act and shall be construed as one part of, but not an essential or irreducible aspect of, a committed intimate relationship.

(b) For the purposes of this section, home-based activities, including but not limited to cooking, cleaning, and housework in general, and activities typical of a committed partner, including but not limited to moral and emotional support, are not to be considered related in any way to the couple's sexual relationship, and may constitute adequate, independent consideration for any agreement.

§ 297.7: Unmarried couples, regardless of sex, who share a common residence shall be prohibited from making enforceable agreements for support and division of property, regardless of the length of their relationship, where such couples share a committed relationship marked by sexual relations and/or other indicia of an exclusive intimate relationship, and the partners are neither legally married to one another under section 300 of the California Family Code nor registered together as domestic partners under section 297 of the California Family Code.

(a) For the purposes of this section, the following definitions shall apply:

(1) "Unmarried couple" shall refer to the committed relationship of two persons, regardless of sexual orientation, who live full-time with one another in the same residence but have not solemnized their union with formal state recognition, either traditional marriage or a domestic partnership.

(2) "Sex" shall refer to the biological orientation of each partner, with transgendered individuals to be classified according to their biological sex at the time when the agreement was made.

(3) "Agreement" shall refer to an enforceable contract with ample consideration, according to generally accepted principles of California contract law.

(4) "Marital status" shall refer to a traditional marriage as defined in the California Constitution and

marriage's duration, up to the ten year limit expressed in section 4336. The idea is that, theoretically, the longer a marriage lasts, the more responsibility one partner has to support the other afterward. CAL. FAM. CODE § 4320 (Deering 2010). The author has adapted the provision to fit a cohabitation agreement, whereby the longer the cohabitation, and therefore the longer the "marriage-like" relation lasts, the greater the expectation that one party must support the other under the agreement.

section 300 of the California Family Code[139], or a domestic partnership as set forth in section 297 of the California Family Code, or the absence of either relation thereof.

(5) "Committed relationship" shall refer to relationships where both partners have been exclusively domiciled with one another in a common residence, and where the partners have engaged in sexual relations and other indicia of an exclusive, intimate relationship, for a period of no less than ten (10) years.[140]

(6) "Sexual relations" shall refer to the physical act and shall be construed as an irreducible aspect of a committed intimate relationship, consistent with the interpretation of the California judiciary.

B. Note on Proposed Cohabitation Statutes

The point of these proposed statutes is to urge the California Legislature to clarify the state of *Marvin* agreements under the new Proposition 8 public policy.[141] Section 297.6, which allows *Marvin* agreements, must navigate a public-policy minefield that is hostile to same-sex relationships, so it is much longer and requires a more careful definition of terms.[142] In contrast, section 297.7, which disallows *Marvin* agreements regardless of sexual orientation, is shorter and less ambiguous, and is supported by a public policy subtext disfavoring non-formalized marriage relationships.[143] While same-sex marriage statutes are not permanent,[144] they can at least offer some insight as to what rights, if any, same-sex couples have in making and enforcing

139 *See supra* note 137.

140 *See supra* note 137.

141 To the extent the California Supreme Court insists Proposition 8 merely reserves the designation "marriage" for opposite-sex couples and otherwise does not affect couples' constitutional rights to enjoy intimate, committed relationships, the court has already spoken regarding same-sex couples' *Marvin* rights. Nothing intrinsic to a same-sex relationship *qua* same-sex relationship should affect its *Marvin* standing. *See supra* note 93. However, the *Strauss* decision did not address the practical realities of *Marvin* agreements, and such contractual agreements are not under constitutional purview anyway, but are governed instead by civil law—hence the urgency for legislative clarification.

142 *See supra* Parts V.A & B. A particular conundrum is distinguishing cohabitation from marriage-like relationships in light of California's public policy favoring marriage or other formalized relationships, e.g., domestic partnerships. The challenge lies in enforcing agreements arising from relationships that are sufficiently intimate and lengthy so as to warrant governmental protection and recognition, without treating those relationships too much like marriages.

143 *See supra* Part V.B. This proposed statute did not need to address the severability of sexual relations, nor the possibility that a same-sex relationship might presume to be "marriage-like" in the sense that the *Hewitt* court disfavored. *See supra* note 105.

144 *See supra* note 108.

Marvin agreements. After all, some information, however fleeting, is preferable to perpetual uncertainty.

CONCLUSION

With the enduring popularity of cohabitation as a lifestyle choice,[145] it is noteworthy that California courts have yet to clarify cohabitating same-sex partners' rights regarding enforceable property and support agreements.[146] Same-sex partners particularly deserve clarification because their relationships have been circumscribed by legislation ranging from Proposition 22 to Proposition 8.[147] Highlighting the need for clarity on this issue and showing how recent shifts in public policy color the enforceability of such agreements, this Comment offers two proposed statutes to decide the viability of today's same-sex *Marvin* agreements.[148] Proponents of same-sex marriage have talked of mounting a ballot challenge to Proposition 8, perhaps as early as 2012, leaving only speculation in the meantime as to whether same-sex couples' rights have fundamentally changed since Proposition 8 passed in 2008.[149] California's same-sex couples will thus continue their uneven journey along the "yellow brick road," but it is unclear whether they will ever reach the Emerald City.

POSTSCRIPT

The avowed ballot challenge[150] to Proposition 8 was mooted on August 4, 2010, when District Court Judge Vaughn R. Walker ruled in *Perry v. Schwarzenegger* that Proposition 8 was unconstitutional.[151] Judge Walker's decision, which unequivocally found that Proposition 8 violated the Equal

145 *See supra* discussion Part II.A.

146 This statement not only points out the ambiguity inherent in severing sexual relations from an agreement for services, but also suggests that California courts will not continue to overlook public policy considerations in addressing *Marvin* agreements, if they ever have.

147 Domestic partnership legislation, as discussed earlier, has also circumscribed same-sex couples' rights, although it has arguably been a positive influence.

148 *See supra* note 111.

149 Attendees at a Chapman University School of Law presentation in November 2009 indicated an effort to repeal Proposition 8 was forthcoming, if not in 2010, then in 2012. They will be greeted by a wearied, but not unsympathetic, electorate: in a November 2009 poll, Californians indicated they supported marriage rights for same-sex partners by a 51% to 43% margin. However, nearly 60% of those polled indicated they did not want to vote on the issue in 2010. Cathleen Decker, *State's Voters Support Same-Sex Marriage*, L.A. TIMES, Nov. 8, 2009, at A4, *available at* http://articles.latimes.com/2009/nov/08/local/me-gay-marriage-poll8 (last visited Dec. 10. 2010).

150 *See supra* note 149.

151 Jesse McKinley & John Schwartz, *California's Ban on Gay Marriage is Struck Down*, N.Y. TIMES, Aug. 5, 2010, at A1, *available at* http://nytimes.com/2010/08/05/us/05prop.html.

Protection Clause of the Fourteenth Amendment,[152] immediately set off jubilation among supporters of same-sex marriage and strident rhetoric among those opposed.[153] Supporters of the legislation immediately filed a motion to stay the decision, which Judge Walker promptly denied.[154] Predictably, the *Perry* decision sparked a series of appeals, not only to the Ninth Circuit Court of Appeals, but also to Governor Schwarzenegger and Attorney General Edmund (Jerry) Brown, pleading with them to defend Proposition 8.[155] Neither has indicated that he will defend the measure, which is slated to go before the Ninth Circuit in December.[156] Proposition 8 is expected to reach the United States Supreme Court no matter what the Ninth Circuit decides, with some already speculating which Justice might provide the swing vote on the sharply-divided Court.[157]

Yet, while the recent hubbub over Proposition 8 makes for good newspaper and Internet copy, it leaves unanswered the question that inspired this Comment: whether California's same-sex couples will enjoy greater freedom to make and enforce cohabitation agreements. Most of the public's attention has focused on the agitation over Proposition 8—as if the *Perry* decision needed any historical boost, it came down on President Barack Obama's forty-ninth birthday—and the controversy has drawn legal luminaries such as David Boies and Ted Olson, who became household names during the *Bush v. Gore* controversy.[158] Meanwhile, same-sex couples eschewing domestic partnerships, who must resort to *Marvin* agreements, have remained largely anonymous and on the sidelines.

In that regard, California's cohabitating same-sex couples are to their marriage-seeking counterparts what Deanna Durbin is to Judy Garland. Durbin was one of MGM's first choices for

152 Perry v. Schwarzenegger, 702 F. Supp. 2d 1132, 1138 (N.D. Cal. 2010).

153 *See supra* note 151.

154 *Perry*, 702 F. Supp. 2d at 1138–39. Judge Walker found that proponents of Proposition 8 met neither of the two most critical requirements for issuing a stay: they could not show the likelihood of success on the merits, and they could not show irreparable injury were their motion denied. *Id.* at 1134–38. Judge Walker also questioned whether proponents of the measure had standing to pursue their appeal, but found their argument unconvincing regardless. *Id.* at 1134–36.

155 Susan Ferriss, *Supporters Pressure Brown, Schwarzenegger to Defend Prop. 8 in Court*, SACBEE.COM (Sept. 2, 2010, 12:00 AM), http://www.sacbee.com/2010/09/02/2999833/supporters-pressure-brown-schwarzenegger.html.

156 *Id.* Judge Walker noted both Brown and Schwarzenegger's unwillingness to defend Proposition 8 in his decision finding the legislation unconstitutional. *See supra* note 151.

157 Edward A. Adams, *House Supports Marriage Equality Resolution*, 96 A.B.A. J. 62, 62 (2010), *available at* http://www.abajournal.com/news/article/aba_backs_marriage_equality_for_gays_and_lesbians.

158 *See supra* note151.

the role of Dorothy Gale in *The Wizard of Oz*, but has faded into obscurity as Garland became synonymous with the role and the film.[159] If history is a guide, Proposition 8 will be associated with same-sex marriage in the same way Garland is associated with *The Wizard of Oz*, and same-sex cohabitating couples may fade into oblivion the same way Durbin is now best known as the answer to a trivia question. The comparison is apt: Durbin had her heyday in the late 1930s but is largely anonymous now,[160] just as same-sex cohabitation had its heyday in the wake of *Marvin* but such couples get scant attention now. The purpose of this Comment is to highlight the lesser-known stakeholders in the same-sex rights debate, in the hope that California's same-sex couples get better directions from California courts than Dorothy got from the Scarecrow.

159 Durbin, a Canadian-born actress who won a special "Juvenile Oscar" in 1938, had a film career spanning the late 1930s and 1940s. *Deanna Durbin*, INTERNET MOVIE DATABASE, http://www.imdb.com/name/nm0002052/bio (last visited Nov. 12, 2010). For more on Durbin, see Tim Dirks' review of *The Wizard of Oz* on the American Movie Classics website, http://www.filmsite.org/wiza.html.

160 PAULINE KAEL, 5001 NIGHTS AT THE MOVIES 136 (1991). As for the relative invisibility of same-sex couples after *Marvin*, it bears noting that the only prominent same-sex cohabitation cases, discussed *supra*, arose in its immediate aftermath. One puzzling issue is what has happened to all the same-sex *Marvin* agreements since then. Same-sex couples might not be making *Marvin* agreements, or might not be enforcing them, or might simply be keeping their agreements out of court. Which factor predominates is, unfortunately, beyond the scope of this Comment.