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THE ILLUSORY RIGHTS OF *MARVIN v. MARVIN* FOR THE SAME-SEX COUPLE VERSUS THE PREFERABLE CANADIAN ALTERNATIVE — *M. v. H.*

Sharmila Roy Grossman[*]

INTRODUCTION

It has been my good fortune to know and befriend an individual named Charlie. He lives in California and is thirty-five years old. At the age of twenty-four, he acquired a very lucrative job doing exactly what he loved, writing. He excelled, writing several published pieces while his salary climbed quickly. At the age of twenty-eight, he shocked those who knew him when he left his dream job and moved to Sacramento, California. Charlie had been in a non-marital, monogamous relationship for seven years with Gregg. Gregg had the opportunity of a lifetime to form a partnership and begin his own firm in Sacramento, California, requiring him to move. Charlie moved with Gregg, without hesitation. When Charlie left San Diego, he had almost $75,000 saved.

After moving, the couple decided that the only way this amazing opportunity would really work is if Charlie "temporarily" sacrificed employment as a journalist to help get the new business off the ground. Charlie did so, again, without hesitation. This arrangement, however, was not so temporary and continued for several years. During this time, Gregg earned all the income and Charlie became instrumental in running the firm's office. Suddenly, Charlie's partner of fourteen years, asked him to leave their home and never come back. Gregg and Charlie had agreed, when they moved, that Gregg would financially provide for all of Charlie's needs. Because Gregg had asked Charlie to basically give up his career, Gregg also agreed to take care of Charlie if their relationship ended. When they made the agreement, they were both completely secure their relationship would never end.

The title to their home was in Gregg's name. Charlie did not have any legal interest in the general partnership. The $75,000 Charlie had in the bank, when he first moved to Sacramento with Gregg, was invested in

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[*] J.D. Candidate, April 2002, California Western School of Law; B.A., Psychology, San Diego State University, 1999. I would like to thank my husband Darren A. Grossman for his support and those times when he protected me from all the world, and sometimes myself, during these last three years, and making this article and the completion of law school possible. I would also like to thank my parents and grandparents, whose assistance and support was immeasurable and will never be forgotten. Lastly, thank you Samir for having the courage to be who you are, I love you.

Gregg's firm over the seven years in Sacramento–without any agreement or expectation of repayment.

Charlie came home to San Diego. He now lives in a small studio apartment that he can barely afford, by writing for a community newspaper with a circulation fewer than 2,000. Meanwhile, Gregg lives in a very large home with a new lover and a net annual income of over $300,000. Charlie consulted an attorney only to learn that the current law might help, but it would be an expensive endeavor and there could be little chance of success.

Why should this be the case? Charlie has invested time, money, and given up a career to support and nurture Gregg, and other non-married couples are entitled to a remedy in these situations. The attorney Charlie consulted explained that judges are *unique individuals* and as such, each has their own unique interpretation of legal precedent. The real answer to this question is that Charlie is homosexual, and his same-sex relationship is still unaccepted by society. Somehow this means that Charlie's legal injuries are less than what a heterosexual would suffer in the exact same scenario.

Charlie's case would be more legally viable if he had invested fourteen years of his life and his career in a relationship with a *woman*. Homosexuality has sweeping legal effect on any claim Charlie would bring in regard to his romantic relationship. Homosexuals are denied basic rights far beyond equitable division of property: Charlie would not be able to bring a wrongful death suit for his homosexual partner;[1] Charlie is not legally entitled to any employer benefits offered through his homosexual partner's company; Charlie has no right to participate in any medical decision of his partner; and the list continues.

This Comment centers on *Marvin v. Marvin*,[2] a case that some have argued confers property rights on homosexual couples. The discussion specifically focuses on the linguistic and semantic choices made by the California Supreme Court when fashioning the *Marvin* opinion and the implications and consequences there from.

It should not be forgotten that homosexuals are denied a multitude of other human rights that heterosexuals are privileged to enjoy and that homosexuals suffer unequal protection under the laws. Unfortunately these other forms of discrimination that same-sex couples endure are beyond the scope of this Comment. For now, this Comment centers on the property rights of an American citizen, who happens to be homosexual, after the dissolution of a cohabiting relationship.

The first section of this Comment discusses the *Marvin* decision and how it theoretically could apply to the same-sex couple. The second section discusses the actual judicial treatment of *Marvin* and subsequent courts'

1. *But see* Smith v. Knoller, 19 SCV 319532 (Cal. Super. Ct. 2001) (very recently there was a shift in the trend of denying homosexuals the same rights as heterosexuals when a California court allowed a wrongful death cause of action to go forward, which was brought by a homosexual partner of the deceased).

2. 557 P.2d 106 (Cal. 1976).

utilization of *Marvin's* language for resolving homosexual cohabitors' property disputes. The final section will explore a more effective judicial opinion recently decided in Ontario, Canada, to divide property between same-sex couples after cohabitation.

I. MARVIN v. MARVIN

During the 1960s and 1970s, there was an 800% increase in the number of adults opting to cohabit rather than marry.[3] This major shift in society created problems regarding property rights when death or separation occurred. The California Supreme Court addressed this problem in *Marvin v. Marvin.*[4] The issue of property rights after a period of cohabitation, however, is more severe for same-sex couples that cohabit. This is due to the legal status, or lack thereof, that same-sex couples endure in this country. Property rights are a central issue in the ongoing debate over what rights homosexuals should be afforded. Because homosexuals are prohibited from marrying, they are forced into cohabitation when involved in monogamous relationships. Many states now view *Marvin* as the seminal case establishing cohabitor property rights in the United States.[5]

A. Facts of the Marvin *Case*

Lee and Michelle Marvin began living together in October of 1964 as non-marital partners.[6] At that time Michelle and Lee entered into an oral contract in which they agreed that they would combine their efforts and earnings and would share all property equally.[7] They also agreed to hold themselves out to the public as husband and wife, and further agreed that Michelle would forego her career as an entertainer in order to be Lee's companion, homemaker, housekeeper, and cook.[8] In return, Lee promised to financially support Michelle and fulfill her needs for the rest of her life.[9] In 1970, six years after the relationship began, Lee insisted that Michelle leave "his" home.[10] He continued to meet Michelle's needs until November of the next year, when he stopped providing support, and Michelle sued for breach

3. *Id.* at 110 n.1. Today there are more than four million same-sex couples living in America, which means roughly 10% of Americans are homosexual. Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families and the Law*, 26 S.U. L. REV. 1, 20 (1998).

4. *See id.*

5. Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1340 (1997). *See* Lisa R. Zimmer, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681 (1990).

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

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

of their oral contract.[11] The trial court granted Lee's motion for summary judgment stating that the 1964 agreement was made when Lee was still married and such an "agreement violated public policy because it derogated the community property rights of Betty Marvin, defendant's lawful wife."[12]

B. The Court's Opinion

The California Supreme Court reviewed cohabitation agreements prior to *Marvin*.[13] Specifically, one case held "[i]f a *man* and *woman* [who are not married] live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property."[14] As prior courts have, the *Marvin* Court also enforces the agreement entered into by the cohabiting parties, but not in entirely the same fashion. *Marvin* contains significant differences. The *Marvin* Court ruled:

> [T]he courts should enforce express contracts between nonvarital [sic] partners except to the extent that the contract is explicitly founded on the consideration of meretricious[15] sexual services. [ ]In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract . . . or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies . . . when warranted by the facts of the case.[16]

The first major difference between the *Marvin* decision and previous holdings is the Court's deliberate use of gender-neutral language. The opinion makes no reference to "man and woman" as did previous cases. Instead, the *Marvin* Court employed the term "nonmarital partners" to describe cohabitors.[17] This gender-neutral language is the reason that many strongly believe the *Marvin* decision applies to homosexual, as well as heterosexual, cohabitors.[18] Indeed there are cases that have applied the *Marvin* precedent to

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11. *Id.*

12. *Id.* at 111 n.3. Michelle requested to amend her complaint to reflect that the agreement was reaffirmed after the divorce was final in January of 1967. The trial court, however, did not allow her leave to amend. This fact makes it more than likely that the trial court's judgment was based on an alternative rationale other than Betty Marvin's community property rights. *Id.*

13. Vallera v. Vallera, 134 P.2d 761 (Cal. 1943).

14. *Id.* at 763 (emphasis added).

15. This term is defined as "[o]f the nature of unlawful sexual connection." BLACK'S LAW DICTIONARY 988 (6th ed. 1990). For a discussion on the alternative meaning of meretricious, see *infra* note 32.

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

17. *Id.* at 112.

18. WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE FAMILY LAW, 20:147 (The Rutter Group 2001); Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J. FAM. L. 497, Part VI (1990/1991); Christensen, *supra* note 5, at 1341.

same-sex couples.[19] Some scholars have lauded *Marvin* for establishing long awaited quasi-marital property rights for homosexuals (as opposed to quasi-marital *status*).[20] Those strongly opposed to same-sex marriage criticize the case.[21] Overall there seems to be some agreement among both supporting and opposing commentators that *Marvin* may be appllied to same-sex couples.

The second major difference between the *Marvin* decision and the pre-*Marvin* cases is that for the first time, the Court clearly held that homemaking services are adequate consideration for a cohabitation agreement.[22] While the court states that homemaking services are valid consideration, however, it reiterates that mere sexual services are not to be considered adequate consideration.[23] The opinion goes on to clarify that parties cannot contract for payment of sexual acts because this amounts to an illegal contract for prostitution.[24]

The court, likely anticipating a defendant's argument, adds a caveat: "The fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses."[25] In other words, the consideration for a promise of financial support and sharing of property cannot be a promise of sexual services, but the fact that the cohabiting adults have sexual relations does not make their cohabitation agreement illegal and thereby unenforceable when there are other forms of consideration present. The agreement would be unenforceable *only* if it rests entirely upon consideration for meretricious sexual services.[26] The court applied the traditional contract principle of severability in making this point. This principle states that if parts of the contractual consideration are illegal, any severable portion of the contract, which is supported by independent legal consideration, will still be enforced.[27]

The third major departure from pre-*Marvin* cases is the type of agreements entered into by non-marital cohabiting partners that the Court was willing to enforce. The court stretches previous case law so that more cohabitation agreements are deemed enforceable. Pre-*Marvin* case law prohibited recovery for breach of an express cohabitation contract if the contracting

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19. *See* discussion *infra* Parts II.A and II.B. These cases will be discussed in detail.

20. Rhonda R. Rivera, *Our Straight Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015, 1123-24 (1999). *See* Melton, *supra* note 18.

21. *See generally* Lynn Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1 (1996).

22. *Marvin*, 557 P.2d at 113 n.5.

23. *Id.* at 116.

24. *Id.*

25. *Id.* at 113.

26. *Id.* The court acknowledges that almost every agreement between non-marital partners who are cohabiting will involve a mutual sexual relationship. Therefore, this should not be the standard for measuring a valid cohabitation agreement. *See id.* at 114.

27. *Id.* at 114.

parties were not a man and a woman.[28] The *Marvin* Court leaves out the terms man and woman, suggesting the sex of the contracting parties has no effect on enforceability. Additionally, after *Marvin,* legal credence is also given to implied contracts, because a court may inquire into the actions or conduct of the cohabitants to determine if an implied contract exists.[29] The Court goes even further and provides *dicta* stating that a nonmarital partner may recover under the doctrine of *quantum meruit* for the reasonable value of the services rendered.[30] The Court's liberal construing of these agreements suggests its willingness to adapt to changing social mores. Its liberal attitude, however, is questionable towards the end of the Court's opinion.

C. Marvin's Potential Application to Same-Sex Couples

Throughout the *Marvin* opinion the Court takes great pains to use gender-neutral language. One can only guess why this deliberate language was used, because the court never states outright the reason it chose to use terms such as "nonmarital partner" and "nonmarital relationships." This poses a problem for same-sex couples. Most legal analysts have concluded that the Court intended its decision to apply to same-sex couples as well as heterosexual couples.[31] The fact that the Court has not stated such an intention expressly has, in effect, created a barrier in the case law rather than a right for same-sex partners reflecting the changes in society as the court claimed it intended to do.[32]

The Court's silence, as to what type of non-marital relationships *Marvin* will apply, is observed by Justice Clark in *Marvin's* dissenting opinion: "the majority fails to advise us of the *circumstances* permitting recovery, *limitations* on recovery, or whether their numerous remedies are cumulative or exclusive."[33] The Court might have intended to open the door for homosexual property rights, but it provided the opportunity to slam it shut in the future

28. *See* Vallera v. Vallera, 134 P.2d 761, 763 (Cal. 1943).

29. *Marvin,* 557 P.2d at 122. The terms "express" and "implied" do not pertain to whether the agreement was oral or in writing, but instead they reflect whether the agreement is shown by direct words of the parties (either spoken or written), which is considered an express contract, or whether the agreement is shown through the conduct or actions of the parties, which is considered an implied contract. *Id.* at 110.

30. *Id.* at 122.

31. HOGOBOOM & KING, *supra* note 18, 20:147.

32. *Marvin,* 557 P.2d at 122. There is yet further language in the *Marvin* opinion that could indicate the Court may not have truly intended its decision to apply to homosexual cohabitants. The Court holds that agreements between cohabiting adults regarding the distribution of property acquired during the relationship shall be given legal credence except in the case that such agreement rests explicitly on the consideration of *meretricious* sexual services. *Id.* at 110. The term meretricious has different interpretations and could indicate something of an unlawful sexual nature *or* involving two people of the same sex. BLACK'S LAW DICTIONARY 412 (pocket ed. 1996). If the court used "meretricious" in the latter sense, then it is clear that they did not intend to enforce cohabitation agreements between same-sex couples.

33. *Marvin,* 557 P.2d at 123 (Clark, J., dissenting) (emphasis added).

by not expressly holding that the law must apply to all cohabitants, regardless of gender.

Marvin's majority opinion provides further language to build an argument that it does not apply to homosexual couples. In a footnote, the court adds,

> Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; *the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise.*[34]

Allowing a homosexual plaintiff to recover a portion of the property acquired during same-sex cohabitation can be easily construed as an evolution of equitable remedies, which some courts could find unsuitable. The language in *Marvin* (emphasized above) allows future courts too much leeway and thereby makes it easier for those courts to deny recovery to a homosexual plaintiff by deeming the remedy "unsuitable." It is apparent at the beginning of footnote twenty-five that the Court is attempting to construct a holding that applies to all cohabitation agreements; however, the Court's "suitability" clause created a rule that resembles a swaying building that could easily collapse on itself at anytime.

II. SUBSEQUENT JUDICIAL TREATMENT OF *MARVIN* AS APPLIED TO SAME-SEX COUPLES

Although the holding of *Marvin* contains gender neutral language, thereby suggesting that its rule could extend to same-sex relationships, the judicial treatment of *Marvin v. Marvin* indicates the judiciary's unwillingness to grant property rights to cohabiting homosexuals. There are two cases directly on point in California, which seriously impact the application of *Marvin* to same-sex cohabitants: *Jones v. Daly* and *Whorton v. Dillingham.*

A. Jones v. Daly[35]

Randall Jones began cohabiting with James Daly in March of 1976. Jones and Daly agreed they would combine their efforts and earnings, share all property equally regardless of who had title, and hold themselves out to the public as cohabiting mates.[36] In addition, they agreed Daly would pay Jones an allowance for his personal use, and in return, Jones would "render his services as a lover, companion, homemaker, traveling companion, housekeeper and cook to Daly."[37] The couple cohabited until Daly's death.

34. *Id.* at 123 n.25 (emphasis added).
35. 176 Cal. Rptr. 130 (Ct. App. 1981).
36. *Id.* at 131.
37. *Id.*

At the time of his death, Daly had substantial real and personal property, which was acquired during the cohabitation and "value[d] in excess of two million dollars."[38] Daly's executors took possession of the property. Jones filed suit claiming that under their oral cohabitors agreement, all of the "cohabitors equitable property" was to be divided equally between himself and Daly.[39] The defendants demurred, stating "the 'cohabitors agreement' is [sic] unenforceable because the complaint show[ed] on its face that plaintiff's rendition of sexual services to Daly was an express and inseparable part of the consideration for the agreement."[40] The trial court sustained the defendant's demurrer. This Court of Appeal upheld the decision, inferring that the word "lover" used in the pleading referred to sexual acts that formed "an inseparable part of the consideration for the [] agreement."[41]

This case teaches us more about how to create a technically proper pleading for a *Marvin* action than it does about the relevant substantive law regarding cohabitation agreements. The *Jones* Court reached its decision based on a minor technicality and shaky inferences regarding sexual acts between homosexual men. Essentially, the *Jones* Court has created a rule that a plaintiff, especially a homosexual one, should not include words such as "sex" or "lover" or other similar words when filing a *Marvin* action. *Jones* effectively narrowed the *Marvin* decision, and by extension, homosexuals' rights to contract with one another regarding the disposition of their real and personal property.[42]

More importantly, *Jones* provides additional strength to the elusive barrier already present in *Marvin*, preventing enforcement of cohabitor agreements between same-sex couples. After *Jones,* it is easier to show that the implied or express contract was illegal (i.e. invalid) and therefore unenforceable by merely alleging in the complaint that the parties engaged in sexual activity with one another, despite many other forms of valid consideration. This was not the "intention" of the *Marvin* court, at least when contemplating heterosexual cohabitants. This twisted application of precedent is strong evidence of judicial distaste for homosexuality. The justices in *Marvin* noted

38. *Id.*

39. *Id.*

40. *Id.* at 132. The defendants based their demurrer on the *Marvin* holding, which prevents recovery for breach of a cohabitation agreement if illegal consideration, such as meretricious sexual services, is inseparable from legal consideration. Marvin v. Marvin, 557 P.2d 106, 112 (Cal. 1976).

41. *Jones*, 176 Cal. Rptr. at 133. The Court noted among other things that the plaintiff and Daly engaged in sexual activity during their relationship and acted as two people would who had "discovered love" and the Court considered this to be sufficient evidence that sexual services was the predominant consideration of their cohabiters agreement. *Id.*

42. *See* Zimmer, *supra* note 5, at 697. Zimmer states, "[t]he primary drawback to the contract alternative is that same-sex couples must eliminate any reference to their sexual relationship from the document. Courts read admission of sexual intimacy in written documents as consideration for the agreement rendering such cohabitation agreements unenforceable." *Id.* This current judicial sensitivity to the mention of a sexual relationship, among a laundry list of other valid and legal consideration, is a direct result of the *Jones* decision.

that many cohabiting adults would have sexual relations that were incident to cohabitation itself.[43] The Court did not hold that such relations automatically created an unenforceable contract.[44] The language used in *Marvin* makes this clear: "even if sexual services are part of the contractual consideration, any Severable [sic] portion of the contract supported by independent consideration will still be enforced."[45]

The *Jones* decision defied yet another part of the *Marvin* holding. *Marvin* expressly held that homemaking services are valuable and lawful consideration, severable from the sexual relationship.[46] The *Jones* Court never addressed or applied this part of *Marvin*. Instead Jones' homemaking services were given no weight because of an *inference* made in the pleading regarding the possible existence of a sexual relationship.[47]

There will always be difficulty trying to explain the value of what a person does everyday inside his or her home as a partner or companion of another. The *Jones* decision limits how a plaintiff may show legal consideration—making a list of daily chores, leaving out any mention of love, emotional support, or intimacy. In reality, chores are probably the smallest and least valuable portion of the consideration a person actually furnishes in an agreement to be someone's life partner. This valuation has never been easy to make, regardless of sexual orientation, and the *Jones* decision makes it even more difficult.

The *Jones* decision was fundamentally incorrect because the Court did not take the broader view nor give value to all the different forms of consideration offered in the agreement. Instead, the Court focused on the word "lover" and had to extrapolate on this word in order to dismiss the case. The Court had to make a significant leap to hold that the word "lover" was equal to the phrase "meretricious sexual services." The plaintiff listed other forms of consideration that the *Marvin* Court expressly held were separable and legal consideration.[48] The Court could have easily found the other forms of consideration to be separable, thus finding valid consideration for Daly's promise to always financially care for Jones.[49]

The *Jones* decision has received similar criticism from the California Court of Appeal in *Bergen v. Wood*.[50] In *Bergen*, the Court held that *Jones* was wrongly decided because *Marvin* plainly states that homemaking services are lawful consideration for a cohabitation agreement.[51] The *Bergen*

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43. *Marvin*, 557 P.2d at 114.
44. *Id.*
45. *Id.*
46. *Id.* at 113.
47. Jones v. Daly, 176 Cal. Rptr. 132 (Ct. App. 1981).
48. *Id.* at 131 (Mr. Jones listed companion, homemaker, housekeeper, and cook as other forms of consideration).
49. *Id.*
50. 18 Cal. Rptr. 2d 75 (Ct. App. 1993).
51. *Id.* at 859.

court notes that Michelle Marvin, in *Marvin v. Marvin*, was able to establish legal consideration for her services as a homemaker, housekeeper, and cook and these were some of the same services Jones provided Daly.[52]

The *Bergen* case applies *Marvin* principles correctly and offers a good example of those services that cannot truly be separated from the sexual relationship. In *Bergen*, Wood began a relationship with Bergen, a German actress he met in Monte Carlo.[53] The couple never cohabited, but still made an agreement regarding their relationship. They agreed that Wood would supply Bergen with money and pay for travel expenses and hotel accommodations, while Bergen agreed to be Wood's companion, confidante, homemaker, and social hostess.[54] When the relationship ended seven years later, Bergen sued for violation of the oral agreement that Wood would provide her financial support. The Court held cohabitation was a prerequisite and a necessity in order to meet the *Marvin* standards.[55] The *Bergen* Court specifically held that "[c]ohabitation is necessary not in and of itself, but rather, because from cohabitation flows the rendition of domestic services, which services amount to lawful consideration for a contract between the parties."[56] In other words, without cohabitation there could be no homemaking services to serve as lawful consideration as contemplated by the *Marvin* court. The only services Bergen supplied to Wood were that of a "social companion" and "hostess." These services are not the types that are normally compensated or separable from the sexual relationship, which in reality seemed to be the basis of the relationship.[57] *Bergen* provides a perfect example of services so closely intertwined with the sexual relationship that compensation for such would be illegal and consequently the *Marvin* rule was not meant to apply.

The *Bergen* Court's application of *Marvin* principles is starkly contrasted to the application of *Marvin* in the *Jones* case. The *Jones* Court entirely disregarded the distinction made in *Marvin,* regarding which services were separable and could be considered legal consideration. This resulted in a narrowing of the *Marvin* decision and a distortion of same-sex couples' right to enter into cohabitation agreements under *Marvin* precedent, enforcing yet another difference between the treatment of homosexuals and heterosexuals under the law.[58]

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52. *Id.*

53. *Id.* at 76.

54. *Id.*

55. *Id.* at 77. The court also pointed out that if cohabitation were not required, then potentially every person that an individual dated, even if only one date had occurred, would be able to bring a *Marvin* action for promises made regarding property or finances. *Id.*

56. *Id.*

57. *Id.* at 79.

58. It should be noted that *Jones v. Daly*, decided in 1981, was the first case to apply the rule set out in *Marvin* to same-sex cohabitants. While this was an important and positive aspect of the *Jones* case, it still does more harm than good when it comes to the rights of homosexuals and cohabitors in general. For example, *Jones* clearly established that the mention of a sexual relationship would render all other consideration inseparable. This appears to be why

B. Whorton v. Dillingham[59]

Whorton is another case example that supports the idea that the *Marvin* court may not have intended its opinion to apply to same-sex couples. The effect that *Jones v. Daly* has had on the *Marvin* analysis can be directly observed in the *Whorton* case. The plaintiff, Donnis Whorton, brought suit for breach of an express[60] cohabitation agreement between him and his same-sex partner, Benjamin Dillingham.[61] Whorton stopped attending school in order to work full-time as the defendant's chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments, and personal representative.[62] Whorton was incidentally Dillingham's lover, companion, and confidante.[63] In return for Whorton's consideration, the defendant promised to give Whorton half the equity interest in all the real estate they already acquired in their joint names and all the property acquired from that point on, along with a promise to financially support Whorton for the rest of his life.[64]

The parties also made a more specific agreement that if any part of their cohabitation agreement was found to be legally unenforceable, then that part would be severable and the rest of their agreement would be enforced.[65] This type of clause was relatively novel and its presence essentially forced the court to develop a procedure or guideline for identifying and severing unlawful from lawful consideration as the *Marvin* precedent instructs the court to do.[66] By developing this guideline, the *Whorton* Court provided ex-

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the heterosexual plaintiff in *Bergen v. Wood* filed a Marvin action and left out all indications that a sexual relationship was shared between the parties. The sexual relationship was the only real consideration given for the defendant's promise to be financially responsible for the plaintiff's trips and lodging when she visited him. The plaintiff used creative language such as "companion," "confidante," and "social hostess" to describe the sexual nature of the relationship, instead of using words such as "lover" or "sex." *See Bergen*, 18 Cal. Rptr. 2d at 75.

59. 248 Cal. Rptr. 405 (Ct. App. 1988).

60. The terms "express" and "implied" do not pertain to whether the agreement was oral or in writing; instead, they reflect whether the agreement is shown by direct words of the parties (either spoken or written), which is considered an express contract, or if the agreement is shown through the conduct or actions of the parties, which is considered an implied contract. Marvin v. Marvin, 557 P.2d 106, 118 n.16 (Cal. 1976).

61. *Whorton*, 248 Cal. Rptr. at 406.

62. *Id.*

63. *Id.* at 407.

64. *Id.*

65. *Id.* It is likely that the parties had the *Marvin* holding in mind when making their agreement and contemplated the complication created by the *Jones* decision.

66. The Court turned to the Restatement Second of Contracts and used the test found therein for determining whether a contract that has both lawful and unlawful forms of consideration is enforceable. *Id.* at 408. The Court held,

> [o]ne test for determining the enforceability . . . [is] "if the parties' performances can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents and one pair is not offen-

amples of the types of services that were lawful and compensable consideration in a cohabitation agreement.[67] The *Whorton* holding, however, only *on its face* seems to follow the arguable goal of the *Marvin* Court to have its holding apply to all cohabitation agreements regardless of gender. In fact, the *Whorton* Court's finding that only certain forms of consideration are legal is precisely the means it uses to diverge from the *Marvin* holding and consequently narrow its scope.

At one point in the opinion, the *Whorton* Court seems to diverge from the *Jones* analysis when it states, "by itemizing the mutual promises to engage in sexual activity, Whorton has not precluded the trier of fact from finding those promises are the consideration for each other and independent of the bargained for consideration. . . ."[68] *Whorton*, however, ends up committing the same error that *Jones* did—ignoring the *Marvin* precedent by refusing to find the homemaking services legal and severable consideration for a cohabitation agreement. This error is made apparent by the services that *Whorton* actually holds to be legal consideration. The court finds that the types of services that can be considered valuable and legal consideration are *those that are apart from services normally incident to the state of cohabitation*—such as being "a chauffeur, secretary, bodyguard, and [business] partner."[69] This is directly contrary to the *Marvin* decision, which specifically holds that "[a] promise to perform homemaking services is, of course, a lawful and adequate consideration for a contract."[70] It is obvious that homemaking services are normally incident to the state of cohabitation. The *Whorton* Court disregards *Marvin* and assists *Jones* in narrowing the precedent by refusing to apply major and significant portions of the *Marvin* holding to same-sex couples.

These few but significant *Marvin* actions, involving homosexual cohabitors, have set the tone for future courts to follow. One commentator described American case law regarding cohabitor property rights as "seething chaos."[71] However, cohabitor property rights, as to homosexuals, are not

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sive to public policy, that portion of the agreement is enforceable by a party who did not engage in serious misconduct.

Id.

67. *Id.* at 409.

68. *Id.* at 409-10. Contrasted with the *Jones* court, which held that because the word "lover" was used by the plaintiff to describe only one aspect of the consideration given for the promise of financial support that this constituted "meretricious" sexual services, as contemplated by the *Marvin* court, and this was not severable from all other forms of consideration listed by the plaintiff, such as homemaking, which was *specifically* held legal consideration in *Marvin*. Jones v. Daly, 176 Cal. Rptr. 130, 132-33 (Ct. App. 1981).

69. *Whorton*, 248 Cal. Rptr. at 409.

70. Marvin v. Marvin, 557 P.2d 106, 113 (Cal. 1976).

71. JOHN MEE, THE PROPERTY RIGHTS OF COHABITEES: AN ANALYSIS OF EQUITY'S RESPONSE IN FIVE COMMON LAW JURISDICTIONS 1 (Hart Pub., Ltd. 1999) (quoting Meagher, *Constructive Trusts: High Court Developments and Prospects*, 4 AUSTRALIAN BAR REV. 67, 71 (1988)).

really in chaos. To the contrary, the case law on point, namely *Jones v. Daly* and *Whorton v. Dillingham*, make the analysis very clear and straightforward. Based on these cases, when it comes to same-sex couples, the courts will likely decline to follow *Marvin* precedent and hold that the sexual relationship is not severable from homemaking services. Even though the language of the *Marvin* opinion provides courts the opportunity to develop remedies for homosexual cohabitants, "[the a]ttempts to challenge the discriminatory treatment of same sex couples have, as yet, met with limited success in the courts."[72] The reason for this is most likely because homosexual cohabitation is still very much unaccepted by American society, just as heterosexual cohabitation was in the years preceding the *Marvin* case. Because of this social disapproval, courts seem more inclined to find homosexual cohabitation agreements unenforceable.[73] This judicial behavior denies homosexuals the basic human right to choose a mate and create a home. Therefore it is not easily justified.

As previous commentators on gay rights have noted, refusing to enforce a cohabitation agreement because of sexual preference, arguably, could qualify as a violation of the constitutional right to privacy.[74] Therefore the state must have a compelling interest to act in this manner.[75] The state's interest would likely be to promote heterosexual sex or even possibly to encourage homosexuals to marry persons of the opposite sex.[76] It would be very difficult to prove these interests are compelling, and that judicial refusal to enforce homosexual cohabitation contracts is the means to satisfy this interest.[77] The first time the U.S. Supreme Court addressed the privacy rights of homosexuals was in *Bowers v. Hardwick* in 1986.[78] Hardwick was charged for violating anti-sodomy laws in the privacy of his own home, and he challenged the constitutionality of the statute, but was unsuccessful.[79]

There are numerous constitutional arguments against the unequal protection of homosexuals and deprivation of basic rights. This topic is vast and important, and it must therefore be noted. Because of its complexity and

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72. *Id.* at 13. While the author was speaking of foreign jurisdictions, this is equally true for America as is apparent by the case law previously discussed.

73. J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L. Q. 93, 140 n.162 (1984). The authors support this contention with an analysis of *Jones v. Daly*.

74. *Id.* at 135.

75. *Id.*

76. *Id.*

77. *Id.*

78. Patrick J. Dooley, Note, *I Am Who I Am, Or Am I? A Comparison of the Equal Protection of Sexual Minorities in Canadian and U.S. Courts: Immutability Has Only Found a Home North of the Border*, 17 ARIZ. J. INT'L & COMP. L. 371, 395 (2000).

79. *Id.* at 395-96. The Court held that the Due Process Clause did not extend a fundamental privacy right to homosexuals to engage in sodomy and that homosexual sodomy was not "deeply rooted in this Nation's history and tradition." *Id.* (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

numerous issues, however, it goes beyond the scope of this Comment and is therefore only addressed briefly here.[80]

The freedom our judicial system enjoys regarding the enforcement of cohabitation contracts, especially for the same-sex couple, has created an environment more uncertain and dangerous than it was before the judiciary ever reviewed the issue. The case law established by *Marvin* lacks any real stability and force, which all laws require if they are to be followed. This instability results from the creation of loopholes by the Court because it has perceived society as unwilling or unprepared to accept homosexuality.[81] This method of adjudication provides society a way out and the means to continue discrimination and exclusion of differences and individuality. The problem with this method is that it produces stagnation in the law, halts growth of people and society, and results in a much different America than the one we live in today. If the beliefs and values of the majority of society were allowed to control at other places and times in our history, women would still have no voice in American government, our children would attend racially segregated schools, and those practicing the Wiccan religion would still be burned at the stake.

It is obvious, after a thorough analysis, that *Marvin v. Marvin* does not ensure the rights of homosexual cohabitants and, in conjunction with subsequent cases, provides a vehicle for further discrimination both socially and judicially. All hope is not lost, however, because there is an alternative.

III. THE CANADIAN ALTERNATIVE

A. The Evolution of Canadian Case Law Granting Rights to Same-Sex Couples

Cohabitation has received social and legal recognition in Canada over the past three decades.[82] Canadian law establishing the rights of non-marital cohabiting adults has evolved in much the same way as American case law. The province of Ontario, however, recently surpassed California and the majority of American states in the area of cohabitor rights, specifically in regard to same-sex cohabitation.[83] While the recent Canadian progress con-

80. For a more thorough discussion of the constitutional arguments associated with the rights of sexual minorities see Dooley, *supra* note 78; and Joseph M. Pellicciotti, *The Constitutional Guarantee of Equal Protection in Canada and the United States: A Comparative Analysis of the Standards for Determining the Validity of Governmental Action*, 5 TULSA J. COMP. & INT'L L. 1 (1997); and Zimmer, *supra* note 5.

81. *See* discussion *supra* Part I.C.

82. Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114, 152-53 (2000).

83. A minority of other American states, including Georgia, Oregon and Alaska, have granted property rights to same-sex cohabitors. Christensen, *supra* note 5, at 1341-44. States other than California, which are more likely to enforce same-sex cohabitation agreements and

cerning homosexual rights occurred in the province of Ontario, the leader in this area of law has always been British Colombia.[84] Similar to America's reaction to homosexual rights and equal treatment for homosexuals, Canada's reaction to homosexual rights and same-sex equality was hesitant.[85] This hesitation can be observed when analyzing a number of cases that the Supreme Court of Canada adjudicated in recent years.

The first time that the Canadian Supreme Court dealt directly with the rights of same-sex couples was in *Egan v. Canada*.[86] Jim Egan and Jack Nesbit had been partners since 1948, and when they applied for spousal Old Age Security benefits in 1991, they were denied because they were not of the opposite sex.[87] The couple sued under section 15 of the Canadian Charter

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establish property rights for homosexuals are those where the courts "are willing to engage in *Marvin's* 'searching inquiry into the nature of the relationship'" to discover if an agreement can be implied where no formal agreement exists. *Id.* at 1343. If a court is willing to imply an agreement where one does not technically exist in order to award one person's property to a former unmarried cohabiting partner, then it is more likely that the same court is willing to enforce a cohabitation agreement between same-sex partners.

Most American jurisdictions are unwilling to enforce same-sex cohabitation agreements. This is evident by legislation such as DOMA (Defense of Marriage Act) essentially prohibiting legal recognition of homosexual relationships. There is no national or state legislation that grants same-sex couples the benefit of marriage. Deborah M. Henson, *A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform*, 7 INT'L J.L. & FAM. 282, 292 (1993). The United States, however, is slowly moving forward in states such as Vermont, which came close to granting all the benefits of marriage to homosexuals in the recent decision Baker v. State, 744 A.2d 864 (Vt. 1999). Unfortunately, the national status of homosexual property rights far exceeds the scope of this paper. This paper is narrowly tailored to the California case establishing same-sex cohabitor property rights, its linguistic limitations, and a more beneficial alternative.

84. Martha A. McCarthy & Joanna L. Radbord, *Family Law for Same Sex Couples: Chartering the Course*, 15 CAN. J. FAM. L. 101, 107 (1998) (In 1997, British Colombia passed the Family Relations Amendment Act and the Family Maintenance Enforcement Amendment Act which effectively included gays and lesbians in the definition of spouse. These acts created several new rights and obligations, which only heterosexuals were entitled to previously, such as custody, access, guardianship, spousal and child support, support enforcement, domestic contract enforcement, and lastly possessory right to property.).

85. Canada slowly granted rights to homosexuals in a "piecemeal fashion." *Id.* at 106. As homosexuals in Canada legally challenged statutes prohibiting same-sex couples certain benefits conferred on traditional couples, the case law established sporadic rights for homosexuals such as employer benefits, conjugal visits, refugee status, and human rights protections. *Id.* This case law approach is identical to the American solution for unequal treatment based on sexual orientation. One example is the *Marvin* decision establishing property rights for homosexual cohabitors. *See* discussion *supra* Part I. Another example is the recent decision in San Francisco by Judge A. James Robertson II, allowing a lesbian partner of a woman mauled to death by two large dogs earlier this year to bring a wrongful death action. Although the later case does not have precedential value, it is an example of the "piecemeal fashion" of establishing rights for homosexuals. Ron Harris, *Woman's Lawsuit in Mauling Death of her Partner Allowed to Proceed*, SAN DIEGO UNION TRIB., July 28, 2001, at A3, *available at* 2001 WL 6475086.

86. Egan v. Canada [1995] 2 S.C.R. 513 (Can.).

87. McCarthy & Radbord, *supra* note 84, at 106.

of Rights and Freedoms claiming that the denial was a violation of their equality rights.[88]

Most Canadian homosexuals, when filing a cause of action for deprivation of rights, do so under section 15.[89] This section of the Charter does not, however, specifically list sexual orientation as a protected class.[90] The Court in *Egan* held for the first time that sexual orientation is a ground for *discrimination*, thereby adding homosexuals to the class of persons protected by section 15.[91] What was peculiar about the decision is that even though all members of the Court agreed that declining benefits based on sexual orientation was discriminatory, they held, in a 5-4 decision, that this discriminatory treatment was still constitutional.[92] The Court based its decision on section 1 of the Charter, which essentially states that rights and freedoms in the charter are subject to society's reasonable limitations.[93] This case is a perfect example of the Court's refusal to recognize the same-sex relationship, much like society's slow recognition of the same.

Another case that had an impact on homosexual rights was *Miron v. Trudel*.[94] The plaintiffs in this case were a man and a woman who were living in a state of non-marital cohabitation with their children.[95] Miron was injured in an automobile accident with an uninsured motorist.[96] As a result of

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88. JOEL BAKAN, JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS 109 (1997).

89. *See* McCarthy & Radbord, *supra* note 84. The title of section 15 is "Equality Rights" and provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1). The Canadian Charter of Rights and Freedoms is equivalent to the American Constitution, but is subject to frequent amendments, which makes it more analogous to the oft-updated California State Constitution.

90. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1).

91. McCarthy & Radbord, *supra* note 84, at 106; CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15.(21).

92. BAKAN, *supra* note 88. While the Court agreed that the plaintiff's rights had been violated and that homosexuals fall within section 15's protections, it held that the infringement was saved by section one of the Charter. McCarthy & Radbord, *supra* note 84, at 106; CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(21).

93. McCarthy & Radbord, *supra* note 84. Section 1 of the Charter provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. The Court held that finding same-sex couples fall under the definition of "spouse" is beyond the reasonable limits of section 1 based on the fact that "sexual orientation was relevant to fundamental social norms and values". McCarthy & Radbord, *supra* note 84. Therefore Egan and Nesbit could not collect spousal Old Age Benefits.

94. Miron v. Trudel [1995] 2 S.C.R. 418 (Can.).

95. *Id.* at 430.

96. *Id.*

the accident, he was no longer able to work and support his family. Miron made a claim for loss of income and damages against Valliere's (his cohabiting partner's) insurance policy, which extended uninsured motorist benefits to the "spouse" of the insured.[97] The insurance company denied the claim on the ground that the two were not legally married.[98] The couple brought suit for accident benefits under the insurance policy, and the insurance company brought a motion to determine whether Miron was the "spouse" of Valliere.[99] The judge held that a "spouse" means a person who is legally married, and therefore Miron was not the spouse of Valliere.[100] The couple appealed the decision by way of a section 15 Charter challenge.[101] The Supreme Court held that marital status was a ground for discrimination under section 15(1) and further held that excluding unmarried cohabitants from benefits and privileges afforded married persons is a violation of the Charter and cannot be saved by section 1.[102] This case essentially holds that a "married requirement" is unconstitutional.[103] *Miron* established that "the Court was willing to question whether privileges should be associated with heterosexuality and marriage" in the first place.[104] This was a very important step towards a holding that would prohibit a "married requirement" between same-sex couples in order to qualify for benefits married persons are entitled.

The third case that had a major impact on the rights of same-sex couples was *Vriend v. Alberta*.[105] Vriend was employed at a college in the province of Alberta.[106] Two years into his employment, the president of the college inquired into his sexuality, and Vriend disclosed that he was a homosexual.[107] Less than a year later the college instituted a prohibition on homosexuality, and Vriend was asked to resign.[108] When he refused, his employment was terminated for non-compliance with the college's policy on homosexual practices.[109] Vriend attempted to file a complaint with the Human Rights Commission of Alberta but was unsuccessful.[110] The Individual Rights Protection Act (IRPA) did not include sexual orientation as a protected class and

97. *Id.* For terms of policy, see *id.* at 432.
98. *Id.*
99. *Id.* at 431.
100. *Id.*
101. *Id.*
102. Holland, *supra* note 82, at 131.
103. McCarthy & Radbord, *supra* note 84, at 107.
104. *Id.* This decision was considered a major victory for heterosexual cohabitants. "The Supreme Court by a clear majority appeared to equate marriage and opposite-sex cohabitation." Holland, *supra* note 82, at 133. It should be noted that this decision was not applied to same-sex cohabitants, nor implied by the court that it should, as was the case in *Marvin v. Marvin*. *See* discussion *supra* Part I.C.
105. [1998] 1 S.C.R. 493 (Can.).
106. *Id.* at 494.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 495.

therefore did not permit the filing of a complaint on the grounds that an employer has discriminated against an individual because of sexual orientation.[111] Vriend brought suit under section 15 of the Charter.[112] The Court held:

> The IRPA in its under-inclusive state therefore denies substantive equality to [homosexuals]. . . . [T]he IRPA creates a distinction which results in the denial of the equal benefit and protection of the law on the basis of sexual orientation, a personal characteristic which is analogous to those enumerated in s[ection] 15(1). This, in itself, is sufficient to conclude that discrimination is present and that there is a violation of s[ection] 15.[113]

The court remedied the section 15 violation by "reading . . . into" the Act sexual orientation as a prohibited ground of discrimination, even though it was excluded initially.[114]

This trilogy of Canadian cases represents an approach similar to the one California has taken in attempting to grant rights to the same-sex couple—the case law method.[115] The problem with the case law method of conferring rights on discriminated groups such as homosexuals is the irregular application of such case law by several different courts' *unique interpretation* of precedent setting cases.[116] This method allows judges to insert, whether in-

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111. *Id.*

112. *Id.*

113. *Id.* at 496-97.

114. *Id.* at 570. Justice Iacobucci went on to say,

> In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the Charter will be reduced to little more than empty words.

Id. at 559-60. This statement indicates a change in the court's attitude towards the acceptance of the presence of same-sex relationships.

115. In California, same-sex couples have not *expressly* been granted any property rights by the judiciary, but it is argued that *Marvin v. Marvin* impliedly grants same-sex couples property distribution rights. *See* discussion, *supra* Part I.B. The California legislature did act once in an attempt to provide same-sex couples with some rights. The Family Code provides a cohabiting same-sex couple with the opportunity to register as a domestic partnership (as well as cohabiting heterosexuals), which would confer a few rights that married individuals enjoy. CAL. FAM. CODE § 299.5 (West 2000). The rest of the Family Code does not apply to same-sex couples with the sole exception of the section on domestic partnership.

116. This problem has been predicted and observed by other analysts. John Mee, Barrister and Lecturer in Law, stated,

> Upon reflection, it appears that many of these problems will arise, not as a result of deficiencies in the relevant equitable doctrines, but rather because of the manner in which judges may apply them in the context of homosexual cohabitation. The point is that . . . in cases dealing with heterosexual cohabitation, equity has traditionally refused to make any doctrinal concessions to the reality of the [homosexual] relationships involved.

tentionally or not, their personal beliefs regarding homosexuality when deciding cases regarding same-sex couples.[117] The effect of personal beliefs and values is more extensive when interpreting case law as opposed to legislation.[118] This problem is observed in the California cases applying *Marvin* case law.[119]

B. M v. H[120] – *A Landmark Case*

Canada quickly realized the weaknesses of the case law method to establish rights for same-sex couples. One author has said it best:

> The odd thing about the evolution of our law in this area is that we have proceeded in this incremental fashion without really tackling the issue. We have recognized the individual human rights of gays and lesbians, and the rights of same sex couples as spouses for various purposes. . . . [T]here is still an assumption, which manifests itself in dominant notions of family and hence our family law, that the "family" is comprised of opposite sex spouses and the children resulting from sexual intercourse. Gay and lesbian families are only exceptionally granted recognition in family law. We've been hedging around the issue, without really getting to the heart of the matter.[121]

Only one year after *Vriend* the Supreme Court decided the most important decision to date – *M v. H.* M and H were a lesbian couple that separated after a ten year relationship, leaving M without a home, access to her liquid capital, an opportunity to participate in their joint advertising business, and income.[122] M filed a claim for spousal support under the Ontario Family Law Act (FLA).[123] The motion judge upheld her claim, finding that the words "a man and a woman" were to be read out of the definition of spouse in

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MEE, *supra* note 71, at 26. The author goes on to explain that "[j]udges might subconsciously (or at least without admitting it) conclude that the law should not get involved in a dispute arising out of a "questionable" relationship and should (as in cases where the litigants had both been involved in some illegality) allow property rights to lie where they fall." *Id.* at 28.

117. "[J]udges might fail to take seriously the level of commitment involved in a homosexual union. This could mean that judges would tend to underestimate the extent of the contributions and sacrifices of a homosexual claimant or would refuse to regard them as having been undertaken on the basis of the relationship." MEE, *supra* note 71, at 28 (footnote omitted).

118. This tends to be the case, at least in American jurisdictions, because courts must obey the published legislative intent of a statute (usually found in the preamble of an Act) unless the statute is found to be unconstitutional. While it is true that lower courts are also required to follow the precedent established by higher courts, there is more of an opportunity to creatively interpret judicial opinions, as opposed to legislation, because the opinions do not always contain the clear intent of the court, as is the case with *Marvin.*

119. *See* discussion *supra* Part II.

120. M v. H [1999] 2 S.C.R. 3 (Can.).

121. McCarthy & Radbord, *supra* note 84, at 111.

122. *M v. H*, 2 S.C.R. at 4.

123. *Id.* at 4.

s[ection] 29 and replaced with the words "two persons"[124] H, joined by the Attorney General of Ontario, appealed the decision to the Court of Appeal, which upheld the motion judge's ruling and suspended the declaration of invalidity for one year in order for the legislature to amend the FLA. [125] H was subsequently granted leave to appeal the case to the Supreme Court challenging the definition of "spouse" under section 15 of the Charter and M was also granted the right to file a cross-appeal. [126]

The Court held that section 29 of the Ontario Family Law Act violated section 15(1) of the Charter.[127] The remedy, however, was more difficult to reach than the actual decision of whether a violation had occurred. In previous cases dealing with section 15(1) Charter challenges by homosexuals, the court provided one of three remedies. It either held the discriminatory provisions unconstitutional but saved under section 1 of the Charter and therefore left the statute unchanged,[128] or it found the statute unconstitutional and not saved by section 1, therefore striking it down.[129] The third remedy was finding the statute under-inclusive in protecting against discrimination of same-sex couples and therefore "reading into" the statute sexual orientation as a prohibited ground of discrimination.[130] The Court in *M v. H* held that these three remedies were not appropriate.[131]

The Court held that the purpose of the spousal support provisions of the Family Law Act was to provide equitable resolutions for economic disputes occurring from the dissolution of relationships.[132] The second objective of the Act was "to alleviate the burden on the public purse by shifting the support obligation to the other partner" who is financially able to support the other, as opposed to the province.[133] These two objectives could not be furthered by any of the remedies previously employed by the Court. Therefore the Court, in *M v. H*, held:

> [T]he remedy of reading in is inappropriate, as it would unduly recast the legislation, and striking down the FLA as a whole is excessive. Therefore the appropriate remedy is to declare [section] 29 [of the FLA] of no force and effect and to suspend the application of the declaration for a period of six months.[134]

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 6.
128. BAKAN, *supra* note 88.
129. Holland, *supra* note 82, at 130.
130. *Vriend* [1998] 1 S.C.R. at 570.
131. *M v. H*, 2 S.C.R. at 27.
132. Holland, *supra* note 82, at 138.
133. *Id.*
134. *M v. H*, 2 S.C.R. at 27-28.

With this holding, the Court attempted to deal with discrimination against same-sex couples in a broader fashion so that the decision would apply to other sections of the FLA which were not being reviewed by the court at that time.[135] The Court suspended the effect of the judgment for six months in order to allow the Ontario legislature time to amend the Family Law Act to comply with its holding.[136]

The legal effect of the decision is far reaching. The Ontario government did amend the Act, which included 67 statutes.[137] It did not, however, include same-sex cohabitants in the definition of spouse.[138] Instead, the amendment added an entire new category entitled "same-sex partners" to all 67 statutes.[139] This amendment effectively produced equal treatment of same-sex and opposite-sex cohabitants, but it did not erase the distinction between them and therefore left a negative stigma intact.[140] The decision, however, brings same-sex couples under the protections and obligations provided by the Family Law Act.[141]

CONCLUSION

Canada has recognized that the courts are not the ideal forums in which to establish fair and equitable legal rights for homosexuals.[142] Instead, a legislative response is needed to develop "coherent legal regimes," which consistently and adequately deal with the issues surrounding the rights of same-sex couples.[143] Canada's "epiphany" is observed in the recent decision of *M v. H*. This important case provided long awaited legal recognition to same-sex relationships and expanded its effect beyond case law regulation by requiring a legislative amendment to the offending provincial statutes.[144] *M v. H* stops short of legalizing same-sex marriage, but leaves the issue open and

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135. Holland, *supra* note 82, at 139.
136. *Id.*
137. *Id.* at 140.

> The government of Ontario responded begrudgingly to the Supreme Court decision, with politicians emphasizing that they are only acting because they have been forced to do so by the Court. This attitude is reflected in the formal name of the amendment—An Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in *M v. H* (Bill 5).

Nicholas Bala, *Alternatives For Extending Spousal Status in Canada*, 17 CAN. J. FAM. L. 169, 182 (2000).

138. Holland, *supra* note 82, at 140.
139. *Id.*
140. *Id.* at 141.
141. Bala, *supra* note 137, at 182.
142. *Id.* at 171.
143. *Id.*
144. *M v. H*, 2 S.C.R. at 27-28.

amenable to future section 15 challenges.[145] Canada's case law and legislation place an emphasis on the nature of the relationship that the parties share.[146] It is only from within this framework that legal recognition can be achieved for same-sex relationships.

Legal recognition of same-sex relationships is exactly what is lacking in California. Recognition cannot be implied from the vague gender-neutral language used in *Marvin*. Vagueness within case law will more likely be used to reach a holding that agrees with a judge's personal beliefs and values rather than extend rights to minority groups that are not expressly protected by the ruling. In fact, one could argue that this was exactly what occurred in *Jones v. Daly*.[147] Legal recognition of same-sex relationships can come in many different forms, of which granting marital status is only one. Legally *recognizing* the homosexual relationship does not equate to *sanctioning* same-sex marriage, as most Americans seem to believe. In fact, Canada itself has not yet gone that far.[148]

In order for California, or any other American jurisdiction, to guarantee equal protection of same-sex couples, there must be legislative action. The possibility exists that even without the support of the legislature, homosexuals might enjoy more equal treatment than they currently do if the judiciary courageously used express language so the intent of the court could be carried out in a more definitive way. Until this happens, homosexuals will continue to be oppressed and suffer discrimination on almost every front.

145. One author believes that the case will allow success in future Charter challenges, and ultimately result in the right for same-sex partners to marry. Bala, *supra* note 137, at 179. In the interim, the author suggests that the legislature could constitutionally grant same-sex couples the right to enter into a relationship called something other than marriage, that confers rights and obligations that are equivalent to marriage. *Id.*

146. MEE, *supra* note 71, at 26.

147. 176 Cal. Rptr. 130 (Ct. App. 1981). *See* discussion *supra* Part II.A.

148. Bala, *supra* note 137, at 174.