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# Marvin v. Marvin: Preserving the Options

Herma Hill Kay<sup>†</sup>  
Carol Amyx<sup>††</sup>

*The number of couples choosing to live together without marriage has increased significantly in recent years. In Marvin v. Marvin, the California Supreme Court redefined the rights of persons living in nonmarital cohabitation to property acquired during their relationship. In this Article, the authors review the statutory and case law prior to Marvin, endorse the court's decision to permit a broad variety of choices for married and unmarried couples, and suggest how the case might be applied to typical couples who choose not to marry.*

They live near you—in a house, apartment, or trailer, in urban centers, small towns, or on farms. They may both be professionals or wage earners; they may work separately or together in various enterprises of their own; one of them may act as a homemaker while the other works outside the home for pay. They share your neighborhood activities, your civic concerns, your national and international problems. Their lifestyle may be avant-garde or traditional. They may be a man and woman, two men, or two women. In one respect, however, they differ from most couples: They are not married.<sup>1</sup> Regardless of their reasons for remaining unmarried, one consequence of their choice in community property states such as California has been that no property rights arise solely from their cohabitation. In cases where their relationship approximated traditional marriage, the result was that, unless they had entered into an express agreement to pool their earnings, work, or assets and to share ownership of the subsequently acquired property, the dependent party was left without legal or equitable redress at the

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1. Homosexual couples frequently wish to marry but have been denied the right to do so under state marriage laws. Challenges to these laws based on the equal protection and due process clauses of the Federal Constitution as well as the equal rights amendment to the Washington state constitution have proved unavailing. See Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974). See generally Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

conclusion of the relationship. In a dramatic effort to remedy what it perceived as the basic unfairness of this situation, one California appellate court, using as its tool a bold—if unwarranted—interpretation of California's 1969 no-fault divorce law, attempted to expand quasi-marital property doctrines to cover such couples. Its approach in *In re Marriage of Cary*<sup>2</sup> was followed by one appellate district court<sup>3</sup> and rejected by two others.<sup>4</sup>

Confronted with this conflict, the California Supreme Court responded by establishing a broad framework for regulating the legal and equitable rights of persons living in nonmarital cohabitation. In *Marvin v. Marvin*<sup>5</sup> it rejected the invitation to modify existing community property law, relying instead upon doctrines drawn from the laws of contract, trust, partnership, and restitution.<sup>6</sup> In so doing, the court fashioned a remedy appropriate for use in any state, regardless of the underlying form of its marital property law. The court has thus taken the lead in recognizing the factual existence of a variety of familial relationships—ranging from marriage through nonmarital cohabitation—affording to each its characteristic set of legal incidents. California's citizens are therefore offered a wide choice among legally sanctioned alternatives within which they may work out their own private arrangements. This Article evaluates both the impact of the *Marvin* decision on prior California law and its probable influence on the rapidly evolving social and legal rights of those who choose not to marry.

## I

### CALIFORNIA LAW PRIOR TO *Marvin*

#### A. *Before the Cary Decision*

Statutory and case law prior to *Cary* had clearly delineated three

2. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1st Dist. 1973). The *Cary* opinion was prepared by division one of the first district. Its reasoning was subsequently rejected by division four of the first district in an unpublished opinion in *In re Marriage of Williamson*, No. 37756 (Cal. Ct. App., 1st Dist. Sept. 29, 1976). Following its decision in *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), the Supreme Court of California granted a hearing in *Williamson*, vacated the judgment, and remanded the matter for reconsideration in light of its opinion in *Marvin*. *Williamson* was then reversed on rehearing, and remanded to the trial court. *In re Marriage of Williamson*, No. 37756 (Cal. Ct. App., 1st Dist. Mar. 2, 1977).

3. *Estate of Atherley*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (4th Dist. 1975).

4. *Beckman v. Mayhew*, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (3d Dist. 1975); *Marvin v. Marvin*, No. 44359 (Cal. Ct. App., 2d Dist. July 23, 1975), *rev'd*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

5. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

6. These doctrines were persuasively called to the court's attention in an article prominently cited in the opinion: Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101 (1976) [hereinafter cited as Bruch].

types of familial relationships, each with its own legal incidents: legal marriage, the putative spouse relationship, and the so-called "meretricious union." "Meretricious unions" were further classified into two subgroups: relationships in which the parties either had entered into an express agreement to pool their assets and share the resulting property or had actually made joint contributions of property and earnings while living together, and those in which no such agreement had been made and the only contribution of one party was in the form of services.

Legal marriage is created by a formal ceremony solemnizing the relationship.<sup>7</sup> Its incidents include the spouses' right to live together in marital cohabitation; the power to confer legitimacy upon their children;<sup>8</sup> equal ownership of the community property produced by either spouse during the marriage;<sup>9</sup> the assumption of mutual obligations of marital and child support;<sup>10</sup> the power to declare a marital homestead;<sup>11</sup> the right to file joint income tax returns;<sup>12</sup> and the right to legal redress against third parties who destroy or diminish either spouse's enjoyment of the consortium of the other.<sup>13</sup> Upon termination of a legal marriage by divorce, spouses have the right to divide the

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7. CAL. CIV. CODE § 4100 (West 1970). Solemnization has been required since 1895, when common law marriage was formally abolished in California. Noting this, the *Marvin* opinion expressly eschews any attempt to "resurrect the doctrine of common law marriage." 18 Cal. 3d at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.

8. The Uniform Parentage Act, CAL. CIV. CODE §§ 7000-18 (West Supp. 1977), extends the power to confer legitimacy to all parents. Prior to its enactment, children were deemed legitimate only when they were born of a wife cohabiting with her husband, who was not impotent or sterile, CAL. EVID. CODE § 621 (West Supp. 1977); when they were born within 300 days after dissolution of marriage, former CAL. EVID. CODE § 661, ch. 299, § 661, 1965 Cal. Stats. 1310 (repealed by Act of Oct., 1, 1975, ch. 1244, § 14, 1975 Cal. Stats. 3202); when the parents married following an out-of-wedlock birth, former CAL. CIV. CODE § 215, ch. 385, § 8, 1870 Cal. Stats. 531 (repealed by Act of Oct. 1, 1975, ch. 1244, § 5, 1975 Cal. Stats. 3195); and when they were born as a result of artificial insemination, former CAL. CIV. CODE § 216, ch. 1615, § 2, 1969 Cal. Stats. 3409 (repealed by Act of Oct. 1, 1975, ch. 1244, § 6, 1975 Cal. Stats. 3195).

9. CAL. CIV. CODE § 5105 (West Supp. 1977). The right of equal control and management of community property was conferred upon the spouses subsequent to the date of the Family Law Act. Act of Aug. 1, 1973, ch. 999, §§ 2-3, 1973 Cal. Stats. 1987; Act of Oct. 1, 1973, ch. 987, §§ 14-15, 1973 Cal. Stats. 1901; Act of Aug. 27, 1974, ch. 546 § 14, 1974 Cal. Stats. 359; Act of Sept. 23, 1974, ch. 1206, §§ 1, 4-5, 1974 Cal. Stats. 2609 (codified in CAL. CIV. CODE §§ 5116, 5125, 5127 (West Supp. 1977)).

10. CAL. CIV. CODE §§ 196, 5132 (West Supp. 1977); CAL. PENAL CODE § 270 (West Supp. 1976).

11. CAL. CIV. CODE § 1238 (West 1954).

12. I.R.C. § 6013.

13. Consortium includes companionship, affection, services, society, and sexual satisfaction. This right was not fully recognized until after the effective date of the Family Law Act. See *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

community property<sup>14</sup> and to seek spousal support,<sup>15</sup> child support,<sup>16</sup> and child custody.<sup>17</sup> If the marriage is terminated by death, a spouse has the right to devise one-half of the community property by will;<sup>18</sup> in the absence of such a disposition, the surviving spouse becomes the owner of the entire community estate<sup>19</sup> and inherits a portion of the separate property of the decedent spouse.<sup>20</sup> The surviving spouse is entitled to a family allowance from the estate;<sup>21</sup> to a probate homestead, if there is no marital homestead;<sup>22</sup> to recover damages for the wrongful death of a spouse;<sup>23</sup> and to receive various government benefits.

Unlike legal marriage, which is defined by statute, the putative spouse doctrine is a judicially created equitable response to the plight of persons who erroneously believe themselves married. Frequently the belief arises from an attempted ceremonial marriage subsequently found to be defective. All eight of the American community property states have devised some form of protection for the putative spouse;<sup>24</sup> an optional section of the Uniform Marriage and Divorce Act facilitates legislative adoption of this doctrine by other states.<sup>25</sup> In California the only requisite for putative spouse status is a good faith belief that one is validly married. Such a belief has been found both where the marriage was void<sup>26</sup> or voidable,<sup>27</sup> and where one party had procured a secret divorce.<sup>28</sup>

The courts have granted the putative spouse the right to an equitable division of the property that would have belonged to the community in a valid marriage.<sup>29</sup> If no such property is available for distribution,

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14. Section 4800, as amended by the Family Law Act, now provides for an equal division of the community property. Prior law tied division of the property to fault-based grounds for divorce. See CAL. CIV. CODE § 4800 (West Supp. 1977).

15. *Id.* § 4801.

16. *Id.* § 4700.

17. *Id.* § 4600.

18. CAL. PROB. CODE § 201 (West 1956).

19. *Id.* §§ 202, 655 (West Supp. 1977).

20. *Id.* §§ 221, 223, 224 (West 1956).

21. *Id.* § 680 (West Supp. 1977).

22. *Id.* § 661.

23. CAL. CIV. PROC. CODE § 377 (West Supp. 1977).

24. W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* 93-94 (2d ed. 1971).

25. UNIFORM MARRIAGE AND DIVORCE ACT § 209.

26. *Figoni v. Figoni*, 211 Cal. 354, 295 P. 339 (1931) (incest); *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533 (1920) (bigamy).

27. *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 69 P.2d 845 (1937) (prior existing marriage); *Coats v. Coats*, 160 Cal. 671, 118 P. 441 (1911) (physical incapacity).

28. *Feig v. Bank of America*, 5 Cal. 2d 266, 54 P.2d 3 (1936).

29. *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533 (1920) (putative spouse awarded half the property on analogy to legal marriage); cf. *Coats v. Coats*, 160 Cal. 671, 118 P. 441 (1911) (putative spouse received only \$10,000, not \$69,952.65, which would have represented half the community property in a valid marriage).

the putative spouse may be awarded a lump sum representing the reasonable value of the household services rendered by the putative spouse in excess of the value of maintenance and support furnished by the other party.<sup>30</sup> No case has awarded the putative spouse permanent alimony, and dictum in one case suggests that no such right exists.<sup>31</sup> When the relationship is terminated by death, the surviving putative spouse has been awarded all the quasi-marital property<sup>32</sup> as well as a spousal share of the decedent's separate property.<sup>33</sup> The putative spouse has been accorded the right to bring suit for the wrongful death of the deceased partner,<sup>34</sup> and to recover worker's compensation death benefits as a surviving widow<sup>35</sup> as well as benefits due a surviving spouse under the public employees retirement fund.<sup>36</sup> Since children born of void or voidable marriages are deemed legitimate in California,<sup>37</sup> putative spouses have the same rights and obligations toward their children as do married persons.

Both the status of putative spouse and its incidents evolved by analogy to legal marriage. The analogy is appropriate, for—unlike persons who deliberately decide not to marry—no one chooses to become a putative spouse. Rather, the persons whose rights are governed by this doctrine have chosen to be married. Once it is shown that the marriage upon which one or both has relied is invalid, the law has sought to equate the parties as closely as possible to legally married persons. That

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30. *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 69 P.2d 845 (1937); *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 200 P.2d 49 (2d Dist. 1948) (sum awarded included both value of household services and restitution of wages contributed by the putative spouse).

31. *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 100, 69 P.2d 845, 847 (1937).

32. *Feig v. Bank of America*, 5 Cal. 2d 266, 54 P.2d 3 (1936); *Estate of Krone*, 83 Cal. App. 2d 766, 189 P.2d 741 (2d Dist. 1948) (applying Probate Code § 201 by analogy).

33. *Estate of Long*, 198 Cal. App. 2d 732, 18 Cal. Rptr. 105 (2d Dist. 1961) (Probate Code § 223). *Contra*, *Estate of Levie*, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1st Dist. 1975) (Probate Code § 221). The *Levie* court, apparently having failed to discover the *Long* case, states that “[n]o California decision has been found, suggesting that a putative spouse is entitled to succeed, under Probate Code Section 221, to an interest in any property which the decedent owned before the putative marriage.” 50 Cal. App. 3d at 576, 123 Cal. Rptr. at 447. The factual difference between allowing a putative spouse to share separate property with decedent's issue under Probate Code Section 221 rather than with the immediate family under section 223 is not sufficient to support a difference in result between *Levie* and *Long*. Of the two, *Long* seems more consistent with the analogy to legal marriage employed in the putative spouse cases.

34. *Kuakoff v. Woods*, 166 Cal. App. 2d 59, 332 P.2d 773 (2d Dist. 1958).

35. *Brennfleck v. Workmen's Comp. Appeals Bd.*, 3 Cal. App. 3d 666, 84 Cal. Rptr. 50 (3d Dist. 1970).

36. *Adduddell v. Board of Administration*, 8 Cal. App. 3d 248, 87 Cal. Rptr. 268 (2d Dist. 1970).

37. CAL. CIV. CODE §§ 7002-04, 7010 (West Supp. 1977).

putative spouses believe themselves married explains the absence of cases defining the rights of a putative spouse during the continuance of the relationship: when the good faith belief evaporated, the status disappeared; continuance of the relationship at that point was deemed "meretricious" and rights were adjudged accordingly.<sup>38</sup>

In contrast to the incidents of legal marriage and the putative spouse status, the rights and obligations of persons knowingly engaged in nonmarital cohabitation—participants in what the courts labelled a "meretricious union"—do not arise from their status. Their rights are instead based on private contract and have been enforced by the courts despite—not because of—their relationship. The California Supreme Court defined the limits of this right to contract in a series of five decisions written between 1931 and 1962.<sup>39</sup>

In *Trutalli v. Meraviglia*,<sup>40</sup> the court laid down the fundamental principle that continues to govern such cases: that the parties were living together unlawfully does not prevent the court from recognizing and enforcing their express agreements regarding property, so long as the cohabitation does not form the consideration for the agreement. The trial court in *Trutalli* found that the parties had entered into two agreements: first, an agreement to live together without marriage and to appear married to the world; and second, an agreement that the woman would perform all the necessary household services, that all monies obtained by either party would be paid to the man for investment, and that all property acquired with these funds would be the joint property of both. The trial court awarded the woman an undivided one-half interest in two parcels of real property held solely in the man's

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38. See *Lazzarevich v. Lazzarevich*, 88 Cal. App. 2d 708, 200 P.2d 49 (2d Dist. 1948). The parties in *Lazzarevich* were validly married in 1921. On March 18, 1932, the husband procured an interlocutory decree of divorce; without the husband's knowledge his attorney obtained a final decree on September 6, 1933. The parties reconciled in 1935; they did not remarry because both believed their original marriage was still in force. On August 1, 1945 the parties separated again and the wife consulted her attorney about a divorce. On August 10, 1945, she was informed that the final decree had been entered in the previous divorce action in 1933. She and her former husband again reconciled on October 1, 1945, and lived together until their final separation on April 1, 1946. Thereafter, the woman sued to recover in quantum meruit for the value of services rendered and contributions made from 1935 to 1956. The court treated her as a putative spouse from 1935 to August 10, 1945, and granted the requested relief. It denied recovery, however, for the period of October 1, 1945 to April 1, 1946, since the woman was no longer a putative spouse after learning that she and her husband had been divorced.

39. In chronological order, the cases are *Flanagan v. Capital Nat'l Bank*, 213 Cal. 664, 3 P.2d 307 (1931); *Trutalli v. Meraviglia*, 215 Cal. 698, 12 P.2d 430 (1932); *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943); *Hill v. Estate of Westbrook*, 39 Cal. 2d 458, 247 P.2d 19 (1952); *Keene v. Keene*, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

40. 215 Cal. 698, 12 P.2d 430 (1932).

name, and the supreme court affirmed. Rejecting the man's argument that the property agreement was based upon an immoral consideration, the court pointed out that the two agreements were separate and distinct contracts and that neither was dependent upon the other.<sup>41</sup> The consideration for the property agreement was not the unlawful cohabitation, but the woman's promise that all monies earned by her would be paid to the man for investment. The court concluded that by living in an "unlawful" relationship at the time they entered into the agreement, the parties did not invalidate the contract so long as the "immoral relation" was not a consideration for the agreement.<sup>42</sup>

Twenty years later, the supreme court indicated what it meant by an immoral relation which could not serve as valid consideration for an agreement between unmarried persons. In *Hill v. Estate of Westbrook*<sup>43</sup> a woman who had lived with decedent in nonmarital cohabitation filed a creditor's claim against his estate in which she sought payment for services rendered to him. Such services, she alleged, consisted of keeping house, living with him "as man and wife," bearing their children, and periodically earning a salary which she gave to him.<sup>44</sup> Judgment for the woman was reversed and the case remanded by the court of appeal on the ground that the trial court had failed to specify the reasonable value of services she had rendered that might have been supported by consideration separable from the agreement to live with decedent "as a concubine" and bear him children.<sup>45</sup> At the second trial plaintiff's theory of recovery rested on decedent's promise to pay her and her expectation of being repaid for services she had rendered while working in his liquor store, hamburger stand, and rooming house. The trial court found, however, that plaintiff's contributions had been made gratuitously and voluntarily, in consideration of the "meretricious" relationship; its judgment for the estate was affirmed on appeal.<sup>46</sup>

In *Hill*, unlike *Trutalli*, there was apparently only one agreement: the agreement to live together without marriage and to have children. Public policy forbade requiring the estate to pay plaintiff for those services; plaintiff was unable to persuade the trial court that payment for her other services had been contemplated by the parties. Read in this manner, the result in *Hill* is merely a reiteration of *Trutalli*'s holding: if there are two agreements, that one may be based

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41. *Id.* at 700, 12 P.2d at 431.

42. *Id.* at 701-02, 12 P.2d at 431.

43. 39 Cal. 2d 458, 459, 247 P.2d 19, 19 (1952).

44. *Id.*

45. *Hill v. Estate of Westbrook*, 95 Cal. App. 2d 599, 603, 213 P.2d 727, 730 (2d Dist. 1950).

46. 39 Cal. 2d at 461, 247 P.2d at 20.

on sexual consideration will not invalidate the other. But if there is only one contract, enforcement turns on whether and to what extent the sexual relationship is an inseparable part of the consideration. *Hill's* message is clear: persons entering into express agreements should limit their contracts to financial matters. Nothing will be gained, and some risk may be incurred, by express reference to the living arrangements of the parties.<sup>47</sup>

The three remaining supreme court cases dealing with nonmarital cohabitation involved parties who had not entered into express property agreements. In *Flanagan v. Capital National Bank*<sup>48</sup> the plaintiff presented a claim based on a community property theory of recovery, although she had lived with decedent in a nonmarital relationship. The woman had signed a contract accepting the provision made for her in decedent's will in lieu of any community property rights she might have. After his death she brought suit to cancel her "waiver" and to assert her community property rights against the estate. Affirming an order granting the estate's motion for a nonsuit, the supreme court noted that the "waiver" was a valid contract, but based its decision on a determination that since plaintiff was neither a legal wife nor a putative spouse, she had no community property rights to assert.<sup>49</sup> Twelve years later, in *Vallera v. Vallera*,<sup>50</sup> Justice Traynor asserted that *Flanagan* had decided "in the negative" the question "whether a woman living with a man as his wife but with no genuine belief that she is legally married to him acquires by reason of cohabitation alone the rights of a co-tenant in his earnings and accumulations during the period of their relationship."<sup>51</sup>

By implication in *Vallera* and by express holding in the last case in the series, *Keene v. Keene*,<sup>52</sup> the supreme court also refused to find a property interest based upon the contribution of services by the nonincome-producing party, whether as a homemaker (*Vallera*) or as a participant in operating a ranch (*Keene*). In neither case did the claimant seek to recover the reasonable value of her services; instead, she sought to establish an interest in property produced during the relationship but held in the name of the other party. Since the court

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47. This tainting problem seems to have been well understood by the courts of appeal in cases immediately following *Trutalli*. Without concentrating upon the living arrangements of the parties, they characterized the issues as problems of property or trust law. See, e.g., *Padilla v. Padilla*, 38 Cal. App. 2d 319, 100 P.2d 1093 (1st Dist. 1940); *Bacon v. Bacon*, 21 Cal. App. 2d 540, 542-43, 69 P.2d 884, 885 (3d Dist. 1937).

48. 213 Cal. 664, 3 P.2d 307 (1931).

49. *Id.* at 666-67, 3 P.2d at 308.

50. 21 Cal. 2d 681, 134 P.2d 761 (1943).

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

52. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

had indicated its willingness to recognize such a property interest when the claimant had contributed funds to the acquisition of the property, strong dissents in both cases argued that its refusal to treat the contribution of services in the same manner was a thinly disguised punishment of the woman for entering into a "meretricious" relationship, while allowing the man—said to be "equally guilty"—to reap its benefits.<sup>53</sup> The dissents ignored, however, that men who had contributed services had similarly been denied rights to property standing in the woman's name.<sup>54</sup>

Since the *Keene* court also rejected recovery based on theories of implied contract, quasi-contract, and resulting trust,<sup>55</sup> its holding effectively curtailed further development of remedial case law in this area.<sup>56</sup> The law remained dominant until the pressures associated with changing social mores stimulated an intermediate court in *In re Marriage of Cary*<sup>57</sup> to seize upon the enactment of the Family Law Act of 1969<sup>58</sup> as an excuse for a new departure in the law.

### B. *The Impact of Cary*

If appearances could be trusted, Paul Cary and Janet Forbes were married. She called herself Janet Cary; the couple's four children bore their father's name, and their birth certificates and school records listed the parents as Paul and Janet Cary. Real property deeds, joint income tax returns, and credit cards proclaimed the same message. In their interaction with parents, close friends, and all outsiders, Paul and Janet represented themselves as a married couple. In their relations to each other, they conformed to the traditional roles of husband and wife: Paul worked to support the family, while Janet remained at home caring for the children and the house. Despite the court's statement that "[b]oth knew that they were not married,"<sup>59</sup> Janet testified that she had believed common law marriages were valid and alleged that Paul had shared her belief.<sup>60</sup> The case was briefed and argued on the

53. *Keene v. Keene*, 57 Cal. 2d 657, 668-69, 371 P.2d 329, 336, 21 Cal. Rptr. 593, 600 (1962) (Peters, J., dissenting); *Vallera v. Vallera*, 21 Cal. 2d 681, 686-87, 134 P.2d 761, 763-64 (1943) (Curtis, J., dissenting).

54. *McQuin v. Rice*, 88 Cal. App. 2d 914, 918, 199 P.2d 742, 744 (2d Dist. 1948); *Basket v. Crook*, 86 Cal. App. 2d 355, 359, 195 P.2d 39, 42 (3d Dist. 1948).

55. 57 Cal. 2d at 664-68, 371 P.2d at 333-36, 21 Cal. Rptr. at 597-600.

56. See Bruch, *supra* note 6, at 106-14.

57. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1st Dist. 1973).

58. CAL. CIV. CODE §§ 4000-5138 (West 1970 & Supp. 1977).

59. *In re Marriage of Cary*, 34 Cal. App. 3d 345, 348, 109 Cal. Rptr. 862, 863 (1st Dist. 1973).

60. Comment, *In re Marriage of Carey [sic]: The End of the Putative-Meretricious Spouse Distinction in California*, 12 SAN DIEGO L. REV. 436, 439 n. 23 (1975) [hereinafter cited as Comment, San Diego Law Review]. Testimony also established

theory that Janet claimed the status of a putative spouse.<sup>61</sup>

Eschewing a narrower compass for the holding, however, the *Cary* court announced in the first sentence of its opinion that “[t]he principal issue presented by this appeal concerns California’s Family Law Act . . . which provides among other things that the concept of individual “fault,” or “guilt,” or “punishment” for such human error, shall not be considered in determining *family property rights*.”<sup>62</sup> The court concluded that the Family Law Act, California’s no-fault divorce statute, had superseded the prior judicial distinction between putative spouses and persons living in nonmarital cohabitation.<sup>63</sup> Accordingly, property acquired in both situations was to be distributed under the Family Law Act’s provision for division of community property upon marital dissolution. *Cary*’s analysis of the Family Law Act proceeds in four steps. First, the court characterized prior case law dealing with the rights of persons living in nonmarital cohabitation as reflecting a purpose to punish those persons, especially women, for engaging in sinful conduct. Second, it recognized that the policy underlying the Family Law Act was to remove the concept of fault, guilt, or punishment from the grounds for divorce and the distribution of marital property. Third, the court construed Civil Code section 4452 to permit the award of one-half the property produced by a “blameless” putative spouse to the person who, in bad faith, had tricked the putative spouse into believing in the validity of their marriage. Finally, it asserted that section 4452, as construed, would be inconsistent with a refusal to divide equally the property acquired by persons living in nonmarital cohabitation. From these propositions the court concluded that

[b]y the Family Law Act the Legislature has announced it to be the public policy of this state that concepts of “guilt” (and punishment therefor) and “innocence” (and reward therefor) are no longer relevant in the determination of family property rights, whether there be a legal marriage or not, and if not, regardless of whether the deficiency is known to one, or both, or neither of the parties.<sup>64</sup>

Only the second of these propositions is accurate, however, and the court overstates its implications. The first is supported only by dissenting opinions;<sup>65</sup> the third cannot be substantiated by an examination of

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that each of the parties had asked the other for a ceremonial marriage at different times; both proposals were rejected. Appellant’s Opening Brief at 3, Respondent’s Reply Brief at 1, 2, *In re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1st Dist. 1973).

61. Appellant’s Opening Brief at 7-11; Respondent’s Reply Brief at 2-4.

62. 34 Cal. App. 3d at 347, 109 Cal. Rptr. at 862-63 (emphasis is the court’s).

63. *Id.* at 353, 109 Cal. Rptr. at 866.

64. *Id.* at 352-53, 109 Cal. Rptr. at 866.

65. *Keene v. Keene*, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962)

the legislative history of the Family Law Act. This weakness undercuts the basis for the fourth proposition.

The charge that California courts were trying to punish persons living in nonmarital cohabitation for their guilt was made in dissents by Justice Curtis in *Vallera* and Justice Peters in *Keene*.<sup>66</sup> The *Cary* court, in attempting to attribute this motivation to the majority in *Keene*, cites to a page of the opinion that does not substantiate its point.<sup>67</sup> The *Marvin* court rejected this interpretation, noting that “the cases denying relief do not rest their refusal upon any theory of ‘punishing’ a ‘guilty’ partner.”<sup>68</sup> Instead, both *Vallera* and *Keene* contrast the fundamentally different theories of recovery in cases involving putative marriages and nonmarital relationships: “[e]quitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith are not present in such a case.”<sup>69</sup> That is, a putative spouse believes the relationship to be a legal marriage; this belief gives rise to an expectation of receiving whatever financial and community property benefits accompany marriage. Persons living together in the knowledge that they are not married do not have similar expectations. The considerations underlying the award of equitable relief to putative spouses—namely, the desire to fulfill reasonable expectations when the belief was misplaced—are therefore absent in the case of persons who know they are not married. The *Marvin* court recognized this distinction: “parties to a nonmarital relationship obviously cannot have based any expectations upon the belief that they were married . . . .”<sup>70</sup> To read a concept of punishment into this functional distinction, as the court did in *Cary*, is to import into the opinions in *Vallera* and *Keene* an element not present in the analysis of either case.

The *Cary* court believed that the spirit of the Family Law Act was inconsistent with the punishment it discerned in *Vallera* and *Keene*. The

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(Peters, J., dissenting); *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943) (Curtis, J., dissenting).

66. See text accompanying note 53 *supra*. Justice Curtis's dissent in *Vallera* was joined by Justice Carter and by then-Judge Peters, sitting pro tem.

67. The *Cary* court in characterizing prior law states that “[e]quitable considerations’ were not present, the courts held, because of the ‘guilt’ of both of the parties.” The court cites as authority the *Keene* opinion at 662 and the *Vallera* opinion at 685. 34 Cal. App. 3d at 350, 109 Cal. Rptr. at 864. An examination of the cited pages, however, reveals that neither court used the word “guilt” or relied on the concept of punishment to support its holding.

68. 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

69. *Keene v. Keene*, 57 Cal. 2d 657, 662, 371 P.2d 329, 331, 21 Cal. Rptr. 593, 595 (1962) (quoting *Vallera v. Vallera*, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943) ).

70. 18 Cal. 3d at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830. The court added that “other expectations and equitable considerations remain.” These “other expectations” are explored in Part II *infra*.

purpose of the Family Law Act, however, was not to abolish sinfulness, guilt, or wrongdoing as a relevant factor in every judicial examination of familial relationships. The Family Law Act created the nation's first no-fault divorce law. Its genesis can be traced to the 1966 Report of the Governor's Commission on the Family. The Commission was charged with studying California family and divorce law and recommending proposals for change.<sup>71</sup> It recommended the enactment of a no-fault divorce law, accompanied by a statewide system of family courts, and buttressed by the elimination of fault from decisions on the division of community property and the award of spousal support.<sup>72</sup> No effort was made to reformulate marriage law, and the situation of persons living in nonmarital cohabitation was not even discussed. The only recommendation made by the Commission that bore on the rights of unmarried persons was that the judicially developed putative spouse doctrine be partially codified.<sup>73</sup> Contemporary articles written by members of the Governor's Commission on the Family, who were active in the legislative reform, make clear that its recommendation for the removal of marital fault was directed only to the grounds for divorce, the disposition of marital property, and the award of alimony and support.<sup>74</sup> To be sure, the legislative changes were startling enough, particularly when seen in historical and comparative perspective,<sup>75</sup> but their focus was on the dissolution of legal marriage, not on the rights of the unmarried.

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71. See generally Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156 (1970).

72. See generally Dinkelspiel & Gough, *A Family Court Act for Contemporary California: A Summary of the Report of the Governor's Commission on the Family*, 42 CAL. ST. B.J. 363 (1967); Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205 (1968).

73. The Commission's report states:

It was the Commission's opinion that some protection was needed for a good-faith spouse in a void marriage, especially one of long duration. Though the property rights of a putative spouse are generally recognized in present decisional law, it was deemed wise to spell out by statute the right of such "innocent" spouse to an interest in the "quasi-marital property" and to support it by analogy to the laws governing the division of property and alimony in the case of valid marriages.

GOVERNOR'S COMMISSION ON THE FAMILY, REPORT 46 (1966) [hereinafter cited as COMMISSION REPORT].

74. Dinkelspiel & Gough, *supra* note 72, at 672; Kay, *supra* note 72, at 1247. Other knowledgeable commentators share the view that the no-fault aspects of the California law as enacted follow the recommendations of the Commission. *E.g.*, Krom, *supra* note 71, at 170; Note, *Marital Fault v. Irremedial Breakdown: The New York Problem and The California Solution*, 16 N.Y.U. L. REV. 119 (1970); Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. REV. 1306 (1970).

75. See generally M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* (1972).

Finally, the interpretation of Civil Code section 4452 suggested in *Cary*—that the “bad faith” partner in a pseudomarrriage is entitled to one-half of the putative spouse’s acquisitions—is not sustained by the legislative history of that section. The Commission’s original recommendation was that the judicially created putative spouse doctrine be partially codified and expanded to include alimony as well as property division. Its proposals were embodied in sections 014b and 014c of the Commission’s draft of the Family Court Act.<sup>76</sup> Modified forms of these two sections<sup>77</sup> were eventually adopted by the Legislature as Civil Code

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76. *Section 014b.* Whenever a determination is made under this Chapter that a marriage is void or otherwise invalid and the court finds that either party or both parties to the union believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and thereupon may divide equitably, by analogy to the laws respecting community property, that property acquired during the union which would have been community property or quasi-community property if the union had been legally valid. Such property shall be termed “quasi-marital property.”

*Section 014c.* In the event that a determination is made that a marriage is void or otherwise invalid the court may, upon a finding that the economic circumstances of the case require it, also order the other party to pay support to a party found to be a putative spouse as provided in Section 014b, in the same manner as if the union had been legally valid, by analogy to the rules set forth in Section 052 of this Act respecting the award of alimony.

COMMISSION REPORT, *supra* note 73, at 75.

The comment to sections 014b and 014c in the Commission’s draft demonstrates its intentions clearly:

Section 014b essentially codifies existing case law. The term “quasi-marital property” has been added to avoid confusion with quasi-community property as defined in § 140.5 of the Civil Code.

It is the intent of the Commission that Sections 014b and 014c cover both the case of a marriage which is void because bigamous or consanguineous, and the case of an attempted marriage which is invalid because of failure to meet the essential requirements of licensing or solemnization.

Section 014c creates new law to conform the support rights of a putative spouse to those of a legal wife. It is the intent of the Commission thereby to negate the effect of such cases as *Sanguinetti vs. Sanguinetti*, 9 Cal. 2d 95 (1937), insofar as they deny the putative wife’s right to support. We believe that the Court should be able to award support to an innocent spouse who has lived with another person in good faith for a number of years, only to find that the marriage was void. To take account of such cases, the courts have used the fiction of the “value of services rendered” or have invoked an estoppel to deny the putative wife’s claim. The Commission intends that this Section accomplish directly what has been done indirectly in equitable situations.

COMMISSION REPORT, *supra* note 73, at 76-77.

77. The Commission’s draft of sections 014b and 014c was originally carried forward intact into the bills embodying the proposed Family Court Act. A.B. No. 1420 (Shoemaker) and S.B. No. 826 (Grunsky), 1967 Reg. Sess. Section 014b appeared as section 4604; section 014c was numbered § 4605. No serious effort was made to obtain passage of the measure during the 1967 session, and both sections reappeared in identical form in the 1968 bill introduced by Senator Grunsky. S.B. No. 88 (Grunsky), 1968 Reg. Sess. §§ 4604, 4605.

The 1969 versions were substantially identical, although original section 014c was significantly modified by deleting the reference to alimony. S.B. No. 252 (Grunsky), 1969 Reg. Sess. §§ 4504, 4505; A.B. No. 530 (Hayes), 1969 Reg. Sess. §§ 4404, 4405.

sections 4452<sup>78</sup> and 4455.<sup>79</sup> Comparing these sections as originally enacted with the recommendations of the Governor's Commission, Professor Aidan Gough made several telling criticisms that stimulated immediate legislative revision<sup>80</sup> bringing section 4455 closer to the

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78. Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property shall be termed "quasi-marital property". If the division of property is in issue and the court expressly reserves jurisdiction, it may make the property division at a time subsequent to the judgment.

Act of Sept. 4, 1969, ch. 1608, § 8, 1969 Cal. Stats. 3322-23 (current amended version at CAL. CIV. CODE § 4452 (West Supp. 1977)).

79. The court may, during the pendency of a proceeding to have a marriage adjudged a nullity, or upon judgment, order the other party to pay for the support of such party in the same manner as if the marriage had not been void or voidable, provided that the parties are found to be putative spouses and the party for whose benefit the order is made is found to be innocent of fraud or wrongdoing in inducing or entering into the marriage, and free from knowledge of the then existence of any prior marriage or other impediment to the contracting of the marriage sought to be annulled.

Act of Sept. 4, 1969, ch. 1608, § 8, 1969 Cal. Stats. 3323 (current amended version at CAL. CIV. CODE § 4455 (West Supp. 1977)).

80. Professor Aidan Gough, Executive Director of the Governor's Commission, commented that:

In section 4452, the Act gives statutory recognition to a concept long-enshrined in California decisional law, the protection of the putative spouse. The section defines a putative spouse as one who enters either a void or voidable marriage in good faith (thus giving some support to the argument advanced above that the new Act does not abolish the doctrine of relation back in cases of voidable marriage). Further, it provides that all property which would have been community property or quasi-community property if the parties had been validly married shall be classified as "quasi-marital property," and divided according to the rules for the division of community property between lawfully married spouses. An addition to prior law is found in section 4455, which provides for an order of support in favor of a putative spouse. Though the section is headed "alimony *pendente lite*; innocent party," the statute provides that either during the pendency of the action or upon judgment the court may order support for the putative spouse in the same manner as if the parties had been lawfully wed, provided that other criteria are met.<sup>2</sup> Thus it seems clear that the legislature intended to allow provision for support after a declaration of nullity, which had not been permitted by previous law. On this point, it is significant to note that section 4516, which deals with temporary alimony on dissolution of marriage, omits mention of the phrase "or upon judgment" which is found in section 4455.

Footnote two contains a further analysis of section 4455:

2. These other criteria create their own confusion: 1) The parties must be "putative spouses" (which surely must have been intended to apply only to the spouse seeking support—it hardly makes sense to deprive an innocent spouse of the right to support because her (or his) mate had not acted in good faith); 2) the party seeking support must be innocent of fraud or wrongdoing in entering the marriage; and 3) he or she must be free from knowledge of a prior marriage or other impediment. The last two requirements seem to have been carried rather thoughtlessly from former Civ. Code § 87. If—as § 4452 requires—a putative spouse must have acted in good faith, isn't the third standard (and perhaps the second as well) superfluous?

Gough, *Community Property and Family Law: The Family Law Act of 1969, 1970*

Commission's conception and, by implication, clarifying the intent of section 4452. The legislative history thus unequivocally demonstrates that the consistent purpose of section 4452 of the Family Law Act was solely to codify the judicially created putative spouse doctrine regarding property rights upon termination of the relationship by separation. No prior cases afforded any protection to a person who, in bad faith, deluded the putative spouse into a false belief in the validity of the putative marriage. Not a shred of legislative history supports the *Cary* court's radical suggestion that section 4452 was meant to award property rights to a person "who in bad faith brought about the pseudomarrriage."<sup>81</sup> The only conceivable basis for such an argument consists of a literal reading of the specific reference in section 4452 to Civil Code section 4800. Since section 4800 calls for an "equal" division of the community and quasi-community property of validly married persons upon dissolution, the *Cary* court reasoned that section 4452 requires a similar equal division even when only one party qualifies as a putative spouse and the only property available for division was acquired by the putative spouse.

The *Cary* court then extended the protections of section 4452 to persons living in nonmarital cohabitation, deeming this construction necessary to avoid an "inconsistent legislative intent" to reward the deceitful partner of a putative spouse while denying recovery to either of the two equally "guilty" parties to a meretricious union.<sup>82</sup> This approach disregards the far more reasonable interpretation that sections 4452 and 4455 were not designed to aid persons not themselves entitled to protection as putative spouses.<sup>83</sup>

Having thus redefined the scope of the Family Law Act, the *Cary* court cautioned against an expansive reading of its holding, warning practitioners that application of the Act would require "not only an ostensible marital relationship but also an actual family relationship, with cohabitation and mutual recognition and assumption of all the usual rights, duties, and obligations attending marriage."<sup>84</sup> In order to come within *Cary*'s scope, therefore, the parties were required to conduct

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CAL. LAW 273, 278-79. Following Professor Gough's comments, the Legislature amended section 4455 to delete the additional criteria he had criticized. Section 4455 now reads as follows:

The court may, during the pendency of a proceeding to have a marriage adjudged a nullity or upon judgment, order a party to pay for the support of the other party in the same manner as if the marriage had not been void or voidable, provided that the party for whose benefit the order is made is found to be a putative spouse.

CAL. CIV. CODE § 4455 (West Supp. 1977).

81. 34 Cal. App. 3d at 351, 109 Cal. Rptr. at 865.

82. *Id.* at 351-52, 109 Cal. Rptr. at 865-66.

83. For an analysis of the *Marvin* court's treatment of this argument, see note 137 *infra*.

84. 34 Cal. App. 3d at 353, 109 Cal. Rptr. at 867.

themselves according to the standards set by traditional marriage law. Not merely cohabitation, but a holding out as husband and wife is necessary. For this reason *Cary* was criticized as an attempt to recreate common law marriage in California.<sup>85</sup>

This test was met in *Cary* by the woman acting as homemaker and the man as breadwinner. This reliance on the traditional roles of husband and wife is in sharp contrast with recent developments in the law governing legally married persons, which have encouraged the married woman to function as the full legal partner of her husband. Within the last 5 years the Legislature has repealed former Civil Code section 5101, which, since the days of the Field Code, had declared the husband to be the "head of the family";<sup>86</sup> has equalized family support obligations;<sup>87</sup> has extended to wives a power equal to that formerly held exclusively by husbands to manage and control the community property during their joint lifetimes<sup>88</sup> and after the death of one spouse;<sup>89</sup> and has mandated the extension of credit to married women on the same terms it is granted to married men.<sup>90</sup> As Professor Prager has persuasively shown,<sup>91</sup> California marital property law for the first time in its history now recognizes the spouses as true partners. Similarly, the California Attorney General has acknowledged the right of a woman to retain her birth name after marriage,<sup>92</sup> and the case law has permitted her to resume her former name after divorce regardless of whether she has

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85. E.g., Comment, *In Re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226, 1227-28 (1974); Comment, *San Diego Law Review*, *supra* note 60, at 446-48.

86. Act of Oct. 1, 1973, ch. 987, § 2, 1973 Cal. Stats. 1898 (operative Jan. 1, 1975). For analogous developments in other countries, see Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMP. L. 1 (1975).

87. CAL. CIV. CODE §§ 4700, 4701 (West Supp. 1977); CAL. PENAL CODE § 270 (West Supp. 1977).

88. CAL. CIV. CODE §§ 5116, 5125, 5127 (West Supp. 1977).

89. CAL. PROB. CODE §§ 202-205 (West Supp. 1976). Commentators agree that the primary purpose of the statutory changes cited here and in note 88 *supra* was to put husbands and wives on equal terms with respect to control of community property. See Kahn and Frimmer, *Management, Probate and Estate Planning Under California's New Community Property Laws*, 49 CAL. ST. B.J. 516, 517 (1974); Comment, *Equal Management and Control Under Senate Bill 569: "To Have and To Hold" Takes on New Meaning in California*, 11 SAN DIEGO L. REV. 999, 1000-01 (1974).

90. CAL. CIV. CODE § 1812.30 (West Supp. 1977). See generally Comment, *Credit for Women in California*, 22 U.C.L.A. L. REV. 873 (1975). For a discussion of the federal law prohibiting discrimination based on sex in credit, see Comment, *Equal Credit: Promise or Reality?* 11 HARV. C.R.—C.L. L. REV. 186 (1976).

91. Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 U.C.L.A. L. REV. 1 (1976).

92. Index Letter No. 74-43 from Attorney General Evelle J. Younger to Senator Milton Marks (March 12, 1974) (copy on file at the *California Law Review*). See also CAL. CIV. PROC. CODE § 1279.5 (West Supp. 1977).

custody of minor children.<sup>93</sup> In view of these developments, it is anomalous to impose upon men and women who choose to live together in nonmarital cohabitation a lifestyle characterized by the restrictions formerly associated with traditional marriage.

Despite its flaws *Cary* was quickly followed.<sup>94</sup> It was next applied to a case in which the man, Harold Atherley, was married to a legal wife, Ruth, during the entire 15-year period of his nonmarital cohabitation with Annette.<sup>95</sup> Here, however, the court made no effort to suggest that Harold and Annette held themselves out as husband and wife during this period. Instead, it stressed that "during their ineretrious relationship Harold and Annette cohabited, pooled resources, resided together continuously, contributed services to joint projects, and otherwise conducted business as if they were man and wife. They clearly had a family relationship and fall within the rule set forth in *Cary*."<sup>96</sup> The same facts also brought Annette squarely within the traditional rules recognizing a property interest in a person who had contributed funds to the acquisition of assets,<sup>97</sup> and the court so indicated,<sup>98</sup> relying on *Vallera* and *Keene*. Furthermore, Annette qualified as a putative spouse following her ceremonial marriage to Harold, which they had contracted in reliance upon his invalid Mexican divorce from Ruth. *Cary* was therefore totally unnecessary to the result in *Atherley*, yet *Atherley's* expansion of *Cary* doubtless encouraged *Cary's* continued use in litigation.

By the time the supreme court moved to review these issues by granting a hearing in *Marvin*, one appellate court had rejected the *Cary* approach in *Beckman v. Mayhew*.<sup>99</sup> In *Beckman* the parties knew they were not married and apparently had no intention of marrying,<sup>100</sup> presumably because their marriage would have cost the woman her monthly government pension payments.<sup>101</sup> Unlike *Atherley*, prior law did not support a recovery. The trial court had found that the parties

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93. *In re Marriage of Banks*, 42 Cal. App. 3d 631, 117 Cal. Rptr. 37 (1st Dist. 1974).

94. A major reason for the popularity of the *Cary* approach may have been the relative ease in meeting the showing required to invoke its rule, at least as compared with other, less amorphous, theories.

95. *Estate of Atherley*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (4th Dist. 1975).

96. *Id.* at 770, 119 Cal. Rptr. at 48.

97. See text accompanying notes 39-58 *supra*.

98. 44 Cal. App. 3d at 767, 119 Cal. Rptr. at 46.

99. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (3d Dist. 1975). *Cary* was also rejected by division four of the first appellate district in an unpublished opinion in *In re Marriage of Williamson*, No. 37756 (Cal. Ct. App., 1st Dist. Sept. 29, 1976). See note 2 *supra*.

100. 49 Cal. App. 3d at 532, 122 Cal. Rptr. at 606.

101. *Id.*

had not made any agreement to pool their income or assets, that the woman had not made a financial contribution to the acquisition of the property standing in the man's name, and that her contribution had been limited to performing services in the home.<sup>102</sup> Feeling bound by *Val-lera* and *Keene* and unpersuaded by *Cary*'s interpretation of the Family Law Act, the court denied recovery. Given this conflict between the districts, and the mounting number of cases similar to *Cary* pending in the trial courts,<sup>103</sup> the Supreme Court of California granted a hearing in *Marvin v. Marvin*.

## II

### THE IMPACT OF *Marvin*

*Marvin* enjoys the singular honor of being one of the most misunderstood decisions of modern times. According to contemporary press accounts, the court held that Michelle Marvin was entitled to one-half the property acquired during her cohabitation with Lee Marvin.<sup>104</sup> A follow-up news story questioned whether unwed couples were required to share their wealth.<sup>105</sup> Attorneys were advised, in reliance on Justice Clark's dissent, that notions of fault, abolished by the Family Law Act for married couples, were now to be applied to persons living in non-marital cohabitation, for "[a]ll of the circumstances surrounding the relationship and its break-up are relevant again."<sup>106</sup> Such distortions must have been the result of hasty reading; careful analysis of Justice

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102. *Id.* at 533-34, 122 Cal. Rptr. at 606-07.

103. *E.g.*, *In re Marriage of Scherr*, No. 445395 (Cal. Super. Ct., Alameda County); *Winship v. Winship*, No. 13975 (Cal. Super. Ct., Riverside County); *appeal filed*, Civ. No. 13975 (4th Dist. Aug. 12, 1974).

104. On the day of the decision, the *San Francisco Examiner* featured the story on page one: "50-50 RIGHTS ORDERED FOR UNWED COUPLES." Despite the misleading headline, the *Examiner*'s story correctly concluded that the court had "said in effect that the property rights of unmarried persons stem from the general principles of contract and equity laws and not from community property laws." S.F. Examiner, Dec. 27, 1976, at 1, col. 6. The *San Francisco Chronicle*'s coverage the following morning was headed simply "Big Ruling on Unmarried Couples" and stressed private agreement as the basis for the holding. S.F. Chronicle, Dec. 28, 1976, at 1, col. 1. The *New York Times*, with a longer lead time, noted that the California court had upheld agreements between unmarried couples to share property acquired during their cohabitation. Its headline, however, sacrificed accuracy to wit: "'I Do' Does Not Have To Be In Writing". N.Y. Times, Jan. 2, 1977, § 4, at 7, col. 1. More misleading was *Time* magazine's account, which included the following key sentence: "The landmark decision, handed down last week, states that cohabitation without marriage gives both parties the right to share property if they separate." TIME, Jan. 10, 1977, at 39.

105. S.F. Chronicle, Jan. 3, 1977, at 21, col. 1. The *Chronicle* reported that unmarried couples who talked to its reporter, Ruthe Stein, agreed that the *Marvin* decision "would make them more cautious about what they promise to their housemates in the heat of passion." *Id.*

106. 1 CAL. FAM. L. REP. 1006 (Jan. 3, 1977).

Tobriner's scholarly opinion reveals that the court has preserved the options formerly available to California couples while removing unnecessary restrictions on their access to the courts.

Michelle Triola and Lee Marvin began living together in October 1964. In the lawsuit Michelle alleged that they had then entered into an oral agreement providing that during their cohabitation they would "combine their efforts and earnings and would share equally in any and all property accumulated as a result of their efforts whether individual or combined."<sup>107</sup> She also alleged that the agreement was subsequently modified to state:

[a] That in order that Plaintiff would be able to devote her full time to Defendant, Marvin, as a companion, homemaker, housekeeper and cook, it was further agreed that the Plaintiff would give up her lucrative career as an entertainer, singer.

[b] That in return Defendant, Marvin, would provide for all of Plaintiff's financial support and needs for the rest of her life.<sup>108</sup>

The court of appeal gave subparagraph [a] a significantly different wording: "That it was further agreed that during the time the parties lived together that plaintiff and defendant would hold themselves out to the general public as husband and wife and plaintiff would further render her services as a companion, homemaker, housekeeper and cook to said defendant."<sup>109</sup> In October of 1964 Lee Marvin was legally married to Betty Marvin; Betty subsequently obtained a final decree of dissolution.<sup>110</sup> Michelle knew of Lee's marriage and its dissolution; she admitted that she at no time believed she was married to Lee.<sup>111</sup> She contended, however, that the pooling agreement had been ratified by the conduct of both parties in continuing to live together following the Marvins' divorce.<sup>112</sup> Michelle fully performed her part of the alleged agreement. On May 8, 1970, she obtained a court order changing her surname from "Triola" to "Marvin".<sup>113</sup> On May 11, 1970, she and Lee

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107. Appellant's Reply Brief at 9, 10, No. 44359 (Cal. Ct. App. July 23, 1975) (quoting the Complaint at 2). Respondent's arguments that the contract was unenforceable because of the Statute of Frauds were rejected by the *Marvin* court, which noted that most of the cases enforcing agreements between nonmarital partners had involved oral agreements. 18 Cal. 3d at 674 n.9, 557 P.2d at 115 n.9, 134 Cal. Rptr. at 824 n.9. This clear statement should dispel any contrary implications that might arise from Justice Carter's reservation of the point in an earlier case. See *Spellens v. Spellens*, 49 Cal. 2d 210, 225 n.5, 317 P.2d 613, 622 n.5 (1957).

108. Appellant's Reply Brief at 10.

109. *Marvin v. Marvin*, No. 44359, slip op. at 21 n.5 (Cal. Ct. App., 2d Dist. July 23, 1975) (quoting para. 4 of the Complaint).

110. Respondent's Brief at 8, No. 44359 (Cal. Ct. App., 2d Dist. July 23, 1975).

111. Appellant's Petition for Hearing in the California Supreme Court at 6.

112. Appellant's Opening Brief at 27-29, No. 44359 (Cal. Ct. App., 2d Dist. July 23, 1975).

113. Respondent's Brief at 9, No. 44359 (Cal. Ct. App., 2d Dist. July 23, 1975).

Marvin separated. He paid her \$800 per month from the date of separation until November 1, 1971, when he ceased making the payments.

Michelle filed suit on February 22, 1972, seeking one-half the property standing in Lee Marvin's name that was acquired during the relationship. The trial court granted Lee's motion for a judgment on the pleadings, denying Michelle's motion to amend her complaint. The action was thereafter dismissed. The court of appeal affirmed on the ground that Michelle would be unable to amend her complaint so as to state a cause of action.<sup>114</sup> Its holding followed *Vallera* and *Keene*, rejected *Cary*, and stated that the alleged agreement was governed by *Hill v. Estate of Westbrook*,<sup>115</sup> in which the "meretricious" relationship itself formed the consideration for the agreement.<sup>116</sup>

The California Supreme Court reversed and remanded the case for trial. It concluded that Michelle's complaint did state a cause of action for breach of an express pooling agreement and furthermore that she could amend her complaint to state other causes of action such as implied contract, quasi-contract, or resulting trust.<sup>117</sup> The court affirmed in part prior California law governing the rights of persons living in nonmarital cohabitation, removed existing barriers to recovery based on services contributed during the relationship, declined to follow *Cary's* interpretation of the Family Law Act, and decided that, in view of changing social attitudes, nonmarital cohabitation should be given legal sanction.

#### A. Marvin's Impact on Prior Law

Toward the end of his opinion Justice Tobriner modestly characterized the import of *Marvin*:

We conclude that the judicial barriers [to] . . . the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed. . . . [T]he courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious consideration. We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties' lawful expectations.<sup>118</sup>

The court did rely heavily upon prior law. Its analysis begins with an

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114. *Marvin v. Marvin*, No. 44359, slip op. at 22 (Cal. Ct. App., 2d Dist. July 23, 1975). The court of appeal's decision was superseded by the supreme court's action in granting a hearing; its opinion was never published. A copy of the slip opinion is on file at the *California Law Review*.

115. 39 Cal. 2d 458, 247 P.2d 19 (1952).

116. Slip op. at 18-19, 21-22.

117. 18 Cal. 3d at 684, 557 P.2d at 123, 134 Cal. Rptr. at 832.

118. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

endorsement of *Truttali v. Meraviglia*<sup>119</sup> and the language in *Vallera v. Vallera*,<sup>120</sup> which upheld express pooling agreements between persons living in nonmarital cohabitation.<sup>121</sup> It rejected defendant's contention that such an agreement would not be enforced if the agreement itself contemplates a nonmarital relationship between the parties.<sup>122</sup> The court instead reaffirmed the close scrutiny of the precise consideration underlying the contract first employed in *Hill v. Estate of Westbrook*.<sup>123</sup> The court read *Hill* not as a deviation from, but as an application of, the *Truttali* principle: "the trial court found that it could not sever *the contract* and place an independent value upon the legitimate services performed by claimant."<sup>124</sup> The *Marvin* court carefully noted the willingness of the court of appeal in *Hill* to enforce any portion of the contract based on independent consideration and severable from the provision of sexual services.<sup>125</sup> Under the *Marvin* reformulation of *Hill*, an agreement will be held to violate public policy only where there is no consideration for the alleged agreement in *Marvin*. In phrasing its services.<sup>126</sup> Contracts of this proscribed type are certain to be extremely rare—the *Marvin* court expressly limits them to agreements for prostitution.<sup>127</sup>

Since the court both accepted *Hill* and found that the plaintiff had stated a cause of action based on an express agreement, it necessarily held that the rendition of sexual services did not form the exclusive consideration for the alleged agreement in *Marvin*. In phrasing its holding on this point, the court relied on plaintiff's allegations that the parties had agreed to pool their earnings and share equally in all property acquired, and that defendant had promised to support plaintiff.<sup>128</sup> This formulation ignores plaintiff's allegation that she had agreed to give up her lucrative career in order to devote her full time to defendant as a companion, homemaker, housekeeper, and cook. Defendant urged that the necessary consequence of this allegation was that plaintiff had produced no earnings to contribute to the pooling agree-

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119. 215 Cal. 698, 12 P.2d 430 (1932) (discussed in text accompanying notes 40-42 *supra*).

120. 21 Cal. 2d 681, 134 P.2d 761 (1943).

121. 18 Cal. 3d at 667-68, 557 P.2d at 111, 134 Cal. Rptr. at 820.

122. *Id.* at 669, 557 P.2d at 114, 134 Cal. Rptr. at 823.

123. 39 Cal. 2d 458, 247 P.2d 19 (1952).

124. 18 Cal. 3d at 671, 557 P.2d at 114, 134 Cal. Rptr. at 823 (emphasis added).

125. *Id.* at 672, 557 P.2d at 114, 134 Cal. Rptr. at 823.

126. See text accompanying notes 43-47 *supra*.

127. "Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason." 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

128. *Id.* at 674-75, 557 P.2d at 116, 134 Cal. Rptr. at 825.

ment.<sup>129</sup> If the *Marvin* agreement were express, it would nonetheless be valid under prior case law upholding such pooling agreements regardless of whether the contributions of one party included property or earnings or merely consisted of work and services in and around the home.<sup>130</sup> Defendant contended, however, that no express pooling agreement existed. Under *Vallera* and *Keene* plaintiff's household services would have been treated as voluntary contributions not giving rise to property rights. Although the *Marvin* court did not technically overrule *Vallera* or *Keene*, it is evident that both cases would be decided differently today. *Marvin* expressly rejects the distinction between the contribution of funds and the rendering of services that was implicit in *Vallera* and that formed the basis for the holding in *Keene*.<sup>131</sup> Moreover, following Professor Bruch's lead,<sup>132</sup> the court expressly accepted the remedies disavowed in *Keene*: implied contract, quasi-contract, and resulting trust.<sup>133</sup> At the very least, then, additional grounds for relief are now available in similar cases. But since the court expressly declined to cast its holding in community property terms,<sup>134</sup> the holding in *Flanagan* and that part of the holding in *Vallera* stating that persons knowingly living in nonmarital cohabitation do not acquire community property rights by reason of their cohabitation alone<sup>135</sup> remain good law.

Similarly, while *Marvin* does not expressly disapprove *Cary* and *Atherley*, it does reject the theory that those cases advance. Noting the absence of any legislative history suggesting that the Family Law Act was intended to govern the property rights of unmarried persons, the court concluded that *Cary*'s interpretation "distends" the Act.<sup>136</sup> Although the *Marvin* court declined to give its own interpretation of Civil Code Section 4452, it noted that the *Cary* court's conclusion that the section should be extended to persons living in nonmarital cohabitation

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129. Respondent's Answer to Petitioner's Supplemental Brief in the Supreme Court of California at 11-12.

130. *E.g.*, *Weak v. Weak*, 202 Cal. App. 2d 632, 21 Cal. Rptr. 9 (3d Dist. 1962); *Ferguson v. Schuenemann*, 167 Cal. App. 2d 413, 334 P.2d 668 (4th Dist. 1959); *Ferraro v. Ferraro*, 146 Cal. App. 2d 849, 304 P.2d 168 (1st Dist. 1956); *Cline v. Festersen*, 128 Cal. App. 2d 380, 275 P.2d 149 (3d Dist. 1954); *Bridges v. Bridges*, 125 Cal. App. 2d 359, 270 P.2d 69 (3d Dist. 1954).

131. 18 Cal. 3d at 679, 557 P.2d at 121, 134 Cal. Rptr. at 830.

132. Bruch, *supra* note 6, at 114-23.

133. See note 55 *supra* and accompanying text. Nor did the court limit itself to existing remedies; instead, it anticipated the "evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship." 18 Cal. 3d at 684 n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.

134. *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

135. See text accompanying notes 48-51 *supra*.

136. 18 Cal. 3d at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829. The Court also stated that it rejected the "reasoning" of *Cary* and *Atherley*. *Id.*

did not follow from its premises.<sup>137</sup> Since the *Marvin* court rejected *Cary's* reasoning, presumably *Cary's* troublesome reliance on the existence of an "actual family relationship"<sup>138</sup> was also disapproved.

The *Marvin* court disavowed *Cary's* reasoning, but it declined to disapprove *Cary's* result. Indeed, the court agreed with the *Cary* and *Atherley* courts that those cases would have resulted in unfair property distributions had they been decided under prior precedent.<sup>139</sup> The court plainly implied that both cases could be decided the same way under *Marvin*, depending on the proven expectations of the parties.

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137. In refusing to resolve the dispute concerning the meaning of section 4452, the court remarked:

Even if *Cary* is correct in holding that a "guilty" putative spouse has a right to one-half of the marital property, it does not necessarily follow that a non-marital partner has an identical right. In a putative marriage the parties will arrange their economic affairs with the expectation that upon dissolution the property will be divided equally. If a "guilty" putative spouse receives one-half of the property under section 4452, no expectation of the "innocent" spouse has been frustrated. In a non-marital relationship, on the other hand, the parties may expressly or tacitly determine to order their economic relationship in some other manner, and to impose community property principles regardless of such understanding may frustrate the parties' expectations.

18 Cal. 3d at 680 n.18, 557 P.2d at 120 n.18, 134 Cal. Rptr. at 829 n.18. The *Marvin* analysis does not adequately distinguish between the case where both parties are putative spouses and the situation, posed hypothetically in *Cary*, where only one party qualifies as a putative spouse. In the first case both parties will expect an equal division of property upon dissolution for the obvious reason that both think they are married and expect to be treated as married persons. In the second situation, however, one party will not have such an expectation. When the parties separate, the putative spouse will discover that there was no marriage. That discovery frustrates the putative spouse's expectations, not as to property, but as to marital status. To say that an award of one-half the property to the deceiving party will not deprive the putative spouse of any of the property benefits of a valid marriage is to miss the underlying equitable appeal of the putative spouse doctrine, which rests on the need to protect innocent persons whose good faith belief has been misplaced. Rewarding the sharp practices of a person who has led another to believe mistakenly in the validity of their marriage is the very antithesis of that protective impulse. The phrase, "guilty" putative spouse", employed by the *Marvin* court, is not only a contradiction in terms but also obscures the very different attitude taken by the framers of the Family Law Act toward the relative guilt or innocence of the spouses in causing the breakdown of their marriage and the deception practiced by a person who encourages another to believe in the validity of a marriage known to be invalid. See notes 73-80 *supra* and accompanying text. Having refused to punish a party guilty of matrimonial fault by denying him or her a divorce, the Family Law Act quite properly refused to permit the division of property to become a new receptacle for the old notions of punishment. But a person who knowingly induced the putative spouse's belief must be seen as a wrongdoer who cannot be permitted to profit from the wrong, regardless of the relative fault of the parties in causing the breakdown of their relationship. No expectations are frustrated by this result, for the deceptive person can have placed no good faith reliance upon the possibility of sharing any property acquired by the putative spouse. Because of this weakness and the flaws noted earlier, see notes 76-83 *supra* and accompanying text, *Cary's* interpretation of section 4452 is incorrect and should be rejected in an appropriate case.

138. See notes 84-93 *supra* and accompanying text.

139. 18 Cal. 3d at 681, 557 P.2d at 120-21, 134 Cal. Rptr. at 829.

Although the court agreed with the assertion in *Vallera* that parties who knowingly live together without marriage do not have the same expectations as putative spouses, the *Marvin* court recognized the possibility of "other expectations and equitable considerations,"<sup>140</sup> explaining that "[t]he parties may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort."<sup>141</sup>

Even if this language is read to imply an equal division of the accumulated property, such an outcome would constitute only a slight departure from prior law in the factual settings of *Cary* and *Atherley*. Janet Cary's expectations were plainly those of a legal wife despite the absence of a wedding ceremony: with a minor extension of existing case law, she could have been found to be a putative spouse.<sup>142</sup> Following a 15-year period during which the parties had pooled their efforts and earnings, even the wedding ceremony itself took place in *Atherley*.<sup>143</sup>

It is more difficult to surmise, however, what the expectations of the parties might have been in *Beckman v. Mayhew*.<sup>144</sup> Both parties had been married previously; Kenneth Mayhew's marriage had ended in divorce, Claire Beckman's by the death of her husband. Unlike the couples in *Cary* and *Atherley*, the parties in *Beckman* seem to have made a mutual decision not to marry in order to prevent one of the legal consequences of their marriage—loss of Claire's government pension, payable only as long as she remained an unremarried widow.<sup>145</sup> Their outward actions regarding their marital status were ambivalent.<sup>146</sup> The parties lived on property acquired by Kenneth prior to the commencement of their relationship. During the time they lived together, he built a house on the property largely by his own labor, using materials he purchased with money borrowed from a friend. Apparently because he knew the property would come to Claire after his death under the provisions of his will, Kenneth asked her to cosign the note securing the loan.<sup>147</sup> Both parties contributed their services to the improvement of

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140. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

141. *Id.*

142. See text accompanying note 60 *supra*.

143. See text following note 98 *supra*.

144. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (3d Dist. 1975).

145. *Id.* at 532, 122 Cal. Rptr. at 606.

146. In social matters the parties made no pretense of marital status. In financial matters, they used their individual last names for some purposes and used the man's last name for other purposes. They filed joint income tax returns and had a joint checking account in which plaintiff adopted defendant's last name. Defendant made a will bequeathing all his property to plaintiff.

*Id.* at 532-33, 122 Cal. Rptr. at 606.

147. *Id.* at 533, 122 Cal. Rptr. at 606.

the property and Claire contributed domestic services in the home as well. When their relationship ended after nearly 12 years, Claire sought to assert a property interest in the real estate and the house. The trial court, in denying relief, found that the parties had not made an express agreement to pool their income or assets, that Claire had not made financial contributions from her pension or other sources to the acquisition of the real estate or the construction of the house, and that she had not paid her pension money into the joint checking account.<sup>148</sup>

Prior to *Marvin*, a person in Claire's position who could not claim under an express contract was denied recovery. One option *Marvin* provides such a person is to seek a recovery in quantum meruit for services rendered. To recover under this theory, however, the plaintiff must show that the services were provided "with the expectation of monetary reward" and the recovery will be discounted by the reasonable value of support furnished by the other party during the relationship.<sup>149</sup> A more promising approach would be an effort to establish a "tacit understanding" that the property would be shared equally or an attempt to persuade the court that the property standing in the defendant's name was "accumulated through mutual effort" of both parties and should be "fairly apportioned" between them.<sup>150</sup>

Such allegations, however, are easier to make than to prove.<sup>151</sup> Whether the supreme court's willingness to give legal effect to the "social acceptance" it perceived being extended to persons living in nonmarital cohabitation<sup>152</sup> will result in easing the plaintiff's burden

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148. *Id.* at 533-34, 122 Cal. Rptr. at 606-07.

149. 18 Cal. 3d at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.

150. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

151. *See, e.g.*, Estate of Thornton, 81 Wash. 2d 72, 499 P.2d 864 (1972), where the court upheld in theory the claim of a woman living in nonmarital cohabitation that an implied partnership existed between her and the man. At trial, however, she was unable to prove her allegations. Estate of Thornton, 14 Wash. App. 397, 541 P.2d 1243 (1975). The two cases are discussed in Bruch, *supra* note 6, at 118-19.

152. 18 Cal. 3d at 683, 557 P.2d at 112, 134 Cal. Rptr. at 831. The *Marvin* court cites no authority for its statement, merely referring to the prevalence of nonmarital relationships. Its conclusion that social approval may be inferred from increased practice is shared by some, *e.g.*, Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 686 (1976), but disputed by others. The concurring opinion of Judges Evans and Paras in *Beckman v. Mayhew* evinces strong disagreement: "The fact that historically many couples have chosen to live together meretriciously, and that many do so now, hardly endows the practice with the dignity of a 'developing social attitude.'" 49 Cal. App. 3d at 536, 122 Cal. Rptr. at 608. *See also* Schwartz & Zeisel, *Unmarried Cohabitation: A National Study of a Parole Policy*, 22 CRIME & DELINQUENCY 137 (1976), reporting that unmarried cohabitation by parolees is disapproved in the overwhelming majority of states. The newly installed President of the United States, Jimmy Carter, has cast the moral force of his office against the practice. In an informal talk to staff members of HUD on February 10, 1977, he was quoted as saying that: "We want to protect the integrity of the family. We need a stable life to

of proof in the California courts is still unclear. In approaching the question of how expansively the *Marvin* holding should be read, it may be helpful to examine the supreme court's concept of the attitudes and expectations held by persons who currently choose to live together without marriage.

### B. *Marvin's Standard: The Reasonable Expectation of a Fair Deal*

At several places in its opinion the *Marvin* court afforded clues to its perception of nonmarital cohabitation as an emerging social phenomenon. The court was plainly impressed by data indicating that there is a "substantial increase" in the number of unmarried cohabitants.<sup>153</sup> In addition, it recognized the demographic and motivational variety among such couples. Thus, at one point in its discussion, the court appeared to limit its holding to "adults" who have voluntarily chosen this lifestyle as an alternative to marriage;<sup>154</sup> at another, it noted that many young couples use nonmarital cohabitation as a sort of preparation for marriage.<sup>155</sup> It recognized in a footnote that the ranks of unmarried cohabitants include persons wishing to avoid permanent commitments<sup>156</sup> as well as those, said to be members of lower socio-economic groups, who are unable to handle the "difficulty and expense of dissolving a former marriage."<sup>157</sup> Thrown in as well are persons who deliberately avoid marriage to prevent the application of the community property system or the loss of presently held economic benefits,<sup>158</sup> and those

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make us better servants of the people. So, those of you who are living in sin, I hope you'll get married." S.F. Chronicle, Feb. 11, 1977, at 1, col. 6.

153. The court cited a law review reference to 1970 census data for this proposition. 18 Cal. 3d at 665 n.1, 557 P.2d at 109 n.1, 134 Cal. Rptr. at 818 n.1, (citing Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226, 1226 (1974) ). A report released by the Bureau of the Census in January 1977 states that the number of persons sharing living quarters with an unrelated member of the opposite sex has approximately doubled since 1970. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 306, MARITAL STATUS AND LIVING ARRANGEMENTS, MARCH 1976, at 4 (1977) [hereinafter cited as CENSUS REPORT]. See note 221 *infra*.

154. 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

155. *Id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. Since the age of majority in California is 18, it is possible that the two statements are not inconsistent. In context, however, the court's reference to "adults" seems to contemplate older persons.

156. *Id.* at 675-76 n.11, 557 P.2d at 117 n.11, 134 Cal. Rptr. at 826 n.11.

157. *Id.* The court seems to be referring to the situation described in Foster, *Common Law Divorce*, 46 MINN. L. REV. 43 (1961).

158. The court cites *Beckman v. Mayhew*, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (3d Dist. 1975) as an illustration of this category. 18 Cal. 3d at 675 n.11, 557 P.2d at 117 n.11, 134 Cal. Rptr. at 826 n.11. The statement would also cover situations in which one party fears the loss of alimony being paid by a former spouse. This situation is addressed by CAL. CIV. CODE § 4801.5 (West Supp. 1977), which creates a "rebuttable presumption, affecting the burden of proof, of decreased need for support if the supported party is cohabiting with a person of the opposite sex." The 1974 version of sec-

who, under the mistaken belief that common law marriage exists in California, consider themselves actually married.<sup>159</sup> The population of persons living together without marriage thus includes persons free to marry who choose not to do so, persons legally incapable of marriage, and persons who believe themselves married. Only the broadest of rules could cover such a variegated group; the *Marvin* court suggests, following Justice Peters,<sup>160</sup> that analysis should begin with a presumption that the parties intend to "deal fairly with each other"<sup>161</sup> and should include an inquiry into their "conduct"<sup>162</sup> and "the nature of their relationship."<sup>163</sup> This approach can be explored by applying it to some situations in which nonmarital cohabitation occurs.

### 1. *Some Typical Factual Patterns*

*Case One.* Mary and John met while both were attending college. He intended to go to law school; she wished to attend medical school. They moved together into an apartment, rented in John's name,<sup>164</sup> and Mary dropped out of school to go to work. She supported herself and John until he graduated from law school. A year later, when Mary had just reenrolled in college to continue her premedical studies, John decided to marry Susan. Excepting a relatively ancient car and some secondhand furniture, there is no accumulation of property resulting from the nonmarital cohabitation of John and Mary.

Beginning with the assumption that the parties intended to deal fairly with each other, at least at the inception of their relationship, what can be deduced from the conduct of Mary and John? One possible line of analysis is this: Mary expected that, after she helped put John through law school, he would pay her expenses while she attended medical school. Had there been an express agreement to that effect, it would surely be enforced under *Marvin*. If there were no express agreement, or if John denied that one existed, however, whether a court following *Marvin* would find an implied agreement might depend on

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tion 4801.5, Act of Sept. 26, 1974, ch. 1338, § 1, 1974 Cal. Stats. 2911, which provided for termination, not merely modification, of spousal support in similar circumstances, was interpreted in *Lang v. Superior Court*, 53 Cal. App. 3d 852, 126 Cal. Rptr. 122 (2d Dist. 1975).

159. If Janet Cary's testimony had been accepted, she and Paul Cary would have fallen into this category. See text accompanying note 60 *supra*.

160. *Keene v. Keene*, 57 Cal. 2d 657, 674, 371 P.2d 329, 339, 21 Cal. Rptr. 593, 603 (1962) (Peters, J., dissenting).

161. 18 Cal. 3d at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830.

162. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

163. *Id.* at 675-76 n.11, 557 P.2d at 117 n.11, 134 Cal. Rptr. at 826 n.11.

164. Unmarried couples may experience difficulties with landlords if they disclose their living arrangements. Weisberg, *Alternative Family Structures and the Law*, 24 FAM. COORDINATOR 549, 551 (1975).

what facts can be proved. If John had supported Mary's ambitions and they had planned together for a "dual career" family, with or without marriage, the case for an implied contract would be strengthened. In contrast, if John had made clear to Mary his hope that she would forego or postpone her professional training until he became an established legal practitioner or until after they had had children, another result might follow.

A different approach would characterize John's legal education as the sole asset produced by the efforts of both parties during their cohabitation. It might be argued that Mary's investment in John's future earning capacity ought to be recognized under theories of unjust enrichment or constructive trust.<sup>165</sup> Some support for this approach may be drawn from cases awarding similar recoveries to wives who have "put hubby through" college or professional school. For example, in *Diment v. Diment*<sup>166</sup> Patricia and Dean had married in 1952, when Dean had not yet finished high school. Within 6 months after the marriage, he recommenced his education and ultimately finished college and medical school. During 8 years of this period, Patricia provided the sole support of the family. At the time of their divorce in 1970, no property was available for division, because Dean had declared bankruptcy in 1969. Nevertheless, the trial court awarded Patricia permanent alimony in the amount of \$39,600, payable in installments. Patricia remarried in 1971, and Dean sought in 1973 to terminate that portion of the award attributable to Patricia's support. His motion was denied; the appellate court affirmed. The award was not for Patricia's support, but instead was a property award based on the increase in Dean's earning capacity during the marriage.<sup>167</sup> It could not be terminated upon Patricia's remarriage or even her death. The rationale of *Diment* applies equally to the situation of John and Mary. *Marvin* ought to be construed as authority for a similar result.

One possible objection to applying *Diment* to a nonmarital relationship is that the availability of permanent alimony following dissolution of a legal marriage makes the result more easily attainable in *Diment* than in Case One, regardless of the court's willingness to rationalize the

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165. See Bruch, *supra* note 6, at 124-26.

166. 531 P.2d 1071 (Okla. App. 1974).

167. Although the award of money is termed 'permanent alimony', it is in substance a property award for the contributions which plaintiff made to defendant's increase in earning capacity. Without this award, plaintiff would be left with nothing to show for her contributions, financial and otherwise, to approximately eighteen years of marriage, which enabled the defendant to acquire a valuable college and medical school education that has greatly enhanced his earning capacity.

*Id.* at 1073. One danger of this approach is the potential risk that the "property" award may be discharged in bankruptcy. See *In re Cox*, 543 F.2d 1277 (10th Cir. 1976).

order as a property award. *Marvin* reserved for later decision the question whether a party to a nonmarital relationship is entitled to support payments following termination of the cohabitation, at least in the absence of an express or implied contract for such payments.<sup>168</sup> There is, however, no need to postulate a generalized duty of support after separation to grant Mary a share in John's increased earning power.<sup>169</sup> One should not assume that her contribution to John's education was intended purely as a gift<sup>170</sup> or merely as a loan to be repaid. Moreover, Mary's conduct in resuming her education after John's graduation indicates that her earlier plan to become a doctor has not been abandoned and that she expects her investment in John's future to be repaid by his investment in her own. Instead of banking her earnings to pay for her education, she has helped to produce a valuable asset which should now be available for her use.

In any event, the mere existence of a support obligation as an incident of legal matrimony has not always been enough to persuade courts that husbands ought to be compelled to pay for their wives' professional training. In *Morgan v. Morgan*<sup>171</sup> a New York appellate court, while commending the wife on her ambition to attend medical school, reversed an order including in the alimony award a sum meant to enable her to achieve that goal. The court reasoned that alimony must be based on the present circumstances of the parties,<sup>172</sup> which included the earning capacity of the wife developed while putting her husband through law school.<sup>173</sup> Courts in other states have taken a more sympathetic view. One court ordered the physician husband to pay for his wife's college education rather than her secretarial training.<sup>174</sup> Another weighed the fact that the parties had just reached the point at which they would begin "to reap some of the economic rewards of their efforts"<sup>175</sup> in setting the alimony award for a wife who had been the major support of the family during the husband's last years of medical school and his first years of practice. Neither of these cases, however,

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168. 18 Cal. 3d at 685 n.26, 557 P.2d at 123 n.26, 134 Cal. Rptr. at 832 n.26.

169. Indeed, once Mary becomes a doctor, she will presumably not need support from John or anyone else.

170. *Id.* at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830.

171. 52 App. Div. 2d 804, 383 N.Y.S.2d 343 (1976), *modifying per curiam*, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (Sup. Ct. 1975); *appeal dismissed*, 40 N.Y.2d 843, 356 N.E.2d 292, 387 N.Y.S.2d 839 (1976).

172. *Id.* at 804, 383 N.Y.S.2d at 344.

173. The wife's earning capacity was estimated by the trial court to be approximately \$10,000 per year. *Morgan v. Morgan*, 81 Misc. 2d 616, 618, 366 N.Y.S.2d 977, 979 (Sup. Ct. 1975), *modified per curiam*, 52 App. Div. 804, 393 N.Y.S.2d 343, *appeal dismissed* 40 N.Y.2d 843, 356 N.E.2d 292, 387 N.Y.S.2d 839 (1976).

174. *Childers v. Childers*, 15 Wash. App. 792, 552 P.2d 83 (1976). The wife's only work experience was as a waitress during the husband's years as an intern.

175. *Magruder v. Magruder*, 190 Neb. 573, 577, 209 N.W.2d 585, 588 (1973).

involved a woman who had chosen to pursue a professional career. If the approach taken in *Morgan* is followed elsewhere, unjust enrichment or constructive trust theories may afford more certain relief than attempts to establish an obligation of support following the termination of a nonmarital relationship.

*Case Two.* Betty, a widow with two teenage children, owns and operates a wholesale supply business. Tom works in a middle level management position for a national manufacturing concern; he earns a higher income than does Betty. Tom is divorced and has continuing obligations of alimony and child support. Eschewing marriage, Betty and Tom acquire a home, taking title as joint tenants, with the parties using their respective names, and set up housekeeping together. Both continue to maintain separate bank accounts. They contribute to their living expenses and the mortgage payments on the house in proportion to their respective incomes. They do not file joint income tax returns; joint filing would increase their tax bill.<sup>176</sup> As she had done prior to the relationship with Tom, Betty continues to pay for housekeeping and child care assistance. After 10 years of nonmarital cohabitation, Tom is transferred by his employer to another state. Betty decides not to sell her business and accompany him. Tom is willing to let her buy his interest in their home, but he contends that the cost ought to reflect the ratio of his contributions to its purchase price, not merely half its present value. If Betty is unwilling to meet this request, Tom threatens to force a sale of the property. Neither has asserted any interest in the accumulations of the other during the period of their relationship.

Although Betty and Tom provide an extreme example because of their financial independence and the extent of their care to keep their assets separate, they may illustrate an attitude prevalent among many mature adults who have completed earlier marriages and who are self-supporting during their relationship. Had they expressly agreed that each partner's earnings and the property acquired from those earnings should remain the separate property of the earning partner, the *Marvin* court would enforce their contract.<sup>177</sup> Assuming that Betty's business increased in value and that Tom made successful investments during their relationship, their conduct in carrying on their affairs separately should lead a court to infer such a "separate property contract" as to

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176. See, e.g., K. DAVIDSON, R. GINSBURG, & H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 528-33 (1974). President Carter, on being informed that present income tax laws reward unmarried cohabitation and penalize marriage, and further learning that his proposed 1977 economic stimulus package would increase this differential, immediately changed his proposal so as to encourage marriage by setting the standard deduction at \$2200 for single persons and \$3000 for married couples. S.F. Chronicle Feb. 17, 1977, at 1, col. 5. See also note 152 *supra*.

177. 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

those accumulations. The only asset acquired through a pooling of earnings is the house. Here their decision to take title in joint tenancy rather than as tenants in common, which would have permitted unequal shares among the cotenants, would seem controlling. That choice can be interpreted as the equivalent of an express agreement that each party's interest in the house would be equal and would not be determined by the amount of their individual contributions. If Tom persists in his determination to force a sale, Betty will lose the house, but she should have a claim for half its value.

*Case Three.* Jan and Kim, both active in the gay community, have been living together for several years in a house Jan owned prior to their relationship. Jan owns and operates a very successful beauty salon; Kim, who hopes to open a restaurant someday, remains at home caring for the house and improving an already highly developed skill as a gourmet cook. They would marry, if state law permitted them to do so,<sup>178</sup> they are considered married by their friends. Twelve years after their relationship commenced, Jan asks Kim to leave. Kim asserts an interest in the property acquired by Jan during their time together.

Although the *Marvin* opinion does not mention homosexual or lesbian relationships, its potential application to such cases was suggested immediately after the opinion was announced.<sup>179</sup> The prior case law was developed in the context of heterosexual couples, but at least one case analogized such agreements to "a joint business enterprise, somewhat akin to a partnership . . . one which any two persons (two women or two men, for example) might undertake."<sup>180</sup> Read in context, the court appears to be comparing only the business, not the sexual, aspect of the relationships, but so long as there is no contract to pay for sexual services, *Marvin's* logic should apply.

A contrary argument might assert that the state's refusal to permit gay couples to marry expresses a stronger public policy against such unions than exists against nonmarital cohabitation between heterosexual couples. This argument is refuted, however, both by the California Legislature's repeal of prohibitions against the private sexual behavior of consenting adults<sup>181</sup> and by *Marvin's* express recognition that the case law never distinguished between "illegal relationships and lawful nonmarital relationships"<sup>182</sup> in enforcing contracts between unmarried cou-

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178. See note 1 *supra*.

179. *E.g.*, 1 CAL. FAM. L. REP. 1006 (Jan. 3, 1977). S.F. Chronicle, Dec. 28, 1976, at 20, col. 6.

180. *Garcia v. Venegas*, 106 Cal. App. 2d 364, 368, 235 P.2d 89, 92 (1st Dist. 1951).

181. Act of May 13, 1975, ch. 71, § 10, 1975 Cal. Stats. 134 (current version at CAL. PENAL CODE § 228a (West Supp. 1976) ).

182. 18 Cal. 3d at 668 n.4, 557 P.2d at 112 n.4, 134 Cal. Rptr. at 821 n.4.

ples. It seems clear, then, that an express pooling agreement between Kim and Jan in Case Three would now be enforced.

The application of other remedies, such as implied contract or trust doctrines, may prove more difficult. The same theory should apply; the difficulty stems from the practical problems of persuading a judiciary unfamiliar with the customs of the gay community what couples like Jan and Kim reasonably expect from each other and from their relationship. Had they been a heterosexual couple, their conduct would probably be viewed as similar to that of Janet and Paul Cary except for the absence of children. The increasing attention given to the lesbian mother's claim to custody<sup>183</sup> indicates that in many cases even that similarity will be present. Will courts be willing to equate Kim's expectations to those of Janet? Can similar "tacit understandings" be established in both cases? Analytically, the answer must be affirmative; practically, counsel must be prepared to undertake not only the burden of proof, but the task of education as well.<sup>184</sup>

## 2. *Specific Factors*

The three cases above represent a few of the myriad situations sure to appear in the courts in *Marvin's* wake. As the factual patterns in particular cases become less clear than those in the examples and as the parties dispute what the facts actually are, *Marvin's* guidance may seem amorphous. It might be helpful, therefore, to identify some indices implicit in the *Marvin* opinion that attorneys should consider in preparing future cases.

In presenting these suggestions, an analogy will be made to former section 230 of the Civil Code, which was applied to determine whether the father of an illegitimate child had legitimated the child through his conduct:

The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth.<sup>185</sup>

The statute was interpreted as imposing five separate conditions, each of which had to be satisfied before legitimation was accomplished. These were biological paternity, illegitimacy, public acknowledgment, recep-

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183. E.g., Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976).

184. See also Bruch, *supra* note 6, at 106.

185. Ch. 385, § 9, 1870 Cal. Stats. 531 (repealed by the Uniform Parentage Act, ch. 1244, § 8, 1975 Cal. Stats. 3196; current version at CAL. CIV. CODE § 7004 (4) (West Supp. 1977) ).

tion into the father's family, and treatment as legitimate.<sup>186</sup> Section 230 provided a method of legitimation that did not require marriage to the child's mother<sup>187</sup> and that could be accomplished without her consent<sup>188</sup> if the five requirements were met. The statute identified conduct that indicated both the father's desire to legitimate the child and the child's expectation of legitimacy. Similarly, *Marvin's* standard is one that seeks to identify the expectations of the parties by an examination of their conduct toward each other and outsiders. Casting their actions in terms of a model similar to that provided by former section 230, therefore, may serve to advance the analysis.

Some factors important to the analysis of cases under *Marvin* have already been identified. Except where marriage is not legally possible, the parties' choice to live together without marriage may be significant. *Marvin* expressly rejects the argument that such a decision alone should form the basis for an inference that the parties intend to keep their earnings and property separate.<sup>189</sup> Cases in which the decision not to marry is mutual, as in *Beckman v. Mayhew*,<sup>190</sup> might, however, be distinguished from those in which it is unilateral, as was apparently the case in *Flanagan v. Capital National Bank*,<sup>191</sup> where the woman acquiesced in the man's wishes. If one party hopes for marriage, or if both do, but at different times, it is much less likely that their continuing to remain unmarried implies any agreement. Where both reject marriage on principle, however, a "tacit understanding" that they consider their property to be separate may exist. That is, if the parties have a strong commitment to each other and wish to share their earnings and accumulations, but are opposed to marriage as an institution, they will likely have the foresight to enter into an express agreement, possibly in writing, clarifying their intentions.<sup>192</sup> Although the lack of such a document should not be determinative, its absence does provide a slight indication that the parties view themselves as independent entities and their respective property as separately owned.

A second important factor in resolving future cases is whether one party is dependent upon the other for support. *Marvin* found "unfair"

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186. Estate of Flood, 217 Cal. 763, 21 P.2d 579 (1933); see generally Kay, *The Family and Kinship System of Illegitimate Children in California Law*, 67 AM. ANTHROPOLOGIST 57, 61 (Special Issue, Dec. 1965).

187. Former Civil Code § 215, ch. 385, § 8, 1870 Cal. Stats 531 (repealed by Uniform Parentage Act, ch. 1244, § 5, 1975 Cal. Stats. 3195; current version at CAL. CIV. CODE § 7004(3) (West Supp. 1977)).

188. *In re Richard M.*, 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975).

189. 18 Cal. 3d at 675 n.11, 557 P.2d at 117 n.11, 134 Cal. Rptr. at 826 n.11.

190. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (3d Dist. 1975).

191. 213 Cal. 664, 3 P.2d 307 (1931).

192. See Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1249-55 (1974).

the situation in which the homemaking partner is left with nothing at the end of the relationship while the income-producing partner is allowed to keep the property standing in his name acquired during the relationship.<sup>193</sup> *Marvin* has rectified this unfairness to the extent that it resulted from the refusal of the court in *Vallera* and *Keene* to recognize the economic value of services performed in the home and on the farm.

Care must be taken, however, not to give controlling weight to a long period of economic dependency by one party upon the other. Certainly, in the vast majority of cases, a judicial inference of an expectation of reward for devotion to home and family by the dependent partner will accurately reflect the couple's understanding. Where the dependent party is the woman in a heterosexual relationship, some judges and commentators feel a special need to protect her.<sup>194</sup> Implicit in this view is the fear that without the financial protection of marriage or its equivalent, women will inevitably be unfairly treated by unscrupulous men. Such protection may be necessary for women who have been socialized in traditional feminine roles. Such women are unlikely, however, to have eschewed marriage deliberately. They are much more likely to be among those who, like Janet Cary, believed common law marriage was valid in California, or who, like Joyce Williamson, participated in an unlicensed "wedding ceremony" despite her knowledge that Earl Williamson was not divorced from his second wife.<sup>195</sup> Many younger American women do not wish to have their intimate relationships with men shaped and constricted by the model of traditional marriage. They wish the freedom, formerly thought appropriate only for men, to experiment with a variety of relationships without fear of limiting entanglements. To the extent they continue to hold these views, such women will not assert property claims at the termination of their nonmarital relationships and no case will arise. If their views shift, however, the expectations of their partners, who may have undertaken to furnish support only for the present in reliance on the conduct of these women, must be protected. The California Supreme Court has recognized that, where qualified women seek to enter occupations formerly reserved to men, they can not be denied the opportunity to do so on the chivalrous but unacceptable ground that they need protection from their feminine weaknesses.<sup>196</sup> Since the court has accepted a mod-

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193. 18 Cal. 3d at 681, 557 P.2d at 120-21, 134 Cal. Rptr. at 829-30.

194. *E.g.*, *Keene v. Keene*, 57 Cal. 2d 657, 668-75, 371 P.2d 329, 336-40, 21 Cal. Rptr. 593, 600-04 (1962) (Peters, J., dissenting); *Vallera v. Vallera*, 21 Cal. 2d 681, 685-87, 134 P.2d 761, 763-64 (1943) (Curtis, J., dissenting).

195. *In re Marriage of Williamson*, No. 37756, slip op. at 1 n.1 (Cal. Ct. App., 1st Dist. Sept. 29, 1976), *rev'd on rehearing*, No. 37756 (Cal. Ct. App., 1st Dist. Mar. 2, 1977). See note 2 *supra*.

196. *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 9-10, 485 P.2d 529, 534, 95 Cal. Rptr. 329, 334 (1971).

ern role for women in the marketplace, *Marvin* should not be read to deny them that role in the home.

Regardless of the outcome in cases where one party is financially dependent upon the other, if both parties produce income, allowing them to retain their own respective accumulations at the termination of the relationship does not appear unfair. Again, the interpretation of facts may be critical: if one person has sacrificed employment or career plans to allow the other to advance economically or professionally, the sacrificing party may rightfully expect compensation or other appropriate relief.<sup>197</sup> Furthermore, the extent to which the primary burden of homemaking is borne by one party rather than shared by both should be considered.<sup>198</sup> Differences in "tacit understandings" may turn on the extent to which the parties have pooled their earnings or maintained separate accounts. *Marvin* expressly recognizes the infinite variety of possible arrangements and notes that different treatment might be appropriate for different assets or ventures.<sup>199</sup>

A third factor is whether the parties represent themselves as being married. Affirmative representations ought not be given much weight. Since by definition the parties know they are not married,<sup>200</sup> their representation is probably designed only to deceive others: parents, friends, employers, creditors, the general public. The deception indicates the couple's need to be comfortable in their surroundings more than any financial understanding they may have negotiated with each other. The *Marvin* court seemed to accept this view, for it emphasized that it neither resurrected common law marriage nor found that Lee and Michelle Marvin were "married."<sup>201</sup> The court reiterated that nonmarital partners need not be treated as "putatively married persons" in order to extend to them the same remedies applicable to unmarried persons who contract but do not cohabit with each other.<sup>202</sup> A contrary reading might revive *Cary* surreptitiously, since its "actual family relationship" standard rested heavily on open cohabitation and a holding out as husband and wife. If, however, the parties actively seek to dispel any inference that might arise from their cohabitation by denying that they are married, they are probably among those couples who consciously

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197. See text accompanying notes 165-175 *supra*.

198. Recent research suggests that, regardless of marital status, women still bear the primary burden of housework. Stafford, Backman, & diBona, *The Division of Labor Among Cohabiting and Married Couples*, 39 J. MARR. & FAM. 43 (1977).

199. 18 Cal. 3d at 674 n.10, 557 P.2d at 116 n.10, 134 Cal. Rptr. at 825 n.10.

200. Couples who believe common law marriages to be valid in California should be excluded from this rule. As implied in the text, such persons are more analogous to putative spouses than nonmarital cohabitants. See text accompanying notes 59-61 *supra*.

201. 18 Cal. 3d at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.

202. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

seek alternative alternatives to marriage. It has already been suggested that, in the absence of an express agreement, such behavior tends to suggest an expectation of financial independence.<sup>203</sup>

A fourth possible factor that ought to be similarly discounted, except as it bears on the parties' beliefs about marriage as an institution, is whether they have jointly produced children. Despite easy access to birth control devices and the legalization of abortion, one cannot assume that all babies are planned. Remaining unmarried after the birth of a child, however, is some indication that the value of marriage is being rejected. The child's legitimacy is protected by the Uniform Parentage Act in California,<sup>204</sup> and both parties will, of course, incur legal obligations as parents. The child's rights and the parents' obligations can shed no light on the parties' financial understandings. If the child's birth results in temporary loss of income for the mother<sup>205</sup> or a longer period of child-rearing leave for either or both of the parents, however, their understanding and expectations may change.

These factors can be combined positively or negatively: they may either establish or disprove the existence of property rights arising from the conduct of the nonmarital partners. In view of the concern expressed by Justice Clark's concurring and dissenting opinion in *Marvin*,<sup>206</sup> however, it may be more useful to explore ways of avoiding *Marvin*'s impact. Combining the enumerated factors in light of the model provided by former Civil Code section 230,<sup>207</sup> the following formulation is possible:

An unmarried couple who live together without an express agreement as to property, who have mutually and deliberately chosen not to marry, who are each financially self-supporting, and who represent themselves as unmarried thereby indicate their lack of expectation that either will share in property accumulated by the other during the relationship, except to the extent they may have contributed funds or services to specific acquisitions or particular ventures.

If this or a similar statement were accepted, Justice Clark's fears about the expansive and vague language used in *Marvin* ought to be allayed. Similarly, his objection that the majority's approach violates the spirit of the Family Law Act by necessitating an examination of the parties' conduct<sup>208</sup> would be answered. The formulation clearly indicates that the conduct to be examined under *Marvin* is not the fault of a party in

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203. See text accompanying note 192 *supra*.

204. See CAL. CIV. CODE § 7000-18 (West Supp. 1977).

205. Not an unlikely result in view of the decision of the United States Supreme Court in *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976).

206. 18 Cal. 3d at 686, 557 P.2d at 123-24, 134 Cal. Rptr. at 832-33.

207. See text accompanying notes 185-86. *supra*.

208. 18 Cal. 3d at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832.

causing the breakdown of the relationship, but the actions of the couple toward each other and third parties that bear on their expectations regarding financial matters.

At the same time, the formulation offers some guidance to persons who fear that *Marvin* will impose upon them obligations they did not seek. Although written agreements providing for separate property and waiving implications that might otherwise be drawn from cohabitation are possible and perhaps advisable, the suggested standard would give sufficient protection to parties whose intentions are clear. In more ambiguous settings, such as those discussed above where one party is dependent upon the other for support,<sup>209</sup> written agreements are likely to become commonplace. Here normal contract rules of fraud and overreaching can serve to curb possible abuse. For example, in Case One, a contract drawn by John or one of his law school friends, in which Mary waived all legal and equitable claims she might have or acquire against John, would probably not survive a challenge by Mary, at least not if she had lacked independent legal advice. Although it may be appropriate to assume that nonmarital partners intend to deal fairly with each other, there appears no warrant for presuming that their good intentions will survive a separation any better than do those of married couples at the point of divorce.

Justice Clark may be correct in charging that *Marvin* places upon trial court judges an additional burden of arbitrating domestic disputes. Whether that burden is seen as "unmanageable" depends on how highly one values the freedom *Marvin* affords couples to opt out of the traditional marriage contract in order to fashion an agreement better suited to their individual needs. After all, as the majority repeatedly points out, the remedies *Marvin* extends to persons living in nonmarital cohabitation have long been afforded to other persons whose relations are purely contractual.<sup>210</sup> The new burden imposed on trial courts is more than outweighed by the increased dignity given to persons experimenting with new lifestyles.

### III

#### CONCLUSION: A FOOTNOTE ON THE FUTURE OF MARRIAGE

Having bowed to what it perceived as a fundamental alteration in social attitudes toward persons living in nonmarital cohabitation,<sup>211</sup> the

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209. See text accompanying notes 193-96 *supra*.

210. 18 Cal. 3d at 682, 684 n.24, 557 P.2d at 121, 122 n.24, 134 Cal. Rptr. at 830, 831 n.24.

211. "The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that

*Marvin* court then endorsed legal marriage as "at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."<sup>212</sup> In an opinion that clarifies and reaffirms the distinction between marriage and nonmarital cohabitation against the background of *Cary's* abortive attempt to blur the legal differences between those two types of unions, such an endorsement is hardly necessary. Marriage as an institution is strengthened, not weakened, by reserving its legal rights and obligations for those who have chosen to incur them. Moreover, the legal and equitable remedies that *Marvin* affords to those who choose not to marry may in turn expand the ability of married couples to vary the terms of the traditional marriage contract.

The concept that traditional marriage is a status that protects women has been vigorously attacked for some time. As early as 1855 the well-known legal disabilities imposed on married women by the common law which Blackstone had asserted were designed for the wife's protection and benefit<sup>213</sup> were specifically rejected by Lucy Stone and her husband, Henry Blackwell, in their *Marriage Protest* because such laws "confer upon the husband an injurious and unnatural superiority, investing him with legal powers which no honorable man would exercise, and which no man should possess."<sup>214</sup> Some feminists have concluded that legal marriage is inherently oppressive for women and have dedicated themselves to its abolition;<sup>215</sup> others have turned their efforts toward reform of laws governing marriage and divorce in an effort to make the institution more nearly analogous to a partnership.<sup>216</sup> Still others have explored the possibility of legal recognition of contracts in lieu of marriage<sup>217</sup> or contracts that alter the obligations of traditional marriage.<sup>218</sup> Certainly Midge Decter's assertions made in 1972 that "every woman wants to marry" and that "marriage is something asked

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have apparently been so widely abandoned by so many." *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

212. *Id.*

213. I W. BLACKSTONE, COMMENTARIES \* 429-33.

214. Stone & Blackwell, *Marriage Protest*, in UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF FEMINISM 149 (A. Kraditor ed. 1970).

215. Cronan, *Marriage*, in NOTES FROM THE THIRD YEAR: WOMEN'S LIBERATION 62-65 (1971), reprinted in K. DAVIDSON, R. GINSBURG & H. KAY, *supra* note 176, at 175-81.

216. See generally Grant, *How Much of a Partnership is Marriage?* 23 HASTINGS L.J. 249 (1971); Kay, *Making Marriage and Divorce Safe for Women*, 60 CALIF. L. REV. 1683 (1972); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974).

217. Weitzman, *supra* note 192, at 1249-76.

218. *Id.* See also Note, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161 (1974).

by women and agreed to by men"<sup>219</sup> have already been belied by the facts.

Marriage seems to be falling in incidence as well as in repute. One 1977 report on the marital status and living arrangements of Americans over 14 disclosed that in 1976 both men and women were almost a year older at first marriage than in 1960; it predicted that an increasing proportion of adults will never marry.<sup>220</sup> Confirming the factual assumption of the *Marvin* court about the increased number of unmarried persons living with an unrelated person of the opposite sex, the same report shows that such households have approximately doubled since 1970.<sup>221</sup> Finally, the incidence of divorce has risen dramatically in the last dozen years: the divorce rate has more than doubled, from 2.3 divorces per 1,000 population in 1963 to 4.8 per 1,000 in 1975.<sup>222</sup> Evaluating all of these trends, the Bureau of the Census concludes that

Survey results over the last several years have indicated that fundamental changes are occurring in marriage and family living. Whether or not these changes represent only a temporary departure from past norms or the emergence of new and lasting lifestyles, the fact of their existence has important implications for current social and economic programs and for the future of such programs.<sup>223</sup>

In view of these developments, social planners should turn their attention to the possibility of creating and strengthening institutional support for individuals entering into family relationships, whether or not these relationships are marital ones.

American society traditionally has rewarded autonomous individuals capable of taking charge of their own lives. Recently, we have come to recognize that social and economic forces prevent many persons from realizing their own potential. More recently still, we have begun to acknowledge the limiting impact of traditional sex roles upon women. The decision to assume family responsibilities superimposes additional difficulties upon the task of carrying on one's life in an autonomous and self-realizing way; in the past, these difficulties have been particularly severe for women. When the family was structured in a more tradition-

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219. M. DECTER, *THE NEW CHASTITY AND OTHER ARGUMENTS AGAINST WOMEN'S LIBERATION* 124 (1972).

220. CENSUS REPORT, *supra* note 153, at 2.

221. *Id.* at 4. The importance of this figure for the purposes of the *Marvin* analysis is somewhat diminished by the following caveat:

[D]ata users who make inferences about the nature of the relationships between unrelated adults of the opposite sex who share the same living quarters should be made aware that the data on this subject are aggregates which are distributed over a spectrum of categories including partners, resident employees, and roomers.

*Id.* at 5.

222. *Id.* at 2.

223. *Id.* at 1.

al manner, a man who married or cohabited with a woman thereby acquired a helpmate who took care of much of the daily business of living for him and bore and raised his children. He, in turn, provided sustenance for himself, his partner, and his family. Social and economic conditions now challenge this model. The entry of women into the labor force and their rising expectations of equal pay and equal opportunity has meant that they, too, are coming to look upon themselves as primary individuals who need help from others to carry on their daily lives smoothly. If ambitious and goal-oriented persons find that marriage or family relationships have become a hindrance to their self-realization, then it is likely that such persons will be reluctant to commit themselves to long-term relationships. It is commonly thought, however, that the maintenance of stable intimate relationships is a necessary prerequisite for the mental and physical health of adults as well as for the healthy development of children. Such relationships ought, therefore, to be encouraged.

To do so, institutional supports should be developed to assist individuals in fulfilling their personal goals while at the same time facilitating their successful functioning in family relationships. Such supports should be available to persons at all points along the economic spectrum. At the least, this requires family planning services, including abortion, at public expense for the poor;<sup>224</sup> coverage of pregnancy in public and private temporary disability plans for employees;<sup>225</sup> availability of child

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224. The Supreme Court, having found this result not compelled either by the 1965 version of Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396g, *Beal v. Doe*, 97 S. Ct. 2366 (1977), or by the Constitution, *Maher v. Roe*, 97 S. Ct. 2376 (1977), suggested in a footnote that the issue should be resolved by the state legislatures or by Congress. *Beal v. Doe*, 97 S. Ct. at 2372-73 n.15. In 1976 Congress had attempted to limit public financial support for abortions to those performed "where the life of the mother would be endangered if the fetus were carried to term," Dep'ts of Labor and Health, Education, and Welfare, Appropriations Act, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1977), but the enforcement of this so-called Hyde Amendment was immediately enjoined by Judge Dooling in *McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976), *appeal docketed sub nom. Califano v. McRae*, No. 76-1113, 45 U.S.L.W. 3591 (March 1, 1977). Nine days after its action in *Beal* and *Maher*, the Supreme Court vacated and remanded the judgment in *McRae* for further consideration in light of its decisions in those cases. *Califano v. McRae*, 97 S. Ct. 2993 (1977). Meanwhile, a new Hyde amendment prohibiting the use of federal funds for any abortions, regardless of whether the mother's life was endangered, was approved by the House of Representatives on June 17, 1977. S.F. Chronicle, June 18, 1977, at 1, col. 2. The Senate, however, voted on June 29, 1977, to allow the use of federal funds both for abortions that are "medically necessary" in the judgment of the woman's physician and where the pregnancy had resulted from rape or incest. S.F. Chronicle, June 30, 1977, at 1, col. 4. The resolution of these differences will be left to a Joint Conference of the House and Senate.

225. Such inclusion is not required either by the Constitution, *Geduldig v. Aiello*, 417 U.S. 484 (1974), or by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975), *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1977).

care centers on a sliding-fee basis for working parents; and restructuring the 40 hour week as well as the traditional concept of the full-time job at the professional or executive level to accommodate the aspirations of both partners in a "dual career" family. These suggestions are not meant to be exhaustive; when sufficient attention is given to the problem, other ideas will undoubtedly emerge.

Basic reform of the laws governing family relationships is an important element of the institutional changes required. So far, reformers have devoted their attention primarily to legal marriage—its formation, its characteristics, and its dissolution.<sup>226</sup> The *Marvin* case breaks new ground in its response to the legal problems of the unmarried. Perhaps its single most important accomplishment is to permit in California, and in other states that follow its lead,<sup>227</sup> the legal realization of a prediction about the future of marriage made in 1972 by Dr. Jessie Bernard:

Not only does marriage have a future, it has many futures. There will be, for example, options that permit different kinds of relationships over time for different stages in life, and options that permit different life styles or living arrangements according to the nature of the relationships.

. . . .

It is not, however, the specific forms the options will take that is important but rather the fact that there will be options, that no one kind of marriage will be required of everyone, that there will be recognition of the enormous difference among human beings which modern life demands and produces. It will come to seem incongruous that everyone has to be forced into an identical mold.<sup>228</sup>

Paradoxically enough, *Marvin's* decision to preserve the option of non-marital cohabitation on a social and moral par with marriage may ultimately lead, not to the destruction of marriage, but to its revitalization.

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226. See authorities cited in notes 216-18 *supra*.

227. In *Carlson v. Olsou*, 45 U.S.L.W. 2582 (June 14, 1977), the Supreme Court of Minnesota relied heavily on *Marvin* to affirm a trial court order partitioning real and personal property acquired during 21 years of nonmarital cohabitation. The trial court found that the man had made an irrevocable gift to the woman in consideration of her "wifely and motherly services". Although the supreme court approved the use of the partition statute as an appropriate vehicle for enforcing the reasonable expectations of the parties, its endorsement of the *Marvin* approach suggests that this will be the preferred mode for future cases.

228. J. BERNARD, *THE FUTURE OF MARRIAGE* 270-71 (1972).