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# Equal Protection for Unmarried Cohabitators: An Insider's Look at *Marvin v. Marvin*

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## I. INTRODUCTION

It is time to reevaluate the legal distinctions separating alternative types of familial relationships. We are witnessing a profound revolution of domestic lifestyle, which has become apparent in the growing legion of persons cohabitating without the blessings of clergy or the marriage license.<sup>1</sup> The increase in non-marital familial relationships is indicative of the fragmentation

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1. "The 1970 census indicates that today perhaps eight times as many couples are living together without being married as cohabited ten years ago." *Marvin v. Marvin*, 18 Cal. 3d 660, 665, n.1, 134 Cal. Rptr. 815, 818 n.1, 557 P.2d 106, 109 n.1 (1976), citing Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226 (1974). Since 1970, Census Bureau figures show that the number of unmarried people of the opposite sex living together has doubled, from 644,000 to 1.3 million, NEWSWEEK, August 1, 1977, at 46.

that has occurred in the family structure over the last hundred years.<sup>2</sup> Those traditionalists who remain critical of societal changes are unable to accept the reality of the staggering statistics on broken families.<sup>3</sup>

The California Supreme Court squarely addressed itself to the changing mores of the day<sup>4</sup> when, in *Marvin v. Marvin*,<sup>5</sup> it declared that prior laws governing the distribution of property acquired during a nonmarital relationship are inconsistent with contemporary social realities. *Marvin* outlines the property rights of nonmarital cohabitators upon termination of their relationship under the guise of contract principles and rules of equity and fair play.<sup>6</sup> The essence of *Marvin* is that relief will be provided to the dependent partner in as equitable a manner as the facts of each case warrant.<sup>7</sup> The legal system of a society

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2. The family unit in America developed in an agrarian society in which the conduct and duties of each family member were rigidly defined. During this time, the family was the most efficient economic unit of production and therefore the practical center of society. In the industrialized society, however, with economy based on technology and specialization of labor, the individual rather than the family has become the basic unit of production.

3. Statistics obtained from the Bureau of Vital Statistics of the State of California show that the number of divorces in the state has increased over 100% in ten years while the number of marriages has remained nearly constant. In 1966, for example, 69,145 couples received a divorce decree, while 144,129 couples obtained marriage licenses. In 1976, 133,363 couples were divorced and 147,451 couples married. Drawing conclusions from statistics which are somewhat inaccurate (thousands of California couples are married in Nevada) is misleading. One fact is apparent, however: if one considers that an average family consists of two parents and two children, then in 1976, 533,462 people suffered through a marital breakdown.

4. Justice Cardozo wrote in a celebrated essay, "A rule which in its origin was the creation of the courts themselves and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* are so changed that perpetuation of the rule would do violence to the social conscience . . .", CORDOZO, *THE GROWTH OF THE LAW*, 136-137 (2d ed. Greenwood Reprinting, 1975).

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

6. *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819, wherein the court concluded:

(1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision. (2) The courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. (3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.

7. Besides the rights and remedies so generously expounded in *Marvin*, see note 6, *supra*, the court also said:

Our opinion does not preclude the evolution of additional equitable

which now accepts nonmarital cohabitation must protect the reasonable expectations<sup>8</sup> of those persons choosing this alternative lifestyle. This spirit embodied in *Marvin* will have profound nationwide implications, as its underlying philosophy will be adopted, legislatively or judically, by every state in the union within five to ten years. One state court recently relied entirely upon *Marvin* in affirming an equal distribution of property acquired during a nonmarital relationship, much the same as had the parties been married.<sup>9</sup>

One of the arguments submitted to the California Supreme Court in the *Marvin* case was that the distinction made in California between married and unmarried persons raises serious constitutional questions.<sup>10</sup> It was argued that refusal to grant relief to a woman who has lived with a man as his wife in all respects except ceremony denies her equal protection of the law when such refusal is based on her nonmarital status, even though that status arose from a marital-type family relationship. However, on superficial reading of Justice Tobriner's deci-

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remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise.

Thus the court left the nature of the equitable remedy virtually unrestricted and unlimited. *Id.* at 684, n.25, 557 P.2d at 123 n.25, 134 Cal. Rptr. at 832 n.25.

8. The expectations of two people who decide to live together, though not based upon the belief that they are married, are nevertheless based upon certain elements of marriage that are implicit in any situation in which lovers engage each other to share their lives together. Namely, there are expectations of mutual support, companionship and enjoyment of the fruits of labor that come out of the relationship.

9. *Carlson v. Olsen*, 256 N.W.2d 249 (Minn. 1977); The court exercised its general equitable powers to protect what the evidence at trial indicated were the reasonable expectations of the parties. The division on an equal basis was made on the theory that the man had made an irrevocable gift to the woman (of the assets purchased solely with his earnings) for her "wifely and motherly services" during a 21 year period of nonmarital cohabitation. The Minnesota Supreme Court relied heavily upon the *Marvin* decision.

Another case relying on *Marvin* is pending before the Supreme Court of Nevada and is scheduled for oral argument just after this article is published; *Warren v. Warren* No. A117550 (8th Judicial District, Clark County, Las Vegas, Nevada, filed Oct. 7, 1976).

10. The constitutional questions raised in Michelle Marvin's Petition For Hearing to the Supreme Court of the State of California concerned the equal protection of the laws, due process, and the rights of privacy, association and contract. By granting contract rights, the court made moot the constitutional issues pertaining thereto.

sion, it appears that the status of the relationship does not have a determinative effect upon the relief accorded. The court apparently bases its decision solely on contract principles, which, prior to *Marvin*, were either applied in an inconsistent manner<sup>11</sup> or were limited on policy grounds now antiquated.<sup>12</sup> The court went so far as to conclude that the provisions of the Family Law Act<sup>13</sup> do not govern the distribution of property acquired during a nonmarital relationship.<sup>14</sup> Thus, it would appear that the court is perpetuating the distinction between marital-type relationships.

A closer analysis of the case, however, betrays the court's true intentions. The court was not prepared to expand the Family Law Act beyond the intentions of the legislature, and therefore expressly rejected the interpretation of *Cary*<sup>15</sup> that the Act requires an equal division of property acquired in nonmarital family relationships.<sup>16</sup> Instead, the court confessed that the legislature never even considered the issue of the property rights of nonmarital partners.<sup>17</sup> In order to provide unmarried cohabitators the same remedies as the Family Law Act provides for married persons, the court granted unusual equitable relief.<sup>18</sup>

As the court did not specifically address itself to the constitutional arguments posed, the basic thrust of this article will be to demonstrate that discrimination on the basis of marital status cannot be constitutionally tolerated. California's willingness to ameliorate the disparity of treatment accorded nonmarital cohabitators is indicated by a discussion of recent legislative amendments couched in terms consistent with the Constitution. A discussion of a general misunderstanding of the *Marvin* case

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11. The *Marvin* court stated:

Thus in summary, the cases prior [In re Marriage of Cary, 34 Cal. App. 3d 345, 104 Cal. Rptr. 562 (1973)] exhibited schizophrenic inconsistency. By enforcing an express contract between nonmarital partners unless it rested upon an unlawful consideration, the courts applied a common law principle as to contracts. Yet the courts disregarded the common law principle that holds that implied contracts can arise from the conduct of the parties. 18 Cal. 3d at 678, 557 P.2d at 118, 134 Cal. Rptr. at 827.

12. Contracts, which called for the parties to live together as husband and wife, were held to be illegal as contrary to good morals. See e.g. *Updeck v. Samuel*, 123 Cal. App. 2d 264, 266 P. 2d 822 (1954); *Heaps v. Toy*, 54 Cal. App. 2d 178, 128 P. 2d 813 (1942).

13. CAL. CIV. CODE §§ 4000-5000 (West 1970).

14. *Marvin*, *supra* note 5 at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

15. In re Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

16. *Marvin*, *supra* note 5 at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.

17. *Id.*, n. 19.

18. *Supra*, note 7.

will then show that the court laid the foundation for new legislation to codify the broad principles of equity, fair play and equal protection announced in *Marvin*. Finally, criticism of proposed legislation illustrates that codification and clarification of *Marvin* must be responsibly drawn so as not to perpetuate the unequal treatment of nonmarital families.

## II. MARTIAL STATUS AND THE EQUAL PROTECTION CLAUSE

### A. Standard of Review

The Supreme Court has only once, in *Eisenstadt v. Baird*,<sup>19</sup> addressed itself to the issue of whether there are constitutional grounds justifying the different statutory treatment accorded persons on the basis of marital status.<sup>20</sup> In that case, the Court held that a Massachusetts statute prohibiting the use of contraceptives except by married persons<sup>21</sup> violated the equal protection clause by providing dissimilar treatment for married and unmarried persons who are similarly situated.<sup>22</sup> The analysis of the *Eisenstadt* Court in reviewing the statute is significant in that it departs from well established guidelines previously utilized by the Court. The two standards of review by which the Court determines the constitutionality of state statutes challenged on equal protection grounds are commonly referred to by the nature of the court's scrutiny. One, the "minimal scrutiny" or traditional "rational basis"<sup>23</sup> test was cited by the Court: "A classification must be reasonable, not arbitrary, and

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19. 405 U.S. 438 (1972). In *Eisenstadt*, the defendant was convicted of violating a Massachusetts statute prohibiting the use of contraceptives except by married persons with proper authorization from a physician or pharmacy.

20. *Id.* at 447.

21. The statute in question provided imprisonment for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception . . .", except as authorized in § 21A which provides, "[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [A] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician." *Id.* at 441, quoting MASS. GEN. LAWS ANN. ch. 272, §§ 21 and 21A (West 1970).

22. *Eisenstadt*, *supra* note 19 at 454.

23. There is a presumption when using the rational basis test, that the classification is constitutional. If the court can conceive of any set of facts to sustain the rationality of the classification, the statute will be upheld. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”<sup>24</sup> Under the other, “strict scrutiny” standard,<sup>25</sup> “statutory classifications which either are based upon certain ‘suspect’ criteria<sup>26</sup> or affect ‘fundamental rights’<sup>27</sup> will be held to deny equal protection unless justified by a ‘compelling’ governmental interest.”<sup>28</sup>

The *Eisenstadt* Court applied an intermediate standard of review, or “strict rationality”<sup>29</sup> test, in which the Court’s scrutiny is somewhat less rigorous than the compelling state interest standard, yet less permissive than the rational basis test. The Court rigorously scrutinized the Massachusetts statute apparently without deference to the constitutional presumption of validity, and rejected the argument that the statute was rationally related to the public interest in health and in promoting premarital sexual intercourse.<sup>30</sup> The fact that the statute challenged in *Eisenstadt* could not even withstand a review less rigorous than the Court’s strict standard indicates that the disparity of treatment accorded on the basis of marital status has no constitutional validity. The Court seems to have used this

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24. *Eisenstadt*, *supra* note 19 at 447, citing *F.S. Royster Guano Co. v. Virginia*, *supra* note 23 at 415.

25. Using this strict standard, there is a presumption that the statutory classification is unconstitutional, and “the state bears the burden of establishing not only that it has a *compelling* interest which justified the law but that the distinctions drawn by the law are *necessary* to further its purpose.” *Westbrook v. Mihaly*, 2 Cal. 3d 765, 785, 471 P.2d 487, 500-01, 87 Cal. Rptr. 839, 852-53, *cert. denied*, 403 U.S. 922 (1970), *vacated on other grounds*, 403 U.S. 915 (1971). *See also*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

26. The following cases have established certain classifications as suspect: *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national origin); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (alienage). In *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973), four justices stated that sex is a suspect class. The California Supreme Court in *Sail’er Inn Inc. v. Kirby*, 5 Cal. 3d 1, 485 P. 2d 529, 95 Cal. Rptr. 329 (1971) specifically held that sex is a suspect class.

27. A number of cases used a strict scrutiny standard of review where fundamental rights were involved. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (right to vote); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to have children); *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969) (right to travel).

28. *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (dissenting opinion). *See Note, Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

29. *See Tribe, The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 123 (1973). The term “strict rationality” has not been used by the Court. For a discussion of the Court’s application of this intermediate standard, *see Fenimore, Equal Rights For Women: The Role of Affirmative Action*, 9 SW. L. REV. 177, 209 (1977).

30. *Eisenstadt*, *supra* note 19 at 448-52.

approach for reasons of judicial convenience,<sup>31</sup> rather than to have applied the strict test which presumes the invalidity of statutes impinging on fundamental freedoms.

### B. Right of Privacy

Entry into a marital or nonmarital familial relationship involves the exercise of fundamental rights. The Supreme Court has stated on numerous occasions that family life is a uniquely private area in which individual decisions are protected *against* governmental intrusion.<sup>32</sup> In *Griswold v. Connecticut*,<sup>33</sup> the Court struck down a statute prohibiting the distribution of contraceptives to married persons as an unconstitutional infringement upon one's right to privacy. The *Eisenstadt* Court cited *Griswold* in discussing the individual's right of access to contraceptives, specifically, and right to privacy, generally.

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.*<sup>34</sup>

The fundamental right of privacy includes several procreative rights<sup>35</sup> and parental rights,<sup>36</sup> which are as much a part of a nonmarital family setting as they are a part of a marital situation. The nonmarried family must be presumed to have all of the characteristics that make the married family unit constitutionally protected: all familial-type relationships involve funda-

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31. *Id.* at 447, n. 7. The Court deems it unnecessary to analyze the Massachusetts statute under the compelling state interest test "because the law fails to satisfy even the more lenient equal protection standard."

32. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

33. 381 U.S. 479 (1965).

34. *Eisenstadt*, *supra* note 19 at 453 (emphasis added).

35. *See, e.g.*, *Roe v. Wade*, *supra* note 32 (abortion for a single woman) and *Griswold v. Connecticut*, *supra* note 32 (use of contraceptives).

36. *See, e.g.*, *Meyer v. Nebraska*, *supra* note 32 (right to acquire useful knowledge, to marry, establish a home, and bring up children) and *Pierce v. Society of Sisters*, *supra* note 32 (right to send one's children to a private school that offers specialized training).



mental decisions which determine the character of a person's life; they are of a uniquely personal nature; they develop profound human relationships; and they generally center around the home.

Two companion cases illustrating the application of constitutional protection to one's ability to make a decision crucial to his or her personal life [*i.e.*, the right to personal autonomy] are *Roe v. Wade*<sup>37</sup> and *Doe v. Bolton*,<sup>38</sup> both involving state criminal abortion statutes. Justice Douglas concurring in the latter case said, "That right [privacy] includes the privilege of an individual to plan his own affairs, for outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."<sup>39</sup>

### C. Right of Association

Freedom of association,<sup>40</sup> while not explicitly stated in the First Amendment to the United States Constitution, is nevertheless implicit in the freedoms of speech, assembly, and petition.<sup>41</sup> The right of association extends not only to political associations, but also to associations involving the social and economic benefit of the members.<sup>42</sup> This basic liberty is much more than the right to attend a meeting, "It includes the right to express one's attitudes or philosophies . . ."<sup>43</sup> and would have no meaning if it did not also include the right to structure one's family in the manner one chooses.<sup>44</sup> Statutes, which impinge upon such a basic liberty, constitute invidious discrimination not tolerated by the Constitution.<sup>45</sup>

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37. *Roe v. Wade*, *supra* note 32, at 113.

38. *Id.* at 179.

39. *Id.* at 213, citing *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

40. U.S. CONST. amend. I & XIV; CAL. CONST. art. I & III.

41. *Griswold v. Connecticut*, *supra* note 32; see also 85 HARV. L. REV. 1130.

42. See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *In re Brown*, 9 Cal. 3d 612, 510 P. 2d 1017, 108 Cal. Rptr. 465 (1973).

43. *Griswold v. Connecticut*, *supra* note 32, at 483, wherein the Supreme Court stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . The right of association contained in the penumbra of the First Amendment is one, as we have seen." *Id.* at 484.

44. Surely if the penumbra of the first amendment freedom of association extends to such broad categories as political, social, and legal association, or succinctly, the right to associate, the protection would extend to the right to build a family as one chooses. It would be an anomaly indeed if the first amendment freedom of association did not fully cover such intimate relationships.

45. See generally *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) wherein the Court noted, in holding the Oklahoma Habitual Criminal Sterilization Act to be

#### D. Governmental Interest

If an individual has a fundamental right to structure his own home life and decide with whom he wishes to live, then governmental action or inaction which seeks to place burdens upon the exercise of such a right would appear to require compelling justification.<sup>46</sup> The central inquiry pivots on whether the state has a compelling interest which is furthered by the statutory classification based on marital status. The obvious purpose for marital classification is to promote and protect the institution of marriage.<sup>47</sup> The *Marvin* court points out

that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.<sup>48</sup>

Since marriage has for so long been viewed as the backbone of society, many of our laws dealing with the family relationship, and the obligations and responsibilities assumed therein, are molded around the one dominating concept of marriage. With the radical changes in contemporary life styles which characterized the development of the *Marvin* decision, the domination of marital consciousness no longer pervades today's society. Nevertheless, if government insists on continuing the public policy to promote marriage, the question becomes whether the maintenance of legal distinctions based on marital status is necessary to further that governmental interest.

In its treatment of the issue of the distribution of property, the *Marvin* court addresses itself to this very inquiry, concluding

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in violation of the equal protection clause, that deprivation of such a basic liberty constituted "invidious discrimination."

46. The discussion which follows focuses on a strict scrutiny analysis. This is in light of California's progressive stance regarding equal protection rights. See, e.g., *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P. 2d 524, 5 Cal. Rptr. 329 (1971). While a "strict rationality" approach might be more proper pursuant to federal standards (see note 29 *supra* and accompanying text), it is more appropriate to utilize a strict scrutiny standard. Doubtless, the result should remain the same using either approach, since a strict rationality test would still demand more than a "dubious relationship" between a legitimate purpose and its consequent effects.

47. *Marvin*, *supra* note 5 at 683, 557 P. 2d at 122, 134 Cal. Rptr. at 831. See also *Deyoe v. Superior Court of Mendocino County*, 140 Cal. 476, 482, 74 P. 28, 29-30 (1903).

48. *Marvin*, *supra* note 5 at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

that "perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy [of promoting marriage]." <sup>49</sup> In short, the numerous distinctions made between non-married and married persons cannot possibly promote marriages generally. Indeed, the opposite conclusion could be inferred, since so many unmarried cohabitators avoid marriage to benefit from certain laws which irrationally distinguish between persons based on marital status. <sup>50</sup> Moreover, this stated policy itself requires re-evaluation, for if the statistics of broken marriages <sup>51</sup> demonstrate anything meaningful, they indicate the government's policy has been ineffectual. In the wake of such failure lies much more than a broken marriage, for more often there is also a broken family.

It is suggested then that the state's policy is really one of promoting the family unit. At one time the concepts of the "family unit" and the "marital institution" were synonymous. <sup>52</sup> There were no other acceptable alternatives to having a family, other than through marriage. The *Marvin* case clearly repudiates traditional mores by recognizing and accepting the prevalence of nonmarital relationships. <sup>53</sup> The backbone of society has not been weakened drastically, as it is still the family unit which constitutes this core, not the institution of marriage. Since alternative familial relationships exist, these families must be pro-

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49. *Id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.

50. NEWSWEEK, August 1, 1977 at 48, wherein it was reported that an elderly couple lived together for several months without getting married in order to retain the social-security benefits each person received. The couple did marry, and the woman's benefits were suspended.

Los Angeles Times, Nov. 13, 1977, Part V at 3, col. 1, wherein it was reported that, in order to avoid a marriage tax penalty assessed against the couple where each spouse contributes equally to the community income, one couple obtains an annual year-end divorce in some foreign resort and uses the tax savings to pay for the vacation and subsequent remarriage ceremony.

51. *Supra*, note 3.

52. These concepts were certainly synonymous in 1903 when *Deyoe v. Superior Court*, *supra* note 47, was decided. Consider, for example, the statement of the *Deyoe* court, "[t]he well-recognized public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separations and illicit unions." *Id.* at 482, 74 P. 2d at 30. Additionally, it might be noted, California has not recognized a common-law marriage as valid. See Annot. 35 A.L.R. 538, 551 (1925).

53. *Marvin* is the first to expressly recognize their acceptance. See, e.g., In re Marriage of Cary, *supra* note 14 (where the court bases its determination on interpretation of legislative intent); In re Estate of Atherley, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975) (also based on interpretation of the Family Law Act); Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975) (where the court candidly refused to follow "straws in the wind").

tected and promoted. Discriminatory treatment toward familial alternatives cannot possibly further a policy that regards family life so highly.

The state, arguably, has an interest in maintaining its exclusive franchise power over the marriage institution and the ceremonial requirements with respect thereto, in that the state is thereby provided with a central registry of valuable records. Such an interest still could not justify discriminatory treatment, as the increasing multitude of nonmarital cohabitators demonstrates that such records are either unnecessary or extremely inaccurate.<sup>54</sup>

Statutory distinctions based on marital status can no longer be justified by abstract claims of protecting the "morality" of citizens. Efforts to impose a particular moral code have been rejected, especially when there is a significant divergence of opinion among the public, as well as in the courts, as to what constitutes "moral behavior."<sup>55</sup> It is difficult therefore to conceive of compelling state interest in the maintenance of "morality" which will justify deprivation of fundamental rights of privacy or liberty in matters related to marriage, family, and sex.<sup>56</sup>

### III. LEGISLATIVE TREND IN CALIFORNIA

Heretofore, California<sup>57</sup> has dealt with unmarried couples through the common law principles of contracts, property and

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54. Unmarried persons, who have been living together, may be married by a clergyman without the necessity of first obtaining health certificates or a prior license. The marriage certificate may then be filed with the county clerk where the ceremony was performed. CAL. CIV. CODE § 4213 (West Supp. 1977).

55. The United States is no longer a society in which any one social group or culture has such a clear-cut hegemony that it can hold forth its moral standards, its style of life, as the example for the rest to follow. See Gusfield, *The Relation of Social Science to Public Policy Toward Drugs*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, January 1975, at 1-15.

56. See, e.g., *People v. Belous*, 71 Cal. 2d 954, 963-64, 458 P.2d 194, 199-200, 80 Cal. Rptr. 354, 359-60 (1969) wherein the court discusses ramifications of the general "right of privacy."

57. The subsequent discussion of the application of the equal protection clause of the U.S. Constitution applies to sections of the California Constitution which have been held to be "substantially the equivalent" of the fourteenth amendment equal protection clause.

CAL. CONST. art. 4, § 16(a) provides: "All laws of a general nature have a uniform operation." CAL. CONST. art. 1, § 7(b) stipulates: "A citizen or class of

trusts;<sup>58</sup> there exists, however, very few statutes that deal specifically with nonmarital cohabitation. The trend of California law dealing with children of unmarried parents reflects the state's interest in dealing positively with alternative familial lifestyles while still promoting the welfare of the family unit. Prior to 1975, California treated children born out of wedlock as illegitimate bastards.<sup>59</sup> The natural parents of such children were treated on an unequal basis, with the mother receiving favored treatment.<sup>60</sup> The social opprobrium suffered by the hapless children bearing the "illegitimate" label remained throughout their lives unless legitimized by the father through a subsequent marriage to the mother<sup>61</sup> or through reception into the couple's home in a public manner befitting a legitimate child.<sup>62</sup> For example, formerly, an illegitimate child could inherit part of the estate of the mother's lineal or collateral kindred but could not likewise inherit from his father's line.<sup>63</sup>

In 1975, California adopted the Uniform Parentage Act,<sup>64</sup> which defines the parent and child relationship<sup>65</sup> and makes the marital status of parents irrelevant.<sup>66</sup> Simultaneously, the legislature made the child's rights to succession dependent upon this

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citizens may not be granted privilege or immunities not granted on the same terms to all citizens." *See also* *Serrano v. Priest*, 5 Cal. 3d 584, 596 n. 11, 487 P. 2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971); *Department of Mental Hygiene v. Kirchner*, 62 Cal. 2d 586, 588, 400 P.2d 321, 322, 43 Cal. Rptr. 329, 330 (1965). "The test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions against special legislation and the equal protection clause of the Federal Constitution." *Los Angeles v. Southern Cal. Tel. Co.*, 32 Cal. 2d 378, 389, 196 P.2d 773, 781 (1948).

58. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAMILY L.Q. 101 (1976).

59. *See* CAL. CIV. CODE §§ 193-231 (West 1970) much of which has been repealed by 1975 statutes.

60. *See, e.g.*, former CAL. CIV. CODE § 200 (West 1954) (repealed by 1975 Cal. Stats. ch. 1244, § 4). *See additionally*, CAL. CIV. CODE § 197 (West Supp. 1977).

61. *See* former CAL. CIV. CODE § 215 (West 1954) (repealed by 1975 Cal. Stats. ch. 1244, § 5).

62. *See* former CAL. CIV. CODE § 230 (West 1954) (repealed by 1975 Cal. Stats. ch. 1244, § 8).

63. *See* former CAL. PROB. CODE § 255 (West 1956) [current version at § 255 (West Supp. 1977) (added by 1975 Cal. Stats. ch. 1244, § 25)].

64. CAL. CIV. CODE, Part 7, §§ 7000 et seq. (West Supp. 1977) (added by 1975 Cal. Stats. ch. 1244, § 11).

65. CAL. CIV. CODE § 7001 (West Supp. 1977) which provides ". . . [P]arent and child relationship means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship."

66. CAL. CIV. CODE § 7002 (West Supp. 1977) which provides "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."

parent and child relationship as opposed to the antiquated status of illegitimacy.<sup>67</sup> This was the first instance in which a state legislature specifically deemed marital status irrelevant to the determination of rights incidental to the family existence.<sup>68</sup>

In making the 1975 statutory changes, the California legislature clearly and consciously reflected the view of the Supreme Court in its recent decisions involving illegitimate children. In one of these cases a statutory provision preventing illegitimate children from collecting workmen's compensation benefits for the death of their father was held violative of the equal protection clause;<sup>69</sup> in another case, a statute denying illegitimate children a wrongful death action for the death of their mother was declared unconstitutional.<sup>70</sup> In the former case, the court utilized the strict standard to scrutinize the state's interest in "protecting 'legitimate family relationships'"<sup>71</sup> and concluded that statutory discrimination against illegitimate children, who bear no responsibility for their birth, is not only unnecessary, but does not even promote the state's policy. The Court, in a third case, said, "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue."<sup>72</sup> Clearly, these cases demonstrate the notion that formalization through marriage is not a primary characteristic of a family, a notion which dominates the 1975 statutory development in California.

In another area of the law, the California legislature recently has made discrimination based on marital status unlawful. The California Health and Safety Code Section 35720 provides that "It shall be unlawful: 1. For the owner of any publicly assisted housing accommodation . . . to deny . . . any person or group of persons such housing accommodation because of the race, color, religion, sex, *marital status*, national origin, or ancestry of such person or persons . . . ."<sup>73</sup> The accompanying classifica-

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67. *Supra*, notes 64 and 66.

68. The Uniform Parentage Act has also been adopted by Hawaii, Montana, North Dakota, and Washington.

69. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

70. *Levy v. Louisiana*, 391 U.S. 68 (1968).

71. *Weber v. Aetna Casualty & Surety Co.*, *supra* note 69 at 173.

72. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972), *quoting* *Glonn v. American Guarantee Co.*, 391 U.S. 73, 75-76 (1968).

73. CAL. HEALTH & SAFETY CODE § 35720 (West Supp. 1977) (amended effective Jan. 1, 1976 by 1975 Cal. Stats. ch. 1189, § 3).

tions mentioned in this statute suggest that marital status may be a suspect classification.<sup>74</sup> Although no case has so held, the mere suggestion further supports the position that discrimination based on such a classification is unconstitutional.

A California Court of Appeal<sup>75</sup> recently struck down, on equal protection grounds, a housing regulation forbidding cohabitation by unmarried tenants as violative of California's Health and Safety Code Section 35720. The court cited the Supreme Court's holdings on the right of privacy,<sup>76</sup> as well as California's recent legislative enactment,<sup>77</sup> but nevertheless used the minimal scrutiny test in concluding that the housing authority's classification "lacks the required rational basis."<sup>78</sup> Clearly, the court found it unnecessary to scrutinize this particular classification any further.

Even though married persons continue to pay lower automobile insurance premiums than unmarried persons, there have been several legislative attempts to preclude marital status, in and of itself, from constituting a condition or risk for which a higher rate may be required of the insured.<sup>79</sup> Other proposals to amend the California Insurance Code would also prohibit marital status from effecting higher premiums for life or disability insurance.<sup>80</sup>

These examples of recent legislative and judicial action demonstrate California's willingness to deal with the increasing number of people who are cohabiting without marriage and to ameliorate the disparity of rights accorded such people. Although great strides have been made in removing the inequitable impediments denying the unmarried equal protection of the laws, the California legislature has not as yet addressed itself to unmarried persons' rights which are incidental to a family situation.<sup>81</sup>

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74. *Supra*, note 26.

75. *Atkisson v. Kern County Housing Authority*, 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976).

76. *Supra*, note 32.

77. *Supra*, note 73.

78. *Atkisson*, *supra* note 75 at 98, 130 Cal. Rptr. at 380.

79. Former CAL. INS. CODE § 11628 (West 1972). See Cal. A.B. 1685, 1975 and Cal. A.B. 3381, 1975 proposed during the 1975-76 Regular Session of the California Legislature.

80. CAL. INS. CODE § 10140 (West 1972). See A.B. No. 1902, 1975 proposed during 1975-76 Regular Session of California Legislature.

81. Certain legislation has been introduced in the California State Senate; however, the proposed statutory changes are only being investigated as this article goes to print. See *infra*, note 97 and accompanying text.

Also, the California State Bar is presently studying several proposals drawn

IV. A MISUNDERSTANDING OF *MARVIN* AND THE FAMILY LAW ACT

A vital step toward providing equal treatment for unmarried families is to delineate what those familial rights are. The most obvious guide is the Family Law Act,<sup>82</sup> which governs the rights, obligations and responsibilities of married persons. A problem was created, however, when the *Marvin* court ruled the Act inapplicable to nonmarital situations. The bar's reaction to this part of the *Marvin* case was to look away from the Family Law Act due to a misunderstanding of the court's genuine message. A brief discussion about the historical interaction between the Family Law Act and nonmarital familial situations will provide a proper perspective with which to understand the court's analysis.

In 1973 in *In re Marriage of Cary*,<sup>83</sup> the California Court of Appeal, First District, held that the principle of equal division of marital assets decreed by the Family Law Act applied also to a nonmarital family relationship. The *Cary* court reasoned that if a person, who by deceit leads another to believe a valid marriage exists between them, shall be legally guaranteed half of the property they acquire,<sup>84</sup> then two persons, who candidly enter upon an unmarried family relationship with no deceitful conduct, should not be denied property rights solely because of the lack of a marital ceremony.<sup>85</sup> Thus *Cary* liberally interpreted the Family Law Act in order to avoid an extremely inequitable distribution of property. By so doing, *Cary* also held that the Act supersedes the pre-1970 judicial rule announced in the *Vallera*<sup>86</sup> and *Keene*<sup>87</sup> cases. Then, in *In re Estate of Atherley*,<sup>88</sup> the

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by the 1977 Conference of Delegates to the State Bar Convention, which proposals will probably not be submitted to the legislature for another year.

82. CAL. CIV. CODE §§ 4000-5000 (West 1970).

83. *Supra*, note 15.

84. *See* CAL. CIV. CODE § 4452 (West 1970).

85. *Cary*, *supra* note 15 at 352, 109 Cal. Rptr. at 865-66. Commentators criticized this reasoning, as noted in *Marvin*, *supra* note 5; *see In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HASTINGS L.J. 1226, 1234-35 (1974) and Comment, *In re Marriage of Carrey [sic]: The End of the Putative-Meretricious Spouse Distinction in California*, 12 SAN DIEGO L. REV. 436, 444-46 (1975).

86. *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P. 2d 761 (1943): "The controversy is thus reduced to 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



Court of Appeal, Fourth District, agreed with *Cary*, saying that the *Cary* rule had received implicit support from recent California statutory changes aimed at curbing discrimination against women.<sup>89</sup> Thereafter, to substantially confuse matters, the Court of Appeal, Third District, held in *Beckman v. Mayhew*<sup>90</sup> that the legislature could not possibly have intended the result reached in *Cary* and that the *Vallera-Keene*<sup>91</sup> rule still applied. In a decision which can be characterized as somewhat less than courageous, the *Beckman* court recognized that developing social attitudes "may portend the crystallization of a public policy inimical to the *Vallera-Keene* doctrine,"<sup>92</sup> but then retreated saying, "[W]e are not permitted to violate stare decisis for the sake of straws in the wind."<sup>93</sup>

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during the period of their relationship. It has already been answered in the negative. (*Flanagan v. Capital National Bank*, 213 Cal. 664, 3 P. 2d 307 (1931).) Equitable 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." 21 Cal. 2d at 684-85, 134 P.2d at 762-63. The *Vallera* court also held that absent an express agreement, the woman was entitled to share the property jointly accumulated, in the proportion that her funds contributed to its acquisition.

87. *Keene v. Keene*, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962). The rule and rationale announced in *Vallera* were reiterated by *Keene* wherein the plaintiff relied on theories of constructive trust and resulting trust (Plaintiff did not seek to recover reasonable value of her services on an implied contract theory). The court said that the woman's services (assisting farm labor) consisted, at best, of improvements on real property, which do not raise a resulting trust in her favor.

In his dissent, Justice Peters criticized the double standard adopted by the majority and said that a woman's services as cook, housekeeper and homemaker, which would constitute sufficient consideration independent of cohabitation, clearly will support a resulting trust in as much as a monetary contribution would. 57 Cal. 2d at 674, 371 P.2d at 339-40, 21 Cal. Rptr. at 603-04 (dissenting opinion).

88. *In re Estate of Atherley*, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

89. *Id.* at 769, n. 11, 119 Cal. Rptr. at 48.

90. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

91. The *Vallera-Keene* rule is a four part statement which states that:

- (1) the female partner (or the male partner, whichever is the claiming party) gains no interest in a meretricious relationship; the court not finding equity in such a circumstance;
- (2) at its termination, the spouse claiming an interest from such a relationship is entitled to share in the accumulated assets only if there has been an express agreement to pool funds;
- (3) in the absence of agreement, for the spouse claiming an interest she must have contributed funds toward the acquisition of the property;
- (4) there shall be no monetary credit for domestic services rendered; in other words, domestic services performed are not funds in the sense of "contribution of funds" to help acquire property.

Comment, *The Scope of Equity with Respect to Non-Marital Relationships*, 5 PEPPERDINE L. REV. 49, 53 (1977).

92. *Supra*, note 90 at 535, 122 Cal. Rptr. at 607.

93. *Id.*

The California Supreme Court was thus asked in *Marvin* to resolve the conflicting positions taken by the state's intermediate appellate courts. The conclusion in *Marvin* that "[t]he provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship . . ."<sup>94</sup> has created still more confusion for the bar because it appears that the court has refused to accord the status of "family" to the family setting within the nonmarital relationship. Such a belief is erroneous, since *Marvin* holds nothing of the kind.

The *Marvin* decision properly limits the role of the judiciary to interpreting what the legislature says, not what the legislature failed to say. There is no indication, either in the legislative history of the Family Law Act, nor in the language of the Act itself, which suggests that the subject of nonmarital cohabitation was considered by the legislature at the Act's inception in 1969.<sup>95</sup> As *Marvin* points out, the delineation of the rights of nonmarital partners previously had been fixed entirely by judicial decision.<sup>96</sup> But in 1969 there were no compelling reasons for the legislature to alter the status quo. Acceptance of nonmarital cohabitation was simply not the prevailing mood of the day. In agreeing with *Beckman*, the court in *Marvin* performed a proper judicial function, holding that any inference drawn from the Family Law Act that the legislature intended to include nonmarital cohabitators improperly extends application of the Act.

There is, however, no basis for the belief that the court intended to deny rights incidental to marriage to unmarried families. The court simply could not grant these rights through the utilization of the Family Law Act, because the Act clearly does not deal with such rights. What the court in *Marvin* did say was that it would not apply the Family Law Act to nonmarital family relationships until the legislature acted to bring such a relationship within the ambit of the Act. *Marvin* lays the foundation for new legislation by recognizing that the prevalence of nonmarital relationships is no "straw in the wind," by clearly abrogating the *Vallera-Keene* doctrine, and by granting relief based upon any equitable basis warranted by the facts.

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94. *Marvin*, *supra* note 5 at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

95. The Family Law Act became effective January 1, 1970.

96. *Marvin*, *supra* note 5 at 681, 557 P.2d at 120, 134 Cal. Rptr. at 829.

The *Marvin* conclusion that the Family Law Act does not apply to nonmarital relationships should not encourage legislation to negate the ramifications of the *Marvin* case. The legislation presently introduced in the state Senate is antithetical to the very spirit of *Marvin*.<sup>97</sup> This bill would create a presumption that property and earnings of an unmarried couple remain separate unless acquired jointly or under some formal agreement. The bill would also prohibit trial courts from considering whether a couple was cohabitating in determining the existence of contractual obligations.

Although the legislature has demonstrated a sincere desire to clarify some of the complex legal issues raised by the *Marvin* decision, the language of this bill appears more in the nature of repeal than clarification. *Marvin* specifically directs trial judges to examine the conduct of the parties to a relationship, in the absence of express agreements, in order to determine their respective rights and reasonable expectations.<sup>98</sup> Prohibiting trial courts from considering the parties' cohabitation is an unrealistic giant step backwards. It is precisely cohabitation, encompassing a basic love relationship and involving special trust, loyalty and confidentiality, that creates the equities and contractual considerations in a *Marvin*-type relationship. Further, the present bill would void *Marvin* rights in the event of a subsequent marriage. This would create great injustice for the couple who cohabit several years before entering into a marriage that lasts only six months. It would also impose on the judiciary the difficult task of determining whether the subsequent marriage was entered into for the purpose of avoiding pre-marital obligations. The present legislative proposal falls critically short of codifying the broad principles of equity, fair play and equal protection announced in *Marvin*. The bill completely fails to recognize the existence of a familial relationship created by nonmarital cohabitation and makes no attempt to provide protection for the members of that family.

Critics of the *Marvin* case, who insist on treating cohabitators as business partners, refuse to accept the fact that "marriage" is no longer in the vocabulary of many people who nonetheless wish to have familial relationships. The prevalence and judicial acceptance of nonmarital partners marks this as a time in which a whole new class of persons requires laws which treat them as fairly and equally as those similarly situated. Any legislation

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97. Cal. S.B. 822, 1977, quoted in Appendix A.

98. *Supra*, note 6.

enacted to clarify the complexities of the *Marvin* decision must provide rights and duties for the unmarried similar to the provisions of the Family Law Act.<sup>99</sup> Legislators must keep in mind that equal treatment is constitutionally mandated.

While other states without a Family Law Act apply *Marvin* with its full force and effect, to provide equal distribution of property to parties dissolving their nonmarital familial relationship,<sup>100</sup> it would be extremely unfortunate for California to retreat from *Marvin* simply because the legislature failed to consider and include in the Act, the class of individuals who, though unmarried, cohabit in a familial relationship. Many attorneys strongly favor legislation that will codify the broad principles so boldly drawn by the *Marvin* court, but the legislation must be drawn in a responsible manner. The *Marvin* opinion, which has been described as a model code for protecting the fundamental property rights of more than two million<sup>101</sup> Americans who have chosen this increasingly popular alternative lifestyle, should be followed, not repealed.

## V. CONCLUSION

Prior to concluding his opinion in *Marvin*, Justice Tobriner stated, "nothing we have said in this opinion should be taken to derogate from that [marriage] institution."<sup>102</sup> He continued, saying that marriage was the most socially productive relationship one can enjoy in a lifetime.<sup>103</sup> The court, however, must also have recognized that for some half million<sup>104</sup> people per year in California the institution of marriage has become one of the most psychologically destructive forces in their lifetime, by an-

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99. The Conference of Delegates to the 1977 State Bar Convention have recommended to the Board of Governors of the State Bar of California that the State Bar sponsor legislation to create an Unmarried Cohabitators Act. The Act proposed tentatively includes a rebuttable presumption that two unmarried adults of the opposite sex jointly occupying the same dwelling unit, assume the rights, duties and obligations usually manifested by married persons. Such legislation would be much more in the spirit of the *Marvin* decision. Since the proposals require further study and clarification, it is likely that the State Bar will not sponsor this legislation for at least another year.

100. *Supra*, note 9.

101. *Marrying, Divorcing and Living Together in the United States Today*, Population Reference Bureau, Inc.

102. *Marvin*, *supra* note 5 at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

103. *Id.*

104. *Supra*, note 3.

nouncing that nonmarital familial cohabitation is a socially acceptable alternative to marriage.

By providing broad equitable and contractual relief to the dependent partner of a nonmarital relationship, *Marvin* has made the first great strides toward providing equal protection of the law for unmarried cohabitators. Discriminatory treatment heretofore accorded such persons on the basis of marital status can no longer be justified as promoting the institution of marriage. In the years ahead, legislative treatment of unmarried cohabitators will face rigorous challenges and must therefore be couched in terms to withstand strict judicial scrutiny. California's legislature, which has already demonstrated a trend toward prohibiting discrimination on the basis of marital status, should remain at the forefront of this legal development by providing for parents and children the rights and obligations which inhere in their status as members of a family.

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APPENDIX A

AMENDED IN SENATE SEPTEMBER 8, 1977

SENATE BILL

No. 822

Introduced by Senator Song

April 4, 1977

An act to add Section 43 *Section 43.1, 43.2, and 43.3* to the Civil Code, relating to personal rights.

LEGISLATIVE COUNSEL'S DIGEST

SB 822, as amended, Song. Personal rights.

Existing law declares various personal rights possessed by persons.

This bill would prohibit a court, in determining the rights of the parties with ~~respect to any transaction whatsoever, from considering the fact that such parties, whether male or female, were cohabiting, and if male and female, were not married to each other. existence of contractual or equitable obligations from considering whether the parties, if unmarried to each other, are or were cohabiting together.~~

It would specify that the above provision shall not be construed as validating any contract the consideration for which is meretricious sexual services.

*It would also create a rebuttable presumption that each member of a couple living together intended to keep his or her earnings and property separate and independent if specified conditions are complied with, except as to the ownership of property acquired with the contributions of funds or services from both members of the couple.*

*It would also declare that the act of marriage shall void all equitable rights and contractual obligations not expressed in writing which may have been created between the spouse prior to the marriage.*

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section ~~43~~ 43.1 is added to the Civil Code, to read:

~~43. (a) Notwithstanding any other provision of law, a court, in determining the rights of the parties with respect to any transaction whatsoever, shall not consider the fact that such parties, whether male or female, were cohabiting and, if male and female, were not married to each other.~~

*43.1. Notwithstanding any other provision of law, no court in determining the existence of contractual or equitable obligations shall consider whether the parties, if unmarried to each other, are or were cohabiting together.*

SEC. 2. Section 43.2 is added to the Civil Code, to read:

*43.2. (a) Each member of a couple cohabiting together in compliance with all of the following conditions shall be presumed to have intended to keep his or her earnings and property separate and independent:*

*(1) The couple was not married to each other and mutually agreed not to marry.*

*(2) The couple made no express agreement as to the joint ownership of the property of either member.*

*(3) Each member of the couple was, or intended to be, financially self-supporting during the time of the cohabitation.*

*(4) Neither member of the couple represented to others on a regular basis that he or she was married to the other member.*

*(b) Subdivision (a) shall not apply in determining the ownership of property acquired with the contributions of funds, property, or services from both members of the couple.*

*(c) The presumption established by subdivision (a) is a presumption affecting the burden of proof, as defined in Section 605 of the Evidence Code.*

*SEC. 3. Section 43.3 is added to the Civil Code, to read:*

*43.3 (a) The act of marriage shall void all equitable rights and contractual obligations not expressed in writing which may have been created between the spouses prior to the marriage.*

*(b) Subdivision (a) shall not apply where a spouse enters into the marriage for the purpose of voiding contractual or equitable obligations.*

*(c) Subdivision (a) shall not apply in determining the ownership of property acquired with the contributions of funds, property, or services from both spouses prior to their marriage.*